

AMERICAN BAR ASSOCIATION

The

M O D E L

PROCUREMENT

ORDINANCE

for

Local Governments

**THE
MODEL PROCUREMENT
ORDINANCE
for
Local Governments**

August, 1982

On August 7, 1982, during the American Bar Association's 1982 Annual Meeting, the Council of the Section of Public Contract Law and the Council of the Section of Urban, State and Local Government Law approved the *Model Procurement Ordinance for Local Governments* and urged its consideration by small units of local government.

It should be noted, however, that unlike the *ABA Model Procurement Code for State and Local Governments*, of which it is a condensation, the *Model Procurement Ordinance for Local Governments* has not been considered or approved by the House of Delegates, the Association's policymaking body. Therefore, its text does not necessarily represent the official policy of the American Bar Association.



ACKNOWLEDGEMENT

The development of the *Model Procurement Ordinance for Local Governments* was made possible through financial support provided to the American Bar Association Fund for Public Education by the U.S. Environmental Protection Agency. In addition, an EPA Headquarters Task Force actively cooperated with the ABA Coordinating Committee on a Model Procurement Code. Nonetheless, the *Model Procurement Ordinance for Local Governments* does not constitute EPA policy.

EPA is engaged in a series of actions designed to reduce and simplify the requirements for the construction of municipal wastewater treatment facilities by EPA grantees. Among these actions is the development of a technical assistance package designed to improve the procurement practices of small municipal grantees. EPA plans to offer this package, which includes the *Model Procurement Ordinance for Local Governments*, to assist them; their use will not be mandatory. The Coordinating Committee on a Model Procurement Code is pleased to have been able to assist EPA in this important work.

A tremendous amount of effort and enterprise has gone into the preparation of the *Model Procurement Ordinance for Local Governments*. The Section of Public Contract Law and the Section of Urban, State and Local Government Law acknowledge with special thanks the work of the Chairman and Vice Chairmen of the Coordinating Committee on a Model Procurement Code and the Project Office Staff. Both Sections also extend their sincere thanks to the many Section members, public purchasing professionals, and other dedicated volunteers, whose hard work made possible the development of the Ordinance.

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INTRODUCTION

This *Model Procurement Ordinance for Local Governments* is designed to provide a small unit of local government with (1) policy guidance and statutory language for managing and controlling its procurement of supplies, services, and construction for public purposes, (2) guidance for the administrative and judicial resolution of controversies relating to public contracts, and (3) a set of ethical standards governing public and private participants in the procurement process. The *Model Procurement Ordinance* is essentially a condensation of the *ABA Model Procurement Code for State and Local Governments*, tailored for consideration and use by smaller units of local government.

The *Model Procurement Ordinance* was drafted by the American Bar Association Coordinating Committee on a Model Procurement Code for State and Local Governments, a joint committee of the ABA Section of Public Contract Law and the ABA Section of Urban, State, and Local Government Law. The *Ordinance* was developed by the Coordinating Committee with the active cooperation and financial support of the U.S. Environmental Protection Agency (EPA). To help ensure that the *Model Procurement Ordinance* would be practical for use by small local jurisdictions, the Coordinating Committee established a Purchasing Officials Review Group whose members were appointed by the National Institute of Governmental Purchasing (NIGP), a key member of the Coordinating Committee's Advisory Board. NIGP, and many of its members, had actively participated in the drafting and review of the *ABA Model Procurement Code for State and Local Governments* and the Code's *Recommended Regulations*.

Procurement Under Federal Assistance and Certification

Attachment O to Office of Management and Budget (OMB) Circular A-102 (Uniform Administrative Requirements for Grants-In-Aid to States and Local Governments; Procurement Standards) sets forth procurement standards that govern public purchases made by states and local governments using most federal assistance funds. The *Model Procurement Ordinance* is designed to provide a small local government with a sound, workable, and consolidated public purchasing system that meets those federal standards. Although the *Ordinance* was developed with the assistance of EPA, it is also applicable to procurements made using federal funds awarded under grants or cooperative agreements from other federal agencies.

Pursuant to Attachment O, many of the major federal grantor agencies have established programs for the certification of the procurement systems used by their state and local government grantees. Since the *Model Procurement Ordinance* was designed to meet Attachment O standards, it should be an especially helpful tool to those units of local government that choose to participate in such procurement system certification programs.

Drafting Concepts

The *ABA Model Procurement Code for State and Local Governments* has proven readily useful to a jurisdiction with a large procurement responsibility and a substantial procurement organization available to manage the public purchasing function. It could be readily adapted for use by most states, major cities, large urban counties, and other large public entities. The Code's adaptation for use by smaller public bodies, however, proved to require substantial modification.

To meet this challenge, the Coordinating Committee undertook the drafting of the *Model Procurement Ordinance for Local Governments*. The *Ordinance* is tailored to the more limited procurement responsibilities and limited administrative resources available to most local governments. At the same time, the fundamental principles of good procurement and ethical standards set forth in the Code have been retained, but appear in a "streamlined" form. The *Ordinance* is designed for consideration by small cities and counties, towns, townships, and other small public bodies exercising a public purchasing responsibility.

The *Model Procurement Ordinance*, like the *ABA Model Procurement Code* from which it is derived, was developed as a "model" rather than a "uniform" legislative proposal in recognition of the substantial differences among local governments in terms of both governmental organization and legal authority to prescribe their own procurement systems. Therefore, the focus of the *Model Procurement Ordinance* is on the policies and procedures necessary for a modern and cost-effective public purchasing system that is fair and open to public scrutiny. The Coordinating Committee encourages thoughtful modification to meet local needs, but calls to the attention of those responsible for adapting the *Model Procurement Ordinance* the process through which its recommendations were developed.

Drafting and Review Process

The *Model Procurement Ordinance for Local Governments* was developed during a drafting and review process that spanned more than two years. In addition, the *Ordinance*, as a condensation of the *ABA Model Procurement Code for State and Local Governments*, had the benefit of the five years of effort that went into drafting the *Code* and its *Recommended Regulations*.

The initial draft of the proposed *Model Procurement Ordinance* was prepared by the ABA Model Procurement Code Project staff, under the general guidance of the Coordinating Committee on a Model Procurement Code. Working with Project volunteers and EPA's Task Force on the Model Procurement Ordinance, the proposed *Ordinance* was refined during the preparation of three internal review drafts. Following a line-by-line review of the last internal review draft, undertaken in conjunction with the EPA Task Force, the Coordinating Committee issued a Public Review Draft of the proposed *Model Procurement Ordinance* in August of 1981. Almost 3,000 copies of the Public Review Draft were circulated. Comments were actively solicited until the close of the comment period in March of 1982. The Purchasing Officials Review Group and the Coordinating Committee then conducted a line-by-line review of the Public Review Draft in light of the comments received. Following further discussion, a Coordinating Committee's Final Draft was presented to the governing Councils of the cosponsoring ABA Sections in May 1982. Following Council review over the next several months, final approval action on the text of the *Model Procurement Ordinance* was taken in August during the 1982 Annual Meeting of the American Bar Association.

Drafting Mechanics

"Commentary" has been occasionally inserted to explain the purpose of a particular provision, to provide further amplification of its meaning, or to demonstrate its application in the context of a particular procurement situation. In addition, Commentary may indicate where adjustments may be needed to make a particular provision conform to existing law or regulations. The *Ordinance* also includes several "Editorial Notes," which provide additional assistance to those adapting the *Ordinance* for use by a particular jurisdiction. Experience indicates that most jurisdictions will not include the Commentary or the Editorial Notes in their ordinances.

Bracketed material [] indicates matters needing particular attention during the drafting of an ordinance based on the *Model Procurement Ordinance*. Brackets enclosing a blank require the insertion of language appropriate to that jurisdiction for such things as dollar and time limitations, position descriptions, or references to specific state laws. Suggested language in brackets indicates that the jurisdiction may want to make changes in light of its own experience and circumstances, or because other local requirements may be applicable. Two bracketed phrases appearing side by side usually indicate that one should be inserted and the other deleted.

AN OVERVIEW OF THE ORDINANCE

General Provisions

Article 1 states the general purposes of the *Ordinance*, and contains definitions of terms used in the *Ordinance*.

Office of the Purchasing Agent

Article 2 suggests the basic organizational structure for managing and conducting public purchasing on a centralized basis. At the same time, the Article gives clear recognition to the benefits of specific delegations of appropriate authority to other professionals available within the local government.

Source Selection and Contract Formation

Article 3 establishes competitive sealed bidding as the preferred method of contracting, but also authorizes the use of other source selection methods in appropriate, specified situations. The other source selection methods are competitive sealed proposals, a competitive selection procedure for designated types of professional services, simplified procedures for making small purchases, and strict requirements relating to sole source procurements and emergency procurements. The Article states the requirements for contracting by each method. Contracts not awarded by competitive sealed bidding generally require a written justification, which becomes a matter of public record. The Article also provides for cancellation of solicitations, the correction or withdrawal of bids, and the cancellation of awards.

The Article provides for determinations relating to the responsibility of prospective contractors, and provides authority to require bid and performance bonds. It also requires the submission of cost or pricing data, and conducting of a price analysis or a cost analysis, for contracts awarded without adequate price competition and for contract price adjustments.

The Article authorizes the use of the type of contract most appropriate to the procurement, although it retains a preference for fixed-price contracts and prohibits cost-plus-a-percentage-of-cost contracts. It also permits, and regulates, the use of both multi-year contracts and the technique of multiple source contracting. Finally, Article 3 also specifies requirements for effective contract administration, and for the reporting of anticompetitive practices.

Specifications

Article 4 requires that specifications be written in a manner that maximizes competition. In particular, it regulates the use of brand name specifications to encourage competition.

Procurement of Construction, Architect-Engineer and Land Surveying Services

Article 5 covers special aspects of construction procurement, including the selection of the appropriate method of construction management, and the use of bid, performance and payment bonds. It also provides a procedure for the competitive award of contracts for architect-engineer and land surveying services in lieu of techniques provided in Article 3.

Debarment or Suspension

Article 6 contains procedures for making debarment or suspension determinations.

Cost Principles

Article 7 has been reserved. Should an enacting jurisdiction wish to include in its ordinance a comprehensive set of contract cost principles, the text of Chapter 7, Cost Principles, of the *Recommended Regulations to the ABA Model Procurement Code for State and Local Governments* may be considered.

Supply Management

Article 8 has been reserved. Should an enacting jurisdiction wish to include in its ordinance the coverage of such topics as quality control, inventory management, excess property transfer, and the disposition of surplus property, the text of Chapter 8, Supply Management, of the *Recommended Regulations to the ABA Model Procurement Code for State and Local Governments* may be considered.

Appeals and Remedies

Article 9 suggests mechanisms for the resolution of disputes arising from the solicitation and award of procurement contracts, bid protests, and contract performance claims. In addition, this Article provides procedures for handling contracts awarded in violation of law.

Cooperative Purchasing

Article 10 has been reserved. Cooperative purchasing and joint-use arrangements among units of local government or with the state have proved to be cost-effective management tools. However, given the broad array of potential users of the *Model Procurement Ordinance*, and the various state law limitations on their authority to enter into such intergovernmental agreements, it was not possible to address effectively this important subject. Should an enacting jurisdiction be able to include in its ordinance coverage of agreements for cooperative purchasing and the joint use of equipment, facilities and personnel, it may consider Article 10, Intergovernmental Relations, of the *ABA Model Procurement Code for State and Local Governments* and Chapter 10 of the Code's *Recommended Regulations*.

Assistance to Small and Disadvantaged Businesses

Article 11 has been reserved. Provisions to assist small and disadvantaged businesses, and other socio-economic programs implemented through the procurement process, could be inserted in this Article by the enacting jurisdiction.

Ethics in Public Contracting

Article 12 contains ethical standards with accompanying sanctions that are applicable to all participants in the public procurement process. The proposed ethical standards cover conflicts of interest, gratuities and kickbacks, contingent fees, and misuse of confidential information.

APPENDIX

The Appendix sets forth provisions which address the various socioeconomic and other federal public policy goals implemented through Attachment O (Procurement Standards) to OMB Circular A-102 (Uniform Administrative Requirements for Grants-in-Aid to States and Local Governments). They have been included with the *Model Procurement Ordinance* as a convenience for any enacting jurisdiction that wants its public purchasing system to address all the current requirements of Attachment O. They do not constitute the recommendations of the American Bar Association, or of any of its Sections or Committees.

PROCUREMENT MANUAL FOR LOCAL GOVERNMENTS

Using financial assistance provided by the U.S. Environmental Protection Agency, the Coordinating Committee on a Model Procurement Code has undertaken a program to draft a Procurement Manual for Local Governments to accompany the *Model Procurement Ordinance*. The purpose of the Procurement Manual is to provide the operating details of public purchasing to those officials charged with the management of public purchasing for smaller units of local government. The Manual will provide comprehensive coverage of procurement procedures in a format that can be effectively used by a public official who might not be an experienced public purchasing professional.

An initial draft of the Manual was completed by the ABA Model Procurement Code Project staff in July, 1981. Based upon comments from the EPA Task Force, and with general guidance from the Coordinating Committee, the ABA Project staff prepared a Discussion Draft for further internal review, which was submitted to EPA in November, 1981.

Completion of the proposed Procurement Manual for Local Governments continues to be a high priority of the ABA Coordinating Committee on a Model Procurement Code. The goal is to have a complete package of the Model Ordinance and Procurement Manual for smaller units of local governments, similar to the package of the Model Procurement Code and Recommended Regulations, currently available to states and larger units of local government.

Based upon the comments received during the internal review, EPA will also continue work on the Procurement Manual for Local Governments. Before being finalized and published, EPA plans to distribute the Manual for public comment.

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ARTICLE 1—GENERAL PROVISIONS

Part A—Purpose and Application

§1-101 Purpose.

The purpose of this Ordinance is to provide for the fair and equitable treatment of all persons involved in public purchasing by the [City], to maximize the purchasing value of public funds in procurement, and to provide safeguards for maintaining a procurement system of quality and integrity.

§1-102 Application.

This Ordinance applies to contracts for the procurement of supplies, services, and construction, entered into by the [City] after the effective date of this Ordinance, unless the parties agree to its application to contracts entered into prior to the effective date. It shall apply to every expenditure of public funds by a public agency for public purchasing irrespective of the source of the funds. When the procurement involves the expenditure of federal assistance or contract funds, the procurement shall be conducted in accordance with any mandatory applicable federal law and regulations. Nothing in this Ordinance shall prevent any public agency from complying with the terms and conditions of any grant, gift, or bequest that is otherwise consistent with law.

Part B—Definitions

§1-201 Definitions.

- (1) *Architect-Engineer and Land Surveying Services.* Those professional services within the scope of the practice of architecture, professional engineering, or land surveying, as defined by the laws of the [State].
- (2) *Blind Trust.* An independently managed trust in which the employee-beneficiary has no management rights and in which the employee-beneficiary is not given notice of alterations in, or other dispositions of, the property subject to the trust.
- (3) *Brand Name or Equal Specification.* A specification limited to one or more items by manufacturers' names or catalogue numbers to describe the standard of quality, performance, and other salient characteristics needed to meet [City] requirements, and which provides for the submission of equivalent products.
- (4) *Brand Name Specification.* A specification limited to one or more items by manufacturers' names or catalogue numbers.
- (5) *Business.* Any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity.
- (6) *Change Order.* A written order signed and issued by the purchasing agent, directing the contractor to make changes which the "Changes" clause of the contract authorizes the purchasing agent to order without the consent of the contractor.
- (7) *Contract Modification (bilateral change).* Any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract.
- (8) *Confidential Information.* Any information which is available to an employee only because of the employee's status as an employee of the [City] and is not a matter of public knowledge or available to the public on request.
- (9) *Construction.* The process of building, altering, repairing, improving, or demolishing any public structure or building, or other public improvements of any kind to any public real property. It does not include the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property.
- (10) *Contract.* All types of [City] agreements, regardless of what they may be called, for the procurement of supplies, services, or construction.
- (11) *Contractor.* Any person having a contract with the [City] or a using agency thereof.
- (12) *Cost Analysis.* The evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.

(13) *Cost Data.* Factual information concerning the cost of labor, material, overhead, and other cost elements which are expected to be incurred or which have been actually incurred by the contractor in performing the contract.

(14) *Cost-Reimbursement Contract.* A contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this Ordinance, and a fee or profit, if any.

(15) *Direct or Indirect Participation.* Involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity.

(16) *Disadvantaged Business.* A small business which is owned or controlled by a majority of persons, not limited to members of minority groups, who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social disadvantages.

(17) *Employee.* An individual drawing a salary or wages from the [City], whether elected or not; any noncompensated individual performing personal services for the [City] or any department, agency, commission, council, board, or any other entity established by the executive or legislative branch of the [City]; and any noncompensated individual serving as an elected official of the [City].

(18) *Financial Interest.*

(a) Ownership of any interest or involvement in any relationship from which, or as a result of which, a person within the past [year] has received, or is presently or in the future entitled to receive, more than [\$____] per year, or its equivalent;

(b) Ownership of [__%] of any property or business; or

(c) Holding a position in a business such as officer, director, trustee, partner, employee, or the like, or holding any position of management.

(19) *Gratuity.* A payment, loan, subscription, advance, deposit of money, service, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received.

(20) *Immediate Family.* A spouse, children, parents, brothers, and sisters.

(21) *Invitation for Bids.* All documents, whether attached or incorporated by reference, utilized for soliciting sealed bids.

(22) *Person.* Any business, individual, union, committee, club, other organization, or group of individuals.

(23) *Price Analysis.* The evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.

(24) *Pricing Data.* Factual information concerning prices for items substantially similar to those being procured. Prices in this definition refer to offered or proposed selling prices, historical selling prices and current selling prices. The definition refers to data relevant to both prime and sub-contract prices.

(25) *Procurement.* The buying, purchasing, renting, leasing, or otherwise acquiring of any supplies, services, or construction. It also includes all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection, and solicitation of sources, preparation and award of contract, and all phases of contract administration.

(26) *Public Agency.* A public entity subject to or created by the [City].

(27) *Qualified Products List.* An approved list of supplies, services, or construction items described by model or catalogue numbers, which, prior to competitive solicitation, the [City] has determined will meet the applicable specification requirements.

(28) *Request for Proposals.* All documents, whether attached or incorporated by reference, utilized for soliciting proposals.

(29) *Responsible Bidder or Offeror.* A person who has the capability in all respects to perform fully the contract requirements, and the tenacity, perseverance, experience, integrity, reliability, capacity, facilities, equipment, and credit which will assure good faith performance.

(30) *Responsive Bidder.* A person who has submitted a bid which conforms in all material respects to the requirements set forth in the invitation for bids.

(31) *Services*. 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) *Small Business*. A United States business which is independently owned and which is not dominant in its field of operation or an affiliate or subsidiary of a business dominant in its field of operation.

(33) *Specification*. 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.

(34) *Supplies*. All property, including but not limited to equipment, materials, printing, insurance, and leases of real property, excluding land or a permanent interest in land.

(35) *Using Agency*. Any department, commission, board, or public agency requiring supplies, services, or construction procured pursuant to this Ordinance.

Part C—Public Access to Procurement Information

§1-301 Public Access to Procurement Information.

Procurement information shall be a [public record] to the extent provided in [cite appropriate statute] and shall be available to the public as provided in such statute.

COMMENTARY:

(1) The purpose of this provision is to achieve maximum public access to procurement information consistent with appropriate consideration of safeguards for contractors and employees.

(2) The appropriate statute to cite in this Section is the State Freedom of Information Act or similar law. The words "public record" have been bracketed to connote that, where the cited public access statute uses a term other than "public record," that term should be substituted.

(3) This provision does not in itself define "public record" or "public access" but rather incorporates the standards set forth in the State's public access statute. Therefore, this Section is not appropriate for states without such statutes.

ARTICLE 2—OFFICE OF THE PURCHASING AGENT

§2-101 Establishment, Appointment, and Tenure.

(1) *Establishment of the Position of Purchasing Agent*. There is hereby created the position of purchasing agent, who shall be the [City's] principal public purchasing official.

(2) *Appointment*. The purchasing agent shall be appointed by the [Mayor] [City Manager] [with the approval of the City Council]. The purchasing agent shall have a minimum of [____] years experience in [public] purchasing within [____] years preceding the date of appointment.

(3) *Tenure*. The purchasing agent shall be appointed to serve [an indefinite term] [a term of ____ years] and may be removed from office by the [Mayor] [City Manager] [City Council] only upon a showing of just cause.

COMMENTARY:

The standard of "just cause" is offered as the equivalent to the prevailing standard of "good cause."

(1) *Principal Public Purchasing Official.* Except as otherwise provided herein, the purchasing agent shall serve as the principal public purchasing official for the [City], and shall be responsible for the procurement of supplies, services, and construction in accordance with this Ordinance, as well as the management and disposal of supplies.

(2) *Duties.* In accordance with this Ordinance, and subject to the supervision of the [Mayor] [City Manager] [and City Council], the purchasing agent shall:

- (a) procure or supervise the procurement of all supplies, services, and construction needed by the [City];
- (b) exercise direct supervision over the [City's] central stores and general supervision over all other inventories of supplies belonging to the [City];
- (c) sell, trade, or otherwise dispose of surplus supplies belonging to the [City]; and
- (d) establish and maintain programs for specifications development, contract administration and inspection and acceptance, in cooperation with the public agencies using the supplies, services, and construction.

(3) *Operational Procedures.* Consistent with this Ordinance, and with the approval of the [Mayor] [City Manager] [and the City Council], the purchasing agent may adopt operational procedures relating to the execution of its duties. [These may be set forth in a Municipal Procurement Handbook.]

COMMENTARY:

(1) This Section authorizes the adoption of internal operating procedures for the guidance of those public officials responsible for, or making use of, the jurisdiction's public purchasing system. Such internal operating procedures are distinct from formal procurement regulations, which have the force and effect of law, binding both public officials and those selling to the government. State administrative procedures act requirements will apply to formal procurement regulations issued by most smaller units of local government.

(2) The Model Procurement Ordinance does not contemplate the issuance of formal procurement regulations. Such regulatory implementation will generally go beyond the needs of most smaller units of local government. However, should an enacting jurisdiction wish to consider a comprehensive set of procurement regulations, which are compatible with the Model Procurement Ordinance, it may review the Recommended Regulations to *The ABA Model Procurement Code for State and Local Governments*. Taken together, the Code and Recommended Regulations are a system for a state or large unit of local government with a substantial procurement responsibility.

(3) Although this Section only authorizes the adoption of internal operating procedures, it is strongly recommended that such procedures be adopted.

§2-103 Delegations to Other [City] Officials.

With the approval of the City Council and the [Mayor] [City Manager], the purchasing agent may delegate authority to purchase certain supplies, services, or construction items to other [City] officials, if such delegation is deemed necessary for the effective procurement of those items. Notwithstanding the provisions of Section 2-102 (Authority and Duties), procurement authority with respect to certain supplies, services, or construction may be delegated to other [City] officials by the [City Manager] [Mayor] with the approval of the City Council, when such delegation is deemed necessary for the effective procurement of these supplies, services, or construction.

COMMENTARY:

This provision recognizes that for the procurement of certain supplies, services, or construction effective management may call for the delegation of procurement authority to other [City] officials possessing specialized skills or knowledge that would make them better qualified to define the [City's] requirements or monitor a contractor's performance. Construction is the example most often cited. If the enacting jurisdiction possesses a professionally qualified director of Public Works or [City] engineer, it would be appropriate to

delegate to that professional procurement responsibility for [City] construction. While this provision of the Ordinance speaks in terms of a broad delegation of authority consistent with the all-encompassing definition of the term "procurement," in many instances more limited delegations might be in the best interests of the enacting jurisdiction. For example, responsibility for the conduct of the solicitation and award of the contract might be retained by the purchasing agent, while the technical definition of the [City's] requirements, for inclusion in the solicitation, might best be handled by the other [City] official possessing the specialized skills. Similarly, such a [City] official possessing specialized skills or knowledge would generally be more effective at monitoring a contractor's technical performance of the contract requirements.

When faced with an especially complex procurement, such as a complex construction project, the [City] may find it necessary to appoint temporarily a highly qualified construction management professional as construction procurement officer for that project. As an alternative, the [City] may choose to contract for the services of a construction management team to oversee all phases of the project. As a [City] contractor, this team would be closely supervised in its performance by the purchasing agent, and other appropriate [City] officials, such as a Public Works director. In selecting and utilizing such a project management team, the [City] should be certain to insure that the contractors providing this management function are independent of those contractors providing construction or other project services to the [City]. Consistent oversight by the [City Council] and [Mayor] [City Manager] will be essential for the successful completion of such complex construction projects.

ARTICLE 3—SOURCE SELECTION AND CONTRACT FORMATION

Part A—Methods of Source Selection

§3-101 Competitive Sealed Bidding.

(1) *Conditions for Use.* All contracts of the [City] shall be awarded by competitive sealed bidding except as otherwise provided in Sections 3-102 (Competitive Sealed Proposals), 3-103 (Contracting for Designated Professional Services), 3-104 (Small Purchases), 3-105 (Sole Source Procurement), 3-106 (Emergency Procurements), and 5-401 (Public Announcement and Selection Process) of this Ordinance.

COMMENTARY:

Experience has demonstrated that the procurement requirements of most units of local government can generally be met through the use of competitive sealed bidding or small purchase procedures. In recognition of this experience, the Model Procurement Ordinance suggests a statutory preference for competitive sealed bidding. However, it is now equally evident that the demands of modern public purchasing require the availability of other competitive source selection techniques. These, too, are set forth in the Model Procurement Ordinance. Enacting jurisdictions are strongly urged to provide their purchasing officials with the full array of source selection techniques proposed, so that they will have the tools to make the most effective procurement to meet public needs.

(2) *Invitation for Bids.* An invitation for bids shall be issued and shall include specifications, and all contractual terms and conditions applicable to the procurement.

(3) *Public Notice.* Adequate public notice of the invitation for bids shall be given a reasonable time, not less than [15] calendar days prior to the date set forth therein for the opening of bids. Such notice may include publication in a newspaper of general circulation a reasonable time prior to bid opening. The public notice shall state the place, date, and time of bid opening.

(4) *Bid Opening*. Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids. The amount of each bid, and such other relevant information as the purchasing agent deems appropriate, together with the name of each bidder shall be recorded; the record and each bid shall be open to public inspection in accordance with Section 1-301 (Public Access to Procurement Information).

(5) *Bid Acceptance and Bid Evaluation*. Bids shall be unconditionally accepted without alteration or correction, except as authorized in this Ordinance. Bids shall be evaluated based on the requirements set forth in the invitation for bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids.

(6) *Correction or Withdrawal of Bids; Cancellation of Awards*. Correction or withdrawal of inadvertently erroneous bids before or after bid opening, or cancellation of awards or contracts based on such bid mistakes, may be permitted where appropriate. Mistakes discovered before bid opening may be modified or withdrawn by written or telegraphic notice received in the office designated in the invitation for bids prior to the time set for bid opening. After bid opening, corrections in bids shall be permitted only to the extent that the bidder can show by clear and convincing evidence that a mistake of a nonjudgmental character was made, the nature of the mistake, and the bid price actually intended. After bid opening, no changes in bid prices or other provisions of bids prejudicial to the interest of the [City] or fair competition shall be permitted. In lieu of bid correction, a low bidder alleging a material mistake of fact may be permitted to withdraw its bid if:

- (a) the mistake is clearly evident on the face of the bid document but the intended correct bid is not similarly evident; or
- (b) the bidder submits evidence which clearly and convincingly demonstrates that a mistake was made. All decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, shall be supported by a written determination made by the purchasing agent.

(7) *Award*. The contract shall be awarded with reasonable promptness by appropriate written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids. In the event the low responsive and responsible bid for a construction project exceeds available funds as certified by the [appropriate fiscal officer], and such bid does not exceed such funds by more than [five] percent, the purchasing agent is authorized, when time or economic considerations preclude resolicitation of work of a reduced scope, to negotiate an adjustment of the bid price with the low responsive and responsible bidder, in order to bring the bid within the amount of available funds. Any such negotiated adjustment shall be based only upon eliminating independent deductive items specified in the invitation for bids.

(8) *Multi-Step Sealed Bidding*. When it is considered impractical to prepare initially a purchase description to support an award based on price, an invitation for bids may be issued requesting the submission of unpriced offers to be followed by an invitation for bids limited to those bidders whose offers have been determined to be technically acceptable under the criteria set forth in the first solicitation.

§3-102 Competitive Sealed Proposals.

COMMENTARY:

The source selection method of competitive sealed proposals, described in this Section of The Model Procurement Ordinance is the equivalent of "Negotiation" as set forth in Para. 11(c) of Attachment O (Procurement Standards) to OMB Circular A-102 (Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments).

(1) *Conditions for Use*. When the purchasing agent determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the [City], a contract may be entered into by use of the competitive sealed proposals method.

COMMENTARY:

The words "practicable" and "advantageous" are to be given ordinary dictionary meanings. In general, "practicable" denotes a situation which justifies a determination that a given factual result can occur. A typical determination would be whether or not there is sufficient time or information to prepare a specification suitable for competitive sealed bidding. "Advantageous" connotes a judgmental assessment of what is in the [City's] best interests. Illustrations include determining:

- (1) whether or not to utilize a fixed-price or cost-type contract under the circumstances;
- (2) whether quality, availability, or capability is overriding in relation to price in procurements of research and development, technical supplies, or services (for example, developing a traffic management system);
- (3) whether the initial installation needs to be evaluated together with subsequent maintenance and service capabilities and what priority should be given these requirements in the best interests of the [City]; or
- (4) whether the marketplace will respond better to a solicitation permitting not only a range of alternative proposals, but evaluation and discussion of them before making the award (for example, computer software programs).

What is practicable (that is, possible) may not necessarily be beneficial to the [City]. Consequently, both terms are used in this Section to avoid a possibly restrictive interpretation of the authority to use competitive sealed proposals. If local conditions require an enacting jurisdiction to reduce the proposed flexibility in choosing between competitive sealed bidding and competitive sealed proposals, the statutory determination under Subsection 1 to use competitive sealed proposals should be confined to a determination that use of competitive sealed bidding is "not practicable."

- (2) *Request for Proposals*. Proposals shall be solicited through a request for proposals.
- (3) *Public Notice*. Adequate public notice of the request for proposals shall be given in the same manner as provided in Section 3-101(3) (Competitive Sealed Bidding, Public Notice); provided, the minimum time shall be [30] calendar days.

Editorial Note:

This minimum should be greater than the minimum set forth in Section 3-101(3) (Competitive Sealed Bidding).

(4) *Receipt of Proposals*. No proposals shall be handled so as to permit disclosure of the identity of any offeror or the contents of any proposal to competing offerors during the process of negotiation. A register of proposals shall be prepared containing the name of each offeror, the number of modifications received, if any, and a description sufficient to identify the item offered. The register of proposals shall be open for public inspection only after contract award.

(5) *Evaluation Factors*. The request for proposals shall state the relative importance of price and other evaluation factors.

(6) *Discussion with Responsible Offerors and Revisions to Proposals*. As provided in the request for proposals, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and conformance to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of the identity of competing offerors or of any information derived from proposals submitted by competing offerors.

(7) *Award*. Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the [City], 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.

§3-103 Contracting for Designated Professional Services.

(1) *Authority.* For the purpose of procuring the services of [accountants] [clergy] [physicians] [lawyers] [dentists] as defined by the laws of the [State], any using agency requiring such services may procure them on its own behalf, in accordance with the selection procedures specified in this Section. [A using agency procuring such services shall consult with the purchasing agent.] No contract for the services of legal counsel may be awarded without the approval of [such officer as may be required by applicable law].

(2) *Selection Procedure.*

- (a) *Conditions for Use.* Except as provided under Section 3-105 (Sole Source Procurement) or Section 3-106 (Emergency Procurements), the professional services designated in Subsection (1) of this Section shall be procured in accordance with this Subsection.
- (b) *Statement of Qualifications.* Persons engaged in providing the designated types of professional services may submit statements of qualifications and expressions of interest in providing such professional services. A using agency using such professional services may specify a uniform format for statements of qualifications. Persons may amend these statements at any time by filing a new statement.
- (c) *Public Announcement and Form of Request for Proposals.* Adequate notice of the need for such services shall be given by the using agency requiring the services through a request for proposals. The request for proposals shall describe the services required, list the types of information and data required of each offeror, and state the relative importance of particular qualifications.
- (d) *Discussions.* The head of a using agency procuring the required professional services or a designee of such officer may conduct discussions with any offeror who has submitted a proposal to determine such offeror's qualifications for further consideration. Discussions shall not disclose any information derived from proposals submitted by other offerors.
- (e) *Award.* Award shall be made to the offeror determined in writing by the head of the using agency procuring the required professional services or a designee of such officer to be best qualified based on the evaluation factors set forth in the request for proposals, and negotiation of compensation determined to be fair and reasonable. If compensation cannot be agreed upon with the best qualified offeror, then negotiations will be formally terminated with the selected offeror. If proposals were submitted by one or more other offerors determined to be qualified, negotiations may be conducted with such other offeror or offerors, in the order of their respective qualification ranking, and the contract may be awarded to the offeror then ranked best qualified if the amount of compensation is determined to be fair and reasonable.

COMMENTARY:

(1) Subsection (1) provides that the services of members of certain professions designated by the [City Council] shall be procured by the using agency requiring such services. It is anticipated that the services such as those listed in this Subsection would be those services which involve extended analysis, the exercise of discretion and independent judgment in their performance, and an advanced, specialized type of knowledge, expertise, or training customarily acquired either by a prolonged course of study or equivalent experience in the field.

(2) An enacting jurisdiction may wish to provide that an agency using the professional services consult with the purchasing agent. However, an investigation of a legal or financial nature may give rise to circumstances requiring the maintenance of confidentiality. For example, the City Attorney may wish to conduct an investigation of a particular using agency and to hire outside legal counsel or auditors to assist in the matter. In such a situation, consultation with the purchasing agency is neither necessary nor desirable.

(3) Procurement of the services of architects, engineers, and land surveyors is covered in Article 5, Part D (Architect-Engineer and Land Surveying Services) of The Model Procurement Ordinance. It is not contemplated, therefore, that they would be listed in Subsection (1).

(4) It is intended that the types of services specified in Subsection (1) may be procured on a "retained" basis as well as for a particular project. Frequently, an enacting jurisdiction may need to consult various professionals on an ongoing but "from-time-to-time" basis. For example, an enacting jurisdiction may wish to retain a specialist in labor law who may be consulted immediately when collective bargaining issues arise.

(5) Under Subsection (2b), award of the contract is to be made on the basis of the criteria stated in the request for proposals. These criteria, in turn, should reflect the policy that demonstrated competence and qualifications to render the required services must be possessed by the offeror with whom the [City] contracts, and that the compensation requested must be fair and reasonable.

(6) Documentation of the actions taken by the head of a using agency using the professional services is an important means of curbing any improprieties and establishing public confidence in the process by which these professional services are procured.

Editorial Note:

The National Institute of Governmental Purchasing (NIGP), a member of the Coordinating Committee's Advisory Board, is of the opinion that the competitive sealed proposals method set forth in Section 3-102 (Competitive Sealed Proposals) should be used by small units of local government for the procurement of professional services. The Coordinating Committee recommends the enactment of Section 3-103 (Contracting for Designated Professional Services) as being more consistent with *The American Bar Association Model Procurement Code for State and Local Governments*.

§3-104 Small Purchases.

(1) *General.* Any contract not exceeding [\$_____] may be made in accordance with the small purchase procedures authorized in this Section. Contract requirements shall not be artificially divided so as to constitute a small purchase under this Section.

(2) *Small Purchases Over [\$300].* Insofar as it is practical for small purchases in excess of [\$300], no less than three businesses shall be solicited to submit quotations. Award shall be made to the business offering the lowest acceptable quotation. The names of the businesses submitting quotations, and the date and amount of each quotation, shall be recorded and maintained as a public record.

(3) *Small Purchases Under [\$300].* The purchasing agent shall adopt operational procedures for making small purchases of [\$300] or less. Such operational procedures shall provide for obtaining adequate and reasonable competition for the supply, service, or construction being purchased. Further, such operational procedures shall require the preparation and maintenance of written records adequate to document the competition obtained, properly account for the funds expended, and facilitate an audit of the small purchase made.

COMMENTARY:

If an enacting jurisdiction wishes to keep its small purchase authority in consonance with the standards for procurements funded by federal grants or other assistance, the dollar maximum should be set at no higher than \$10,000. State statutory requirements, or the public policy and practice of the enacting jurisdiction may call for a significantly lower ceiling.

§3-105 Sole Source Procurement.

A contract may be awarded without competition when the purchasing agent determines in writing, after conducting a good faith review of available sources, that there is only one source for the required supply, service, or construction item. The purchasing agent shall conduct negotiations, as appropriate, as to price, delivery, and terms. A record of sole source procurements shall be maintained as a public record and shall list each contractor's name, the amount and type of each contract, a listing of the item(s) procured under each contract, and the identification number of each contract file.

§3-106 Emergency Procurements.

Notwithstanding any other provisions of this Ordinance, the purchasing agent may make or authorize others to make emergency procurements of supplies, services, or construction items when there exists a threat to public health, welfare, or safety; 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. As soon as practicable, a record of each emergency procurement shall be made and shall set forth the contractor's name, the amount and type of the contract, a listing of the item(s) procured under the contract, and the identification number of the contract file.

§3-107 Cancellation of Invitations for Bids or Requests for Proposals.

An invitation for bids, a request for proposals, or other solicitation may be cancelled, 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 for good cause and in the best interests of the [City]. The reasons therefor shall be made part of the contract file. Each solicitation issued by the [City] shall state that the solicitation may be cancelled and that any bid or proposal may be rejected in whole or in part for good cause when in the best interests of the [City]. Notice of cancellation shall be sent to all businesses solicited. The notice shall identify the solicitation, explain the reason for cancellation and, where appropriate, explain that an opportunity will be given to compete on any resolicitation or any future procurements of similar items. Reasons for rejection shall be provided upon request by unsuccessful bidders or offerors.

Part B—Qualifications and Duties

§3-201 Responsibility of Bidders and Offerors.

(1) *Determination of Nonresponsibility.* If a bidder or offeror who otherwise would have been awarded a contract is found nonresponsible, a written determination of nonresponsibility, setting forth the basis of the finding, shall be prepared by the purchasing agent. The unreasonable failure of a bidder or offeror to supply promptly information in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such bidder or offeror. A copy of the determination shall be sent promptly to the nonresponsible bidder or offeror. The final determination shall be made part of the contract file and be made a public record.

(2) *Right of Nondisclosure.* Information furnished by a bidder or offeror pursuant to this Section shall not be disclosed by the [City] outside of the office of the purchasing agent, or using agency, without prior written consent by the bidder or offeror.

COMMENTARY:

An inquiry is not required in every case. The extent to which a review or investigation should be conducted will depend on the value and size of the procurement, and the bidder's or offeror's past record of contract performance in the public and private sectors. Since the information solicited from the bidder or offeror for such evaluation may be of a privileged or a proprietary nature, Subsection (2) prohibits the disclosure of such information without the consent of the bidder or offeror.

§3-202 Cost or Pricing Data.

(1) *Required Submissions Relating to the Award of Contracts.* A prospective contractor shall submit cost or pricing data when the contract is expected to exceed [\$100,000] and is to be awarded by competitive sealed proposals (Section 3-102; Competitive Sealed Proposals), or by sole source procurement authority (Section 3-105; Sole Source Procurement).

(2) *Exceptions.* The submission of cost or pricing data relating to the award of a contract is not required when:

- (a) the contract price is based on adequate price competition;
- (b) the contract price is based on established catalogue prices or market prices;
- (c) the contract price is set by law or regulation; or
- (d) it is determined in writing by the purchasing agent that the requirements of Section 3-202(1) (Cost or Pricing Data; Required Submissions Relating to the Award of Contracts) may be waived, and the determination states the reasons for such waiver.

(3) *Required Submissions Relating to Change Orders or Contract Modifications.* A contractor shall submit cost or pricing data prior to the pricing of any change order or contract modification, including adjustments to contracts awarded by competitive sealed bidding, whether or not cost or pricing data was required in connection with the initial pricing of the contract, when the change or modification involves aggregate increases or aggregate decreases in costs plus applicable profits that are expected to exceed [\$100,000].

(4) *Exceptions.* The submission of cost or pricing data relating to the pricing of a change order or contract modification is not required when:

- (a) unrelated and separately priced adjustments for which cost or pricing data would not be required are consolidated for administrative convenience; or
- (b) it is determined in writing by the purchasing agent that the requirements of Section 3-202(3) (Cost or Pricing Data; Required Submissions Relating to Change Orders or Contract Modifications) may be waived, and the determination states the reasons for such waiver.

(5) *Certification Required.* A contractor, actual or prospective, required to submit cost or pricing data in accordance with this Section, shall certify that, to the best of its knowledge and belief, the cost or pricing data submitted was accurate, complete, and current as of a mutually specified date prior to the award of the contract or the pricing of the change order or contract modification.

(6) *Price Adjustment Provision Required.* Any contract award, change order, or contract modification under which the submission and certification of cost or pricing data are required shall contain a provision stating that the price to the [City], including profit or fee, shall be adjusted to exclude any significant sums by which the [City] finds that such price was increased because the contractor-furnished cost or pricing data was inaccurate, incomplete, or not current as of the date agreed upon between the [City] and the contractor.

§3-203 Cost or Price Analysis.

A cost analysis or a price analysis, as appropriate, shall be conducted prior to award of the contract other than one awarded under Section 3-101 (Competitive Sealed Bidding). A written record of such cost analysis or price analysis shall be made a part of the contract file.

COMMENTARY:

(1) Cost analysis includes the appropriate verification of cost or pricing data, and the use of this data, as well as any available historical comparative data, to evaluate:

- (a) specific elements of costs;
- (b) the necessity of certain costs;
- (c) the reasonableness of amounts estimated for the necessary costs;
- (d) the reasonableness of allowances for contingencies;
- (e) the basis used for allocation of indirect costs;
- (f) the appropriateness of allocations of particular indirect costs to the proposed contract; and
- (g) the reasonableness of the total cost or price.

(2) Price analysis is used to determine if a price is reasonable and acceptable. It involves an evaluation of prices for the same or similar items or services. Examples of price analysis criteria include, but are not limited to:

- (a) price submissions of prospective bidders or offerors in the current procurement;
- (b) prior price quotations and contract prices charged by the bidder, offeror, or contractor;
- (c) prices published in catalogues or price lists;
- (d) prices available on the open market; and
- (e) in-house estimates of cost.

In making a price analysis, consideration must be given to any differing terms and conditions.

§3-204 Bid and Performance Bonds on Supply or Service Contracts.

Bid and performance bonds or other security may be requested for supply contracts or service contracts as the purchasing agent or head of a using agency deems advisable to protect the [City's] interests. Any such bonding requirements shall be set forth in the solicitation. Bid or performance bonds shall not be used as a substitute for a determination of a bidder or offeror's responsibility.

Part C—Types of Contracts and Contract Administration

§3-301 Types of Contracts.

(1) *General Authority.* Subject to the limitations of this Section, any type of contract which is appropriate to the procurement and which will promote the best interests of the [City] may be used, provided that the use of a cost-plus-a-percentage-of-cost contract is prohibited. A cost reimbursement contract may be used only when a determination is made in writing that such contract is likely to be less costly to the [City] than any other type or that it is impracticable to obtain the supply, service, or construction item required except under such a contract.

(2) *Multi-Term Contracts.*

(a) *Specified Period.* Unless otherwise provided by law, a contract for supplies or services may be entered into for any period of time deemed to be in the best interests of the [City], provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.

(b) *Determination Prior to Use.* Prior to the utilization of a multi-term contract, it shall be determined in writing:

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

(c) *Cancellation Due to Unavailability of Funds in Succeeding Fiscal Periods.* When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled and the contractor shall be reimbursed for the reasonable value of any non-recurring costs incurred but not amortized in the price of the supplies or services delivered under the contract. The cost of cancellation may be paid from any appropriations available for such purposes.

(3) *Multiple Source Contracting.*

(a) *General.* A multiple source award is an award of an indefinite quantity contract for one or more similar supplies or services to more than one bidder or offeror. The obligation to order the [City's] actual requirements is limited by the provision of Uniform Commercial Code Section 2-306(1).

(b) *Limitations on Use.* A multiple source 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 source award shall be made in accordance with the provisions of Section 3-101 (Competitive Sealed Bidding), Section

- 3-102 (Competitive Sealed Proposals), Section 3-104 (Small Purchases), and Section 3-106 (Emergency Procurements), as applicable. Multiple source awards shall not be made when a single award will meet the [City's] needs without sacrifice of economy or service. Awards shall not be made for the purpose of dividing the business, making available product or supplier selection to allow for user preference unrelated to utility or economy, or avoiding the resolution of tie bids. Any such awards shall be limited to the least number of suppliers necessary to meet the valid requirements.
- (c) *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:
 - (i) the [City] shall reserve the right to take bids separately if a particular quantity requirement arises which exceeds its normal requirement or an amount specified in the contract; and
 - (ii) the [City] shall reserve the right to take bids separately if the purchasing agent approves a finding that the supply or service available under the contract will not meet a nonrecurring special need of the [City].
 - (d) *Intent to Use.* If a multiple source award is anticipated prior to issuing a solicitation, the [City] shall reserve the right to make such an award and the criteria for award shall be stated in the solicitation.
 - (e) *Determination Required.* The purchasing agent shall make a written determination setting forth the reasons for a multiple source award, which shall be made a part of the procurement file.

COMMENTARY:

- (1) Subsection (1) provides the purchasing agent with the necessary flexibility to select the best type of contract for a particular procurement action. In making the selection, the purchasing agent must be certain that the [City] and the contractor have the management structures and personnel resources needed to administer properly performance of the contract type selected. For example, if a cost reimbursement-type contract is to be used, the contractor's accounting system must be capable of providing timely cost data in a form that will permit proper administration by the [City]. Similarly, the purchasing agent must have available adequately trained personnel capable of interpreting and auditing the cost data submitted by the contractor.
- (2) Some jurisdictions may have state or local restrictions upon the use of funds in a calendar or fiscal year other than that in which the funds are appropriated. This Section permits multi-term procurement in order to enable a [City] to procure larger quantities and obtain the benefits of volume discounts. A multi-term contract should be used only for supplies or services needed on a continuing basis with annual quantity requirements which can be reasonably estimated in advance. Multi-term procurements should attract more competitors to submit bids or offers for the large contract awards and thereby provide the jurisdiction with the benefits of increased competition.
- (3) Subsection 2(c) is applicable when funds are not appropriated in a subsequent year of a multi-term contract which is in progress. Where funds are not appropriated or otherwise made available for the next funding of the contract, there is no alternative but to cancel the contract and to reimburse the contractor for those nonrecurring costs that have not been amortized through the selling price of goods already delivered under the contract. The phrase "nonrecurring costs" should be broadly construed.
- (4) The Model Procurement Ordinance uses the term "multiple source award" to identify purchase arrangements which establish more than one source of supply. It is recognized, however, that such contracts have been variously referred to as "open-end contracts," "term contracts," "blanket contracts," "blanket orders," "serial awards," "progressive awards," and "purchase agreements." Competitive sealed bidding is the conventional procurement method for establishing such contracts, although competitive sealed proposals, small purchase procedures, and emergency procurements may be used.

(1) *Contract Clauses.* All [City] contracts for supplies, services, and construction shall include provisions necessary to define the responsibilities and rights of the parties to the contract. The purchasing agent, after consultation with the [City] Attorney, may issue clauses appropriate for supply, service, or construction contracts, addressing among others the following subjects:

- (a) the unilateral right of the [City] to order in writing changes in the work within the scope of the contract;
- (b) the unilateral right of the [City] to order in writing temporary stopping of the work or delaying performance that does not alter the scope of the contract;
- (c) variations occurring between estimated quantities of work in contract and actual quantities;
- (d) defective pricing;
- (e) liquidated damages;
- (f) specified excuses for delay or nonperformance;
- (g) termination of the contract for default;
- (h) termination of the contract in whole or in part for the convenience of the [City];
- (i) suspension of work on a construction project ordered by the [City]; and
- (j) site conditions differing from those indicated in the contract, or ordinarily encountered, except that a differing site conditions clause need not be included in a contract:
 - (i) when the contract is negotiated;
 - (ii) when the contractor provides the site or design; or
 - (iii) when the parties have otherwise agreed with respect to the risk of differing site conditions.

(2) *Price Adjustments.*

- (a) Adjustments in price resulting from the use of contract clauses required by Subsection (1) of this Section shall be computed in one or more of the following ways:
 - (i) by agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
 - (ii) by unit prices specified in the contract or subsequently agreed upon;
 - (iii) by the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;
 - (iv) in such other manner as the contracting parties may mutually agree; or
 - (v) in the absence of agreement by the parties, by a unilateral determination by the [City] of the costs attributable to the events or situations under such clauses with adjustment of profit or fee as computed by the [City], as accounted for in accordance with [reference to cost principles] and subject to the provisions of Article 9 (Appeals and Remedies).
- (b) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of Section 3-202 (Cost or Pricing Data).

(3) *Standard Clauses and Their Modification.* The purchasing agent, after consultation with the [City] Attorney, may establish standard contract clauses for use in [City] contracts. If the purchasing agent establishes any standard clauses addressing the subjects set forth in Subsection (1) of this Section, such clauses may be varied provided that any variations are supported by a written determination that states the circumstances justifying such variations, and provided that notice of any such material variation be stated in the invitation for bids or request for proposals.

§3-303 Contract Administration.

A contract administration system designed to insure that a contractor is performing in accordance with the solicitation under which the contract was awarded, and the terms and conditions of the contract, shall be maintained.

COMMENTARY:

Where the enacting jurisdiction has a professional Public Works staff, it may choose to place responsibility for the solicitation, award, and administration of construction with that organization. With respect to the administration of supply and service contracts, the purchasing agent will have prime responsibility but will need the close cooperation of the using agencies actually using the supplies or services.

§3-304 Cost Reimbursement Provisions.

[Reserved]

COMMENTARY:

If a contract is being funded in whole or in part by assistance from a federal agency, then reimbursement to contractors for incurred costs or cost estimates included in negotiated prices may be subject to appropriate federal cost principles, e.g., Subpart 1-15 of Title 41, Code of Federal Regulations. In addition, the [City] should be aware that individual federal agencies may have requirements applicable to their particular assistance programs. Information concerning these agency regulations is generally set forth in the assistance agreement, and is also available from the federal agency program manager.

§3-305 Approval of Accounting System.

Except with respect to firm fixed-price contracts, no contract type shall be used unless it has been determined in writing by the purchasing agent that:

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

§3-306 Right to Inspect Plant.

The [City] may, at reasonable times, inspect the part of the plant, place of business, or worksite of a contractor or subcontractor at any tier which is pertinent to the performance of any contract awarded or to be awarded by the [City].

§3-307 Right to Audit Records.

(1) *Audit of Cost or Pricing Data.* The [City] may at reasonable times and places, audit the books and records of any contractor who has submitted cost or pricing data pursuant to Section 3-202 (Cost or Pricing Data) to the extent that such books, documents, papers, and records are pertinent to such cost or pricing data. Any person who receives a contract, change order, or contract modification for which cost or pricing data is required, shall maintain such books, documents, papers, and records that are pertinent to such cost or pricing data for [three] years from the date of final payment under the contract.

(2) *Contract Audit.* The [City] shall be entitled to audit the books and records of a contractor or a subcontractor at any tier under any negotiated contract or subcontract other than a firm fixed-price contract to the extent that such books, documents, papers, and records are pertinent to the performance of such contract or subcontract. Such books and records shall be maintained by the contractor for a period of [three] years from the date of final payment under the prime contract and by the subcontractor for a period of [three] years from the date of final payment under the subcontract.

§3-308 Reporting of Anticompetitive Practices.

When for any reason collusion or other anticompetitive practices are suspected among any bidders or offerors, a notice of the relevant facts shall be transmitted to the State Attorney General and [the appropriate legal officer for the jurisdiction conducting the procurement].

(1) *Contract File.* All determinations and other written records pertaining to the solicitation, award, or performance of a contract shall be maintained for the [City] in a contract file by the purchasing agent.

(2) *Retention of Procurement Records.* All procurement records shall be retained and disposed of by the [City] in accordance with records retention guidelines and schedules approved by the [City Council].

COMMENTARY:

If a contract is being funded in whole or in part by assistance from a federal agency, then Attachment O (Procurement Standards) to OMB Circular A-102 (Uniform Administrative Requirements for Grants-in-aid to State and Local Governments), and any implementing regulations issued by individual federal agencies require that all procurement records pertaining to that contract shall be maintained for three years from the closeout date of the assistance agreement or the final disposition of any controversy arising out of the assistance agreement.

ARTICLE 4—SPECIFICATIONS

§4-101 Maximum Practicable Competition.

All specifications shall be drafted so as to promote overall economy for the purposes intended and encourage competition in satisfying the [City's] needs, and shall not be unduly restrictive. The policy enunciated in this Section applies to all specifications including but not limited to, those prepared for the [City] by architects, engineers, designers, and draftsmen.

§4-102 Qualified Products List.

[Reserved]

§4-103 Brand Name or Equal Specification.

(1) *Use.* Brand name or equal specifications may be used when the purchasing agent determines in writing that:

- (a) no other design or performance specification or qualified products list is available;
- (b) time does not permit the preparation of another form of purchase description, not including a brand name specification;
- (c) the nature of the product or the nature of the [City's] requirements makes use of a brand name or equal specification suitable for the procurement; or
- (d) use of a brand name or equal specification is in the [City's] best interests.

COMMENTARY:

It is not intended that the prior written determination required for use of a brand name or equal specification will impose an undue administrative burden. Rather it is designed to capture the important management decision to use this type of specification. Such determination may be made for categories of supplies, services, or construction items or, in appropriate circumstances, for an entire procurement action even though a number of different items are being procured. Standard forms may be developed to record the determination.

(2) *Designation of Several Brand Names.* Brand name or equal specifications shall seek to designate three, or as many different brands as are practicable, as "or equal" references and shall further state that substantially equivalent products to those designated will be considered for award.

(3) *Required Characteristics.* Unless the purchasing agent determines in writing that the essential characteristics of the brand names included in the specifications are commonly known in the industry or trade, brand name or equal specifications shall include a description of the particular design, functional, or performance characteristics which are required.

(4) *Nonrestrictive Use of Brand Name or Equal Specifications.* Where a brand name or equal specification is used in a solicitation, the solicitation shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance, and characteristics desired and is not intended to limit or restrict competition.

§4-104 Brand Name Specification.

(1) *Use.* Since use of a brand name specification is restrictive of product competition, it may be used only when the purchasing agent makes a written determination that only the identified brand name item or items will satisfy the [City's] needs.

(2) *Competition.* The purchasing agent shall seek to identify sources from which the designated brand name item or items can be obtained and shall solicit such sources to achieve whatever degree of price competition is practicable. If only one source can supply the requirement, the procurement shall be made under Section 3-105 (Sole Source Procurement).

ARTICLE 5—PROCUREMENT OF CONSTRUCTION, ARCHITECT-ENGINEER AND LAND SURVEYING SERVICES

Part A—Management of Construction Contracting

§5-101 Responsibility for Selection of Methods of Construction Contracting Management.

The purchasing agent [director of Public Works] [head of the public agency responsible for the construction project] shall have discretion to select the appropriate method of construction contracting management for a particular project. In determining which method to use, the [title of designated official] shall consider the [City's] requirements, its resources, and the potential contractor's capabilities. The [title of designated official] shall execute, and include in the contract file a written statement setting forth the facts which led to the selection of a particular method of construction contracting management for each project.

COMMENTARY:

(1) It is recognized that at least the following methods currently are being used for control and coordination of construction projects:

- (a) a single prime contractor (including a turnkey or design-build contractor); or
- (b) multiple prime contractors managed by:
 - (i) a designated general contractor;
 - (ii) a construction manager; or
 - (iii) a [purchasing agent] [Public Works director].

The [City] may wish to define and explain each of these methods of construction contract management in its Municipal Procurement Handbook. Definitions and explanations may be found in the Recommended Regulations for *The American Bar Association Model Procurement Code for State and Local Governments*, R5-201 (Management of Construction Contracts). If the single prime contractor method of construction contracting is proscribed by State statute, the [City] should so state in this Section.

(2) Complex construction projects require intensive, coordinated management to be completed on time and within budget. A small jurisdiction enacting the Model Procurement Ordinance may wish to consider contracting for the services of a program management team to augment the [City's] full-time staff. The program management team may be structured to include skills needed by the [City], to include planning, design, procurement, financial management, and contract administration, as well as the construction manager mentioned in the preceding paragraph. In selecting and utilizing such a program management team, the [City] must make every reasonable effort to be certain that the contractor providing these expert services is independent of those other contractors the team is supervising on behalf of the [City]. The program management team must be the servant of the [City] to be fully effective.

Part B—Bid Security and Performance Bonds

§5-201 Bid Security.

(1) *Requirement for Bid Security.* Bid security shall be required for all competitive sealed bidding for construction contracts when the price is estimated by the purchasing agent to exceed [\$____]. Bid security shall be a bond provided by a surety company authorized to do business in the [State], or the equivalent in cash, or otherwise supplied in a form satisfactory to the [City]. Nothing herein shall prevent the requirement of such bonds on construction contracts under [\$____] when the circumstances warrant.

(2) *Amount of Bid Security.* Bid security shall be in an amount equal to at least [____ %] of the amount of the bid.

(3) *Rejection of Bids for Noncompliance with Bid Security Requirements.* When the invitation for bids requires security, noncompliance requires that the bid be rejected unless it is determined that the bid fails to comply only in a nonsubstantial manner with the security requirements.

(4) *Withdrawal of Bids.* If a bidder is permitted to withdraw its bid before award as provided in Section 3-101(6) (Competitive Sealed Bidding; Correction or Withdrawal of Bids; Cancellation of Awards), no action shall be had against the bidder or the bid security.

§5-202 Contract Performance and Payment Bonds.

(1) *When Required—Amounts.* When a construction contract is awarded in excess of [\$25,000], the following bonds or security shall be delivered to the [City] and shall become binding on the parties upon the execution of the contract:

- (a) a performance bond satisfactory to the [City], executed by a surety company authorized to do business in the [State] or otherwise secured in a manner satisfactory to the [City], in an amount equal to 100% of the price specified in the contract; and
- (b) a payment bond satisfactory to the [City], executed by a surety company authorized to do business in the State or otherwise secured in a manner satisfactory to the [City], for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract. The bond shall be in an amount equal to 100% of the price specified in the contract.

(2) *Reduction of Bond Amounts.* [After notice to the City Council,] the purchasing agent is authorized to reduce the amount of performance and payment bonds to [50%] of the contract price for each bond when a written determination is made that it is in the best interests of the [City] to do so.

(3) *Authority to Require Additional Bonds.* Nothing in this Section shall be construed to limit the authority of the [City] to require a performance bond or other security in addition to those bonds, or in circumstances other than specified in Subsection (1) of this Section.

(4) *Suits on Payment Bonds—Right to Institute.* Unless otherwise authorized by law, any person who has furnished labor or material to the contractor or subcontractors for the work provided in the contract, for which a payment bond is furnished under this Section, and who has not been paid in full within 90 days from the date on which that person performed the last of the labor or supplied the material, shall have the right to sue on the payment bond for any amount unpaid at the time the suit is instituted and to prosecute the action for the amount due that person. However, any person having a contract with a subcontractor of the contractor, but no express or implied contract with the contractor furnishing the payment bond, shall have a right of action upon the payment bond upon giving written notice to the contractor within 90 days from the date on which that person performed the last of the labor or supplied the material. That person shall state in the notice the amount claimed and the name of the party to whom the material was supplied or for whom the labor was performed. The notice shall be served personally or by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office or conducts business.

(5) *Suits on Payment Bonds—Where and When Brought.* Unless otherwise authorized by law, every suit instituted upon a payment bond shall be brought in a court of competent jurisdiction for the county or district in which the construction contract was to be performed.

§5-203 Copies of Bond Forms.

Any person may request and obtain from the [City] a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond shall be prima facie evidence of the contents, execution, and delivery of the original.

Part C—Fiscal Responsibility

§5-301 Fiscal Responsibility.

Every contract modification, change order, or contract price adjustment in excess of [\$____] under a construction contract with the [City] shall be subject to prior approval by the [City Council] after receiving a report from the [appropriate fiscal officer or City Council committee chairperson] as to the effect of the contract modification, change order, or contract price adjustment on the total project budget or the total contract budget.

Part D—Architect-Engineer and Land Surveying Services

§5-401 Public Announcement and Selection Process.

(1) *Public Announcement.* It is the policy of the [City] to announce publicly all requirements for architect-engineer and land surveying services and to negotiate such contracts on the basis of demonstrated competence and qualifications at fair and reasonable prices. In the procurement of architect-engineer and land surveying services, the purchasing agent shall request firms to submit a statement of qualifications and performance data.

(2) *Selection Process.* A selection committee composed of three members, including the purchasing agent, [the director of Public Works or another officer with appropriate professional qualifications] and the head of a using agency in need of the architect-engineer or land surveying services shall conduct discussions with no less than three firms regarding the proposed contract and the relative utility of alternative methods of approach for furnishing the required services and shall select from among them no less than three of the firms deemed most qualified to provide the required services. The selection shall be made in order of preference, based on criteria established and published by the selection committee.

(c) *negotiation.* The purchasing agent shall negotiate a contract with the firm considered to be the most qualified for architect-engineer or land surveying services at compensation which the purchasing agent determines in writing to be fair and reasonable to the [City]. In making this decision, the purchasing agent shall take into account the estimated value, the scope, the complexity, and the professional nature of the services to be rendered. Should the purchasing agent be unable to negotiate a satisfactory contract with the firm considered to be the most qualified at a price the purchasing agent determines to be fair and reasonable to the [City], negotiations with that firm shall be formally terminated. The purchasing agent shall then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the purchasing agent shall formally terminate negotiations. The purchasing agent shall then undertake negotiations with the third most qualified firm. Should the purchasing agent be unable to negotiate a contract at a fair and reasonable price with any of the selected firms, the selection committee shall select additional firms in order of their competence and qualifications, and the purchasing agent shall continue negotiations in accordance with this Section until an agreement is reached.

COMMENTARY:

(1) This Section applies to procurement of all services within the scope of architecture, professional engineering, or land surveying as defined by the laws of the State whether or not construction is involved.

(2) The principal reasons supporting this selection procedure for architect-engineer and land surveying services are the importance of selecting the best qualified firm and the lack of a definitive scope of work for such services at the time the selection is made. In general, the architect-engineer or land surveyor is engaged to represent the [City's] interests and is, therefore, in a different relationship with the [City] from that normally existing in a buyer-seller situation. For these reasons, the qualifications, competence, and availability of the three most qualified architect-engineer or land surveying firms is considered initially, and price negotiated later.

(3) It is considered more desirable to make the qualification selection first and then to discuss the price because both parties need to review in detail what is involved in the work (for example, estimates of man-hours, personnel costs, and alternatives that the architect-engineer or land surveyor should consider in depth). Once parameters have been fully discussed and understood and the architect-engineer or land surveyor proposes a fee for the work, the recommended procedure requires the [City] to make its own evaluation and judgment as to the reasonableness of the fee.

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

(5) If an enacting jurisdiction desires to use a different selection process, or is precluded from using the recommended procedure by State law, then it may consider the following language:

"The purchasing agent shall negotiate with the highest qualified firms for a contract for architect-engineer or land surveying services at compensation which the purchasing agent determines in writing to be fair and reasonable to the [City]. In making such determination, the purchasing agent shall take into account, in the following order of importance, the professional competence of offerors, the technical merits of offers, and the price for which the services are to be rendered."

ARTICLE 6—DEBARMENT OR SUSPENSION

§6-101 Authority to Debar or Suspend.

After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the purchasing agent, after consulting with the [City] Attorney, is authorized to debar a person for cause from consideration for award of contracts. The debarment shall be for a period of not more than [three years]. After consultation with the [City] Attorney, the purchasing agent is authorized to suspend a person from consideration for award of contracts if there is probable cause to believe that the person has engaged in any activity which might lead to debarment. The suspension shall be for a period not to exceed [three months]. The causes for debarment include:

- (a) conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;
- (b) conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a [City] contractor;
- (c) conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;
- (d) violation of contract provisions, as set forth below, of a character which is regarded by the purchasing agent to be so serious as to justify debarment action:
 - (i) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or
 - (ii) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;
- (e) any other cause the purchasing agent determines to be so serious and compelling as to affect responsibility as a [City] contractor, including debarment by another governmental entity for any cause listed in this Ordinance; and
- (f) for violation of the ethical standards set forth in Article 12 (Ethics in Public Contracting).

§6-102 Decision to Debar or Suspend.

The purchasing agent shall issue a written decision to debar or suspend. The decision shall state the reasons for the action taken and inform the debarred or suspended person involved of its rights concerning judicial or administrative review.

§6-103 Notice of Decision.

A copy of the decision required by Section 6-102 (Decision to Debar or Suspend) shall be mailed or otherwise furnished immediately to the debarred or suspended person.

§6-104 Finality of Decision.

A decision under Section 6-102 (Decision to Debar or Suspend) shall be final and conclusive, unless fraudulent, or the debarred or suspended person within 10 days after receipt of the decision takes an appeal to the [City Council] or commences a timely action in court in accordance with applicable law.

ARTICLE 7—COST PRINCIPLES

[Reserved]

ARTICLE 8—SUPPLY MANAGEMENT

[Reserved]

ARTICLE 9—APPEALS AND REMEDIES

§9-101 Bid Protests.

(1) *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 [City Council] [Mayor] [City Manager]. Protestors are urged to seek resolution of their complaints initially with the purchasing agent. A protest with respect to an invitation for bids or request for proposals shall be submitted in writing prior to the opening of bids or the closing date of proposals, unless the aggrieved person did not know and should not have known of the facts giving rise to such protest prior to bid opening or the closing date for proposals. The protest shall be submitted within [____] calendar days after such aggrieved person knows or should have known of the facts giving rise thereto.

(2) *Stay of Procurements During Protests.* In the event of a timely protest under Subsection (1) of this Section, the purchasing agent shall not proceed further with the solicitation or award of the contract until all administrative and judicial remedies have been exhausted or until the [City Council] [Mayor] [City Manager] makes a determination on the record that the award of a contract without delay is necessary to protect substantial interests of the [City].

(3) *Entitlement to Costs.* In addition to any other relief, when a protest is sustained and the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror shall be entitled to the reasonable costs incurred in connection with the solicitation, including bid preparation costs other than attorney's fees.

§9-102 Contract Claims.

(1) *Decision of the Purchasing Agent.* All claims by a contractor against the [City] relating to a contract, except bid protests, shall be submitted in writing to the purchasing agent for a decision. The contractor may request a conference with the purchasing agent on the claim. Claims include, without limitation, disputes arising under a contract, and those based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.

(2) *Notice to the Contractor of the Purchasing Agent's Decision.* The decision of the purchasing agent shall be promptly issued in writing, and shall be immediately mailed or otherwise furnished to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of its appeal rights under Subsection (3) of this Section.

(3) *Finality of Purchasing Agent's Decision; Contractor's Right to Appeal.* The purchasing agent's decision shall be final and conclusive unless, within [____] calendar days from the date of receipt of the decision, the contractor mails or otherwise delivers a written appeal to the [City Council] or commences an action in a court of competent jurisdiction.

(4) *Failure to Render Timely Decision.* If the purchasing agent does not issue a written decision regarding any contract controversy within [____] days after written request for a final decision, or within such longer period as may be agreed upon between the parties, then the aggrieved party may proceed as if an adverse decision had been received.

§9-103 Access to Administrative Forums.

[Reserved]

COMMENTARY:

In *The American Bar Association Model Procurement Code for State and Local Governments* Article 9 (Legal and Contractual Remedies), Optional Part E provides for the creation of a procurement appeals board to serve as an administrative forum for disputes relating to bid protests, contract claims or controversies, and suspensions and debarments. Provisions for establishing such a full-time, multi-member board have been excluded from The Model Procurement Ordinance as being generally inappropriate to the smaller jurisdiction for which the Ordinance is designed. It is crucial, however, that some forum above the level of the purchasing agent be available to hear such disputes.

The Model Procurement Ordinance provides for the [City Council] to hear and decide both bid protests and contract performance disputes. The [City Council] may decide to delegate its authority to a hearing officer (other than the purchasing agent) or a part-time board (that does not include the purchasing agent). If the [City Council] chooses to delegate its authority, it must carefully consider the scope of authority it is delegating to the hearing officer or board. Among the issues to be considered are the following:

- (a) whether the decisions rendered by the hearing officer or board will be advisory decisions or final decisions that bind the [City];
- (b) whether the hearing officer or board will be authorized to decide questions of fact only, or both questions of fact and law; and
- (c) whether the hearing officer or board will be free to fashion remedies providing appropriate redress to the prevailing party.

Rather than establish its own administrative forum, an enacting jurisdiction may find it more cost effective to use the services of a procurement appeals board established by the State or by a large city within the State. As yet another alternative, the enacting jurisdiction may decide to provide, through contract clause, for the arbitration of contract performance claims.

Whichever means is chosen, it is essential that a forum be provided to both the [City] and the contractor in which their grievances may be heard and by which appropriate relief may be granted.

§9-104 Access to [City] Courts.

[Reserved]

COMMENTARY:

(1) If an enacting jurisdiction has an existing municipal court, it may wish to expand that court's jurisdiction to permit it to hear and decide bid protests, contract claims, and appeals from suspensions and debarments imposed by the purchasing agent. State law may prohibit such an expansion of the court's jurisdiction.

(2) If the enacting jurisdiction chooses this approach, this Section may be used to define the scope of the court's review and define the remedies it may grant, as well as to define its jurisdiction.

§9-105 Access to [State] Courts.

[Reserved]

COMMENTARY:

Although a unit of local government lacks the authority to establish the jurisdiction or scope of review of the State's courts, the enacting jurisdiction may use this Section to notify its contractors and bidders of the remedies available from the State courts.

§9-106 Authority of the Purchasing Agent to Settle Bid Protests and Contract Claims.

The purchasing agent is authorized to settle any protest regarding the solicitation or award of a [City] contract, or any claim arising out of the performance of a [City] contract, prior to an appeal to the [City Council] or the commencement of an action in a court of competent jurisdiction.

§9-107 Remedies for Solicitations or Awards in Violation of Law.

(1) *Prior to Bid Opening or Closing Date for Receipt of Proposals.* If prior to the bid opening or the closing date for receipt of proposals, the purchasing agent, after consultation with the [City] Attorney, determines that a solicitation is in violation of federal, state, or municipal law, then the solicitation shall be cancelled or revised to comply with applicable law.

(2) *Prior to Award.* If after bid opening or the closing date for receipt of proposals, the purchasing agent, after consultation with the [City] Attorney, determines that a solicitation or a proposed award of a contract is in violation of federal, state, or municipal law, then the solicitation or proposed award shall be cancelled.

(3) *After Award.* If, after an award, the purchasing agent, after consultation with the [City] Attorney, determines that a solicitation or award of a contract was in violation of applicable law, then:

- (a) if the person awarded the contract has not acted fraudulently or in bad faith:
 - (i) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the [City]; or
 - (ii) the contract may be terminated and the person awarded the contract shall be compensated for the actual costs reasonably incurred under the contract, plus a reasonable profit, prior to the termination; or
- (b) if the person awarded the contract has acted fraudulently or in bad faith the contract may be declared null and void or voidable, if such action is in the best interests of the [City].

ARTICLE 10—COOPERATIVE PURCHASING

[Reserved]

ARTICLE 11—ASSISTANCE TO SMALL AND DISADVANTAGED BUSINESSES

[Reserved]

ARTICLE 12—ETHICS IN PUBLIC CONTRACTING

§12-101 Criminal Penalties.

To the extent that violations of the ethical standards of conduct set forth in this Article constitute violations of the [State Criminal Code] they shall be punishable as provided therein. Such penalties shall be in addition to the civil sanctions set forth in this Part. Criminal, civil, and administrative sanctions against employees or nonemployees which are in existence on the effective date of this Ordinance shall not be impaired.

§12-102 Employee Conflict of Interest.

It shall be unethical for any [City] employee to participate directly or indirectly in a procurement contract when the [City] employee knows that:

- (a) the [City] employee or any member of the [City] employee's immediate family has a financial interest pertaining to the procurement contract; or
- (b) any other person, business, or organization with whom the [City] employee or any member of a [City] employee's immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement contract.

A [City] employee or any member of a [City] employee's immediate family who holds a financial interest in a disclosed blind trust shall not be deemed to have a conflict of interest with regard to matters pertaining to that financial interest.

§12-103 Gratuities and Kickbacks.

(1) *Gratuities.* It shall be unethical for any person to offer, give, or agree to give any [City] employee or former [City] employee, or for any [City] employee or former [City] employee to solicit, demand, accept, or agree to accept from another person, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, or preparation of any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter, pertaining to any program requirement or a contract or subcontract, or to any solicitation or proposal therefor.

(2) *Kickbacks.* It shall be unethical for any payment, gratuity, or offer of employment to be made by or on behalf of a subcontractor under a contract to the prime contractor or higher tier subcontractor or any person associated therewith, as an inducement for the award of a subcontract or order.

(3) *Contract Clause.* The prohibition against gratuities and kickbacks prescribed in this Section shall be conspicuously set forth in every contract and solicitation therefor.

§12-104 Prohibition Against Contingent Fees.

It shall be unethical for a person to be retained, or to retain a person, to solicit or secure a [City] contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies for the purpose of securing business.

§12-105 Contemporaneous Employment Prohibited.

It shall be unethical for any [City] employee who is participating directly or indirectly in the procurement process to become or to be, while such a [City] employee, the employee of any person contracting with the governmental body by whom the employee is employed.

§12-106 Waivers from Contemporaneous Employment Prohibition and Other Conflicts of Interest.

The [City Council] may grant a waiver from the employee conflict of interest provision (Section 12-102; Employee Conflict of Interest) or the contemporaneous employment provision (Section 12-105; Contemporaneous Employment Prohibited) upon making a written determination that:

- (a) the contemporaneous employment or financial interest of the [City] employee has been publicly disclosed;
- (b) the [City] employee will be able to perform its procurement functions without actual or apparent bias or favoritism; and
- (c) the award will be in the best interests of the [City].

§12-107 Use of Confidential Information.

It shall be unethical for any employee or former employee knowingly to use confidential information for actual or anticipated personal gain, or for the actual or anticipated personal gain of any other person.

§12-108 Sanctions.

(1) *Employees.* The [Mayor] [City Manager] [City Council] may impose any one or more of the following sanctions on a [City] employee for violations of the ethical standards in this Article:

- (a) oral or written warnings or reprimands;
- (b) suspension with or without pay for specified periods of time; or
- (c) termination of employment.

(2) *Nonemployees.* The [City Council] may impose any one or more of the following sanctions on a nonemployee for violations of the ethical standards:

- (a) written warnings or reprimands;
- (b) termination of contracts; or
- (c) debarment or suspension as provided in Section 6-101 (Authority to Debar or Suspend).

§12-109 Recovery of Value Transferred or Received in Breach of Ethical Standards.

(1) *General Provisions.* The value of anything transferred or received in breach of the ethical standards of this Ordinance by a [City] employee or a nonemployee may be recovered from both [City] employee and nonemployee.

(2) *Recovery of Kickbacks by the [City].* Upon a showing that a subcontractor made a kickback to a prime contractor or a higher tier subcontractor in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the amount thereof was included in the price of the subcontract or order and ultimately borne by the [City] and will be recoverable hereunder from the recipient. In addition, that amount may also be recovered from the subcontractor making such kickbacks. Recovery from one offending party shall not preclude recovery from other offending parties.

APPENDIX

Additional Provisions Relating to Compliance With Attachment O to OMB Circular A-102

Editorial Note.

The ABA Model Procurement Ordinance for Local Governments suggests a legislative basis for a modern, comprehensive, open, and competitive procurement system designed to promote efficiency, effectiveness, and fairness in public purchasing by small units of local government. As such, the Model Procurement Ordinance is seen as fulfilling the fundamental standards of good public purchasing which are required of governmental recipients by Attachment O (Procurement Standards) to OMB Circular A-102 (Uniform Administrative Requirements for Grants-in-Aid to States and Local Governments), when procuring supplies, services, or construction using most federal assistance funds. However, like *The ABA Model Procurement Code for State and Local Governments* from which it is derived, the ABA Model Procurement Ordinance for Local Governments does not suggest "model" coverage for those additional requirements of Attachment O that implement various socioeconomic and other federal public policy goals. This Appendix contains additional provisions covering these "other" requirements of the current edition of Attachment O.

Several observations should be noted concerning the provisions set forth in this Appendix. First, the text of these provisions represents only a paraphrasing of the Attachment O text. Second, the additional provisions have been numbered so as to suggest an appropriate placement within the structure of the Model Procurement Ordinance. Third, these additional provisions have been drafted so as to make them applicable only if the procurement is being funded in whole or in part by assistance from a federal agency; if no federal assistance funds are involved, these additional provisions would be inapplicable. Finally, the additional provisions set forth in this Appendix have been included as a convenience for a small unit of local government that wants to be certain that its new procurement system addresses all of the current requirements of Attachment O. They do not constitute the recommendations of the American Bar Association, or any of its Sections or Committees.

§3-308 Contractor Records.

If a contract is being funded in whole or in part by assistance from a federal agency, then the contract shall include provisions:

- (a) requiring the contractor and subcontractors at any tier to maintain for three years from the date of final payment under the contract all books, documents, papers, and records pertinent to the contract; and
- (b) requiring the contractor and subcontractor at any tier to provide to the [City], the federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives access to such books, documents, papers, and records for the purposes of examining, auditing, and copying them.

§3-309 Patents.

If a contract involving research and development, experimental, or demonstration work is being funded in whole or in part by assistance from a federal agency, then the contract shall include provisions:

- (a) giving notice to the contractor of the applicable grantor agency requirements and regulations concerning reporting of, and rights to any discovery or invention arising out of the contract; and
- (b) requiring a contractor to include a similar provision in all subcontracts involving research and development, experimental, or demonstration work.

§3-310 Copyrights and Rights in Data.

If a contract is being funded in whole or in part by assistance from a federal agency, then the contract shall include a provision giving the contractor notice of the applicable regulations concerning the rights of the United States to any plans, drawings, specifications, computer programs, technical reports, operating manuals, and similar work products developed and paid for under the contract.

§3-311 Notice of Federal Public Policy Requirements.

If the contract is being funded in whole or in part by assistance from a federal agency, and the contract is subject to one or more federal public policy requirements, such as:

- (a) equal employment opportunity;
- (b) fair labor standards;
- (c) energy conservation;
- (d) environmental protection; or
- (e) other similar socioeconomic programs, then, the purchasing agent shall include contract provisions giving the contractor notice of these requirements, and where appropriate, including in those contract provisions the requirement that the contractor give a similar notice to all of its subcontractors.

COMMENTARY:

Para. 14 (Contract Provisions) of Attachment O to OMB Circular A-102 lists all of the public policy requirements enumerated in this Section. However, it should be noted that many other cross-cutting public policy requirements, established by federal statute and binding upon the recipient by the acceptance of the federal assistance, exist and may impact upon the [City's] procurements. Assistance regarding compliance is available from the federal grantor agency's program manager.

§4-103 Buy American

If a contract is being funded in whole or in part by assistance from a federal agency, then the [City] shall adhere to the appropriate "Buy American" requirements of the federal agency providing the assistance.

COMMENTARY:

In the absence of a "Buy American" requirement mandated by the federal grantor agency, it is becoming the prevailing practice that federal agencies will not bear the additional costs associated with the [City's] compliance with "Buy American" requirements mandated by state statute or local ordinance.

§4-104 Energy Conservation.

If a contract is being funded in whole or in part by assistance from a federal agency, then the [City's] solicitation shall seek to promote energy conservation and shall comply with any mandatory standards and policies which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Public Law 94-163).

§11-201 Small, Women-Owned, and Minority Business Enterprises.

(1) *Expand Participation.* If a contract is being funded in whole or in part by assistance from a federal agency, the purchasing agent shall take affirmative steps to assure that small, women-owned, and minority businesses are utilized when possible as sources of supplies, services, and construction items.

(2) *Examples of Affirmative Steps.* Affirmative steps to be taken shall include:

- (a) including qualified small, women-owned, and minority businesses on solicitation lists;
- (b) assuring that small, women-owned, and minority businesses are solicited whenever they are potential sources;

- (c) when economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum small, women-owned, and minority business participation;
 - (d) where the requirement permits, establishing delivery schedules which will encourage participation by small, women-owned, and minority business; and
 - (e) using the services and assistance of the Small Business Administration, or the Office of Minority Business Enterprise of the Department of Commerce, as required.
- (3) *Pass-Through to Subcontracts.* A contractor awarded a federally-funded contract shall take the affirmative steps, as listed in Subsection (2) of this Section, in awarding its subcontracts.

COMMENTARY:

Several federal grantor agencies have specific requirements regarding the participation of minority-owned and/or women-owned businesses. These specific grantor agency requirements (which may be required of the governmental recipient as a condition of the grant, as in the case of the U.S. Environmental Protection Agency), must be complied with in the performance of the particular federally-funded project to which they apply. Generally, the specifics of these requirements will be available from the federal grantor agency's program manager.

§11-202 Labor Surplus Area Businesses.

If a contract is being funded in whole or in part by assistance from a federal agency, the purchasing agent is encouraged to procure supplies, services, and construction items from businesses located in labor surplus areas.