



Defending Liberty
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American Bar Association

The
2000

Model
Procurement
Code

Recommended
Regulations

for State and Local Governments



Section of
Public Contract Law

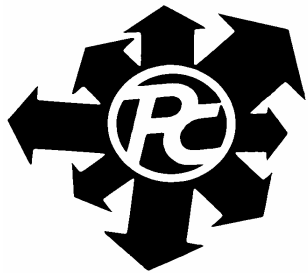


Section of
State and Local
Government Law

As approved at the August 2002 ABA Annual Meeting by the Section of Public Contract Law and Section of State and Local Government Law.

The American Bar Association

2002 ABA Model Procurement Regulations



ABA

At the August 2002 American Bar Association Annual Meeting, the Council of the Section of Public Contract Law and the Council of the Section of State and Local Government Law adopted resolutions approving the Recommended Regulations and urging their consideration by interested States and units of local government. Unlike the ABA 2000 Model Procurement Code for State and Local Governments, which these regulations are designed to implement, the Recommended Regulations have not been considered or approved by the House of Delegates, the Association's policymaking body. These Recommended Regulations do not constitute the official policy of the American Bar Association.

ACKNOWLEDGMENTS

The 2000 American Bar Association's Model Procurement Code Project was made possible through seed funding for the project provided by the Sections of Public Contract Law and State and Local Government Law.

The Sections acknowledge with special thanks and appreciation the support of Lockheed Martin, the Civil and Environmental Engineering Department of the Massachusetts Institute of Technology, Public Technology, Inc., and the National Institute of Governmental Purchasing. Each provided major grant funding to support the project. The Sections also gratefully acknowledge the financial support of the American Consulting Engineers Council, The Engineers Joint Contract Documents Committee, and the Council On Federal Procurement of Architect/Engineer Services. The Sections also acknowledge with gratitude that the 2000 Revisions were accomplished in cooperation with the National Association of State Procurement Officials. The Sections also acknowledge the special support of John T. Kuelbs and Janice C. Griffith, Chairs of the sponsoring sections at the time the revision project commenced, and the several succeeding chairs of both Sections that have seen the project through.

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Introduction

to the

2000 ABA Model Procurement Code

Background: The 1979 ABA Model Procurement Code.

On February 13, 1979, after years of extensive work by the Section of Public Contract Law, Section of State and Local Government Law, and other national organizations interested in state and local procurement, the 1979 Edition of the ABA Model Procurement Code for State and Local Governments was adopted by the House of Delegates of the American Bar Association.

Since 1979, the Code has been adopted in full by sixteen (16) states; in part, by several more; and by thousands of local jurisdictions across the United States. The 1979 edition of the ABA Model Procurement Code has helped to create transparent, competitive, and reliable processes by which billions of dollars in public funds are expended through contracts with private sector businesses. As described below, the Code was in need of an update based on the ever-changing procurement environment, and the MPC Revision Project was structured to complete the task on or about the Code's twentieth birthday. The Model Procurement Code is one of the most successful projects ever conducted by the Section of Public Contract Law and Section of State and Local Government Law, and has had a profound and favorable impact on the conduct of public procurement throughout the United States since 1979.

The Code Revision Project: 1997 to 2000

The Sections of Public Contract Law and State and Local Government have been joint sponsors of the Model Procurement Code Revision Project since July 1997. The purpose of the Project was to update the Model Procurement Code for State and Local Governments to fit the requirements and needs of state and local governments and their contractors in the year 2000 and beyond.

The goals of the Revision Project were simple, yet profound:

- (1) Reduce transaction costs for all governmental entities at the state and local levels;
- (2) Reduce transaction costs to private sector suppliers of goods and services;
- (3) Substantially increase available levels and ranges of competition through modern methods of electronic communications; and

- (4) Encourage the competitive use of new technologies, new methods of performing, and new forms of project delivery in public procurement, particularly in the construction area.

Broad Participation in the Revision Project Through the Internet

Broad participation in the Revision Project was essential to its success. To achieve this goal, the Project was conducted on the World Wide Web through the Massachusetts Institute of Technology (MIT). The Project solicited and encouraged full participation by members of the sponsoring Sections, interested associations, and individual procurement officials and agencies throughout the country through the revision process. In addition to participation via the World Wide Web, extensive comments and suggestions were received by leading procurement organizations. These groups included, to name just a few: the National Institute of Governmental Purchasing (NIGP), the National Association of State Procurement Officials (NASPO), the Construction Industry Roundtable (CIRT), the American Consulting Engineers Council, and the Council On Federal Procurement of Architectural & Engineering Services.

The Regulations Revision Project: 2001 to 2002

The Sections of Public Contract Law and State and Local Government have been joint sponsors of the Model Procurement Code Revision Project since July 1997. The purpose of the Project was to update the Model Procurement Code for State and Local Governments to fit the requirements and needs of state and local governments and their contractors in the year 2000 and beyond.

Preserving the Principles of the 1979 Model Procurement Code

The 1979 Code offered states and local jurisdictions, for the first time and in one place, a basic formulation of the fundamental principles upon which durable procurement systems rest. For twenty years, these principles have well served the public officials who manage state and local procurement systems and the thousands of private sector suppliers. The Revision Project did not result in any major changes to these basic principles. Indeed, these principles have become bedrock notions in the American law associated with public procurement. Coverage of these basic principles was preserved in the revised Code:

1. Competition
2. Ethics
3. Predictability (stability, advanced publication, accountability)
4. Clear Statements of Procurement Needs

5. Equal Treatment of Bidders/Offerors
6. Methods of Source Selection
7. Bid / Proposal Evaluation
8. Reduction in Transaction Costs for Public and Private Sector Entities
9. Procurement of Construction Related Services
10. Remedies
11. Facilitation of Intergovernmental Transactions (Cooperative Procurements)

Why Update the Processes in the Code?

Since 1979, the process by which procurement transactions are conducted has progressed exponentially. Technology has changed dramatically since the 1979 Code was formulated. Indeed, personal computers, email, and the internet did not exist in 1979, and there were few fax machines. These new technologies offer exciting and innovative opportunities to make public procurement processes even more predictable and more accessible to potential suppliers, to produce greater competition through wide distribution of procurement needs, and to substantially lower the average cost of procurement transactions to both government and private sector suppliers. In the construction industry, the development of Computer Aided Design (CAD) has made new and different forms of project delivery for constructed facilities possible, such as Design-Build, Design-Build-Operate, and Design-Build-Finance-Operate. The sponsoring Sections identified at least five reasons why the 1979 Code required updating in order for it to keep its place as the leading national policy blueprint for state and local purchasing.

Procurement Volume Has Increased Rapidly

In 1997, state and local governments were spending approximately 750 billion dollars annually in the procurement of goods, supplies, equipment, services, and construction. The dollar value of spending by the states has risen significantly since 1979 when the Code was first introduced. The number of procurement transactions per year is also rising dramatically, as electronic procurement techniques make smaller purchases more affordable to governmental entities. Shifting program responsibility from the federal government to the states will likely accelerate this trend. Simply stated, the 1979 Code requires updating to adapt the language for use in the electronic age.

Procurement Has Changed Significantly Since 1979

The nature of the procurement process has changed significantly since 1979, primarily in the area of the need to purchase proprietary technology. Much of this proprietary technology relates to computers, networks, and the software and hardware required to operate, maintain, upgrade, and replace them. To keep pace and

to remain the leading publication for public acquisition in the United States, the 1979 Code had to be updated to fit the changing nature of the items that state and local governments are buying, and to offer the best practices as to how these technology-oriented procurements should be handled.

The Means By Which Procurement Transactions Are Conducted Have Changed

The means by which public procurement needs can be advertised, questions answered, bids received, and awards made has been revolutionized since 1979. Through commercially available software programs that notify subscribers of specifically targeted opportunities, the internet offers dramatic opportunities to widely advertise public procurement needs, to increase levels of competition, and to improve the private sector's confidence in the predictability of state and local procurement processes.¹ Electronically based commercial contracting is being regularly practiced in the private sector. The mechanisms for advertising needs, opening bids, and similar processes have been overtaken, in many respects, by technological changes in telecommunications. The 1979 Code was confining in these respects and needed to be repositioned to wisely incorporate electronic commerce developments into public procurement.

Variability Among the States

Since 1979, state and local governments have had few alternatives other than responding to changes in the nature of equipment and services purchased on an ad hoc basis, except where good fortune and other circumstances have permitted joint effort by a few jurisdictions. The result has been great experimentation and variation among the state and local governments in the methods by which equipment and services have been procured. The proliferation of "local content" procurement regulations has, in turn, created a multitude of arcane differences among the thousands of jurisdictions buying such equipment and services on an annual basis.

The resulting trends were negative, because complex, arcane procurement rules for such acquisitions by numerous jurisdictions discouraged competition by raising the costs to companies of understanding and complying with different rules in each

¹ For simplicity, concepts of predictability and private sector confidence in stability of procurement systems, through advanced publication, open processes, and remedies are sometimes referred to as "transparency."

jurisdiction. These costs are recovered in the prices offered by a smaller pool of competitors, resulting in unnecessarily high costs to state and local governments.

National Progress Was Again Required

The greatest contribution of the 1979 Code was the identification, with the American Bar Association acting as a neutral organization, of a national consensus among knowledgeable professionals, organizations, public agencies, and private firms as to the key elements of effective, transparent, yet stable procurement systems. The 1979 Code provided an objective national benchmark against which procurement legislation and regulations at the state and local level have been measured for two decades. The Revision Project extended the unique position of the ABA as a neutral facilitator to once again collect comments from procurement officials, agencies, associations, and private firms throughout the nation.

The Update Process

Prior to the commencement of the Revision Project, both the National Association of State Procurement Officials (NASPO) and the National Institute of Governmental Purchasing (NIGP) approached the sponsoring ABA Sections and unofficially requested that the 1979 Code be updated to meet the modern requirements of advanced procurement transactions. Throughout the Project, these and other groups interested in state and local procurement practices contributed their suggestions and their comments to the Project.

The approach followed in updating the Code was a simpler, more focused version of the extensive process followed in 1979 to generate the original document. A Reporter system was used to focus on the technical improvements required to update the Code, while preserving its basic principles.

Reporters

Two Reporters were named by the sponsoring Sections to conduct and manage the Project. These Reporters operated at the direction of the Councils of each Section, and were coordinated by a small Steering Committee comprised of two representative members from each Section. The Reporters and the Steering Committee members are national experts in state and local procurement with significant experience in past Code drafting efforts. The Reporters were **Margaret E. McConnell** and **John B. Miller**. Ms. McConnell was a member of the original MPC Project Staff from 1976 to 1980. After returning to Arizona, she was actively engaged in the private practice of procurement law in Phoenix until 1990. From 1990 to 1996, she served as State Procurement Administrator for the State of Arizona. She is currently Assistant General Counsel for Maricopa County Community College District. John B. Miller

is Associate Professor of Civil and Environmental Engineering at MIT, in Cambridge, MA. Mr. Miller was engaged in private practice concentrating on construction and government contracts law in Boston for fifteen years, prior to returning to MIT in 1995. He is a past chair of the Section of Public Contract Law.

The Steering Committee

The four members of the Steering Committee were: **Thomas J. Madden, Larry C. Ethridge, Craig T. Othmer, and Charles D. Olson.** Messrs. Madden and Othmer represented the Section of Public Contract Law. Messrs. Ethridge and Olson represented the Section of State and Local Government Law. Messrs. Madden and Ethridge are previous Chairs of the Model Procurement Code Coordinating Committee. Mr. Madden, now in private practice in Washington, D.C., was instrumental in the formation of the original Code project through his former position as General Counsel of Law Enforcement Assistance Administration (LEAA), the governmental entity that provided the initial financial support for the original Code project. He is a Past Chair of the Section of Public contract Law. Mr. Ethridge served as Assistant Project Director to the original Code project, and is now actively engaged in the practice of procurement law in Louisville, Kentucky. He is a Past Chair of the Section of State and Local Government Law. Mr. Othmer is Chair of the State and Local Procurement Division of the Section of Public Contract Law and was a member of the Section's Council from 1996 -1999. He is in private practice in Santa Fe, New Mexico. Mr. Olson is the Budget Officer and a member of the governing Council of the State and Local Government Law Section, and is in private practice in Waco, Texas, representing numerous local governments.

The Section Councils

The Councils of each of the sponsoring Sections retained the right to conduct individual debates on the revisions proposed by the Reporters. Although the Reporters' recommendations were largely adopted by each of the respective Section Councils, differences in language were adopted by the separate Councils between August 1999 and March, 2000. These differences were resolved by the Steering Committee, acting as a conference committee for both Sections and the document submitted for approval by the House of Delegates was then separately approved by each sponsoring Section Council.

Project Communications

Most communications during the course of the project were conducted on the World Wide Web, through a Project web site hosted at MIT, and through quick links among this site and web sites of sponsoring and participating organizations. Individuals were able to participate in the work of the Project by accessing any of these web sites. Through this set of links, which provided instant notification of the

Project's existence and status, the Project was able to access the expertise of thousands of procurement professionals in both the public and private sectors.

Executive Summary of the Changes

Changes in the Year 2000 edition of the Code are described in Commentary interspersed throughout the document. This section offers a brief summary of the more important changes.

Electronic Commerce

The Revisions to the Code modify definitions and add new definitions to Articles 1 and 3 that allow procurement processes to adapt to the electronic age.

Cooperative Purchasing

The Revisions to the Code modify definitions and language in Article 10 of the Code to extend the benefits of cooperative purchasing of supplies and services among state and local governments.

Flexibility in Purchasing Methods

The Revisions to the Code provide badly needed flexibility to senior procurement officials to flexibly adapt procurement procedures to unusual circumstances, with appropriate safeguards and reporting responsibilities found in Article 3.

Processes for Delivery of Infrastructure Facilities and Services.

The Revisions to the Code provide more explicit guidance on the use of construction delivery methods previously authorized by the 1979 Code that were not widely used by enacting jurisdiction. The Revisions provide best practice recommendations in the use of these alternative delivery methods as effective tools in managing an entire collection of a city's, a state's, or a county's infrastructure facilities. These changes are found in Article 5 of the Code.

Conclusion

The American Bar Association's 2000 Model Procurement Code keeps the Code, and the ABA, at the forefront of procurement policy in the United States.

The 2002 Model Regulations Code makes practical suggestions and techniques for implementing the Code readily available to state and local governments.

Rand L. Allen, Chair,
Section of Public Contract Law
1999-2000

Sholem Friedman, Chair,
Section of State and Local Government Law
1999-2000

Dated: July, 2000

2002 Adoption of the Model Procurement Regulations

The 2002 Model Regulations Code makes practical suggestions and techniques for implementing the Code readily available to state and local governments.

The Section of Public Contract Law and the Section of State and Local Government Law are pleased to adopt for distribution and enactment the 2002 version of the Model Procurement Regulations.

Norman R. Thorpe, Chair,
Section of Public Contract Law
2001-2002

Daniel J. Curtin, Jr, Chair,
Section of State and Local Government Law
2001-2002

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Orlando, Florida

THE 2000 ABA MODEL PROCUREMENT CODE

The 2000 American Bar Association Model Procurement Code for State and Local Governments provides: (1) the statutory principles and policy guidance for managing and controlling the procurement of supplies, services, and construction for public purposes; (2) administrative and judicial remedies for the resolution of controversies relating to public contracts; and (3) a set of ethical standards governing public and private participants in the procurement process. The Code was approved by the policymaking body of the American Bar Association, its House of Delegates, on July 11, 2000, and represents official ABA policy in this area of the law. It represents a three-year effort to update the text of the 1979 Code to fit the circumstances of state and local procurement at the beginning of the new century.

Drafting Concepts

The 2000 Code continues the ABA's commitment to a "model" rather than a "uniform" procurement code because of the diverse organizational structures used by the States and the multitude of local government bodies and the differences in their procurement needs. The Reporters continued to recognize that varying organizational and political constraints in enacting jurisdictions might require the adaptation of any proposed code to particular state and local situations. In substantive matters, however, the 2000 Code continues to reflect certain basic policies equally applicable to the conduct of procurement by all public bodies.

The 2000 Code remains a short statute that provides the fundamentals of sound procurement that should be implemented by regulations consistent with the statutory framework. Procurement continues to be a dynamic process that is continually evolving and that requires revision of procurement methods as experience and requirements change. Incorporating a large number of details in a statute tends to establish an overly rigid structure that constricts good procurement practices, hinders improvement and reform, frustrates initiative and innovation, and may lead to strained judicial interpretations.

The use of regulations to implement statutory policies, however, permits change and modification and provides a means for expeditious improvement and innovation in procurement techniques. When coupled with requirements for public participation in the issuance and revision of procurement regulations and appropriate legislative oversight, a comprehensive statute implemented by more specific regulations provides a flexible system that promotes efficiency in procurement and conserves taxpayers' money.

Mechanics of Drafting

In some Articles of the Code, alternative provisions articulating more than one approach to a given procurement policy are included. However, except as specifically indicated, the order in which alternatives are presented does not signify a preference for any particular alternative.

Code Commentary is used, where appropriate, to explain the rationale underlying various Sections, to aid in the interpretation of the statutory language, and to provide guidance in the development of regulations. The Reporters have made a special effort to provide commentary that explains changes between the original Code and the revised version.

Bracketed material [] indicates areas needing the particular attention of enacting jurisdictions. Brackets enclosing a blank require 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 enacting jurisdiction may want to make changes in light of its own experience and circumstances, or other legislative requirements that may be applicable. Two bracketed phrases appearing side-by-side usually indicate that one should be inserted and the other deleted.

One bracketed item that appears consistently throughout the Code is the word "State." This means, of course, that an enacting city, county, or other local unit should appropriately change that word. In addition, since the Code is oriented to state-level procurement, enactment by local governments will necessitate close scrutiny of all of the Code's provisions so that they may be adapted to their administrative needs.

AN OVERVIEW OF THE 2000 CODE ARTICLES

Articles 1 through 10 cover basic policies for the procurement of supplies, services, and construction; disposal of supplies; and legal remedies. Article 11 provides socioeconomic policies that a State may wish to amplify. Article 12 establishes ethical standards for public officials and contractors in connection with governmental procurement. The following is a synopsis of the scope of each Article.

General Provisions

Article 1 describes the general purposes of the Code, specifies its applicability, provides guidance for interpretations and contains definitions of terms used in more than one Article.

Section 1-301 of the 2000 Code adds new definitions for the terms “Electronic,” “Public Notice,” “Signature,” and “Written or In Writing” and modifies the definition of “Construction.” These definitional changes, and the accompanying technical changes made elsewhere in the Code, are intended to facilitate the use of electronic means of communication to publish requirements, make advertisements, and, as technology continues to develop, seamlessly move to all-electronic procurement transactions.

Procurement Organization

Article 2 sets forth the basic organizational concepts for establishing procurement policy and conducting procurement operations. It also contains several alternative proposals for establishing the procurement policymaking office. In addition, Article 2 provides for certain exemptions from central procurement and authorizes the creation of a Procurement Advisory Council to suggest reforms and improvements and a Procurement Institute to train procurement personnel.

Article 2 is modified in the 2000 Code to provide greater flexibility in how the procurement functions are carried out in the enacting jurisdiction. Alternative A continues the 1979 Code’s recommendation that a separate Procurement Policy Office be established, and includes two options for staffing the office with either an outside or an inside Board. Alternative B adds a second option to Article 2 that assumes no Policy Office will be established. This option provides statutory authority for the Chief Procurement Officer to adopt and publish regulations implementing the Code. Section 2-302 has been changed to eliminate blanket exemptions from the procurement statute. Section 2-303 is modified slightly to fit with other changes in the 2000 Code.

Source Selection and Contract Formation

Article 3 describes the selection and contract formation methods authorized by the Code, and authorizes procurement officials to select and apply these methods. These source selection methods include: competitive sealed bidding, competitive sealed proposals, small purchase procedures, sole source procurement, emergency procurements, and a competitive selection procedure for designated types of services. There is no longer a statutory preference for competitive sealed bidding, although Section 3-202 makes competitive sealed bidding a default source selection method. The Article contains requirements for contracting by each method, and contracts not awarded by competitive sealed bidding generally require a written justification, which will be a matter of public record. The Article permits the use of any type of contract although it prohibits cost-plus-a-percentage-of-cost contracts. It also requires the submission of cost or pricing data for contracts awarded without adequate price competition and for contract price adjustments.

Article 3 has been revised in other respects. First, Section 3-203 is revised through the addition of subparagraphs (b) and (c), which adds flexibility in the extent to which Competitive Sealed Proposals may be used as a source selection method, and which requires the use of this method in the award of contracts for design-build, design-build-operate-maintain, and design-build-finance-operate-maintain services. Second, Section 3-203(5), regarding Evaluation Factors, is amended to require that RFP's state the relative importance of price and other factors and subfactors that will be separately evaluated and scored by the procuring agency. Third, Section 3-203(8) has been added to authorize the Procurement Officer to conduct debriefings after source selection decision and contract award. Fourth, a new Section 3-207 has been added which authorizes the Chief Procurement Officer or the Head of a Purchasing Agency to initiate Special Procurements in limited circumstances, with public disclosure of the reasons therefor both in advance and after such procurements where the application of all requirements of competitive sealed bidding or competitive sealed proposals is contrary to the public interest. Fifth, Section 3-403, now entitled "Substantiation of Offered Prices," has been substantially rewritten to change the 1979 Code's requirement to submit certified cost or pricing data to a less burdensome standard appropriate to the commercial supplies and services that state and local governments buy. Similar changes are made to Section 3-502, Approval of Accounting System, to clarify that cost accounting and allocation systems need only be reviewed in cost reimbursement situations.

Specifications

Article 4 contains requirements for developing, monitoring, and using specifications. It requires that specifications be written in a manner to maximize competition to the extent possible.

Procurement of Infrastructure Facilities and Services (New Title)

Article 5 in the 1979 Code covered special aspects of construction procurement; use of bid, performance and payment bonds; and contract clauses for change orders, variations in estimated quantities, suspension of work, and termination. It also established criteria for making price adjustments due to changes and variations in estimated quantities. The Article also included provisions governing the competitive award of contracts for architect-engineer and land surveying services in lieu of competitive sealed bidding or competitive sealed proposals as provided in Article 3.

Article 5 is substantially revised in the 2000 Code. A variety of project delivery and finance methods are authorized for simultaneous use by agencies in managing the infrastructure facilities and services in their infrastructure collection. Delivery methods are structured so that an agency can select from among any of the project delivery methods based on the circumstances of each project and its impact on the

overall portfolio of projects and services. (Section 5-203, Choice of Project Delivery Methods).

Article 5 establishes five project delivery methods that may be applied by the procuring agency to procure infrastructure projects and services. These five delivery methods are Design-Bid-Build, Design-Build, Design-Build-Operate-Maintain, Design-Build-Finance-Operate-Maintain, and Operations and Maintenance. For three of these options – Design-Build, Design-Build-Operate-Maintain, and Design-Build-Finance-Operate-Maintain – Section 5-204 contains the procedures for applying the competitive sealed proposal process of Article 3 as the source selection method. The starting gate for these competitions is the statement of “design requirements” in the RFP, which establishes a common minimum threshold of owner requirements in these competitions. The finish gate is the submission of “proposal development documents” by offerors in response to the RFP.

The Design-Bid-Build project delivery method from the 1979 Code is preserved intact, and the language from the 1979 Code describing the process for selecting architects and engineers remains intact, with technical corrections to fit the new Article 5. (See Section 5-205). A new Section 5-305 authorizes additional forms of security to assure the timely, faithful, and uninterrupted provision of operations and maintenance services procured separately, or as one element of design-build-operate-maintain or design-build-finance-operate-maintain services.

Modification and Termination of Contracts for Supplies and Services

Article 6 authorizes the use of clauses in contracts for supplies and services covering changes and variations in estimated quantities and sets forth the criteria for making price adjustments pursuant to such clauses. It also authorizes the inclusion of other clauses, including liquidated damages, excusable delay, and termination. Only minor technical corrections were made in Article 6 of the 2000 Code.

Cost Principles

Article 7 provides for the promulgation of regulations establishing cost principles to be used to determine types of costs reimbursable under cost-type contracts. No changes were made in Article 7 of the 2000 Code.

Supply Management

Article 8 establishes requirements for control over the life cycle of supplies procured and establishes criteria for management, transfer, and disposal of surplus property. No changes were made in Article 8 of the 2000 Code.

Legal and Contractual Remedies

Article 9 provides mechanisms for the resolution of disputes relating to solicitations and awards, contract performance, and debarment or suspension

determinations. In addition, this Article provides procedures for handling contracts awarded in violation of law.

Other than the Commentary at the beginning of Article 9, which relates to (a) the application of the North American Free Trade Agreement and the World Trade Organization Government Procurement Agreement; and (b) the use of alternative dispute resolution mechanisms; Article 9 is unchanged in the 2000 Model Procurement Code. The decision not to attempt revisions to Article 9 in the 2000 Code was jointly made by the Reporters, the Steering Committee, and the respective Councils of the supporting ABA Sections.

Intergovernmental Relations (Cooperative Purchasing)

Article 10 contains provisions designed to facilitate cooperative procurement among the various units of government. It permits standardization of specifications for use by several jurisdictions, joint use of real and personal property, and sharing of personnel among local governments and between a State and its political subdivisions. The Article also provides that a State, at the request of other jurisdictions, may provide procurement information and technical services to those jurisdictions.

The 2000 Code makes a number of definitional changes in Cooperative Purchasing pursuant to Section 10-101 of the Code, clarifying that Public Procurement Units are freely authorized and encouraged to enter into cooperative purchasing arrangements with one another. The definition of Public Procurement Unit is expanded to include local governments, other state governments, local governments in other states, federal agencies of the United States, and any not-for-profit entity comprised of more than one such Unit or Activity. The intent of these changes is to broaden the opportunity for state and local governments to obtain volume discounts through joint purchasing and to lower the transaction costs of both purchasing agencies and vendors in completing such transactions.

Assistance to Small and Disadvantaged Businesses; Federal Assistance or Contract Procurement Requirements

Article 11 provides administrative procedures for assisting small and disadvantaged businesses in learning how to do business with the enacting jurisdiction. This Article also can be used to incorporate additional state socioeconomic policies that are to be implemented through the procurement process. Article 11 requires compliance with federal law and regulations not presently reflected in the Code when a procurement involves the expenditure of federal assistance or contract funds. *No changes were made in Article 11 of the 2000 Code.*

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. Additionally, this Article authorizes establishment of an Ethics Commission with authority to render advisory opinions to participants in the procurement process. *No changes were made in Article 12 of the 2000 Code.*

IMPLEMENTING REGULATIONS

These Model Regulations are based upon the 2000 ABA Model Procurement Code, for implementation by enacting jurisdictions in conjunction with the Code. Time and resource limitations did not permit the simultaneous drafting of the Code and Regulations as part of the 2000 Code Revision Project.

The modifications to the 1980 Regulations were prepared by Dr. John B. Miller, with input from Margaret E. McConnell. Ms. McConnell and Dr. Miller previously served as Reporters for the 2000 Code Revision Project.

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ARTICLE 1 – GENERAL PROVISIONS

Part A – Purposes, Construction, and Application

CODE PROVISION:

§1-101 Purposes, Rules of Construction.

(1) *Interpretation.*

This Code shall be construed and applied to promote its underlying purposes and policies.

(2) *Purposes and Policies.*

The underlying purposes and policies of this Code are:

- (a) to simplify, clarify, and modernize the law governing procurement by this [State];
- (b) to permit the continued development of procurement policies and practices;
- (c) to make as consistent as possible the procurement laws among the various jurisdictions;
- (d) to provide for increased public confidence in the procedures followed in public procurement;
- (e) to ensure the fair and equitable treatment of all persons who deal with the procurement system of this [State];
- (f) to provide increased economy in [State] procurement activities and to maximize to the fullest extent practicable the purchasing value of public funds of the [State];
- (g) to foster effective broad-based competition within the free enterprise system;
- (h) to provide safeguards for the maintenance of a procurement system of quality and integrity, and
- (i) to obtain in a cost-effective and responsive manner the materials, services, and construction required by [State] agencies in order for those agencies to better serve this [State's] businesses and residents.

COMMENTARY:

These broad policies outline the general rationale for the promulgation of this Code but are in no way to be interpreted as limiting either its provisions or application. This Code is intended to simplify, clarify, and modernize

[State] procurement, as well as to increase the confidence of both the persons who deal with the procurement system and the general public in the procurement activities of the [State]. The 2000 edition of the Code adds subparagraph (i), which is adapted from the statutes of Arizona, at Laws 1984, Ch 251 §1 as amended.

(3) *Singular-Plural and Gender Rules.*

In this Code, unless the context requires otherwise:

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

Regulation 1-102 - Supplementary General Principles of Law

CODE PROVISION:

§1-102 Supplementary General Principles of Law Applicable.

Unless displaced by the particular provisions of this Code, the principles of law and equity, including the Uniform Commercial Code of this State, the law merchant, and law relative to capacity to contract, agency, fraud, misrepresentation, duress, coercion, mistake, or bankruptcy shall supplement the provisions of this Code.

R1-102 [RESERVED]

Regulation 1-103 - Requirement of Good Faith

CODE PROVISION:

§1-103 Requirement of Good Faith.

This Code requires all parties involved in the negotiation, performance, or administration of [State] contracts to act in good faith.

R1-103 [RESERVED]

Regulation 1-104 - Application of these Regulations

CODE PROVISION:

§1-104 Application of this Code.

- (1) *General Application.*

This Code applies only to contracts solicited or entered into after the effective date of this Code unless the parties agree to its application to a contract solicited or entered into prior to the effective date.

COMMENTARY:

This Code would not retroactively affect rights and remedies under existing contracts.

(2) *Application to [State] Procurement.*

This Code shall apply to every expenditure of public funds irrespective of their source, including federal assistance monies except as otherwise specified in Section 11-301 (Compliance with Federal Requirements), by this [State], acting through a governmental body as defined herein, under any contract, except that this Code shall not apply to either grants, or contracts between the [State and its political subdivisions] or other governments, except as provided in Article 10 (Intergovernmental Relations). It shall also apply to the disposal of [State] supplies. Nothing in this Code or in regulations promulgated hereunder shall prevent any governmental body or political subdivision from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement.

COMMENTARY:

The last sentence of this Section enables the [State] to comply with conditions contained in gifts, bequests, or agreements between the [State] and a private party (for example, a lessee) specifying requirements for the design, location, construction, or utilization of facilities, including industrial development facilities.

[ALTERNATIVE A]

(3) *Application to Political Subdivisions and Other Local Public Agencies.*

[OPTION 1]

This Code and the State Procurement Regulations shall apply to all political subdivisions and other local public agencies of this State except that the [Policy Office] [Chief Procurement Officer] may permit optional use of selected portions of the regulations.

[OPTION 2]

The following Sections of this Code and regulations pertaining thereto, as indicated below, shall apply to all political subdivisions and other local public agencies of this State:

[The enacting jurisdiction should list here those Sections of this Code to be applicable at the local government level.]

Any other Section of this Code or its regulations may be adopted by any political subdivision or other local public agency at its discretion.

COMMENTARY:

(1) It is recognized that compliance with some provisions of this Code may be beyond the capacity of many local governments. Thus, Option 2 would allow the State to selectively apply those Sections which are basic to the procurement function rather than organizational in nature. Specifically, it is recommended that should Option 2 be adopted, the basic provisions of Article 3 (Source Selection and Contract Formation), Article 4 (Specifications), Article 5 (Procurement of Infrastructure Facilities and Services), Article 6 (Modification and Termination of Contracts for Supplies and Services), Article 7 (Cost Principles), Article 9 (Legal and Contractual Remedies), and Article 12 (Ethics in Public Contracting) be considered for possible application to political subdivisions and other local public agencies.

(2) Full application of this Alternative may cause unfunded mandates as defined elsewhere in State law. In the event of such a situation, Alternative B should be adopted.

[END OF ALTERNATIVE A]

[ALTERNATIVE B]

(3) *Political Subdivisions and Other Local Public Agencies Authorized to Adopt this Code.*

All political subdivisions and other local public agencies of this State are authorized to adopt all or any part of this Code and its accompanying regulations.

COMMENTARY:

- (1) Alternatives A and B should be considered in the context of the State's constitutional and statutory provisions with respect to home rule. Alternative A's imposition of Code provisions on local governments may be inconsistent with broad grants of home rule powers.
- (2) It is intended that the terms "political subdivisions" and "other local public agencies" cover all types of units or organizations created by State and local governments.
- (3) It should also be noted that if either Option 1 or Option 2 under Alternative A is enacted, various sections of this Code will have to be adjusted to name appropriate local officials to enter contracts, give approvals, raise objections, and the like.

[END OF ALTERNATIVE B]

Regulation 1-105 - Severability

CODE PROVISION:

§1-105 Severability.

If any provision of this Code or any application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or application of this Code which can be given effect without the invalid provision or application, and to this end the provisions of this Code are declared to be severable.

Regulation 1-106 - Specific Repealer

CODE PROVISION:

§1-106 Specific Repealer.

The following acts and all other acts and parts of acts inconsistent herewith are hereby repealed:

[The enacting jurisdiction must list each act or section of any act that is specifically repealed.]

Editorial Note: It is not intended that a jurisdiction list in the regulations the statutes or statutory provisions which have been repealed.

R1-106 [RESERVED]

Regulation 1-107 - Specific Amender

CODE PROVISION:

§1-107 Specific Amender.

The following acts and all other acts and parts of acts inconsistent herewith are hereby amended:

[The enacting jurisdiction must list each act or section of any act that is specifically amended.]

Editorial Note: It is not intended that a jurisdiction list in the regulations the statutes or statutory provisions which have been amended.

R1-107 [RESERVED]

Regulation 1-108 - Construction Against Implicit Repealer

CODE PROVISION:

§1-108 Construction Against Implicit Repealer.

Since this Code is a general act, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction of the subsequent legislation can be reasonably avoided.

R1-108 [RESERVED]

Regulation 1-109 - Effective Date of these Regulations

CODE PROVISION:

§1-109 Effective Date.

This Code shall become effective at 12:01 A.M. on [_____], 20[____].

COMMENTARY:

The effective date of this Code should be set at least six months after enactment to allow adequate time for development of regulations and the other administrative matters necessitated by its enactment.

Regulation 1-201 - Statutory and Regulatory Determinations

Part B – Determinations

CODE PROVISION:

§1-201 Determinations.

Written determinations required by this Code shall be retained in the appropriate official contract file of the Chief Procurement Officer or the Purchasing Agency.

COMMENTARY:

This provision is unchanged, but noted here because the new definition of “written or in writing” in Section 1-301(26) will permit determinations to be issued electronically. As procurement processes involve more electronic transmissions, the [Policy Office] [Chief Procurement Officer] may issue regulations concerning the retention and form of procurement and contract files.

R1-201.01 Written Determinations.

R1-201.01.1 *Preparation and Execution.* Where the [State] Procurement Code or these regulations require a written determination; the officer required to prepare the determination may delegate its preparation, but the responsibility for and the execution of the determination shall not be delegated.

R1-201.01.2 *Content.* Each written determination shall set out sufficient facts, circumstances, and reasoning as will substantiate the specific determination which is made.

R1-201.01.3 *Obtaining Supporting Information.* While an officer is responsible for the execution of the written determination, other [State] personnel, particularly technical personnel and appropriate personnel in the Using Agency, are responsible for furnishing to the cognizant procurement official, in an accurate and adequate fashion, the information pertinent to the determination. When requested, such information shall be furnished in writing to the cognizant procurement official who shall have the authority to decide the final form and content of the determination and to resolve any questions or conflicts arising with respect thereto.

R1-201.01.4 *Forms.* The Chief Procurement Officer is authorized to prescribe methods and operational procedures to be used in preparing written determinations.

R1-201.01.5 *Retention.* Each written determination shall be filed in the solicitation or contract file to which it applies, shall be retained as part of such file for so long as the file is required to be maintained, and except as otherwise provided by law or regulation, shall be open to public inspection.

Regulation 1-301 – Definitions of Terms Used in these Regulations

Part C – Definitions of Terms Used in this Code

CODE PROVISION:

§1-301 Definitions.

The words defined in this Section shall have the meanings set forth below whenever they appear in this Code, unless:

- (a) the context in which they are used clearly requires a different meaning; or
- (b) a different definition is prescribed for a particular Article or provision.

- (1) *Business* means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity.
- (2) *Change Order* means a written order signed by the Procurement Officer, directing the contractor to make changes which the Changes clause of the contract authorizes the Procurement Officer to order without the consent of the contractor.

COMMENTARY:

This definition does not preclude the Procurement Officer from seeking the consent of a contractor to a change order.

- (3) *Chief Procurement Officer* means the person holding the position created in Section 2-201 (Creation of the Office of the Chief Procurement Officer), as the head of the central procurement office of the [State].

COMMENTARY:

Should the enacting jurisdiction desire to call this official by some other title, it should substitute that title for “Chief Procurement Officer” wherever such term appears in this Code and its implementing regulations.

- (4) *Construction* means the process of building, altering, repairing, improving, or demolishing any public infrastructure facility, including any public structure, public building, or other public improvements of any kind to real property. It does not include the routine operation, routine repair, or routine maintenance of any existing public infrastructure facility, including structures, buildings, or real property.

COMMENTARY:

The 2000 version of the Code expands the definition of construction to include any “public infrastructure facility” defined in Section 5-101(8). The revised definition preserves the statutory distinctions between operation and maintenance, which involves routine services; and construction, which is intended to apply to nonroutine activities.

- (5) *Contract* means all types of [State] agreements, regardless of what they may be called, for the procurement or disposal of supplies, services, or construction.

COMMENTARY:

Collective bargaining agreements between the enacting jurisdiction and its employees are excluded from coverage under this Code by the definition of “services.” See Subsection 21 of this Section.

- (6) *Contract Modification* means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract.

COMMENTARY:

The new definition of “written or in writing” in Section 1-301(26) will permit determinations to be issued electronically.

- (7) *Contractor* means any person having a contract with a governmental body.
- (8) *Data* means recorded information, regardless of form or characteristic.
- (9) *Designee* means a duly authorized representative of a person holding a superior position.
- (10) *Electronic* means electrical, digital, magnetic, optical, electromagnetic, or any other similar technology.

COMMENTARY

(1) The purpose of this definition is to facilitate the use of electronic documents of all types. The Code does not attempt to anticipate the specific technologies that may allow the procurement process to be performed electronically, but provides the [Chief Procurement Officer] [Policy Office] with the necessary flexibility to adopt regulations that do so.

(2) The implementation of electronic procurement processes should include sound system checks and balances that demonstrate a high level of accountability and integrity. The key to public and vendor confidence in the procurement system is the existence of reliable records as to how procurement decisions are made. Records, either electronic or paper, that are sufficient to document decisions must be created and maintained.

- (11) *Employee* means an individual drawing a salary from a governmental body, whether elected or not, and any noncompensated individual performing personal services for any governmental body.
- (12) *Governmental Body* means any department, commission, council, board, bureau, committee, institution, legislative body, agency, government corporation, or other establishment or official of the executive, legislative, or judicial branch of this [State].
- (13) *Grant* means the furnishing by the [State] of assistance, whether financial or otherwise, to any person to support a program authorized by law. It does not include an award whose primary purpose is to procure an end product, whether in the form of supplies, services, or construction; a contract resulting from such an award is not a grant but a procurement contract.
- (14) *May* denotes the permissive.
- (15) *Person* means any business, individual, union, committee, club, other organization, or group of individuals.
- (16) *Procurement* means buying, purchasing, renting, leasing, or otherwise acquiring 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.

- (17) *Procurement Officer* means any person duly authorized to enter into and administer contracts and make written determinations with respect thereto. The term also includes an authorized representative acting within the limits of authority.
- (18) *Public Notice* means the distribution or dissemination of information to interested parties using methods that are reasonably available. Such methods will often include publication in newspapers of general circulation, electronic or paper mailing lists, and web site(s) designated by the [State] and maintained for that purpose.

COMMENTARY:

This is a new definition. Because the adequacy of notice will, as a practical matter, vary from locality to locality and procurement to procurement, no attempt is made to define statutorily either a prescribed method of public notice or the duration of its publication. However, the implementing regulations should provide criteria and general guidelines for the method and duration of public notice. Electronic dissemination of notice is specifically contemplated by the new definition.

- (19) *Purchasing Agency* means any governmental body other than the Chief Procurement Officer which is authorized by this Code or its implementing regulations, or by way of delegation from the Chief Procurement Officer, to enter into contracts.
- (20) *Regulation* means a governmental body's statement, having general or particular applicability and future effect, designed to implement, interpret, or prescribe law or policy, or describing organization, procedure, or practice requirements, which has been promulgated in accordance with the [Administrative Procedure Act].
- (21) *Services* means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. This term shall not include employment agreements or collective bargaining agreements.

COMMENTARY:

This definition of "services" includes, but is not limited to, consulting, personal, professional, technical, and purchase-of-client services.

- (22) *Shall* denotes the imperative.
- (23) *Signature* means [enter the appropriate reference to the State's applicable Digital Signature Act if enacted] [a manual or electronic identifier, or the electronic result of an authentication technique attached to or logically associated with a record that is intended by the person using it to have the same force and effect as a manual signature.]

COMMENTARY:

(1) The purpose of this definition is to permit the acceptance of an electronic signature that is consistent with the [State's] [Electronic or Digital Signature Act] or [current legislation regarding the use of such technology]. In the

absence of legislation on digital signatures, the Code offers a definition adapted from definitions of “electronic signature” adopted across the country. A review of emerging technologies indicates that digital signatures may emerge as the equivalent of manual signatures, provided that three key tests are met: (a) sender authentication (verification of the sender, typically through verification of a certificate identifying the sender); (b) message integrity (confirmation that the message or signature was properly received in the original format of the sender); and (c) nonrepudiation (confirmation that the Sender cannot deny the message or signature was sent).

(2) In defining the term “signature,” the intent of the Code is to protect the integrity of the procurement process and to ensure that the transmission and receipt of information concerning public solicitations is accurate and reliable.

- (24) *Supplies* means all property, including but not limited to equipment, materials, printing, insurance, and leases of real property, excluding land or a permanent interest in land.
- (25) *Using Agency* means any governmental body of the [State] which utilizes any supplies, services, or construction procured under this Code.
- (26) *Written or In Writing* means the product of any method of forming characters on paper, other materials, or viewable screens, which can be read, retrieved, and reproduced, including information that is electronically transmitted and stored.

COMMENTARY:

This definition is a combination of definitions of “written” or “in writing” found in the U.S. Code of Federal Regulations (CFR 48 CFR 2.101) and in the Florida Electronic Signature Act of 1996 (F.S.A. §282.72(4)). These definitions are similar to a number of other States’ definitions. The fact that “digital signatures” are currently in vogue does not mean that this technology will ultimately prove to be the most appropriate means of data transfer or communication for procurement purposes. The intent of the revisions to the Code is to authorize the responsible use of technological developments in electronic writings and signatures as they occur.

SUMMARY DEFINITIONAL CROSS-REFERENCES:

“Architectural and Engineering Services”	Section	5-101(1)
“Blind Trust”	Section	12-101(1)
“Confidential Information”	Section	12-101(2)
“Conspicuously”	Section	12-101(3)
“Cooperative Purchasing”	Section	10-101(1)
“Cost-Reimbursement Contract”	Section	3-101(1)
“Design-bid-build”	Section	5-101(2)
“Design-build”	Section	5-101(3)
“Design-build-finance-operate-maintain”	Section	5-101(4)
“Design-build-operate-maintain”	Section	5-101(5)
“Design Requirements”	Section	5-101(6)
“Direct or Indirect Participation”	Section	12-101(4)
“Disadvantaged Business”	Section	11-101(1)
“Established Catalogue Price”	Section	3-101(2)
“Excess Supplies”	Section	8-101(1)
“Expendable Supplies”	Section	8-101(2)
“External Procurement Activity”	Section	10-101(2)
“Financial Interest”	Section	12-101(5)
“Gratuity”	Section	12-101(6)
“Immediate Family”	Section	12-101(7)
“Independent Checking Engineer”	Section	5-101(7)
“Infrastructure Facility”	Section	5-101(8)
“Invitation for Bids”	Section	3-101(3)
“Local Public Procurement Unit”	Section	10-101(3)
“Non-expendable Supplies”	Section	8-101(3)

“Official Responsibility”	Section	12-101(8)
“Operations and Maintenance”	Section	5-101(9)
“Proposal Development Documents”	Section	5-101(10)
“Public Procurement Unit”	Section	10-101(4)
“Purchase Description”	Section	3-101(4)
“Purchase Request”	Section	12-101(9)
“Request for Proposals”	Section	3-101(5)
“Responsible Bidder or Offeror”	Section	3-101(6)
“Responsive Bidder”	Section	3-101(7)
“Small Business”	Section	11-101(2)
“Specification”	Section	4-101(1)
“State Public Procurement Unit”	Section	10-101(5)
“Surplus Supplies”	Section	8-101(5)

R1-301.01 Definitions.

As used throughout these regulations, words and terms defined in the [State] Procurement Code shall have the same meaning as in the Code, and each word or term listed in this Section shall have the meaning set forth below or in the Regulation cited, unless:

- (a) its use clearly requires a different meaning; or
- (b) a different definition is prescribed for a particular Chapter or portion thereof.

R1-301.01.1 *Actual Costs* is defined in Regulation 7-101.01.1.

R1-301.01.2 *Bona Fide Employee* is defined in Regulation 12-101.01.1.

R1-301.01.3 *Bona Fide Established Commercial Selling Agency* is defined in Regulation 12-101.01.2.

R1-301.01.4 *Brand Name or Equal Specification* is defined in Regulation 4-101.01.2.

R1-301.01.5 *Brand Name Specification* is defined in Regulation 4-101.01.1.

R1-301.01.6 *Business Employee* is defined in Regulation 12-101.01.3.

R1-301.01.7 *Capability* is defined in Regulation 3-101.01.1.

R1-301.01.8 *Cost Analysis* is defined in Regulation 3-101.01.2.

R1-301.01.9 *Cost Data* is defined in Regulation 3-101.01.3.

R1-301.01.10 *Cost Objective* is defined in Regulation 7-101.01.2.

R1-301.01.11 *Days* mean calendar days. In computing any period of time prescribed by these regulations [or by any order of the Procurement Appeals Board], the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included

unless it is a Saturday, Sunday, or a [State] holiday, in which event the period shall run to the end of the next business day.

Editorial Note: This time computation provision should be conformed to any existing [State] law covering the subject.

R1-301.01.12 *Discussions* is defined in Regulation 3-101.01.4.

R1-301.01.13 *Employee* is defined in Regulation 12-101.01.4.

R1-301.01.14 *Financial Interest* is defined in Regulation 12-101.01.5.

R1-301.01.15 *Gratuity* is defined in Regulation 12-101.01.6.

R1-301.01.16 *Immediate Family* is defined in Regulation 12-101.01.7

R1-301.01.17 *Interested Party* is defined in Regulation 9-101.01.1.

R1-301.01.1B *May* denotes the permissive. However, the words "no person may" mean that no person is required, authorized, or permitted to do the act prescribed.

R1-301.01.19 *Offer* means proposal and *Offeror* means a person submitting a proposal when a procurement is made by a source selection method other than competitive sealed bidding.

R1-301.01.20 *Practicable* denotes what may be accomplished or put into practical application. For purposes of these Regulations, the terms "practical" and "practicable" shall be considered to have the same meaning.

R1-301.01.21 *Prequalification for Inclusion on Bidders Lists* is defined in Regulation 3-101.01.5.

R1-301.01.22 *Price Analysis* is defined in Regulation 3-101.01.6.

R1-301.01.23 *Price Data* is defined in Regulation 3-101.01.7.

R1-301.01.24 *Prime Builder (Prime Contractor)* is defined in Regulation 5-101.02.1.

R1-301.01.25 *Protest* means a written statement concerning any unresolved disagreement or controversy arising out of the solicitation or award of a [State] contract[.] [filed in accordance with [Section R9-101.03 (Filing of Protest)] [or A9-506 Rule 2 (Filing or Protest or Appeal)].]

R1-301.01.26 *Protestor* [means any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or the award of a contract and who files a protest.] [is defined in Regulation 9-101.01.2.]

R1-301.01.27 *Purchase Request or Purchase Requisition* means that document whereby a Using Agency requests that a contract be entered into

for a specific need, and may include, but is not limited to, the description of the requested item, delivery schedule, transportation data, criteria for evaluation, suggested sources of supply, and information supplied for the making of any written determination required by the [State] Procurement Code or these regulations.

R1-301.01.28 *Qualified Products List* is defined in Regulation 4-101.01.3.

R1-301.01.29 *Solicitation* is defined in Regulation 3-101.01.8.

R1-301.01.30 *Specification* is defined in Regulation 4-101.01.4.

R1-301.01.31 *Specification for a Common or General Use Item* is defined in Regulation 4-101.01.5.

R1-301.01.32 *Suppliers* is defined in Regulation 3-101.01.9.

R1-301.01.33 *Supplies* is defined, for the purposes of Chapter 8, in Regulation 8-101.01.1.

R1-301.01.34 *Technical Proposal* means solicited or unsolicited submission of information from a prospective contractor which states how that party intends to perform certain work; its technical and business qualifications; and its proposed delivery, warranty, and other terms and conditions as those might differ from or supplement the [State's] solicitation requirements. It shall include such pricing information as may be required.

Regulation 1-401 - Public Access

Part D – Public Access

CODE PROVISION:

§1-401 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 open records 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. This provision does not 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.

R1-401 [RESERVED]

CODE PROVISION:

§1-501 Authorization for the Use of Electronic Transmissions.

The use of electronic media, including acceptance of electronic signatures, is authorized consistent with the [State's] applicable statutory, regulatory or other guidance for use of such media, so long as such guidance provides for:

- (a) appropriate security to prevent unauthorized access to the bidding, approval, and award processes; and
- (b) accurate retrieval or conversion of electronic forms of such information into a medium which permits inspection and copying.

ARTICLE 2 – PROCUREMENT ORGANIZATION

[ALTERNATIVE A]

Part A – [State] Procurement Policy Office

CODE PROVISION:

§2-101 Creation and Membership of the [State] Procurement Policy Office.

- (1) *Creation of the [State] Procurement Policy Office.*

There is hereby created in the [executive branch of this State] [Department of _____] the [State] Procurement Policy Office which is referred to hereinafter as the Policy Office.

COMMENTARY:

(1) Some jurisdictions prefer to separate procurement policymaking and operational functions, so this Part A offers this language which establishes a [State] Procurement Policy Office to perform the former duties. The original Code did not designate this Part as an alternative. The American Bar Association still recommends that jurisdictions separate policymaking and operations. However, the 2000 edition of the Code recognizes that [States] may elect not to create a Policy Office under Section 2-101, and instead to vest this power in the Chief Procurement Officer. The 2000 Code revisions contemplate that approach as an additional alternative to provide leadership in the procurement policymaking function without creating a separate board. See the revisions to Section 2-204 (Authority of the Chief Procurement Officer).

(2) The separation of policymaking and operational functions can be achieved through the establishment of an independent policy body such as the Policy Office. This Section provides for placement of the Policy Office either as an independent entity within the executive branch of the government or within an existing department of government such as General Services, Finance, or Administration. Placement in the executive branch as a separate entity is the preferred arrangement as it would further ensure the professional integrity of this important policymaking body, and appropriately elevate the entire procurement process in the public sector.

(3) While the American Bar Association endorses the separation of policymaking and operational functions, few States adopting versions of the Code have embraced this approach. A Policy Office may require an additional administrative body requiring support and staffing. Combining the two functions eliminates the need for separate administration. Additionally, those States that have eliminated boards or commissions as overseers of administrative agencies may view the creation of the Policy Office as a step back in that direction. The 2000 Code has been revised to offer enacting jurisdictions a choice of management approaches.

[OPTION 1]

- (2) *Membership of the Policy Office (Outside Board).*

The Policy Office shall consist of a board of [three] members who shall not otherwise be full-time employees of the [State], and who shall be appointed by the [Governor] [and confirmed by the Senate]. The Chief Procurement Officer shall serve as an ex officio member of the Policy Office. Each appointed member shall have demonstrated sufficient business or professional experience to discharge the functions of the Policy Office. The term of office of each member shall be [six] years, except that in making the initial appointments the [Governor] shall appoint one

member for a term of [two] years, one member for a term of [four] years, and one member for a term of [six] years, so that the term of one member shall expire every [two] years. Members may be reappointed for succeeding terms. The chairperson shall be appointed by the [Governor] [and confirmed by the Senate]. No member of the Policy Office shall be eligible for appointment as the Chief Procurement Officer. Members of the Policy Office may receive compensation for services as provided by law and shall be reimbursed for any expenses reasonably incurred in the performance of their duties. The members of the Policy Office shall devote such time to their duties as may be necessary for the proper discharge thereof.

[END OF OPTION 1]

[OPTION 2]

(2) *Membership of the Policy Office (Inside Board).*

The Policy Office shall consist of two cabinet or elected [State] officials, appointed by the [Governor], in addition to the [Director of General Services, or Commissioner of the Department of Finance or the Department of Administration], who shall serve as chairperson. No member of the Policy Office shall act concurrently as the Chief Procurement Officer. The Chief Procurement Officer shall serve as an ex officio member of the Policy Office.

[END OF OPTION 2]

COMMENTARY:

- (1) Section 2-101 provides one option for centralizing procurement policymaking in a single Policy Office. Two different options for doing so are presented. Under either option, the Chief Procurement Officer should be added as an ex officio member of the Policy Office to provide continuity between the policymaking and operational functions.
- (2) Option 1 provides for the establishment of an "outside" procurement board which is to be composed of private citizens.
- (3) Option 2 provides for an "inside" board, centralizing procurement policymaking in a group of high-level officials. In some jurisdictions, experience has indicated that a high-level official such as the Commissioner of Administration or Finance, or Director of General Services is able to provide assistance to the Chief Procurement Officer in terms of communicating with political policymakers and other high-level administrative officials on such matters as budget, personnel, and staffing. The requirements provided in Section 2-201 (Creation of the Office of the Chief Procurement Officer) that the Chief Procurement Officer be a highly-qualified career official, with a relatively long term and otherwise removable only for cause, further assures the independence and integrity of procurement operations.
- (4) The two structures set out above can be combined to form a "mixed" board, whereby a citizen board, such as provided in Option 1, could be chaired by a high-level official and administratively housed in that official's department.
- (5) A fourth organizational structure is to provide that a single public official, such as the Director of General Services, or the Commissioner of Finance or Administration, shall assume the duties of the Policy Office.
- (6) In deciding among the various forms of organization; the following considerations are relevant:
 - (a) the need for continuity of membership;
 - (b) the capacity for carrying out the responsibilities of the Policy Office;
 - (c) the need for prompt and efficient action;
 - (d) the independence and accountability of the Policy Office; and
 - (e) the comparative administrative expenses involved.
- (7) Where the organizational structure requires appointment of persons to the Policy Office, such appointments should be made in accordance with existing law and such persons may be compensated in accordance with law.

(3) *Administrative Support.*

The [insert appropriate executive agency] is authorized to provide such services as the Policy Office may request, on such basis, reimbursable or otherwise, as may be agreed upon between the [insert appropriate executive agency] and the Policy Office.

R2-101 [RESERVED]

Regulation 2-102 - Authority and Duties of the Policy Office

CODE PROVISION:

§2-102 Authority and Duties of the Policy Office.

Except as otherwise provided in this Code, the Policy Office shall have the authority and responsibility to promulgate regulations, consistent with this Code, governing the procurement, management, control, and disposal of any and all supplies, services, and construction to be procured by the [State]. The Policy Office shall promulgate the regulations according to Part D of this Article. The Policy Office shall consider and decide matters of policy within the provisions of this Code. The Policy Office shall have the power to audit and monitor the implementation of its regulations and the requirements of this Code, but shall not exercise authority over the award or administration of any particular contract, or over any dispute, claim, or litigation pertaining thereto.

COMMENTARY:

(1) This Section is designed to give the Policy Office broad authority to promulgate regulations, except as otherwise expressly provided in this Code. There are two such exceptions. Article 9 (Legal and Contractual Remedies) provides an option for the establishment of a Procurement Appeals Board, which would have the power to adopt its own rules of procedure under Section 9-503 (Rules of Procedure). Article 12 (Ethics in Public Contracting) provides for the creation of an Ethics Commission with broad power to promulgate regulations designed to implement the provisions of Article 12.

(2) Examples of the type of regulations that may be promulgated by the Policy Office include:

- (a) conditions and procedures for delegations of procurement authority;
- (b) pre-qualification, suspension, debarment, and reinstatement of prospective bidders and contractors;
- (c) small purchase procedures;
- (d) conditions and procedures for the procurement of perishables and items for resale;
- (e) conditions and procedures for the use of source selection methods authorized by this Code, including emergency procurements;
- (f) the opening or rejection of bids and offers, and waiver of informalities in bids and offers;
- (g) confidentiality of technical data and trade secrets submitted by actual or prospective bidders or offerors;
- (h) partial, progressive, and multiple awards;
- (i) supervision of storerooms and inventories, including determination of appropriate stock levels and the management, transfer, sale, or other disposal of publicly-owned supplies;
- (j) definitions and classes of contractual services and procedures for acquiring them;
- (k) regulations providing for conducting price analysis;
- (l) use of payment and performance bonds in connection with contracts for supplies and services; and
- (m) guidelines for use of cost principles in negotiations, adjustments, and settlements.

The Policy Office may also adopt such other regulations as it may deem desirable to carry out the provisions of this Code, such as regulations applicable to cooperative purchasing agreements between the enacting jurisdiction and other jurisdictions. This Section is not, however, intended to give the Policy Office power to promulgate regulations governing management and operation of Using Agencies.

(3) Implicit in the Policy Office's power to promulgate regulations is the power to adopt procedural rules for its own internal operations. In States which adopt both the Policy Office and the Office of the Chief Procurement Officer, the Policy Office should not, however, adopt operational procedures governing the Office of the Chief Procurement Officer.

[END OF ALTERNATIVE A]

R2-102 [RESERVED]

Regulation 2-201 - Creation of the Office of the Chief Procurement Officer

Part B – Chief Procurement Officer

CODE PROVISION:

§2-201 Creation of the Office of the Chief Procurement Officer.

There is hereby created an Office of the Chief Procurement Officer, headed by the Chief Procurement Officer.

COMMENTARY:

Periodic surveys of the National Association of State Procurement Officials indicate that, in many States, statutes assign the duties of the Chief Procurement Officer to the Director of General Services, the Secretary of Administration or a similar official. In such cases, statutes assigning those duties should ensure that any official to whom such duties are assigned has plenary authority over the State's procurement system, including or similar to the duties and authorities set forth in this Part for the Chief Procurement Officer.

R2-201 [RESERVED]

Regulation 2-202 - Appointment and Qualifications

CODE PROVISION:

§2-202 Appointment and Qualifications.

The [Policy Office] [Governor] shall appoint the Chief Procurement Officer. The Chief Procurement Officer shall have relevant, recent experience in public procurement and in the large-scale procurement of supplies, services, or construction, and shall be a person with demonstrated executive and organizational ability.

COMMENTARY:

This Section has been revised from the 1979 Code. Language specifying a required number of years of experience, acquired within a specific number of years before the date of appointment, has been removed to eliminate artificial barriers to hiring the best-qualified individuals.

R2-202 [RESERVED]

Regulation 2-203 - Tenure, Removal, and Compensation

CODE PROVISION:

§2-203 Tenure, Removal, and Compensation.

- (1) *Tenure and Removal.* The Chief Procurement Officer shall be a full-time public official of the [State] [appointed to serve a term of [ten] years] and

may be removed from office by the [Governor] [Policy Office] only upon a showing of just cause.

- (2) *Compensation.* The Chief Procurement Officer shall be compensated as provided by law.

COMMENTARY:

(1) As the principal official responsible for all procurement actions and for the handling of large sums of the taxpayers' monies, the Chief Procurement Officer should be compensated by a salary sufficient to attract and retain a person with the requisite technical skills and professional ability.

(2) In some jurisdictions, the Chief Procurement Officer is a classified employee. In those cases, the language under this Section, and under Section 2-202, should be altered to properly recognize that status.

R2-203 [RESERVED]

Regulation 2-204 - Authority of the Chief Procurement Officer

CODE PROVISION:

§2-204 Authority of the Chief Procurement Officer.

- (1) *Principal Contracting Officer of the [State].*

The Chief Procurement Officer shall serve as the central procurement officer of the [State].

- (2) *Power to Adopt Operational Procedures.*

Consistent with the provisions of this Code, the Chief Procurement Officer may adopt operational procedures governing the internal functions of the Office of the Chief Procurement Officer.

- (3) *Duties.*

Except as otherwise specifically provided in this Code, the Chief Procurement Officer shall, in accordance with regulations:

- (a) procure or supervise the procurement of all supplies, services, and construction needed by the [State];
- (b) exercise general supervision and control over all inventories of supplies belonging to the [State];
- (c) sell, trade, or otherwise dispose of surplus supplies belonging to the [State];
- (d) establish and maintain programs for the inspection, testing, and acceptance of supplies, services, and construction; and
- (e) ensure compliance with this Code and implementing regulations by reviewing and monitoring procurements conducted by any designee, department, agency or official delegated authority under

Section 2-205 (Delegation of Authority by the Chief Procurement Officer).

[ALTERNATIVE B – NO POLICY OFFICE]

(4) *Regulations.*

The Chief Procurement Officer is authorized to adopt regulations, consistent with the Code, governing the procurement, management, control, and disposal of any and all supplies, services and construction procured by the [State], unless exempted pursuant to Section 2-303.

COMMENTARY:

Subsection (4) should be adopted if the enacting jurisdiction does not create a Policy Office under Sections 2-101 and 2-102, or otherwise separate policymaking from operational responsibilities.

[END OF ALTERNATIVE B]

R2-204 **[RESERVED]**

Regulation 2-205 - Delegation of Procurement Authority

CODE PROVISION:

§2-205 Delegation of Authority by the Chief Procurement Officer.

Subject to regulations, the Chief Procurement Officer may delegate authority to designees or to any department, agency, or official.

R2-205.01 Authority to Delegate.

R2-205.01.1 *Rule of Interpretation.* Authority may not be delegated by the Chief Procurement Officer or by the head of a Purchasing Agency unless so provided in the [State] Procurement Code or these regulations by the use of the phrase "or such officer's designee."

R2-205.01.2 *General.* Except as provided by Subsections R2-205.02.1, R2-205.02.3, and R2-205.02.4 of this Section, any authority conferred on the Chief Procurement Officer by the [State] Procurement Code may be delegated by that officer to any employee in any department or agency; and any authority conferred on the head of a Purchasing Agency by the [State] Procurement Code may be delegated by that officer to any employee in that Purchasing Agency. Such delegations shall remain in effect unless modified or until revoked in writing.

COMMENTARY:

As the head of a substantial organization, the Chief Procurement Officer will be unable to do everything himself or herself. Rather, it will be necessary for him or her to delegate authority to others.

R2-205.01.3 *Statutory Exceptions to Delegation*. The authority conferred on the Chief Procurement Officer or the head of a Purchasing Agency in the following Sections of the [State] Procurement Code shall not be delegated:

(a) Section 5-302(2) (Contract Performance and Payment Bonds, Reduction of Bond Amounts);

(b) Section 5-401(4) (Contract Clauses and Their Administration, Modification of Required Clauses);

(c) Section 6-101(4) (Contract Clauses and Their Administration, Modification of Clauses);

[(d) Section 9-101(6)(Authority to Resolve Protested Solicitations and Awards, Stay of Procurements During Protests);] [and]

[(e) Section 9-102(1) (Authority to Debar or Suspend, Authority).]

R2-205.02 General Policy.

R2-205.02.1 *Decision to Delegate*. The Chief Procurement Officer or the head of a Purchasing Agency may delegate authority or may revoke authority such officer has delegated. Factors to consider in making the decision to delegate include:

(a) the expertise of the potential delegate in terms of procurement knowledge and any specialized knowledge pertinent to the authority to be delegated;

(b) the past experience of the potential delegate in exercising similar authority;

(c) the degree of economy and efficiency to be achieved in meeting the [State's] requirements if authority is delegated;

(d) the available resources of the Office of the Chief Procurement Officer to exercise the authority if it is not delegated; and

(e) the consistency of delegation under similar circumstances.

R2-205.03.2 *Compliance with Code and Regulations*. Any designee of the Chief Procurement Officer, or of the head of a Purchasing Agency, shall exercise delegated authority in accordance with the delegation, the [State] Procurement Code, and these regulations.

R2-205.03 Delegation of Authority to Officials in Other Departments and Agencies.

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

- (a) the activity or function authorized;
- (b) any limits or restrictions on the exercise of the delegated authority;
- (c) whether the authority may be further delegated; and
- (d) the duration of the delegation.

Regulation 2-301 - Centralization of Procurement Authority

Part C – Organization of Public Procurement

CODE PROVISION:

§2-301 Centralization of Procurement Authority.

Except as otherwise provided in this Part, all rights, powers, duties, and authority relating to the procurement of supplies, services, and construction, and the management, control, warehousing, sale, and disposal of supplies, services, and construction now vested in, or exercised by, any [State] governmental body under the several statutes relating thereto are hereby transferred to the Policy Office or the Chief Procurement Officer, as provided in this Code.

COMMENTARY:

State and local public procurement systems are the means through which critical and strategic services, supplies and construction are purchased to support essential public functions. To operate effectively, it is imperative in those systems that there be central leadership to provide direction and cohesion. The Code's drafters, in creating a central procurement official, do not intend to promote the idea that the day-to-day procurement functions must be performed directly out of the central office. It is expected that the Chief Procurement Officer will freely delegate his or her authority, as provided in Section 2-205, considering the following factors:

- (a) the expertise of the potential delegate in terms of procurement knowledge and any specialized knowledge pertinent to the authority to be delegated;
- (b) the past experience of the potential delegate in exercising similar authority;
- (c) the degree of economy and efficiency to be achieved in meeting the [State's] requirements if authority is delegated;
- (d) the available resources of the Office of the Chief Procurement Officer to exercise the authority if it is not delegated, and the consistency of delegation under similar circumstances.

R2-301 [RESERVED]

Regulation 2-302 - Authority to Contract for Certain Services

CODE PROVISION:

§2-302 Authority to Contract for Legal Services.

No contract for the services of legal counsel may be awarded without the approval of [such officer as may be required by applicable law].

COMMENTARY:

(1) The original Code contained Subsection (1) that authorized any governmental body to act as a Purchasing Agency concerning the purchase of certain services. Examples of services in the Code's statutory text were accountants, clergy, physicians, lawyers, and dentists. That Subsection reflected the fact that, at the time the Code was approved in 1979, many State and local governments exempted certain professional services from central oversight and, in some cases, from any procurement procedures whatsoever. Today, State and local governments purchase far greater services than they did twenty years ago, and the services being purchased are much more complex. Since contracting for services can be one of the most difficult types of public procurement, there should not be a "blanket" exemption from central purchasing oversight and the assistance of purchasing professionals. The Chief Procurement Officer should delegate procurement authority to any governmental body whose purchasing staff is qualified to conduct complex service procurements under the various source selection methods set forth in Article 3 and Article 5 of this Code.

(2) Many States, by statute, direct the Attorney General to provide legal services for the State. State statutes also define what agencies other than the Attorney General can employ counsel, or whether the Attorney General or the Governor, or both, must approve such decisions.

R2-302 [RESERVED]

Regulation 2-303 - Exemptions

[OPTIONAL PART]

CODE PROVISION:

§2-303 Exemptions.

Unless otherwise ordered by regulation, with approval of the [Governor], the following supplies, services, and construction need not be procured through the Office of the Chief Procurement Officer, but shall nevertheless be procured by the appropriate Purchasing Agency subject to the requirements of this Code and the regulations:

- (a) the design, construction, maintenance, operation, and private finance of bridge, highway, water, waste water, or other heavy or specialized infrastructure facility or service, as defined in Section 5-101 of this Code;
- (b) works of art for museum and public display;
- (c) published books, maps, periodicals, and technical pamphlets.]

COMMENTARY:

Each State adopting the Code has chosen to exempt certain types of procurements from centralized coverage. This provision shows a jurisdiction adopting the Code where exemptions should be enumerated. As stated in the original commentary to this Section, extensive delegation of procurement authority, based on an agency's expertise and capabilities, is preferable to "across the board" exemptions. A cohesive and integrated procurement system with centralized policymaking, liberal delegation of procurement authority to agencies with special expertise, and implementation by those agencies promotes competition, efficiency, economy, and quality. If this option is adopted, the authority to conduct exempted procurements is delegated by the Legislature to the Purchasing Agencies which require these supplies, services or construction.

[END OF OPTIONAL PART]

R2-303 [RESERVED]

Regulation 2-401 - [State] Procurement Regulations

Part D – [State] Procurement Regulations

CODE PROVISION:

§2-401 [State] Procurement Regulations.

(1) Regulations.

Regulations shall be promulgated in accordance with the applicable provisions of the [Administrative Procedure Act].

(2) [Policy Office] [Chief Procurement Officer] Shall Not Delegate Power to Promulgate Regulations.

The [Policy Office] [Chief Procurement Officer] shall not delegate its power to promulgate regulations.

(3) Regulations Shall Not Change Existing Contract Rights.

No regulation shall change any commitment, right, or obligation of the [State] or of a contractor under a contract in existence on the effective date of such regulation.

Part E – Coordination, Training, and Education

CODE PROVISION:

§2-501 Collection of Data Concerning Public Procurement.

The Chief Procurement Officer shall cooperate with the [State Budget Office] and the [State Auditor] in the preparation of statistical data concerning the procurement, usage, and disposition of all supplies, services, and construction, and employ such trained personnel as may be necessary to carry out this function. All Using Agencies shall furnish such reports as the Chief Procurement Officer may require concerning usage, needs, and stocks on hand, and the Chief Procurement Officer shall have authority to prescribe forms to be used by the Using Agencies in requisitioning, ordering, and reporting of supplies, services, and construction.

COMMENTARY:

The [Policy Office and the] Chief Procurement Officer should endeavor to perform their duties in a manner which will ensure that the supplies, services, or construction procured meet the requirements of the Using Agencies. To achieve this goal, [the Policy Office,] the Chief Procurement Officer, and the Using Agencies should be free to make recommendations to each other. A close and cooperative relationship should be maintained.

R2-501 [RESERVED]

Regulation 2-502 - Procurement Advisory Council; Other Advisory Groups

CODE PROVISION:

§2-502 Procurement Advisory Council; Other Advisory Groups.

(1) *Procurement Advisory Council.*

The [Policy Office] [Chief Procurement Officer] may establish a Procurement Advisory Council and allocate therefor such funds as may be available and the [Policy Office] [Chief Procurement Officer] shall deem appropriate. If created, such Council, upon adequate public notice, shall meet at least once a year for the discussion of problems and recommendations for improvement of the procurement process. When requested by the [Policy Office] [Chief Procurement Officer], the Procurement Advisory Council may conduct studies, research, analyses, and make reports and recommendations with respect to subjects or matters within the jurisdiction of the [Policy Office] [Chief Procurement Officer]. The Procurement Advisory Council may consist of qualified representatives of State and local government and such other persons as the [Policy Office] [Chief Procurement Officer] may deem desirable.

(2) *Other Advisory Groups.*

The Chief Procurement Officer may appoint Advisory Groups to assist with respect to specifications or procurement in specific areas, and with respect to any other matters within the authority of the Chief Procurement Officer.

(3) *Reimbursement of Expenses.*

Members of the Procurement Advisory Council and other Advisory Groups [shall] [may] be reimbursed for expenses incurred in the performance of their duties, subject to such expenditure limitations as may be prescribed by the [Policy Office] [Chief Procurement Officer] and applicable law.

R2-502 [RESERVED]

Regulation 2-503 - Procurement Institute

CODE PROVISION:

§2-503 Procurement Institute.

(1) *Creation.*

The [Policy Office] [Chief Procurement Officer] may establish and maintain a Procurement Institute, either alone or in cooperation with other States, the Federal Government, municipalities or other units of local government, or other persons.

(2) *Functions.*

The Procurement Institute may:

- (a) conduct or participate in procurement education and training programs for [State] employees and others, including persons not employed by the [State];

- (b) conduct research into existing and new methods of procurement;
and
- (c) establish and maintain a [State] Procurement Library.

(3) *Funding.*

The [Policy Office] [Chief Procurement Officer] may allocate funds for the Procurement Institute as the [Policy Office] [Chief Procurement Officer] deems appropriate.

COMMENTARY:

(1) The 2000 Code revision process has shown that many of the obstacles procuring agencies and officials encounter are those that have been written into the Code by enacting jurisdictions. The inherent flexibility of much of the language of the Code will be increasingly important as electronic means of communication becomes more prevalent in the coming years. Along with the Code's flexibility is the continuous need for training and education in how to use this flexibility in the pursuit of the [State's] long-term procurement needs. The Procurement Institute(s) envisioned in the Code are intended to help enacting jurisdictions use this flexibility, without the need for restrictive additional language that ultimately interferes with cooperative purchasing, electronic purchasing, and broad competition.

(2) Procurement is a complex process which experience has shown can only be adequately learned over a period of time. Thus training in procurement is vital for new [State] employees without prior experience in the field. It will accelerate the learning process and will tend to make [State] procurement personnel knowledgeable and effective in the minimum time.

(3) In addition, training courses should also be reasonably available to vendor personnel, university professors, students, and others. Experience has shown that when a vendor or other person affected by the system makes an unnecessary mistake through lack of knowledge of the ground rules of procurement, it causes friction and expense to the State. Some States already have extensive and sophisticated procurement education and training systems through public agencies, public or private university systems, or private, nationally-recognized organizations such as the National Association of State Procurement Officials or the National Institute of Governmental Purchasing. Many of these programs have been very successful. Where such training systems exist, it is recommended that they be used to the fullest extent possible.

R2-503 [RESERVED]

Regulation 2-601 - Duties of the [Attorney General]

Part F – Duties of the [Attorney General]

CODE PROVISION:

§2-601 Duties of the [Attorney General].

The Attorney General, or such officer as the Attorney General may designate, shall serve as legal counsel and provide necessary legal services to [the Policy Office and] the Chief Procurement Officer.

COMMENTARY:

The Attorney General should serve as the legal counsel to advise and assist the [Policy Office and the] Chief Procurement Officer on legal matters. In most cases, the Attorney General will provide such legal counsel, but if this is not feasible, a high-ranking member of the Attorney General's staff should be designated to perform this important function. Such legal counsel should appoint such assistants as may be deemed necessary to act as advisors to personnel in the Chief Procurement Officer's organization and in the Purchasing Agencies. In addition, the legal counsel or assistant should provide prompt legal advice to their clients as each occasion demands, so that the procurement process, where speed is so often necessary, can move ahead promptly.

DEFINITIONAL CROSS-REFERENCES:

“Chief Procurement Officer”	Section	1-301(3)
“Construction”	Section	1-301(4)
“Contract”	Section	1-301(5)
“Contractor”	Section	1-301(7)
“Designee”	Section	1-301(9)
“Employee”	Section	1-301(10)
“Governmental Body”	Section	1-301(11)
“Infrastructure Facility”	Section	5-101(8)
“May”	Section	1-301(14)
“Person”	Section	1-301(15)
“Procurement”	Section	1-301(16)
“Public Notice”	Section	1-301((18)
“Regulation”	Section	1-301(20)
“Services”	Section	1-301(19)
“Shall”	Section	1-301(22)
“Specification”	Section	4-101(1)
“Supplies”	Section	1-301(24)
“Surplus Supplies”	Section	8-101(5)
“Using Agency”	Section	1-301(25)

R2-601 [RESERVED]

ARTICLE 3 – SOURCE SELECTION AND CONTRACT FORMATION

Part A – Definitions

CODE PROVISION:

§3-101 Definitions of Terms Used in this Article.

- (1) *Cost-Reimbursement Contract* means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this Code, and a fee, if any.
- (2) *Established Catalogue Price* means the price included in a catalogue, price list, schedule, or other form that:
 - (a) is regularly maintained by a manufacturer or contractor;
 - (b) is either published or otherwise available for inspection by customers; and
 - (c) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved.
- (3) *Invitation for Bids* means all documents, whether attached or incorporated by reference, utilized for soliciting bids.
- (4) *Purchase Description* means the words used in a solicitation to describe the supplies, services, or construction to be purchased, and includes specifications attached to, or made a part of the solicitation.
- (5) *Request for Proposals* means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.
- (6) *Responsible Bidder* or *Offeror* means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.
- (7) *Responsive Bidder* means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.

COMMENTARY:

This Section only defines terms with special meanings that are unique to this Article. Other terms having special meanings that are used both in this Article and in other Articles of this Code are defined in Section 1-301 (Definitions).

DEFINITIONAL CROSS-REFERENCES:

“Change Order”	Section	1-301(2)
“Chief Procurement Officer”	Section	1-301(3)
“Construction”	Section	1-301(4)
“Contract”	Section	1-301(5)
“Contract Modification”	Section	1-301(6)
“Contractor”	Section	1-301(7)
“Data”	Section	1-301(8)
“Designee”	Section	1-301(9)
“Electronic”	Section	1-301(10)
“May”	Section	1-301(14)
“Person”	Section	1-301(15)
“Procurement”	Section	1-301(16)
“Procurement Officer”	Section	1-301(17)
“Public Notice”	Section	1-301(18)
“Purchasing Agency”	Section	1-301(19)
“Regulation”	Section	1-301(20)
“Services”	Section	1-301(21)
“Shall”	Section	1-301(22)
“Signature”	Section	1-301(23)
“Specification”	Section	4-101
“Supplies”	Section	1-301(24)
“Written” or “In Writing”	Section	1-301(26)

Regulation 3-101 - Definitions

R3-101.01 Definitions.

R3-101.01.1 *Capability*, as used in Section 3-101(6) (Definitions, Responsible Bidder or Offeror) of the [State] Procurement Code, means, for the purpose of these regulations, capability at the time of award of the contract.

R3-101.01.2 *Cost Analysis* is 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.

R3-101.01.3 *Cost Data* are information concerning the actual or estimated cost of labor, material, overhead, and other cost elements which have been actually incurred or which are expected to be incurred by the contractor in performing the contract.

R3-101.01.4 *Discussions*, as used in the source selection process, means an exchange of information or other manner of negotiation during which the offeror and the [State] may alter or otherwise change the conditions, terms, and price of the proposed contract. Discussions may be conducted in connection with competitive sealed proposals, sole source, and emergency procurement; discussions are not permissible in competitive sealed bidding (except to the extent permissible in the first phase of multi-step sealed bidding).

R3-101.01.5 *Prequalification for Inclusion on Bidders Lists* means determining in accordance with Regulation 3-402 (Prequalification) that a prospective bidder or offeror satisfies the criteria established for being included on the bidders list.

R3-101.01.6 *Price Analysis*: is 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.

R3-101.01.7 *Price Data* are factual information concerning prices, including profit, for supplies, services, or construction substantially similar to those being procured. In this definition, "prices" refer to offered or proposed selling prices, historical selling prices, and current selling prices of such items. This definition refers to data relevant to both prime and subcontract prices.

R3-101.01.8 *Solicitation* means an Invitation for Bids, a Request for Proposals, a request for quotations, or any other document issued by the [State] for the purpose of soliciting bids or proposals to perform a [State] contract.

R3-101.01.9 *Suppliers*, as used in Section 3-402 (Prequalification) of the [State] Procurement Code, means prospective bidders or offerors.

Regulation 3-102 - General Provisions

R3-102.01 Extension of Time for Bid or Proposal Acceptance.

After opening bids or proposals the Procurement Officer may request bidders or offerors to extend the time during which the [State] may accept their bids or proposals, provided that, with regard to bids, no other change is permitted. The reasons for requesting such extension shall be documented.

R3-102.02 Extension of Time on Indefinite Quantity Contracts.

The time of performance of an indefinite quantity contract may be extended upon agreement of the parties, provided the extension is for [90] days or less and the Chief Procurement Officer or the head of a Purchasing Agency determines in writing that it is not practical to award another contract at the time of such extension.

R3-102.03 Only One Bid or Proposal Received.

R3-102.03.1 *One Bid Received*. If only one responsive bid is received in response to an Invitation for Bids (including multi-step bidding), an award may be made to the single bidder if the Procurement Officer finds that the price submitted is fair and reasonable, and that either other prospective bidders had reasonable opportunity to respond, or there is not adequate time

for re-solicitation. Otherwise the bid may be rejected pursuant to the provisions of Regulation 3-301 (Cancellation of Solicitations; Rejection of Bids or Proposals) and:

- (a) new bids or offers may be solicited;
- (b) the proposed procurement may be cancelled; or
- (c) if the Chief Procurement Officer determines in writing that the need for the supply or service continues, but that the price of the one bid is not fair and reasonable and there is no time for re-solicitation or re-solicitation would likely be futile, the procurement may then be conducted under Regulation 3-205 (Sole Source Procurement) or Regulation 3-206 (Emergency Procurements), as appropriate.

R3-102.03.2 *One Proposal Received.* If only one proposal is received in response to a Request for Proposals, the Procurement Officer may, as such officer deems appropriate, either make an award in accordance with the procedures set forth in Section 3-203 (Competitive Sealed Proposals) of the [State] Procurement Code and Regulation 3-203 (Competitive Sealed Proposals) of these regulations or, if time permits, resolicit for the purpose of obtaining competitive sealed proposals.

R3-102.04 Multiple or Alternate Bids or Proposals.

Unless multiple or alternate bids or proposals are specifically provided for, the solicitation shall state that such bids or proposals shall not be accepted. When prohibited, multiple or alternate bids or proposals shall be rejected, provided that if a bidder clearly indicates a base bid, it shall be considered for award as though it were the only bid or proposal submitted by the bidder or offeror. The provisions of this Section shall be set forth in the solicitation, and if multiple or alternate bids or proposals are allowed, it shall specify their treatment.

R3-102.05 Procuring [State]-Produced Supplies or Services.

Using Agency requirements may be fulfilled by procuring supplies produced or services performed incident to the [State's] own programs, such as industries of correctional institutions. The Chief Procurement Officer or the head of a Purchasing Agency shall determine whether such supplies or services meet the [State's] requirements and whether the price represents a fair market value for such supplies or services. If it is determined that such requirements cannot be met by [State]-produced supplies or services, or the price is not fair and reasonable, the procurement may be made from the private sector in accordance with the [State] Procurement Code. When such

procurements are made from other [State] agencies, the private sector shall not be solicited to compete against [State] agencies.

Editorial Note: This Section should be conformed to any existing [State] statutory provisions.

R3-102.06 Bid and Performance Bonds for Supply Contracts or Service Contracts.

Bid and performance bonds or other security may be required for supply contracts or service contracts as the Chief Procurement Officer, the head of a Purchasing Agency, or such officer's designee deems advisable to protect the interest of the [State]. Any such requirements must be set forth in the solicitation. Bid or performance bonds should not be used as a substitute for a determination of bidder or offeror responsibility. Regulation 5-301 (Bid Bonds) and Regulation 5-302 (Performance and Payment Bonds) set forth bonding requirements applicable to construction contracts and may be considered when establishing any such requirements for supply contracts or service contracts.

R3-102.07 Conditioning Bids or Proposals Upon Other Awards Not Acceptable.

Any bid or proposal which is conditioned upon receiving award of both the particular contract being solicited and another [State] contract shall be deemed nonresponsive and not acceptable.

Regulation 3-103 - Relations Between Agencies

R3-103.01 Purchase Requests by Agencies.

Chief Procurement Officer's Authority to Reject. When the Chief Procurement Officer, after consultation with the requesting agency, decides that processing the purchase request is clearly not in the best interest of the [State] or that further review is needed, such officer shall return such purchase request to the requesting agency. A statement of the reasons for its return shall accompany the returned request. Examples of reasons a purchase request may be returned include, but are not limited to:

- (a) the request can be satisfied from existing [State] stocks or [State] contracts;
- (b) the request exceeds agency needs;
- (c) the supplies, services, or construction requested could be procured more economically at a different time without detriment to the [State]; or
- (d) the quality requested is inconsistent with [State] standards and usage.

COMMENTARY:

Some jurisdictions use the term "purchase requisition" instead of "purchase request."

Regulation 3-104 - Unsolicited Offers

R3-104.01 Unsolicited Offers.

R3-104.01.1 *Defined.* An unsolicited offer is any offer other than one submitted in response to a solicitation.

R3-104.01.2 *Processing of Unsolicited Offers.* The Chief Procurement Officer or the head of the Purchasing Agency shall consider the offer as provided in this Section. If an agency that receives an unsolicited offer is not authorized to enter into a contract for the supplies or services offered, the head of such agency shall forward the offer to the Chief Procurement Officer who shall have final authority with respect to evaluation, acceptance, and rejection of such unsolicited offers.

R3-104.01.3 *Conditions for Consideration.* To be considered for evaluation an unsolicited offer:

- (a) must be in writing;
- (b) must be sufficiently detailed to allow a judgment to be made concerning the potential utility of the offer to the [State];
- (c) must be unique or innovative to [State] use;
- (d) must demonstrate that the proprietary character of the offering warrants consideration of the use of sole source procurement; and
- (e) may be subject to testing under terms and conditions specified by the [State].

R3-104.01.4 *Evaluation.* The unsolicited offer shall be evaluated to determine its utility to the [State] and whether it would be to the [State's] advantage to enter into a contract based on such offer. If an award is to be made on the basis of such offer, the sole source procedures in Regulation 3-205 (Sole Source Procurement) shall be followed.

R3-104.01.5 *Confidentiality.* Any written request for confidentiality of data contained in an unsolicited offer that is made in writing shall be honored. If an award is made, confidentiality of data shall be agreed upon by the parties and governed by the provisions of the contract. If agreement cannot be reached on confidentiality, the [State] may reject the unsolicited offer.

Regulation 3-105 - Novation or Change of Name

R3-105.01 Novation or Change of Name.

R3-105.01.1 *No Assignment.* No [State] contract is transferable, or otherwise assignable, without the written consent of the Chief Procurement Officer or the head of a Purchasing Agency provided, however, that a contractor may assign monies receivable under a contract after due notice to the [State].

R3-105.01.2 *Recognition of a Successor in Interest; Novation.* When in the best interest of the [State], a successor in interest may be recognized in a novation agreement in which the transferor and the transferee shall agree that:

- (a) the transferee assumes all of the transferor's obligations;
- (b) the transferor waives all rights under the contract as against the [State]; and
- (c) unless the transferor guarantees performance of the contract by the transferee, the transferee shall, if required, furnish a satisfactory performance bond.

R3105.01.3 *Change of Name.* When a contractor requests change the name in which it holds a contract with the [State], the Procurement Officer responsible for the contract shall, upon receipt of a document indicating such change of name (for example, an amendment to the articles of incorporation of the corporation), enter into an agreement with the requesting contractor to effect such a change of name. The agreement changing the name shall specifically indicate that no other terms and conditions of the contract are thereby changed.

Regulation 3-106 - Contracting for Installment Purchase Payments

R1-106.01 Contracting for Installment Purchase Payments, Including Interest.

Supply contracts may provide for installment purchase payments, including interest charges, over a period of time. Installment payments, however, should be used judiciously in order to achieve economy and not to avoid budgetary restraints and shall be justified in writing by the head of the Using Agency. Heads of Using Agencies shall be responsible for ensuring that statutory or other prohibitions are not violated by use of installment provisions and that all budgetary, funding, or other required prior approvals are obtained. No such agreement shall be used unless provision for installment payments is included in the solicitation document.

Regulation 3-107 - Purchase of Items Separately from Construction Contract

R3-107.01 Purchase of Items Separately from Construction Contract.

The Chief Procurement Officer or the head of a Purchasing Agency is authorized to determine whether a supply item or group of supply items shall be included as a part of, or procured separately from, any contract for construction.

Part B – Methods of Source Selection

CODE PROVISION:

§3-201 Methods of Source Selection.

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

- (a) Section 3-202 (Competitive Sealed Bidding);
- (b) Section 3-203 (Competitive Sealed Proposals);
- (c) Section 3-204 (Small Purchases);
- (d) Section 3-205 (Sole Source Procurement);
- (e) Section 3-206 (Emergency Procurements);
- (f) Section 3-207 (Special Procurements);
- (g) Section 5-205 (Architectural and Engineering Services).

COMMENTARY:

- (1) With competitive sealed bidding as a starting point (Section 3-202), procurement officials are able to choose an appropriate source selection method to meet the circumstances of each procurement. Procurement officials should be able to freely select an appropriate source selection method, based on that official's discretion. Procurement officials should recognize the flexibility that the Code offers them when using the competitive sealed bidding method, such as product acceptability and multi-step processes.
- (2) The purpose of this Part is to provide procurement officials with adequate authority to conduct procurement transactions by fair and open competition under varying market conditions in order to satisfy public needs for supplies, services, and construction at the most economical prices.
- (3) Fair and open competition is a basic tenet of public procurement. Such competition reduces the opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically. Since the marketplace is different for various supplies, services, and construction, this Code authorizes a variety of source selection techniques designed to provide the best competition for all types of procurements. It also permits less formal competitive procedures where the amount of the contract does not warrant the expense and time otherwise involved. Competitive sealed bidding (Section 3-202), competitive sealed proposals (Section 3-203), simplified, small purchase procedures (Section 3-204), and special procurement procedures (Section 3-207), therefore, are recognized as valid competitive procurement methods when used in accordance with the criteria and conditions set forth in this Article.
- (4) Subsection (d) lists sole source procurements (Section 3-205) as an exception to other methods only when it is determined in writing that there is only one source for the required supply, service, or construction item.
- (5) The statutory authorization in Section 3-201 to use competitive sealed bidding and competitive sealed proposals applies to four new project delivery methods identified in Article 5 of the 2000 Code: design-build, design-build-operate-maintain, design-build-finance-operate-maintain, and operations and maintenance. These four new delivery methods, when added to the design-bid-build project delivery already authorized in the 1979 version of the Code, provide procurement officials with increased flexibility in the procurement of the design, construction, operation,

maintenance, and finance of public infrastructure facilities. Article 5 continues to rely on the source selection methods of Article 3, while providing maximum flexibility to procurement officials to separate or integrate the design, construction, operation, maintenance, and finance functions.

Regulation 3-202-Competitive Sealed Bidding; Multi-Step Sealed Bidding

CODE PROVISION:

§3-202 Competitive Sealed Bidding.

- (1) *Conditions for Use.* Contracts shall be awarded by competitive sealed bidding except as otherwise provided in Section 3-201 (Methods of Source Selection).

COMMENTARY:

Competitive sealed bidding does not include negotiations with bidders after the receipt and opening of bids. Award is to be made based strictly on the criteria set forth in the Invitation for Bids.

- (2) *Invitation for Bids.* An Invitation for Bids shall be issued and shall include a purchase description, 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 prior to the date set forth therein for the opening of bids, in accordance with regulations.

COMMENTARY:

Public notice required by this Subsection should be given sufficiently in advance of bid opening to permit potential bidders to prepare and submit their bids in a timely manner. Because the adequacy of notice will, as a practical matter, vary from locality to locality and procurement to procurement, no attempt is made in Subsection (3) to define statutorily either a prescribed method of notice or the duration of its publication. However, the regulations should provide criteria and general guidelines for the method and duration of public notice.

- (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 may be specified by regulation, together with the name of each bidder shall be recorded; the record and each bid shall be open to public inspection.
- (5) *Bid Acceptance and Bid Evaluation.* Bids shall be unconditionally accepted without alteration or correction, except as authorized in this Code. 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.

COMMENTARY:

- (1) The only provisions of this Code that allow alteration or correction of bids are found in Subsection (6) of this Section and Section 5-301(3) (Bid Security, Rejection of Bids for Noncompliance with Bid Security Requirements).
- (2) This Subsection makes clear that judgmental evaluations of products, particularly where bid samples or product descriptions are submitted, may properly be used in determining whether a product proffered by a bidder meets the acceptability standards of the specification requirements for the procurement. Such judgmental evaluations as appearance, workmanship, finish, taste, and feel all may be taken into consideration under this Subsection. Additionally, the ability to make such determinations, and to reject as nonresponsive any bid which does not meet the purchase description is inherent in the definition of responsive bidder in Section 3-101(7) (Definitions, Responsive Bidder).
- (3) The bid evaluation may take into account not only acquisition costs of supplies, but the cost of their ownership which relates to the quality of the product, including life cycle factors such as maintainability and reliability. Any such criteria must be set forth in the Invitation for Bids to enable bidders to calculate how such criteria will affect their bid price.
- (4) This Subsection does not permit a contract to be awarded to a bidder submitting a higher quality item than the minimum required by the purchase description unless that bidder also has the bid price evaluated lowest in accordance with the objective criteria set forth in the Invitation for Bids. Furthermore, this procedure does not permit discussions or negotiations with bidders after receipt and opening of bids.

- (6) *Correction or Withdrawal of Bids; Cancellation of Awards.* Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such bid mistakes, shall be permitted in accordance with regulations. After bid opening, no changes in bid prices or other provisions of bids prejudicial to the interest of the [State] or fair competition shall be permitted. Except as otherwise provided by regulation, 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 Chief Procurement Officer or head of a Purchasing Agency.

COMMENTARY:

- (1) Correction or withdrawal of bids before or after contract award requires careful consideration to maintain the integrity of the competitive bidding system, to assure fairness, and to avoid delays or poor contract performance. While bidders should be expected to be bound by their bids, circumstances frequently arise where correction or withdrawal of bids is proper and should be permitted.
- (2) To maintain the integrity of the competitive sealed bidding system, a bidder should not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid unless the mistake is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition.
- (3) An otherwise low bidder should be permitted to correct a material mistake of fact in its bid, including price, when the intended bid is obvious from the bid document or is otherwise supported by proof that has evidentiary value. A low bidder should not be permitted to correct a bid for mistakes or errors in judgment.
- (4) In lieu of bid correction, the [State] should permit a low bidder alleging a material mistake of fact to withdraw its bid when there is reasonable proof that a mistake was made and the intended bid cannot be ascertained with reasonable certainty.
- (5) After bid opening an otherwise low bidder should not be permitted to delete exceptions to the bid conditions or specifications which affect price or substantive obligations; however, such bidder should be permitted the opportunity to furnish other information called for by the Invitation for Bids and not supplied due to oversight, so long as it does not affect responsiveness.
- (6) A suspected bid mistake can give rise to a duty on the part of the [State] to request confirmation of a bid, and failure to do so can result in a nonbinding award, where there is an appearance of mistake. Therefore, the bidder

should be asked to reconfirm the bid before award. In such instances, a bidder should be permitted to correct the bid or to withdraw it when the bidder acknowledges that a mistake was made.

(7) Correction of bid mistakes after award should be subject to the same proof as corrections before award with a further requirement that no correction be permitted that would cause the contract price to exceed the next low bid.

(8) Nothing in this Section is intended to prohibit the [State] from accepting a voluntary reduction in price from a low bidder after bid opening; provided that such reduction is not conditioned on, or results in, the modification or deletion of any conditions contained in the Invitation for Bids.

- (7) *Award.* The contract shall be awarded with reasonable promptness by 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 all bids for a construction project exceed available funds as certified by the appropriate fiscal officer, and the low responsive and responsible bid does not exceed such funds by more than [five] percent, the Chief Procurement Officer, or the head of a Purchasing Agency, is authorized in situations where time or economic considerations preclude resolicitation of work of a reduced scope to negotiate an adjustment of the bid price, including changes in the bid requirements, with the low responsive and responsible bidder, in order to bring the bid within the amount of available funds.

COMMENTARY:

(1) The successful bidder must be responsive as defined in Section 3-101(7) and responsible as defined in Section 3-101(6), and the bid must be the lowest bid determined under criteria set forth in the Invitation for Bids.

(2) This Subsection also provides authority to negotiate changes in construction project bid requirements with a low bidder in order to arrive at a price not in excess of available funds. This authority would be limited to situations where the excess is less than a stated percentage over the available funds. It should be noted that even where the bids exceed the percentage limitation on the discretionary authority to negotiate with the low bidder, if circumstances warrant an emergency determination, the procurement can proceed under Section 3-206 (Emergency Procurements).

(3) When all bids are determined to be unreasonable or the lowest bid on a construction project exceeds the amount specified in this Subsection, and the public need does not permit the time required to resolicit bids, then a contract may be awarded pursuant to the emergency authority in Section 3-206 (Emergency Procurements) in accordance with regulations.

(4) Note that the new definition of "written or in writing" in Section 1-301(26) permits awards to be issued electronically.

- (8) *Multi-Step Sealed Bidding.* When it is considered impractical to initially prepare 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 qualified under the criteria set forth in the first solicitation.

COMMENTARY:

To provide additional flexibility in meeting the designated public need, multi-step competitive sealed bidding is authorized.

R3-202.01 The Invitation for Bids.

R3-202.01.1 *Use.* The Invitation for Bids is used to initiate a competitive sealed bid procurement.

R3-202.01.2 *Content.* The Invitation for Bids shall include the following:

(a) instructions and information to bidders concerning the bid submission requirements, including the time and date set for receipt of bids, the address of the office to which bids are to be delivered, the maximum time for bid acceptance by the [State], and any other special information;

(b) the purchase description, evaluation factors, delivery or performance schedule, and such inspection and acceptance requirements as are not included in the purchase description; and

(c) the contract terms and conditions, including warranty and bonding or other security requirements, as applicable.

R3-202.01.3 *Incorporation by Reference.* The Invitation for Bids may incorporate documents by reference provided that the Invitation for Bids specifies where such documents can be obtained.

R3-202.01.4 *Acknowledgement of Amendments.* The Invitation for Bids shall require the acknowledgement of the receipt of all amendments issued.

R3-202.02 Bidding Time.

Bidding time is the period of time between the date of distribution of the Invitation for Bids and the time and date set for receipt of bids. In each case bidding time will be set to provide bidders a reasonable time to prepare their bids. A minimum of [___] days shall be provided unless a shorter time is deemed necessary for a particular procurement as determined in writing by the Procurement Officer

R3-202.03 Bidder Submissions.

R3-202.03.1 *Bid Form.* The Invitation for Bids shall provide a form which shall include space in which the bid price shall be inserted and which the bidder shall sign and submit along with all other necessary submissions.

Editorial Note: Enacting jurisdictions may want to specify their standard bid forms here.

R3-202.03.2 *Telegraphic Bids.* The Invitation for Bids may state that electronic, telegraphic, and mailgram bids will be considered whenever they are received in hand at the designated office by the time and date set for receipt of bids. Such electronic, telegraphic, or mailgram bids shall contain specific reference to the Invitation for Bids; the items, quantities, and prices for which the bid is submitted; the time and place of delivery; and a statement that the bidder agrees to all the terms; conditions, and provisions of the Invitation for Bids.

R3-202.03.3 Bid Samples and Descriptive Literature.

- (a) "Descriptive literature" means information available in the ordinary course of business which shows the characteristics, construction, or operation of an item which enables the [State] to consider whether the item meets its needs.
- (b) "Bid sample" means a sample to be furnished by a bidder to show the characteristics of the item offered in the bid.
- (c) Bid samples or descriptive literature may be required when it is necessary to evaluate required characteristics of the items bid.
- (d) The Invitation for Bids shall state that bid samples or descriptive literature should not be submitted unless expressly requested and that, regardless of any attempt by a bidder to condition the bid, unsolicited bid samples or descriptive literature which are submitted at the bidder's risk will not be examined or tested, and will not be deemed to vary any of the provisions of the Invitation for Bids.

R3-202.04 Public Notice.

R3-202.04.1 *Distribution.* Invitations for Bids or Notices of the Availability of Invitations for Bids shall be mailed or otherwise furnished to a sufficient number of potential bidders for the purpose of securing competition. Notices of Availability shall indicate where, when, and for how long Invitations for Bids may be obtained; generally describe the supply, service, or construction desired; and may contain other appropriate information. (See also Section R3-202.05 (Bidders Lists).) Where appropriate the Procurement Officer may require payment of a fee or a deposit for the supplying of the Invitation for Bids.

R3-202.04.2 *Publication.* Every procurement in excess of [\$______] shall be publicized in one or more of the following ways:

- (a) in a newspaper of general circulation;
- (b) in a newspaper of local circulation in the area pertinent to the procurement;
- (c) in industry media;
- (d) through electronic mailing lists,
- (e) through the internet, agency web site, or other publicly accessible electronic media, or
- (f) in a government publication designed for giving public notice.

R3-202.04.3 *Public Availability.* A copy of the Invitation for Bids shall be made available for public inspection at the Procurement Officer's office or the public information office of such officer's agency.

R3-202.05 Bidders Lists.

R3-202.07.1 *Purpose.* Bidders lists may be compiled to provide the [State] with the names of businesses that may be interested in competing for various types of [State] contracts. Unless otherwise provided, inclusion or exclusion of the name of a business does not indicate whether the business is responsible in respect to a particular procurement or otherwise capable of successfully performing a [State] contract.

R3-202.07.2 *Public Availability.* Names and addresses on bidders lists shall be available for public inspection provided these lists shall not be used for private promotional, commercial or marketing purposes.

R3-202.06 Pre-Bid Conferences.

Pre-bid conferences may be conducted to explain the procurement requirements. They shall be announced to all prospective bidder-s known to have received an Invitation for Bids. The conference should be held long enough after the Invitation for Bids has been issued to allow bidders to become familiar with it, but sufficiently before bid opening to allow consideration of the conference results in preparing their bids. Nothing stated at the pre-bid conference shall change the Invitation for Bids unless a change is made by written amendment as provided in Section R3-202.09 (Amendments to Invitations for Bids) and the Invitation for Bids if a pre-bid conference was required therein, or the notice of pre-bid conference shall so provide. A summary of the conference shall be supplied to all these prospective bidders known to have received an invitation for Bids. If a transcript is made it shall be a public record.

R3-202.07 Amendments to Invitations for Bids.

R3-202.07.1 *Form.* Amendments to Invitations for Bids shall be identified as such and shall require that the bidder acknowledge receipt of all amendments issued. The amendment shall reference the portions of the Invitation for Bids it amends.

R3-202.07.2 *Distribution.* Amendments shall be sent to all prospective bidders known to have received an Invitation for Bids.

R3-202.07.3 *Timeliness.* Amendments shall be distributed within a reasonable time to allow prospective bidders to consider them in preparing their bids. If the time and date set for receipt of bids will not permit such

preparation, such time shall be increased to the extent possible in the amendment or, if necessary, by telegram or telephone and confirmed in the amendment.

COMMENTARY:

Amendments should be used to:

- (a) make any changes in the Invitation for Bids such as changes in quantity, purchase descriptions, delivery schedules, and opening dates;
- (b) correct defects or ambiguities; or
- (c) furnish to other bidders information given to one bidder if such information will assist the other bidders in submitting bids or if the lack of such information would prejudice the other bidders.

R3-202.8 Pre-Opening Modification or Withdrawal of Bids.

R3-202.8.1 *Procedure.* Bids may be modified or withdrawn by written notice received in the office designated in the Invitation for Bids prior to the time and date set for bid opening. An electronic or telegraphic modification or withdrawal received from the bidder or, as applicable, the receiving telegraph company office prior to the time and date set for bid opening will be effective provided that there is objective evidence, in electronic form or from the receiving telegraph company, confirming that the message was received at prior to the time and date set for bid opening.

R3-202.8.2 *Disposition of Bid Security.* If a bid is withdrawn in accordance with this Section, the bid security, if any, shall be returned to the bidder.

R3-202.8.3 *Records.* All documents relating to the modification or withdrawal of bids shall be made a part of the appropriate procurement file.

R3-202.9 Late Bids, Late Withdrawals, and Late Modifications.

R3-202.9.1 *Definition.* Any bid received after the time and date set for receipt of bids is late. Any withdrawal or modification of a bid received after the time and date set for opening of bids at the place designated for opening is late.

R3-202.9.2 *Treatment.* No late bid, late modification, or late withdrawal will be considered unless received before contract award, and the bid, modification, or withdrawal would have been timely but for the action or inaction of [State] personnel directly serving the procurement activity.

R3-202.9.3 *Notice.* Bidders submitting late bids that will not be considered for award shall be so notified as soon as practicable.

R3-202.9.4 *Records*. Records equivalent to those required in Section R3-202.8.3 (Pre-Opening Modification or Withdrawal of Bids, Records) shall be made and kept for each late bid, late modification, or late withdrawal.

R3-202.10 Receipt, Opening, and Recording of Bids.

R3-202.10.1 *Receipt*. Upon its receipt, each bid and modification shall be time-stamped but not opened and shall be stored in a secure place until the time and date set for bid opening. Bids submitted through electronic means shall be received in such a manner that the time and date of submittal, along with the contents of such bids shall be securely stored until the time and date set for bid opening.

R3-202.10.2 *Opening and Recording*. Bids and modifications shall be opened publicly, in the presence of one or more witnesses, at the time, date, and place designated in the Invitation for Bids. The name of each bidder, the bid price, and such other information as is deemed appropriate by the Procurement Officer, shall be read aloud or otherwise made available. Such information also shall be recorded at the time of bid opening; that is, the bids shall be tabulated or a bid abstract made. The names and addresses of required witnesses shall also be recorded at the opening. The opened bids shall be available for public inspection except to the extent the bidder designates trade secrets or other proprietary data to be confidential as set forth in Subsection R3-202.10.3 of this Section. Material so designated shall accompany the bid shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid. Price and makes and model or catalogue of the items offered, deliveries, and terms of payment shall be publicly available at the time of bid opening regardless of any designation to the contrary. Bid submitted through electronic means shall be received in such a manner that the requirements of this section can be readily met.

R3-202.10.3 *Confidential Data*. The Procurement Officer shall examine the bids to determine the validity of any requests for nondisclosure of trade secrets and other proprietary data identified in writing. If the parties do not agree as to the disclosure of data, the Procurement Officer shall inform the bidders in writing what portions of the bids will be disclosed and that, unless the bidder protests under Article 9 (Legal and Contractual Remedies) of the [State] Procurement Code. The bids will be so disclosed. the bids shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data.

COMMENTARY:

It may be appropriate to establish bid receipt times for construction contracts no earlier than 2:00 p.m. on Tuesday through Friday and not to set bid receipt for the day after a legal holiday. This will facilitate receipt and evaluation of subcontractor bids by bidders (that is, the general contractors) which will benefit that [State] by increasing competition for subcontractors and reducing errors in evaluating and compiling subcontractor bids.

R3-202.11 Mistakes in Bids.

R3-202.11.1 *General.* Correction or withdrawal of a bid because of an inadvertent, non-judgmental mistake in the bid requires careful consideration to protect the integrity of the competitive bidding system, and to assure fairness. If the mistake is attributable to an error in judgment, the bid may not be corrected. Bid correction or withdrawal by reason of a nonjudgmental mistake is permissible but only to the extent it is not contrary to the interest of the [State] or the fair treatment of other bidders.

R3-202.11.2 *Mistakes Discovered Before Opening.* A bidder may correct mistakes discovered before the time and date set for bid opening by withdrawing or correcting the bid as provided in Section R3-202.8 (Pre-Opening Modification or Withdrawal of Bids).

R3-202.11.3 *Confirmation of Bid.* When the Procurement Officer knows or has reason to conclude that a mistake has been made, such officer should request the bidder to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. If the bidder alleges mistake, the bid may be corrected or withdrawn if the conditions set forth in Subsections R3-202.11.4 through R3-202.11.6 of this Section are met.

R3-202.11.4 *Mistakes Discovered After Opening but Before Award.* This Subsection sets forth procedures to be applied in three situations described in Subsections R3-202.11.4(a) through R3-202.11.4(c) of this Subsection in which mistakes in bids are discovered after the time and date set for bid opening but before award.

(a) *Minor Informalities.* Minor informalities are matters of form rather than substance evident from the bid document, or insignificant mistakes that can be waived or corrected without prejudice to other bidders; that is, the effect on price, quantity, quality, delivery, or contractual conditions is negligible. The Procurement Officer shall waive such informalities or allow the bidder to correct them depending on which is in the best interest of the [State]. Examples include the failure of a bidder to:

- (i) return the number of signed bids required by the Invitation for Bids;
- (ii) sign the bid, but only if the unsigned bid is accompanied by other material indicating the bidder's intent to be bound; or

(iii) acknowledge receipt of an amendment to the Invitation for Bids, but only if:

(A) it is clear from the bid that the bidder received the amendment and intended to be bound by its terms; or

(B) the amendment involved had a negligible effect on price, quantity, quality, or delivery

(b) *Mistakes Where Intended Correct Bid is Evident.* If the mistake and the intended correct bid are clearly evident on the face of the bid document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of the bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors.

(c) *Mistakes Where Intended Correct Bid is Not Evident.* A bidder may be permitted to withdraw a low bid if:

(i) a mistake is clearly evident on the face of the bid document but the intended correct is not similarly evident or

(ii) the bidder submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made.

R3-202.11.5 *Mistakes Discovered After Award.* Mistakes shall not be corrected after award of the contract except where the Chief Procurement Officer or the head of a Purchasing Agency makes a written determination that it would be unconscionable not to allow the mistake to be corrected.

R3-202.11.6 *Determinations Required.* When a bid is corrected or withdrawn, or correction or withdrawal is denied, under subsections R3-202.11.4 or R3-202.11.5 of this Section, the Chief Procurement Officer or the head of a Purchasing agency shall prepare a written determination showing that the relief was granted or denied in accordance with these regulations, except that the Procurement Officer shall prepare the determination required under Subsection R3-202.11.4(a) of this Section.

R3-202.12 Bid Evaluation and Award

R3-202.12.1 *General.* The contract is to be awarded "to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids." See Section 3-202(7) (Competitive Sealed Bidding, Award) of the [State] Procurement Code. The Invitation for Bids shall set forth the requirements and criteria which will be used to determine the lowest responsive bidder. No bid shall be evaluated for any requirement or criterion that is not disclosed in the Invitation for Bids.

R3-202.12.2 *Responsibility and Responsiveness.* Responsibility of prospective contractors is covered by Regulation 3-401 (Responsibility) of this Chapter. Responsiveness of bids is covered by Section 3-101(7) of the [State] Procurement Code which defines "responsive bidder" as "a person who has submitted a bid which conforms in all material respects to the Invitation for Bids."

R3-202.12.3 *Product Acceptability.* The Invitation for Bids shall set forth any evaluation criterion to be used in determining product acceptability. It may require the submission of bid samples, descriptive literature, technical data, or other material. It may also provide for accomplishing any of the following prior to award:

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

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

R3-202.12.4 *Determination of Lowest Bidder.* Following determination of product acceptability as set forth in Subsection R3-202.12.3 of this Section, if any is required, bids will be evaluated to determine which bidder offers the lowest cost to the [State] in accordance with the evaluation criteria set forth in the Invitation for Bids. Only objectively measurable criteria which are set forth in the Invitation for Bids shall be applied in determining the lowest bidder. Examples of such criteria include, but are not limited to, transportation cost, and ownership or life cycle cost formulas. Evaluation factors need not be precise predictors of actual future costs, but to the extent possible such evaluation factors shall:

- (a) be reasonable estimates based upon information the [State] has available concerning future use; and
- (b) treat all bids equitably.

R3-202.12.5 *Restrictions.* Nothing in this Section shall be deemed to permit contract award to a bidder submitting a higher quality item than that designated in the Invitation for Bids if such bidder is not also the lowest

bidder as determined under Subsection R3-202.12.4 of this Section. Further, this Section does not permit negotiations with any bidder.

COMMENTARY:

The following is an example of objectively measurable criteria as applied in evaluating a bid. Two bids are received on ballpoint pens. The Invitation for Bids provided that bid prices per dozen pens would be evaluated by dividing the bid price per pen by thousand feet of writing. Bidder A bids 60 cents per dozen pens and it is determined by testing that A's pen writes 9,000 feet. Bidder B bids 72 cents per dozen pens and B's pen writes 12,000 feet. Bidder A's bid is evaluated to be 5/9 cents per thousand feet while Bidder B's is 1/2 cents per thousand feet, clearly lower. The contract would be awarded to Bidder B at 72 cents per dozen pens.

R3-202.13 Low Tie Bids.

R3-202.13.1 *Definition.* Low tie bids are low responsive bids from responsible bidders that are identical in price and which meet all the requirements and criteria set forth in the Invitation for Bids.

R3-202.13.2 *Award.* Award shall not be made by drawing lots, except as set forth below, or by dividing business among identical bidders. In the discretion of the Chief Procurement Officer or the head of a Purchase Agency, tie award shall be made in manner that will discourage tie bids and a written determination is made so stating, award may be made by drawing lots.

R3-202.13.3 *Record.* Records shall be made of all Invitations for Bids on which tie bids are received showing at least the following information:

- (a) the identification number of the Invitation for Bids;
- (b) the supply, service, or construction item; and
- (c) a listing of all the bidders and the prices submitted.

A copy of each such record shall be sent to the [appropriate legal officer].

COMMENTARY:

Procedures which can be used to discourage tie bids include:

- (a) award the contract to a business providing supplies produced or manufactured in this [State] or to a business that otherwise maintains a place of business in this [State];
- (b) where identical low bids include the cost of delivery, award the contract to the tie bidder farthest from the point of delivery;
- (c) award the contract to the identical bidder who received the previous award and continue to award succeeding contracts to the same bidder so long as all low bids are identical;
- (d) reject all bids and negotiate a price with the tie bidders provided that the contract shall be let for less than the lowest responsive bid received;
- (e) reject the identical bids and offer to sell to the highest bidder a contract wherein the [State] will buy the requirements at the identical bid prices.

If (d) and (e) are to be used, the Code must be amended to authorize such procedures in the case of tie bids.

R3-202.14 Documentation of Award.

Following award, a record showing the basis for determining the successful bidder shall be made a part of the procurement file.

R3-202.15 Publicizing Awards.

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

R3-202.16 Multi-Step Sealed Bidding.

R3-202.16.1 *Definition.* Multi-step sealed bidding is a two phase process consisting of a technical first phase composed of one or more steps in which bidders submit unpriced technical offers to be evaluated by the [State], and a second phase in which those bidders whose technical offers are determined to be acceptable during the first phase have their price bids considered. It is designed to obtain the benefits of competitive sealed bidding by award of a contract to the lowest responsive, responsible bidder, and at the same time obtain the benefits of the competitive sealed proposals procedure through the solicitation of technical offers and the conduct of discussions to evaluate and determine the acceptability of technical offers.

R3-202.16.2 *Conditions for Use.* The multi-step sealed bidding method may be used when it is not practical to prepare initially a definitive purchase description which will be suitable to permit an award based on price. Multi-step sealed bidding may thus be used when it is considered desirable:

- (a) to invite and evaluate technical offers to determine their acceptability to fulfill the purchase description requirements;
- (b) to conduct discussions for the purposes of facilitating understanding of the technical offer and purchase description requirements and, where appropriate, obtain supplemental information, permit amendments of technical offers, or amend the purchase description;
- (c) to accomplish Subsections R3-202.16.2(a) and R3-202.16.2(b) of this Section prior to soliciting priced bids; and
- (d) to award the contract to the lowest responsive and responsible bidder in accordance with the competitive sealed bidding procedures.

R3-202.17 Pre-Bid Conferences in Multi-Step Sealed Bidding.

Prior to the submission of unpriced technical offers, a pre-bid conference as contemplated by Section R3-202.06 (Pre-Bid Conferences) may be conducted by the Procurement Officer. The Procurement Officer may also hold a conference of all potential bidders in accordance with Section R3-202.06 at any time during the evaluation of the unpriced technical offers.

R3-202.18 Procedure for Phase One of Multi-Step Sealed Bidding.

R3-202.18.1 *Form.* Multi-step sealed bidding shall be initiated by the issuance of an Invitation for Bids in the form required by Section R3-202.01 (The Invitation for Bids), except as hereinafter provided. In addition to the requirements set forth in Section R3-202.01, the multi-step Invitation for Bids shall state:

- (a) that unpriced technical offers are requested;
- (b) whether priced bids are to be submitted at the same time as unpriced technical offers; if they are, such priced bids shall be submitted in a separate sealed envelope;
- (c) that it is a multi-step sealed bid procurement, and priced bids will be considered only in the second phase and only from those bidders whose unpriced technical offers are found acceptable in the first phase;
- (d) the criteria to be used in the evaluation of the unpriced technical offers;
- (e) that the [State], to the extent the Procurement Officer finds necessary, may conduct oral or written discussions of the unpriced technical offers;
- (f) that bidders may designate those portions of the unpriced technical offers which contain trade secrets or other proprietary data which are to remain confidential; and
- (g) that the item being procured shall be furnished generally in accordance with the bidder's technical offer as found to be finally acceptable and shall meet the requirements of the Invitation for Bids.

COMMENTARY:

The obligation to keep data confidential is not intended to create any liability that would not otherwise exist under State law.

R3-202.18.2 *Amendments to the Invitation for Bids.* After receipt of unpriced technical offers, amendments to the Invitation for Bids shall be distributed only to bidders who submitted unpriced technical offers, and they shall be permitted to submit new unpriced technical offers or to amend those submitted. If, in the opinion of the Procurement Officer, a contemplated amendment will significantly change the nature of the procurement, the

Invitation for Bids shall be cancelled in accordance with Regulation 3-301 (Cancellation of Solicitations; Rejection of Bids or Proposals) of this Chapter and a new Invitation for Bids issued.

R3-202.18.3 Receipt and Handling of Unpriced Technical Offers. Unpriced technical offers shall not be opened publicly but shall be opened in front of two or more [procurement] officials. Such offers shall not be disclosed to unauthorized persons. Bidders may request nondisclosure of trade secrets and other proprietary data identified in writing.

R3-202.18.4 Evaluation of Unpriced Technical Offers. The unpriced technical offers submitted by bidders shall be evaluated solely in accordance with the criteria set forth in the Invitation for Bids. The unpriced technical offers shall be categorized as:

- (a) acceptable;
- (b) potentially acceptable, that is, reasonably susceptible of being made acceptable; or
- (c) unacceptable. The Procurement Officer shall record in writing the basis for finding an offer unacceptable and make it part of the procurement file.

The Procurement Officer may initiate Phase Two of the procedure if, in the Procurement Officer's opinion, there are sufficient acceptable unpriced technical offers to assure effective price competition in the second phase without technical discussions. If the Procurement Officer finds that such is not the case, the Procurement Officer shall issue an amendment to the Invitation for Bids or engage in technical discussions as set forth in Subsection R3-2-02.18.5 of this Section.

R3-202.18.5 Discussion of Unpriced Technical Offers. The Procurement Officer may conduct discussions with any bidder who submits an acceptable or potentially acceptable technical offer. During the course of such discussions the Procurement Officer shall not disclose any information derived from one unpriced technical offer to any other bidder. Once discussions are begun, any bidder who has not been notified that its offer has been finally found unacceptable may submit supplemental information amending its technical offer at any time until the closing date established by the Procurement Officer. Such submission may be made at the request of the Procurement Officer or upon the bidder's own initiative.

COMMENTARY:

It is considered desirable for the Procurement Officer to keep a record of the date, place, and purpose of meetings and those attending.

R3-202.18.6 *Notice of Unacceptable Unpriced Technical Offer.* When the Procurement Officer determines a bidder's unpriced technical offer to be unacceptable, such offeror shall not be afforded an additional opportunity to supplement its technical offer.

R3-202.19 Mistakes During Multi-Step Sealed Bidding.

Mistakes may be corrected or bids maybe withdrawn during Phase One at any time. During Phase Two, mistakes may be corrected or withdrawal permitted in accordance with Section R3-202.11 (Mistakes in Bids).

R3-202.20 Procedure for Phase Two.

R3-202.20.1 *Initiation.* Upon the completion of Phase One, the Procurement Officer shall either:

(a) open priced bids submitted in Phase One (if priced bids were required to be submitted) from bidders whose unpriced technical offers were found to be acceptable; or

(b) if priced bids have not been submitted, technical discussions have been held, or amendments to the Invitation for Bids have been issued, invite each acceptable bidder to submit a priced bid.

R3-202.20.2 *Conduct.* Phase Two shall be conducted as any other competitive sealed bid procurement except:

(a) as specifically set forth in Section R3-202.16 (Multi-Step Sealed Bidding) through this Section;

(b) no public notice need be given of this invitation to submit priced bids because such notice was previously given;

(c) after award the unpriced technical offer of the successful bidder shall be disclosed as follows. The Procurement Officer shall examine written requests of confidentiality for trade secrets and proprietary data in the technical offer of such bidder to determine the validity of any such requests. If the parties do not agree as to the disclosure of data, the Procurement Officer shall inform the bidder in writing what portions of the unpriced technical offer will be disclosed and that, unless the bidder protests under Article 9 (Legal and Contractual Remedies) of the [State] Procurement Code, the offer will be so disclosed. Such technical offer shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data; and

(d) unpriced technical offers of bidders who are not awarded the contract shall not be open to public inspection unless the Chief Procurement Officer determines in writing that public inspection of such offers is essential to

assure confidence in the integrity of the procurement process; provided, however, that the provisions of Subsection R3-202.20.2(c) of this Section shall apply with respect to the possible disclosure of trade secrets and proprietary data.

COMMENTARY:

The obligation to keep data confidential is not intended to create any liability that would not otherwise exist under State law.

Regulation 3-203 Competitive Sealed Proposals

CODE PROVISION:

§3-203 Competitive Sealed Proposals.

- (1) *Conditions for Use.*
 - (a) A contract may be entered into by competitive sealed proposals when the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer above the level of the Procurement Officer determines in writing, pursuant to regulations, that the use of competitive sealed bidding is either not practicable or not advantageous to the [State].
 - (b) Regulations may provide that it is either not practicable or not advantageous to the [State] to procure specified types of supplies, services, or construction by competitive sealed bidding.
 - (c) Contracts for the design-build, design-build-operate-maintain, or design-build-finance-operate-maintain project delivery methods specified in Article 5 shall be entered into by competitive sealed proposals, except as otherwise provided in Subsections (c), (d), (e), and (f) of Section 3-201 (Methods of Source Selection).

COMMENTARY:

(1) The competitive sealed proposal method (similar to competitive negotiation) is available for use when competitive sealed bidding is either not practicable or not advantageous. The competitive sealed proposal method is mandated for the project delivery methods described in Article 5: design-build, design-build-operate-maintain, and design-build-finance-operate-maintain.

(2) The competitive sealed bidding and competitive sealed proposal methods assure price and product competition. The use of functional or performance specifications is allowed under both methods to facilitate consideration of alternative means of meeting [State] needs, with evaluation, where appropriate, on the basis of total or life cycle costs. The criteria to be used in the evaluation process under either method must be fully disclosed in the solicitation. Only criteria disclosed in the solicitation may be used to evaluate the items bid or proposed.

(3) These two methods of source selection differ in the following ways:

- (a) Under competitive sealed bidding, judgmental factors may be used only to determine if the supply, service, or construction item bid meets the purchase description. Under competitive sealed proposals, judgmental factors may be used to determine not only if the items being offered meet the purchase description but may also be used to evaluate the relative merits of competing proposals. The effect of this different use of judgmental evaluation factors is that under competitive sealed bidding, once the judgmental evaluation is completed, award is made on a purely objective basis to the lowest responsive

and responsible bidder. Under competitive sealed proposals, the quality of competing products or services may be compared and trade-offs made between price and quality of the products or services offered (all as set forth in the solicitation). Award under competitive sealed proposals is then made to the responsible offeror whose proposal is most advantageous to the [State].

- (b) Competitive sealed bidding and competitive sealed proposals also differ in that, under competitive sealed bidding, no change in bids is allowed once they have been opened, except for correction of errors in limited circumstances. The competitive sealed proposal method, on the other hand, permits discussions after proposals have been opened to allow clarification and changes in proposals provided that adequate precautions are taken to treat each offeror fairly and to ensure that information gleaned from competing proposals is not disclosed to other offerors.
- (4) 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 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 [State's] best interest. Illustrations include determining:
 - (a) whether to utilize a fixed-price or cost-type contract under the circumstances;
 - (b) whether quality, availability, or capability is overriding in relation to price in procurements for research and development, technical supplies, or services (for example, developing a traffic management system);
 - (c) 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 [State]; or
 - (d) 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 [State]. 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)(b) to use competitive sealed proposals should be confined to a determination that use of competitive sealed bidding is "not practicable."

(5) Whenever it is determined that it is practicable but not advantageous to use competitive sealed bidding, the basis for the determination should be specified with particularity.

- (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 3-202(3) (Competitive Sealed Bidding, Public Notice).
- (4) *Receipt of Proposals.* Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A Register of Proposals shall be prepared in accordance with regulations, and shall be open for public inspection after contract award.
- (5) *Evaluation Factors.* The Request for Proposals shall state the relative importance of price and other factors and subfactors, if any.

COMMENTARY:

Subsection (5) requires that the Request for Proposals ("RFP") set forth the relative importance of the factors and any subfactors, in addition to price, that will be considered in awarding the contract. A statement in the RFP of the specific weighting to be used by the jurisdiction for each factor and subfactor, while not required, is recommended so that all offerors will have sufficient guidance to prepare their proposals. This Subsection serves two purposes. First,

a fair competition necessitates an understanding on the part of all competitors of the basis upon which award will be made. Second, a statement of the basis for award is also essential to assure that the proposals will be as responsive as possible so that the jurisdiction can obtain the optimum benefits of the competitive solicitation. The requirement for disclosure of the relative importance of all evaluation factors and subfactors applies to the areas or items that will be separately evaluated and scored, e.g., the items listed on evaluation score sheets. The requirement does not extend to advance disclosure of the separate items or emphasis that are considered in the mental process of the evaluators in formulating their scores for the factors and subfactors that are described in the solicitation.

- (6) *Discussion with Responsible Offerors and Revisions to Proposals.* As provided in the Request for Proposals, and under regulations, 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 responsiveness 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 any information derived from proposals submitted by competing offerors.

COMMENTARY:

(1) Subsection (6) provides the procurement official an opportunity to make certain that offerors fully understand the solicitation requirements and provides offerors an opportunity to clarify proposals where necessary so as to assure responsiveness to the solicitation. Price discussions can best be conducted when there is a mutual understanding of the contractual requirements. Clarifications are intended to promote exchanges between the [State] and an offeror that may occur when an award is contemplated without discussions, for example, to resolve minor or clerical errors or ambiguities in proposals.

(2) When discussions or negotiations are contemplated after the receipt of proposals which are expected to lead to the revision of proposals or to best and final offers, fair and equitable treatment of competitors dictates that negotiations be conducted in accordance with ethical business standards. Auction techniques shall be prohibited in discussions with offerors under the competitive sealed proposal method. There must be a cut-off for the submission of revised proposals and final offers. Both Subsection (4) and Subsection (6) are intended to provide that prices; technical solutions; unique technologies; innovative use of commercial items, design, construction, or operating techniques; or other aspects of proposals submitted by one offeror must not be disclosed to competing offerors. Safeguards against abuse in the conduct of negotiations must be strictly observed to maintain the essential integrity of the process. Procedures should be specified in regulations in order to achieve these objectives.

- (7) *Award.* Award shall be made to the responsible offeror whose proposal conforms to the solicitation and is determined in writing to be the most advantageous to the [State] 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. Written notice of the award of a contract to the successful offeror shall be promptly given to all offerors.

COMMENTARY:

The file should show with particularity how the pertinent factors and criteria were applied in determining that the successful proposal is most advantageous to the [State] to assure offerors that their proposals were evaluated fairly and to minimize protests or litigation.

- (8) *Debriefings.* The Procurement Officer is authorized to provide debriefings that furnish the basis for the source selection decision and contract award.

COMMENTARY:

Debriefings may be given orally, in writing, or by any other method acceptable to the Procurement Official. A post-award debriefing may include: (a) the [State's] evaluation of significant weaknesses or deficiencies in the proposal, if applicable; (b) the overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror; (c) the overall ranking of all proposals, when any such ranking was developed during the source selection; (d) a summary of the rationale for award; (e) reasonable responses to relevant questions about whether source selection procedures contained in the Request For Proposal and applicable law were followed. Post-award debriefings should not include point-by-point comparisons of the debriefed proposal with those of other offerors. Any debriefing should not reveal any information prohibited from disclosure by law, or exempt from release under the [applicable public records laws], including trade secrets, or privileged or confidential commercial or manufacturing information. A summary of any debriefing should be included in the contract file.

R3-203.01 Use of Competitive Sealed Proposals.

R3-203.01.1 *When Competitive Sealed Bidding is Not Practicable.*

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

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

R3-203.01.2 *When Competitive Sealed Bidding is Not Advantageous.* A determination may be made to use competitive sealed proposals if it is determined that it is not advantageous to the [State], even though practicable,

to use competitive sealed bidding. Factors to be considered in determining whether competitive sealed bidding is not advantageous include:

(a) if prior procurements indicate that competitive sealed proposals may result in more beneficial contracts for the [State]; and

(b) whether the factors listed in Subsections R3-203.01.1(b) through R3-203.01.1(d) of this Section are desirable in conducting a procurement rather than necessary; if they are, then such factors may be used to support a determination that competitive sealed bidding is not advantageous.

COMMENTARY:

The following are offered as examples of circumstances when formal competitive sealed bidding is "practicable" but not "advantageous." (The word "practicable" is given its "ordinary dictionary meaning," and Webster's Unabridged 3rd Edition gives the following as the primary definition of "practicable": "possible to practice or perform," the remaining definitions being to similar effect.)

(1) While it may be "practicable" to base a procurement of asphalt, for example, on competitive sealed bids even though it is known that only two contractors in the area have asphalt plants with sufficient capacity to submit responsive bids, the potential for inflated (and perhaps collusive) bids is high. Accordingly, it might not be "advantageous" to use the competitive sealed bidding method. Competitive sealed proposals, which permit negotiation, might be preferable as enhancing the competition for the procurement.

(2) It could be "practicable" to invite competitive sealed bids on a functional specification prepared by the [State] for equipment that is highly specialized such as airport emergency equipment. However, the contract award would likely better serve the [State's] interest if it were made on the basis of the most advantageous proposal rather than the lowest responsive and responsible bidder. Therefore, it would not be "advantageous" to the [State] to take competitive sealed bids, that is, the [State] specification could conceivably result in an acceptable product but another could have been obtained more economically and in a form that would better serve the needs of the [State], but for the strictures of competitive sealed bidding. Competitive sealed proposals would also afford the opportunity to discuss design characteristics with the offerors as the discussions proceeded.

R3-203.02. Determinations.

The Chief Procurement Officer or the head of a Purchasing Agency may make determinations by category of supply, service, infrastructure facility, or construction item that it is either not practicable or not advantageous to the [State] to procure specified types of supplies, services, or construction by competitive sealed bidding. Procurements of the specified types of supplies, services, or construction may then be made by competitive sealed proposals based upon such determination. The officer who made such determination may modify or revoke it at any time, and such determination should be reviewed for current applicability from time to time.

R3-203.03 Content of the Request for Proposals.

The Request for Proposals shall be prepared in accordance with Section R3-202.01 (The Invitation for Bids) provided that it shall also include:

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

R3-203.04 Proposal Preparation Time.

Proposal preparation time shall be set to provide offerors a reasonable time to prepare their proposals. A minimum of [____] days shall be provided unless a shorter time is deemed necessary for a particular procurement as determined in writing by the Procurement Officer.

COMMENTARY:

The minimum proposal preparation time should be longer than the minimum bidding time to be specified in Section R3-202.04 (Bidding Time) of this Chapter

R3-203.05 Form of Proposal.

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

R3-203.06 Public Notice.

Public notice shall be given by distributing the Request for Proposals in the same manner provided for distributing an Invitation for Bids under Section R3-202.04 (Public Notice).

R3-203.07 Use of Bidders Lists.

Bidders lists compiled and maintained in accordance with Section R3-202.05 (Bidders Lists) may serve as a basis for soliciting competitive sealed proposals.

R3-203.08 Pre-Proposal Conferences.

Pre-proposal conferences may be conducted in accordance with Section R3-202.06 (Pre-Bid Conferences). Any such conference should be held prior to submission of initial proposals.

R3-203.09 Amendments to Requests for Proposals.

Amendments to Requests for Proposals may be made in accordance with Section R3-202.07 (Amendments to Invitations for Bids) prior to submission of proposals. After submission of proposals, amendments may be

made in accordance with Section R3-202.18.2 (Procedure for Phase One of Multi-Step Sealed Bidding, Amendments to the Invitation for Bids).

R3-203.10 Modification or Withdrawal of Proposals.

Proposals may be modified or withdrawn prior to the established due date in accordance with Section R3-202.8 (Pre-Opening Modification or Withdrawal of Bids). For the purposes of this Section and Section R3-203.11 (Late Proposals, Late Withdrawals, and Late Modifications), the established due date is either the time and date announced for receipt of proposals or receipt of modifications to proposals, if any; or if discussions have begun, it is the time and date by which best and final offers must be submitted, provided that only offerors who submitted proposals by the time announced for receipt of proposals may submit best and final offers.

R3-203.11 Late Proposals, Late Withdrawals, and Late Modifications.

Any proposal, withdrawal, or modification received after the established due date at the place designated for receipt of proposals is late. See Section R3-203.10 (Modification or Withdrawal of Proposals) for the definition of "established due date." They may only be considered in accordance with Section R3-202.11 (Late Bids, Late Withdrawals, and Late Modifications).

R3-203.12 Receipt and Registration of Proposals.

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

R3-203.13 Evaluation of Proposals.

R3-203.13.1 *Evaluation Factors in the Request for Proposals.* The Request for Proposals shall state all of the evaluation factors (and subfactors), including price, and their relative importance.

R3-203.13.2 *Evaluation.* The evaluation shall be based on the evaluation factors set forth in the Request for Proposals. Numerical rating systems may be used but are not required. Factors not specified in the Request for Proposals shall not be considered.

R3-203.13.3 *Classifying Proposals*. For the purpose of conducting discussions under Section R3-203.14 (Proposal Discussions with Individual Offerors), proposals shall be initially classified as:

- (a) acceptable;
- (b) potentially acceptable, that is, reasonably susceptible of being made acceptable; or
- (c) unacceptable.

Offerors whose proposals are unacceptable shall be so notified promptly.

R3-203.14 Proposal Discussions with Individual Offerors.

R3-203.14.1 *"Offerors" Defined*. For the purposes of Section 3-203(6) (Competitive Sealed Proposals, Discussion with Responsible Offerors and Revisions to Proposals) of the [State] Procurement Code and this Section, the term "offerors" includes only those businesses submitting proposals that are acceptable or potentially acceptable. The term shall not include businesses who submitted unacceptable proposals.

R3-203.14.2 *Purposes of Discussions*. Discussions are held to:

- (a) promote understanding of the [State's] requirements and the offerors' proposals; and
- (b) facilitate arriving at a contract that will be most advantageous to the [State] taking into consideration price and the other evaluation factors set forth in the Request for Proposals.

R3-203.14.3 *Conduct of Discussions*. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. The Procurement Officer should establish procedures and schedules for conducting discussions. If during discussions there is a need for any substantial clarification of or change in the Request for Proposals, the Request shall be amended to incorporate such clarification or change. Auction techniques (revealing one offeror's price to another) and disclosure of any information derived from competing proposals are prohibited. Any substantial oral clarification of a proposal shall be reduced to writing by the offeror.

COMMENTARY:

It is considered desirable for the Procurement Officer to keep a record of the date, place, and purpose of meetings and those attending.

R3-203.14.4 *Best and Final Offers*. The Procurement Officer shall establish a common date and time for the submission of best and final offers. Best and

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

R3-203.15 Mistakes in Proposals.

R3-203.15.1 *Modification or Withdrawal of Proposals.* Proposals may be modified or withdrawn as provided in Section R3-203.10 (Modification or Withdrawal of Proposals).

R3-203.15.2 *Confirmation of Proposal.* When the Procurement Officer knows or has reason to conclude before award that a mistake has been made, such officer should request the offeror to confirm the proposal. If the offeror alleges mistake, the proposal may be corrected or withdrawn during any discussions that are held or if the conditions set forth in Subsections R3-203.15.3 through R3-203.15.5 of this Section are met.

R3-203.15.3 *Mistakes Discovered After Receipt of Proposals but Before Award.* This Subsection sets forth procedures to be applied in four situations in which mistakes in proposals are discovered after receipt of proposals but before award.

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

(b) *Minor Informalities.* Minor informalities, unless otherwise corrected by an offeror as provided in this Section, shall be treated as they are under competitive sealed bidding. See Section R3-202.11.4(a) (Mistakes in Bids, Mistakes Discovered After Opening but Before Award).

(c) *Correction of Mistakes.* If discussions are not held or if the best and final offers upon which award will be made have been received, mistakes may be corrected and the intended correct offer considered only if:

(i) the mistake and the intended correct offer are clearly evident on the face of the proposal, in which event the proposal may not be withdrawn; or

(ii) the mistake is not clearly evident on the face of the proposal, but the offeror submits proof of evidentiary value which clearly and convincingly demonstrates both the existence of a mistake and the intended correct offer, and such correction would not be contrary to the fair and equal treatment of other offerors.

(d) *Withdrawal of Proposals.* If discussions are not held, or if the best and final offers upon which award will be made have been received, the offeror may be permitted to withdraw the proposal if:

(i) the mistake is clearly evident on the face of the proposal and the intended correct offer is not;

(ii) the offeror submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made but does not demonstrate the intended correct offer; or

(iii) the offeror submits proof of evidentiary value which clearly and convincingly demonstrates the intended correct offer, but to allow correction would be contrary to the fair and equal treatment of the other offerors.

R3-203.15.4 *Mistakes Discovered After Award.* Mistakes shall not be corrected after award of the contract except where the Chief Procurement Officer or the head of a Purchasing Agency finds it would be unconscionable not to allow the mistake to be corrected.

Regulation 3-204 Small Purchases

CODE PROVISION:

§3-204 Small Purchases.

Any procurement not exceeding the amount established by regulation may be made in accordance with small purchase procedures, provided, however, that procurement requirements shall not be artificially divided so as to constitute a small purchase under this Section.

COMMENTARY:

This Section recognizes that certain public purchases do not justify the administrative time and expense necessary for the conduct of competitive sealed bidding. Streamlined procedures, to be set forth in regulations, will make small purchases administratively simpler to complete and yet ensure competition. The appropriate dollar limitations for the use of these procedures are left to regulation within each enacting jurisdiction. Care must be taken to ensure that purchase requirements are not fragmented in order to fall within the authority contained in this Section, thus circumventing the source selection procedures required by either Section 3-202 (Competitive Sealed Bidding), or Section 3-203 (Competitive Sealed Proposals).

R3-204.01 Application.

In accordance with Section 3-204 (Small Purchases) of the [State] Procurement Code, this Regulation establishes [\$25,000] as the amount for

supplies or services and [\$100,000] as the amount for construction below which small purchase procedures may be used for procurements.

COMMENTARY:

These small purchase regulations present general guidance and reporting requirements to provide that competition is obtained and the small purchase system is not abused. Enacting jurisdictions should provide more detailed treatment in operational procedure manuals, with added coverage to include the use of blanket orders, petty cash or imprest funds, and necessary audit trails.

R3-204.02 Authority to Make Small Purchases.

R3-204.02.1 *Amount.* The Office of the Chief Procurement Officer or a Purchasing Agency may use this Regulation if the procurement is to be less than [\$25,000] for supplies or services and less than [\$100,000] for construction. If these methods are not used, the other methods of source selection provided in Section 3-201 (Methods of Source Selection) of the [State] Procurement Code shall apply.

R3-204.02.2 *Existing [State] Contract for Item.* Supplies, services, or construction items which may be obtained under current [State] contracts shall be procured under such agreements in accordance with the terms of such contracts. Further, supplies, services, or construction items available from [State] stocks shall not be procured under this Regulation. Operational procedures and contract terms may provide for waivers or exceptions to this Subsection.

R3-204.02.3 *Available from One Business Only.* If the supply, service, or construction item is available from only one business, the sole source procurement method set forth in Regulation 3-205 (Sole Source Procurement) of these regulations shall be used even if the procurement is a small purchase as specified in Subsection R3-204.02.1 of this Section.

R3-204.03 Competition for Small Purchases of Supplies or Services Between [\$1,000] and [\$25,000].

R3-204.03.1 *Procedure.* Insofar as it is practical for small purchases of supplies or services between [\$1,000] and [\$25,000], no less than three businesses shall be solicited to submit written, electronic, or oral quotations that are recorded and placed in the procurement file. Award shall be made to the business offering the lowest acceptable quotation.

R3-204.03.2 *Records.* The names of the businesses submitting quotations and the date and amount of each quotation shall be recorded and maintained as a public record.

R3-204.04 Competition for Small Purchases of Construction.

For procurement of construction, as defined in Section 1-301(4) of the [State] Procurement Code, between [\$1,000] and [\$100,000], the procedures and records required in Section R3-204.03 (Small Purchases of Supplies or Services Between [\$1,000] and [\$100,000]) shall apply. For procurement of construction less than [\$1,000], Section R3-204.05 (Small Purchases of [\$1,000] or Less) shall apply.

R3-204.05 Small Purchases of [\$1,000] or Less.

The Chief Procurement Officer or the head of a Purchasing Agency shall adopt operational procedures for making small purchases of less than [\$1,000]. Such operational procedures shall provide for obtaining adequate and reasonable competition and for making records to properly account for funds and to facilitate auditing of the Purchasing Agency.

Regulation 3-205 Sole Source Procurement

CODE PROVISION:

§3-205 Sole Source Procurement.

A contract may be awarded for a supply, service, or construction item without competition when, under regulations, the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer above the level of the Procurement Officer determines in writing that there is only one source for the required supply, service, or construction item.

COMMENTARY:

- (1) This method of procurement involves no competition and should be utilized only when justified and necessary to serve [State] needs. This Code contemplates that the [Policy Office] [Chief Procurement Officer] will promulgate regulations which establish standards applicable to procurement needs that may warrant award on a sole source basis.
- (2) The power to authorize a sole source award is limited to the Chief Procurement Officer and the head of an agency with purchasing authority, or their designees above the level of Procurement Officer. The purpose in specifying these officials is to reflect an intent that such determinations will be made at a high level. The permission for these officials to authorize a designee to act for them should be subject to regulations.

R3-205.01 Conditions for Use of Sole Source Procurement.

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

- (a) where the compatibility of equipment, accessories, or replacement parts is the paramount consideration;
- (b) where a sole supplier's item is needed for trial use or testing;
- (c) where a sole supplier's item is to be procured for resale;

(d) where public utility services are to be procured.

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

R3-205.02 Negotiation in Sole Source Procurement.

The Procurement Officer shall conduct negotiations, as appropriate, as to price, delivery, and terms.

R3-205.03 Record of Sole Source Procurement.

For the purpose of complying with Section 3-704 (Record of Procurement Actions Taken Under Section 3-205(Sole Source Procurement) and Section 3-206 (Emergency Procurements) of the [State] Procurement Code, a record of sole source procurements shall be maintained that lists:

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

The record for each fiscal year shall be submitted to the [legislature at the beginning of the next legislative session].

Regulation 3-206 Emergency Procurements

CODE PROVISION:

§3-206 Emergency Procurements.

Notwithstanding any other provision of this Code, the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer may make or authorize others to make emergency procurements when there exists a threat to public health, welfare, or safety under emergency conditions as defined in regulations; provided that such emergency procurements shall be made with such competition as is practicable under the circumstances. A written determination of the

basis for the emergency and for the selection of the particular contractor shall be included in the contract file.

COMMENTARY:

(1) This Section authorizes the procurement of supplies, services, or construction where the urgency of the need does not permit the delay involved in utilizing more formal competitive methods. This Code contemplates that the [Policy Office] [Chief Procurement Officer] will promulgate regulations establishing standards for making emergency procurements and controlling delegations of authority by the Chief Procurement Officer or the head of a Purchasing Agency. Such regulations may limit the authority of such officials to delegate the authority to make procurements above designated dollar amounts.

(2) While in a particular emergency an award may be made without any competition, the intent of this Code is to require as much competition as practicable in a given situation. When the amount of the emergency procurement is within that adopted for Section 3-204 (Small Purchases), the competitive procedures prescribed under that Section should be used when feasible.

(3) Use of this Section may be justified because all bids submitted under the competitive sealed bid method are unreasonable, and there is no time to re-solicit bids without endangering the public health, welfare, or safety. As with other emergency conditions, regulations will further define these circumstances, and any procurements conducted pursuant to this authority must be done so as to treat all bidders fairly and to promote such competition as is practicable under the circumstances.

R3-206.01 Definition of Emergency Conditions.

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

- (a) the functioning of [State] government;
- (b) the preservation or protection of property; or
- (c) the health or safety of any person.

R3-206.02 Scope of Emergency Procurements.

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

R3-206.03 Authority to Make Emergency Procurements.

Any [State] agency may make emergency procurements of up to [\$25,000] when an emergency condition arises and the need cannot be met through normal procurement methods, provided that whenever practical, approval by the Procurement Officer of the [State] agency or the Chief Procurement Officer shall be obtained prior to the procurement. Prior to all such emergency procurements of [\$25,000] or more, the Chief Procurement Officer, the head of a [State] agency, or either officer's designee shall approve the procurement.

CODE PROVISION:

§3-207 Special Procurements.

Notwithstanding any other provision of this Code, the Chief Procurement Officer or the head of a Purchasing Agency may with prior public notice initiate a procurement above the small purchase amount specified in Section 3-204 where the officer determines that an unusual or unique situation exists that makes the application of all requirements of competitive sealed bidding or competitive sealed proposals contrary to the public interest. Any special procurement under this Section shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the procurement and for the selection of the particular contractor shall be included by the Chief Procurement Officer or the head of a Purchasing Agency in the contract file, and a report shall be made publicly available at least annually describing all such determinations made subsequent to the prior report.

COMMENTARY:

(1) This new Section 2-307 authorizes special procurements in very limited circumstances, where deviations from the strict requirements of the Code are necessary to protect the interest of the [State]. It is based on the versions of the Code adopted by the States of Alaska and Arizona. See Alaska Statutes Section 36.30.308 (authorizing the use of an innovative procurement process under certain conditions to purchase new or unique state requirements, new technologies, or to achieve best value) and Arizona Revised Statutes Section 41-2537 (authorizing, under emergency procurement authority, a waiver for competitive sealed bidding or competitive sealed proposals when doing so is in the State's best interests). To ensure proper safeguards, the 2000 Code contemplates that only the Chief Procurement Officer, or the head of a Purchasing Agency will authorize each special procurement process, and document both the reasons therefor and the selection process followed. The second sentence of the Section confirms that those requirements of the competitive processes that can practicably be applied to such procurement will be applied.

(2) The 2000 Code revisions delete the original Section 3-207, entitled "Competitive Selection Procedures for Services Specified in Section 2-302." Generally, the original Section specified that certain services – those exempted from direct or delegated procurement authority of the Chief Procurement Officer under Section 2-302 – could be purchased through a procurement method in which price was not an evaluation factor. Revisions to Section 2-302 have reduced the need for the original Section 3-207. In addition, the experience of purchasing professionals has been that services may be effectively procured through the Code's other source selection methods. Where enacting jurisdictions have adapted the original Section 3-207 to cover all "professional services," the term has been difficult to define.

(3) The purchasing method used to buy any service should be determined based on such factors as the reasons the services are needed and the dollar amount involved. By eliminating the original Section 3-207, the 2000 revision ensures that the Code does not dictate only one method for purchasing services, and that a full array of factors, not just the type of service alone, is the basis for the source selection method used.

**Part C – Cancellation of Invitations for Bids
or Requests for Proposals**

Regulation 3-301 Cancellation of Solicitations

CODE PROVISION:

§3-301 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 in the best interests of the [State] in accordance with regulations. The reasons therefor shall be made part of the contract file.

COMMENTARY:

It is contemplated that the authority granted by this Section should only be exercised for cogent and compelling reasons as set forth in the regulations.

R3-301.01 Cancellation of Solicitation-Notice.

Each solicitation issued by the [State] shall state that the solicitation may be cancelled as provided in this Regulation.

R3-301.02 Cancellation of Solicitation; Rejection of All Bids or Proposals.

R3-301.02.1 Prior to Opening.

(a) As used in this Section, "opening" means the date set for opening of bids, receipt of unpriced technical offers in multi-step sealed bidding, or receipt of proposals in competitive sealed proposals.

(b) Prior to opening, a solicitation may be cancelled in whole or in part when the Chief Procurement Officer or the head of a Purchasing Agency determines in writing that such action is in the [State's] best interest.

(c) When a solicitation is cancelled prior to opening, notice of cancellation shall be sent to all businesses solicited.

(d) The notice of cancellation shall:

(i) identify the solicitation;

(ii) briefly explain the reason for cancellation; and

(iii) where appropriate, explain that an opportunity will be given to compete on any resolicitation or any future procurements of similar supplies, services, or construction.

R3-301.02.2 After Opening.

(a) After opening but prior to award, all bids or proposals may be rejected in whole or in part when the Chief Procurement Officer or the head of a Purchasing Agency determines in writing that such action is in the [State's] best interest.

(b) A notice of rejection should be sent to all businesses that submitted bids or proposals, and it shall conform to Subsection R3-301.04.1(d) of this Section.

R3-301.02.3 *Documentation*. The reasons for cancellation or rejection shall be made a part of the procurement file and shall be available for public inspection.

R3-301.03 Rejection of Individual Bids or Proposals.

R3-301.03.1 *General*. This Section applies to rejections of individual bids or proposals in whole or in part.

R3-301.03.2 *Notice in Solicitation*. Each solicitation issued by the [State] shall provide that any bid or proposal may be rejected in whole or in part when in the best interest of the [State] as provided in this Regulation.

R3-301.03.3 *Reasons for Rejection*.

(a) *Bids*. As used in this Subsection, "bid" means any bid submitted in competitive sealed bidding or in the second phase of multi-step sealed bidding and includes submissions under Regulation 3-204 (Small Purchases) if no changes in offers are allowed after submission. Reasons for rejecting a bid include but are not limited to:

(i) the business that submitted the bid is nonresponsible as determined under Section R3-401.05 (Written Determination of Nonresponsibility Required) of this Chapter;

(ii) the bid is not responsive, that is, it does not conform in all material respects to the Invitation for Bids; see Section R3-202.12.2 (Bid Evaluation and Award, Responsibility and Responsiveness) of this Chapter; or

(iii) the supply, service, or construction item offered in the bid is unacceptable by reason of its failure to meet the requirements of the specifications or permissible alternates or other acceptability criteria set forth in the Invitation for Bids. (See Section R3-202.12.3 (Bid Evaluation and Award, Product Acceptability) of this Chapter.)

(b) *Proposals*. As used in this Subsection, "proposal" means any offer submitted in response to any solicitation, including an offer under Regulation 3-204 (Small Purchases), except a bid as defined in Subsection R3-301.03.3(a) of this Section. Unless the solicitation states otherwise, proposals need not be unconditionally accepted without alteration or correction, and the [State's] stated requirements may be revised or clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include but are not limited to:

- (i) the business that submitted the proposal is nonresponsible as determined under Section 3-401 (Responsibility of Bidders and Offerors) of the [State] Procurement Code;
- (ii) the proposal ultimately (that is, after any opportunity has passed for altering or clarifying the proposal) fails to meet the announced -requirements of the [State] in some material respect; or
- (iii) the proposed price is clearly unreasonable.

R3-301.03.4 *Notice of Rejection.* Upon request, unsuccessful bidders or offerors shall be advised of the reasons therefor.

R3-301.04 "All or None" Bids or Proposals.

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

R3-301.05 Disposition of Bids or Proposals.

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

Part D – Qualifications and Duties

Regulation 3-401 Qualification and Duties

CODE PROVISION:

§3-401 Responsibility of Bidders and Offerors.

- (1) *Determination of Nonresponsibility.* A written determination of nonresponsibility of a bidder or offeror shall be made in accordance with regulations. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such bidder or offeror.
- (2) *Right of Nondisclosure.* Confidential information furnished by a bidder or offeror pursuant to this Section shall not be disclosed outside of the Office of the Chief Procurement Officer or the Purchasing Agency without prior written consent by the bidder or offeror.

COMMENTARY:

(1) To obtain true economy, the [State] must minimize the possibility of a subsequent default by the contractor, late deliveries, or other unsatisfactory performance which would result in additional administrative costs. Subsection (1) recognizes that it is important that the bidder or offeror will be a responsible contractor – that the contractor has the financial ability, resources, skills, capability, and business integrity necessary to perform the contract.

(2) 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.

R3-401.01 Application.

A determination of responsibility or nonresponsibility shall be governed by this Regulation.

R3-401.02 Standards of Responsibility.

R3-401.01.1 *Standards.* Factors to be considered in determining whether the standard of responsibility has been met include whether a prospective contractor has:

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

R3-401.02.2 *Information Pertaining to Responsibility.* The prospective contractor shall supply information requested by the Procurement Officer concerning the responsibility of such contractor. If such contractor fails to supply the requested information, the Procurement Officer shall base the determination of responsibility upon any available information or may find the prospective contractor nonresponsible if such failure is unreasonable.

R3-401.03 Ability to Meet Standards.

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

- (a) evidence that such contractor possesses such necessary items;
- (b) acceptable plans to subcontract for such necessary items; or

(c) a documented commitment from, or explicit arrangement with, a satisfactory source to

provide the necessary items.

R3-401.04 Duty Concerning Responsibility.

Before awarding a contract, the Procurement Officer must be satisfied that the prospective contractor is responsible.

R3-401.05 Written Determination of Nonresponsibility Required.

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 Chief Procurement Officer or the head of a Purchasing Agency. A copy of the determination shall be sent promptly to the nonresponsible bidder or offeror. The final determination shall be made part of the procurement file.

Editorial Note: A few states have required some sort of hearing prior to finding a prospective contractor nonresponsible. See, e.g., *Housing Authority of the City of Opelousas, Louisiana v. Pittman Construction Company*, 264 F.2d 695 (5th Cir. 1959); *Seacoast Construction Corporation v. Lockport Urban Renewal Agency*, 72 Misc.2d 372, 339 N.Y.S.2d 188 (1972). These regulations do not require a hearing because:

- (a) such a hearing requirement prior to every finding of nonresponsibility would unduly constrain the [State] in making a business decision; and
- (b) the protest procedures contained in Section 9-101 (Authority to Resolve Protested Solicitations and Awards) of the Model Procurement Code provide sufficient protection since, once a protest is filed with the chief Procurement Officer or the head of a Purchasing Agency, the courts, or the Procurement Appeals Board, the procurement is stayed unless a written determination of urgency is made.

Regulation 3-402 Prequalification of Suppliers

CODE PROVISION:

§3-402 Prequalification of Suppliers.

Prospective suppliers may be prequalified for particular types of supplies, services, and construction. The method of submitting prequalification information and the information required in order to be prequalified shall be determined by the [Policy Office] [Chief Procurement Officer].

COMMENTARY:

- (1) Prequalification is not a conclusive determination of responsibility, and a prequalified bidder or offeror may be rejected as nonresponsible on the basis of subsequently discovered information. Similarly, a prior failure to prequalify will not bar a subsequent determination that a bidder or offeror is responsible with respect to any given procurement.
- (2) Prequalification is only of limited utility if a procurement cannot be limited to prequalified suppliers. Regulations should establish that unless an emergency exists or the contract is for a small purchase, a competition

may not be limited to pre-qualified offerors unless public notice of the procurement was given in sufficient time for any interested firms to prepare necessary submissions and become prequalified.

R3-402.01 Prequalification.

R3-402.01.1 *General.* Prospective contractors may be prequalified for bidder lists, but distribution of the solicitation shall not be limited to prequalified contractors nor may a prospective contractor be denied award of a contract simply because such contractor was not prequalified. The fact that a prospective contractor has been prequalified does not necessarily represent a finding of responsibility.

R3-402.01.2 *Qualified Products Lists.* This Section is not applicable to qualified products lists which are treated in Section R4-202.02.2 (Procedures for the Development of Specifications, Special Additional Procedures) of Chapter 4 (Specifications) of these regulations.

Regulation 3-403 Substantiation of Offered Prices

CODE PROVISION:

§3-403 Substantiation of Offered Prices.

The Procurement Officer may request factual information reasonably available to the bidder or offeror to substantiate that the price or cost offered, or some portion of it, is reasonable, if:

- (1) the price is not:
 - (a) based on adequate price competition;
 - (b) based on established catalogue or market prices; or
 - (c) set by law or regulation; and
- (2) the price or cost exceeds an amount established in the regulations.

COMMENTARY:

The 2000 revisions have changed the 1979 Code's requirement to submit certified cost or pricing data (which was modeled on the Truth in Negotiations Act, 10 U.S.C. 2306a) to reflect a less burdensome standard appropriate to the commercial supplies and services that state and local governments buy. The threshold for submission of such data is left to regulations but should be substantial. The data must also be limited to that normally kept by the contractor and not require extensive sweeps to gather data not reasonably available.

R3-403.01 Meaning of Terms Not Defined in the [State] Procurement Code

R3-403.01.1 *Adequate Price Competition.* Price competition exists if competitive sealed proposals are solicited and at least two responsible

offerors independently compete for a contract to be awarded to the responsible offeror submitting the lowest evaluated price by submitting priced offers (or best and final offers) meeting the requirements of the solicitation. If the foregoing conditions are met, price competition shall be presumed to be "adequate" unless the Procurement Officer determines in writing that such competition is not adequate.

R3-403.01.2 *Established Market Price* means a current price, established in the usual and ordinary course of trade between buyers and sellers, which can be substantiated from sources which are independent of the manufacturer or supplier and may be an indication of the reasonableness of price.

R3-403.03.4 *Prices Set by Law or Regulation*. The price of a supply or service is set by law or regulation if some governmental body establishes the price that the offeror or contractor may charge the [State] and other customers.

R3-403.02 Submission of Substantiating Data.

R3-403.02.1 *Time and Manner*. When factual information is requested by the Procurement Officer to substantiate that the price or cost offered, or some portion of such price or cost, is reasonable, the offeror shall submit such data to the Procurement Officer prior to beginning price negotiations at any reasonable time and in any reasonable manner prescribed by the Procurement Officer. Such information shall either be actually submitted or specifically identified in writing.

R3-403.02.4 *Refusal to Submit Data*. A refusal by the offeror to supply the requested information may be grounds to disqualify the offeror or to defer award pending further review and analysis. In the event the Procurement Officer decides to enter into the contract without first receiving the requested information, the Procurement Officer shall make a written determination setting forth the reasons for the award, which shall be made a part of the procurement file.

Part E – Types of Contracts

Regulation 3-501 Types of Contracts

CODE PROVISIONS:

§3-501 Types of Contracts.

Subject to the limitations of this Section, any type of contract which will promote the best interests of the [State] 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 [State] than any other type or that it is impracticable to obtain the supplies, services, or construction required except under such a contract.

COMMENTARY:

(1) The intent of this Section is to authorize any type of contract which best suits the interest of the [State] except that a cost-plus-a-percentage-of-cost contract is prohibited. Examples of contract types permitted are firm fixed-price, fixed-price with economic price adjustments, fixed-price incentive, cost-reimbursement and time and materials contracts. Other types of cost-reimbursement contracts may be used when uncertainties involved in the work to be performed are of such magnitude that the cost of performance is too difficult to estimate with reasonable certainty, and use of a fixed-price contract could seriously affect a contractor's financial stability or result in payments by the [State] for contingencies that never occur. Use of cost-type contracts are also authorized when it is impracticable to contract on any other basis.

(2) Article 7 (Cost Principles) requires that only those costs recognized as allowable under the contract will be reimbursed.

(3) It is contemplated that the regulations will contain guidelines or requirements for the review and/or approval of subcontracts awarded by cost-reimbursement contractors as deemed appropriate to protect the financial interests of the [State].

R3-501.01 Prohibition of Cost-Plus-a-Percentage-of-Cost Contracting.

Except for a cost-plus-a-percentage-of-cost contract R3-501 which is prohibited by Section 3-501 (Types of Contracts) of the [State] Procurement Code, the use of any type of contract is permissible. Permitted contract types include, but are not limited to, the following:

Fixed price contracts (with contract specified adjustments); Firm fixed-price contracts; Fixed-price contracts with price adjustment; Cost-reimbursement contracts; Allowable Cost Contracts; Cost-Plus-Fixed Fee Contracts; Cost Incentive Contracts; Fixed-Price Cost Incentive Contracts; Cost-Reimbursement Contracts with Cost Incentive Fee; Performance Incentive contracts; Time and Materials Contracts; Labor Hour Contracts; Definite Quantity contracts; Indefinite Quantity contracts; Requirements Contracts; Leases; Lease with Purchase Option.

COMMENTARY:

A cost-plus-a-percentage-of-cost contract is one in which, prior to completion of the work, the parties agree that the fee will be a predetermined percentage of the total cost of the work. Thereby, the more the contractor spends, the greater its fee, and the contractor's incentive may therefore be to incur cost at the expense of the [State] and not to economize.

R3-501.02 Option Provisions.

R3-501.02.1 Contract Provision. When a contract is to contain an option for renewal, extension, or purchase, notice of such provision shall be included in the solicitation. Exercise of the option is always at the [State's] discretion only, and not subject to agreement or acceptance by the contractor.

R3-501.02.2 Exercise of Option. Before exercising any option for renewal, extension, or purchase, the Procurement Officer should attempt to ascertain whether a competitive procurement is practical, in terms of pertinent

competitive and cost factors, and would be more advantageous to the [State] than renewal or extension of the existing contract.

R3-501.02.3 *Lease with Purchase Option.* A purchase option in a lease may be exercised only if the lease containing the purchase option was awarded under competitive sealed bidding or competitive sealed proposals, or the leased supply or facility is the only supply or facility that can meet the [State's] requirements, as determined in writing by an officer above the level of the Procurement Officer. Before exercising such an option the Procurement Officer shall:

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

COMMENTARY:

Careful evaluation of the economics of leasing versus buying is required prior to a decision to award a lease or lease-purchase contract. Such evaluation examines the comparative costs of leasing and the costs of outright purchase and maintenance, projected as total costs for the estimated use of the item, and the consideration of other pertinent factors such as continuing need and functional obsolescence or inefficiencies which could result from technological advancements.

Similar analysis and care is called for prior to exercising a lease option to purchase, particularly with respect to protecting the principles of open competition and preventing the acquisition of outmoded equipment.

The question of leasing versus buying involves policy matters important to the budget function as well as to procurement, and the budget and procurement entities need to collaborate in establishing criteria or guidelines applicable to lease and lease-purchase.

R3-501.03 Policy Regarding Selection of Contract Types.

R3-501.03.1 General. The selection of an appropriate contract type depends on factors such as the nature of the supplies or services to be procured, the uncertainties which may be involved in contract performance, and the extent to which the [State] or the contractor is to assume the risk of the cost of performance of the contract. Contract types differ in the degree of responsibility assumed by the contractor.

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

- (a) the type and complexity of the supply or service being procured:

- (b) the difficulty of estimating performance costs such as the inability of the [State] to develop definitive specifications, to identify the risks to contractor inherent in the nature of the work to be performed, or otherwise to establish clearly the requirements of the contract;
- (c) the administrative costs to both parties;
- (d) the degree to which the [State] must provide technical coordination during the performance of the contract;
- (e) the effect of the choice of the type of contract on the amount of competition to be expected;
- (f) the stability of material or commodity market prices or wage levels;
- (g) the urgency of the requirement; and
- (h) the length of contract performance.

COMMENTARY:

It is self-defeating for the [State] to select a type of contract that would place an unreasonable economic risk on the contractor, since such action may tend to jeopardize satisfactory performance of the contract. See R5-203.01 for the application of project delivery methods to infrastructure facilities and services.

CODE PROVISION:

§3-502 Approval of Accounting System.

Regulations shall be issued requiring that contractors submit appropriate documentation prior to the award of contracts in which the [State] agrees to reimburse costs, confirming 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 accounting principles.

COMMENTARY:

This Section does not require any particular accounting method and leaves to the [State's] discretion the determination of the adequacy of any given accounting system. The 2000 revisions clarified that only when costs are to be reimbursed is there any need to review the contractor's cost accounting and allocation system. This review should be consistent with the type of costs to be reimbursed. For instance, if only direct material costs are to be reimbursed, there is much less chance that system inadequacies will lead to problems, than if reimbursement of actual overhead and general and administrative expenses are required by the contract.

Regulation 3-503 Multi-Year Contracts

CODE PROVISION:

§3-503 Multi-Year Contracts.

- (1) *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 [State] 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.
- (2) *Use.* A multi-year contract is authorized where:
 - (a) estimated requirements cover the period of the contract and are reasonably firm and continuing; and
 - (b) such a contract will serve the best interests of the [State] by encouraging effective competition or otherwise promoting economies in [State] procurement.
- (3) *Cancellation Due to Unavailability of Funds in Succeeding Fiscal Periods.* When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract 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.

COMMENTARY:

- (1) The 2000 revisions to the Code are intended to clarify that multi-year contracts are a common method of procurement, and that contract durations need not be tied exclusively to fiscal years. The phrase "multi-term" has been changed to "multi-year," which a number of commentators have suggested was confusing. Some jurisdictions may have legislative restrictions upon the use of funds in a calendar year other than that in which the funds are appropriated. This Section permits multi-year procurements in order to enable a [State] to procure larger quantities and obtain the benefits of volume discounts. A multi-year contract should be used only for supplies or services needed on a continuing basis with annual quantity requirements that can be reasonably estimated in advance. Multi-year procurements should attract more competitors to submit bids or offers for the larger contract awards and thereby provide the jurisdiction with the benefits of increased competition.
- (2) Subsection (3) is applicable when funds are not appropriated in a subsequent year of a multi-year contract which is in progress. Where funds are not appropriated or otherwise made available for the next funding period of the contract, there is no alternative but to cancel the contract and to reimburse the contractor for those non-recurring costs that have not been amortized through the selling price of goods already delivered under the contract.
- (3) The phrase "non-recurring costs" in Subsection (3) should be broadly construed.

R3-503.01 Multi-Term Contract Procedure.

R3-503.01.1 *Solicitation.* The solicitation shall state:

- (a) the amount of supplies or services required for the proposed contract period;
- (b) that a unit price shall be given for each supply or service, and that such unit prices shall be the same throughout the contract (except to the extent price adjustments may be provided in the solicitation and resulting contract);
- (c) that the multi-term contract will be cancelled only if funds are not appropriated or otherwise made available to support continuation of performance in any fiscal period succeeding the first; however, this does not affect either the [State's] rights or the contractor's rights under any termination clause in the contract;
- (d) that the Procurement Officer must notify the contractor on a timely basis that the funds are, or are not, available for the continuation of the contract for each succeeding fiscal period;
- (e) whether bidders or offerors may submit prices for:
 - (i) the first fiscal period only;
 - (ii) the entire time of performance only; or
 - (iii) both the first fiscal period and the entire time of performance;
- (f) that a multi-term contract may be awarded and how award will be determined including, if prices for the first fiscal period and entire time of performance are submitted, how such prices will be compared; and
- (g) that, in the event of cancellation as provided in Subsection R3-503.03.1(c) of this Section, the contractor will be reimbursed the unamortized, reasonably incurred, nonrecurring costs.

R3-503.01.2 *Award.* Award shall be made as stated in the solicitation and permitted under the source selection method utilized. Care should be taken when evaluating multi-term prices against prices for the first fiscal period that award on the basis of prices for the first period does not permit the successful bidder or offeror to "buy in", that is, give such bidder or offeror an undue competitive advantage in subsequent procurements.

R3-503.01.3 *Cancellation.*

- (a) "Cancellation," as used in multi-term contracting, means the cancellation of the total requirements for the remaining portion of the contract because funds were not appropriated or otherwise made available. The contract for the

first fiscal period shall not be cancelled. Cancellation results when the Procurement Officer:

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

R3-504.01 Incremental Award.

R3-504.01.1 *General.* An incremental award is an award of portions of a definite quantity requirement to more than one contractor. Each portion is for a definite quantity and the sum of the portions is the total definite quantity required. An incremental award may be used only when awards to more than one bidder or offeror for different amounts of the same item are necessary to obtain the total quantity or the required delivery.

R3-504.01.2 *Intent to Use.* If an incremental award is anticipated prior to issuing a solicitation, the [State] shall reserve the right to make such an award and the criteria for award shall be stated in the solicitation.

R3-504.01.3 *Determination Required.* The Procurement Officer shall make a written determination setting forth the reasons for the incremental award, which shall be made a part of the procurement file.

R3-504.02 Multiple Award.

R3-504.02.1 *General.* A multiple award is an award of an indefinite quantity contract for one or more similar supplies or services to more than one bidder or offeror when the [State] is obligated to order all of its actual requirements for the specified supplies or services from those contractors. The obligation to order the [State's] actual requirements is limited by the provisions of Uniform Commercial Code Section 2-306(1).

Editorial Note: Section 2-306(1) of the U.C.C. is quoted in the Editorial Note to Section R3-501.09.3 (Definite Quantity and Indefinite Quantity Contracts, Requirements Contracts).

R3-504.02.2 *Limitations on Use.* A multiple award may be made when award to two or more bidders or offerors for similar products is necessary for adequate delivery, service, or product compatibility. Any multiple award shall

be made in accordance with the provisions of Regulation 3-202 (Competitive Sealed Bidding), Regulation 3-203 (Competitive Sealed Proposals), Regulation 3-204 (Small Purchases), and Regulation 3-206 (Emergency Procurements), as applicable. Multiple awards shall not be made when a single award will meet the [State's] needs without sacrifice of economy or service.

R3-504.02.3 *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:

(a) the [State] shall reserve the right to take bids separately if a particular quantity requirement arises which exceeds its norm or an amount specified in the contract;

(b) the [State] shall reserve the right to take bids separately if the Chief Procurement Officer or the head of a Purchasing Agency approves a finding that the supply or service available under the contract will not meet a nonrecurring special need of the [State]; and

(c) the contract shall allow the [State] to procure supplies produced, or services performed, incidental to the [State's] own programs, such as industries of correctional institutions, when such supplies or services satisfy the need.

R3-504.02.4 *Intent to Use.* If a multiple award is anticipated prior to issuing a solicitation, the [State] shall reserve the right to make such an award and the criteria for award shall be stated in the solicitation.

R3-504.02.5 *Determination Required.* The Procurement Officer shall make a written determination setting forth the reasons for a multiple award, which shall be made a part of the procurement file.

COMMENTARY:

Within these regulations, purchase arrangements which establish more than one source of supply are either multiple or progressive award contracts. It is recognized that such contracts have been variously referred to as "open-end contracts," "term contracts," "blanket contract," "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 if appropriate as determined in accordance with Regulation 3-203, Regulation 3-204, or Regulation 3-206, respectively.

Part F – Inspection of Plant and Audit of Records

CODE PROVISION:

§3-601 Right to Inspect Plant.

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

Regulation 3-602-Audits

CODE PROVISION:

§3-602 Right to Audit Records

- (1) *Audit of Cost or Pricing Data.* The [State] may, at reasonable times and places, audit the books and records of any person who has submitted data in substantiation of offered prices pursuant to Section 3-403 (Substantiation of Offered Prices) to the extent that such books and records relate to that data. Any person who receives a contract, change order, or contract modification for which such data is required, shall maintain such books and records that relate to such cost or pricing data for [three] years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing.
- (2) *Contract Audit.* The [State] shall be entitled to audit the books and records of a contractor or any subcontractor under any negotiated contract or subcontract other than a firm fixed-price contract to the extent that such books and records relate to the performance of such contract or subcontract. Such books and records shall be maintained by the contractor for a period of [three] years from the date of final payment under the prime contract and by the subcontractor for a period of [three] years from the date of final payment under the subcontract, unless a shorter period is otherwise authorized in writing.

Regulation 3-701-Finality of Determinations

Part G – Determinations and Reports

CODE PROVISION:

§3-701 Finality of Determinations.

The determinations required by Section 3-202(6) (Competitive Sealed Bidding, Correction or Withdrawal of Bids; Cancellation of Awards), Section 3-203(1) (Competitive Sealed Proposals, Conditions for Use), Section 3-203(7) (Competitive Sealed Proposals, Award), Section 3-205 (Sole Source Procurement), Section 3-206 (Emergency Procurements), Section 3-207 (Special Procurements), Section 3-401(1) (Responsibility of Bidders and Offerors, Determination of Nonresponsibility), Section 3-403(3) (Substantiation of Offered Prices), Section 3-501 (Types of

Contracts), Section 3-502 (Approval of Accounting System), Section 3-503(2) (Multi-Year Contracts, Use) and Section 5-203 (Choice of Project Delivery Methods) are final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.

R3-701 [RESERVED]

CODE PROVISION:

§3-702 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 Attorney General.

Regulation 3-703-Retention of Procurement Records

CODE PROVISION:

§3-703 Retention of Procurement Records.

All procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the [Attorney General]. All retained documents shall be made available to the [Attorney General] or a designee upon request and proper receipt therefor.

R3-703 [RESERVED]

*Regulation 3-704-Record of Sole Source
Procurements and Emergency Procurements*

CODE PROVISION:

§3-704 Record of Procurement Actions Taken Under Section 3-205 (Sole Source Procurement), Section 3-206 (Emergency Procurements), and Section 3-207 (Special Procurements).

- (1) *Contents of Record.* The Chief Procurement Officer shall maintain a record listing all contracts made under Section 3-205 (Sole Source Procurement), Section 3-206 (Emergency Procurements), or 3-207 (Special Procurements) for a minimum of [five] years. The record shall contain:
 - (a) each contractor's name;
 - (b) the amount and type of each contract; and
 - (c) a listing of the supplies, services, or construction procured under each contract.

- (2) *Submission to [Legislature].* A copy of the record required by Subsection (1) shall be submitted to the [legislature] on an annual basis. The record shall be available for public inspection.

R3-704 [RESERVED]

See Section R3-205.04 (Record of Sole Source Procurement) and Section R3-206.06.2 (Determination and Record of Emergency Procurement, Record).

ARTICLE 4 – SPECIFICATIONS

Part A – Definitions

Regulation 4-101 Definitions

CODE PROVISION:

§4-101 Definitions of Terms Used in this Article.

- (1) *Specification* means any description of the physical or functional characteristics, or of the nature of a supply, service, or construction item. It may include a description of any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery.

DEFINITIONAL CROSS-REFERENCES:

“Chief Procurement Officer”	Section	1-301(3)
“Construction”	Section	1-301(4)
“May”	Section	1-301(14)
“Regulation”	Section	1-301(20)
“Services”	Section	1-301(21)
“Shall”	Section	1-301(22)
“Supplies”	Section	1-301(24)
“Using Agency”	Section	1-301(22)
“Written” or “In Writing”	Section	1-301(26)

R4-101.01 Definitions.

R4-101.01.1 *Brand Name Specification* means a specification limited to one or more items by manufacturers' names or catalogue numbers.

R4-101.01.2 *Brand Name or Equal Specification* means a specification which uses one or more manufacturer's names or catalogue numbers to describe the standard of quality, performance, and other characteristics needed to meet [State] requirements, and which provides for the submission of equivalent products.

R4-101.01.3 *Qualified Products List* means an approved list of supplies, services, or construction items described by model or catalogue numbers, which, prior to competitive solicitation, the [State] has determined will meet the applicable specification requirements.

R4-101.01.4 *Specification* means any description of the physical, functional, or performance characteristics, or of the nature of a supply, service, or construction item. A specification includes, as appropriate, requirements for inspecting, testing, or preparing a supply, service, or construction item for

delivery. Unless the context requires otherwise, the terms "specification" and "purchase description" are used interchangeably throughout the [State] Procurement Regulations.

R4-101.01.5 *Specification for a Common or General Use Item* means a specification which has been developed and approved for repeated use in procurements.

Regulation 4-201-General Provisions

Part B – Specifications

CODE PROVISION:

§4-201 Regulations for Specification Preparation.

Regulations shall set standards for the preparation, maintenance, and content of specifications for supplies, services, and construction required by the [State].

R4-201.01 General Purpose and Policies.

R4-201.01.1 *Use of Functional or Performance Descriptions.* Specifications shall, to the extent practicable, emphasize functional or performance criteria while limiting design or other detailed physical descriptions to those necessary to meet the needs of the [State]. To facilitate the use of such criteria, Using Agencies shall endeavor to include as a part of their purchase requisitions the principal functional or performance needs to be met.

R4-201.01.2 *Preference for Commercially Available Products.* It is the general policy of this [State] to procure standard commercial products whenever practicable. In developing specifications, accepted commercial standards shall be used and unique requirements shall be avoided, to the extent practicable.

Regulation 4-202- Duties of Chief Procurement Officer

CODE PROVISION:

§4-202 Duties of the Chief Procurement Officer.

The [Chief Procurement Officer] shall monitor the use of specifications for supplies, services, and construction required by the [State] [Purchasing Agency].

COMMENTARY:

Regulations will set standards as to how specifications and work statements are drafted. The Chief Procurement Officer is charged with ensuring those who prepare the specifications meet those standards.

R4-202.01 Authority to Prepare Specifications.

R4-202.01.1 *Statutory Authority of the [State] [Purchasing Agency] to Prepare Specifications.* The [State] [Purchasing Agency] is authorized to prepare specifications for any type of supplies, services, or construction, the use of which shall be monitored by the Chief Procurement Officer.

R4-202.01.2 Authority to Contract for Preparation of Specifications (Including Design Requirements).

(a) When a written determination is made by the head of a Purchasing Agency authorized to prepare such specifications that there will be no substantial conflict of interest involved and it is otherwise in the best interest of the [State], a contract to prepare specifications for [State] use in procurement of supplies or services may be entered into provided such officer retains the authority to finally approve the specifications.

(b) Whenever it is determined under Section 5-203 (Choice of Project Delivery Methods) of the [State] Procurement Code that the selected method of delivery for a project requires specifications, including, as appropriate, design requirements (as defined in Section 5-201 of the [State] Procurement Code), to be prepared by other than [State] personnel, a contract may be entered into for such preparation provided the head of the Purchasing Agency retains the authority to finally approve such specifications (and design requirements).

R4-202.01.3 Small Purchase and Emergency Authority. If a specification for general or common use or a qualified products list exists for an item to be procured under Regulation 3-204 (Small Purchases), it shall be used except as otherwise provided by the head of a Purchasing Agency. If no such specification exists, Purchasing and Using Agencies shall prepare specifications for use in such purchases. In an emergency under Regulation 3-206 (Emergency Procurements), any necessary specifications may be utilized by the Purchasing or Using Agency without regard to the provisions of this Chapter.

CODE PROVISION:

§4-203 [Reserved]

COMMENTARY:

The 1979 version of the Code contained a provision under this Section authorizing a Purchasing Agency to prepare its own specifications for certain items that were exempted from the authority of the Chief Procurement Officer. Section 4-202 (Duties of the Chief Procurement Officer) has been revised to eliminate the specific requirement that he or she prepare all specifications. With this change, the provisions of Section 4-203 are no longer necessary.

CODE PROVISION:

§4-204 Relationship With Using Agencies.

The Chief Procurement Officer shall obtain expert advice and assistance from personnel of Using Agencies in the development of specifications and may delegate in writing to a Using Agency the authority to prepare and utilize its own specifications.

CODE PROVISION:

§4-205 Maximum Practicable Competition.

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

CODE PROVISION:

§4-206 Specifications Prepared by Other Than [State] Personnel.

The requirements of this Article regarding the purposes and nonrestrictiveness of specifications shall apply to all specifications prepared other than by [State] personnel, including, but not limited to, those prepared by architects, engineers, and designers.

ARTICLE 5 – PROCUREMENT OF INFRASTRUCTURE FACILITIES AND SERVICES

Part A – Definitions

Regulation 5-101-Definitions and Applications to Infrastructure

CODE PROVISION:

§5-101 Definitions.

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

COMMENTARY:

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

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

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

(3) The new definition promotes closer integration of project feasibility and evaluation services with the evaluation of design and project alternatives. Current nationwide efforts to improve overall Infrastructure Asset Management

techniques and strategies reflects a growing need for public owners to assess the effects of alternative designs, technologies, projects, schedules, and finance methods on initial and life-cycle quality, cost, and time of delivery of entire collections of infrastructure facilities. Public owners need to structure long-term strategies for the design, construction, operation, and maintenance of collections of infrastructure facilities. The American Consulting Engineers' Council's present focus on value based delivery systems, for instance, is one example of how an integrated approach to the procurement of design and related services encourages the design professional's role as a trusted advisor in the simultaneous use of a variety of project delivery and finance methods.

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

COMMENTARY:

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

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

COMMENTARY:

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

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

COMMENTARY:

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

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

- (5) *Design-build-operate-maintain* means a project delivery method in which the Purchasing Agency enters into a single contract for design, construction, maintenance, and operation of an infrastructure facility over a contractually defined period. All or a portion of the funds required to pay for the services provided by the contractor during the contract period are either appropriated by the [State] prior to award of the contract or secured by the [State] through fare, toll, or user charges.

COMMENTARY:

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

- (6) *Design requirements* means the written description of the infrastructure facility or service to be procured under this Article, including:
- (a) required features, functions, characteristics, qualities, and properties that are required by the [State];
 - (b) the anticipated schedule, including start, duration, and completion; and
 - (c) estimated budgets (as applicable to the specific procurement) for design, construction, operation and maintenance.

The design requirements may, but need not, include drawings and other documents illustrating the scale and relationship of the features, functions, and characteristics of the project.

COMMENTARY:

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

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

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

maintain or design-build-finance-operate-maintain procurements. The function of the independent peer reviewer is to confirm that the key elements of the professional engineering and architectural design provided by the contractor are in conformance with the applicable standard of care.

COMMENTARY:

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

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

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

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

COMMENTARY:

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

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

COMMENTARY:

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

infrastructure facility and service. Many governments will continue to produce new facilities using either the design-bid-build or design-build project delivery method, followed by long-term operations and maintenance directly by public employees. The Code gives procurement officials the flexibility to use competitive sealed bidding to acquire all or a portion of the supplies and services required to maintain and operate infrastructure facilities.

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

COMMENTARY:

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

DEFINITIONAL CROSS-REFERENCES:

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

R5-101.01 Definitions.

R5-101.01.1 *Designer*, as used in Chapter 5, means a person who has been awarded, through the qualifications-based process set forth in Section 5-205 of the [State] Procurement Code, a contract with the [State] for the design (or alteration, repair, improvement, or demolition) of any Infrastructure Facility using the Design-Bid-Build project delivery method defined in Section 5-101 (2) of the Code.

R5-101.01.2 *Builder*, as used in Chapter 5, means a person who has been awarded, through competitive sealed bidding, a separate contract with the [State] to construct (alter, repair, improve, or demolish) any Infrastructure Facility using the Design-Bid-Build project delivery method defined in Section 5-101(2) of the Code.

R5-101.01.3 *Construction Manager (At-Risk)*, as used in Chapter 5, means a person who has been awarded, through competitive sealed proposals, a separate contract with the [State] to construct (alter, repair, improve, or demolish) any Infrastructure Facility using the Design-Bid-Build project delivery method defined in Section 5-101(2) of the Code. A Construction Manager (At-Risk) typically is subject to the same performance and payment bond requirements applicable to Builders.

R5-101.01.4 *Construction Manager (Agent)*, as used in Chapter 5, means a person who has a contract with the [State] to provide contract administration, project management, and other specified services to the [State] in connection with the [State's] administration of any of the project delivery methods defined in Section 5-101 of the Code. A *Construction Manager (Agent)* does not typically assume responsibility for the proper or timely performance of the [State's] independent contractors, i.e., Designers, Builders, Construction Managers (At-Risk), Design-Builders, DBO Producers, or DBFO Producers. A Construction Manager (Agent) typically is subject to the same professional liability requirements applicable to design professionals.

R5-101.01.5 *Design-Builder*, as used in Chapter 5, means a person who has been awarded, through competitive sealed proposals, a contract with the [State] for the design and construction (or alteration, repair, improvement, or demolition) of any Infrastructure Facility using the Design-Build project delivery method defined in Section 5-101 (3) of the Code.

R5-101.01.6 *DBO Producer*, as used in Chapter 5, means a person who has been awarded, through competitive sealed proposals, a [15 to 25 year] contract with the [State] for the design, construction (or alteration, repair, improvement, or demolition), and operation & maintenance of any Infrastructure Facility using the Design-Build-Operate-Maintain project delivery method defined in Section 5-101 (5) of the Code.

R5-101.01.7 *DBFO Producer*, as used in Chapter 5, means a person who has been awarded, through competitive sealed proposals, a [15 to 25 year] contract with the [State] for the design, construction (or alteration, repair, improvement, or demolition), finance, and operation & maintenance of any Infrastructure Facility using the Design-Build-Finance-Operate-Maintain project delivery method defined in Section 5-101 (4) of the Code.

R5-101.01.8 *Independent Peer Reviewer*, as used in Chapter 5, means a person who has been awarded a contract with the [State] for an independent, contemporaneous, peer review of the design services provided to the [State] by a DBO or DBFO Producer. In the event the [State] does not elect to contract with the Independent Peer Reviewer proposed by the successful DBO or DBFO Producer, the Independent Peer Reviewer shall be selected through competitive sealed proposals.

R5-101.01.9 *Operator*, as used in Chapter 5, means a person who has been awarded, through competitive sealed bidding, a separate contract with the [State] for the routine operation, routine repair, and routine maintenance (Operation and Maintenance) of any Infrastructure Facility, as defined in Section 5-101 (9) of the Code.

R5-101.02 Consolidation of Other Definitions.

R5-101.02.1 *Prime Builder* means a *Builder* that has subcontracted a portion of its work to subcontractors and suppliers. The term *Prime Builder* is synonymous with the term *Prime Contractor* and *Single Prime Builder*.

R5-101.02.2 *Single Prime Builder*, previously referred to in the 1980 Regulations as a *Single Prime Contractor* or *General Contractor*, means a single *Builder* to whom the [State] has contracted all the construction work associated with a particular project. In most circumstances, the term *Builder* is used synonymously with the term *Prime Builder*.

R5-101.02.3 *Multiple Prime Builder*, previously referred to in the 1980 Regulations as a *Multiple Prime Contractor*, means one of multiple *Builders* to whom the [State] has contracted the construction work associated with a

particular project. The term *Multiple Prime Builder* is not synonymous with the term *Single Prime Builder*. Multiple Prime Builders are sometimes used when the [State] wishes to begin constructing appropriate portions of an Infrastructure Facility before design of the entire facility has been completed (sometimes referred to as “Fast Track Construction”).

R5-101.02.4 *Turnkey Builder*, previously referred to in the 1980 Regulations, means a *Design-Builder*. The scope of work assigned to some Turnkey Builders may include a short period (one to five years) of initial operations and maintenance in addition to design and construction. As used in Chapter 5, a short period of operations and maintenance (less than 5 years) is insufficient to classify such contracts as Design-Build-Operate-Maintain under Section 5-101 (5) of the Code.

R5-101.03 Application.

The provisions of this Chapter shall apply to all procurements of infrastructure facilities and services which are expected to be [\$100,000] or greater and to the procurement of architectural and engineering services which are expected to be [\$15,000] or greater. Procurement of construction expected to be less than [\$100,000] and procurement of architectural and engineering services expected to be less than [\$15,000] shall be made in accordance with Section 3-204 (Small Purchases) of the [State] Procurement Code.

Part B – Contracting for Infrastructure Facilities and Services

Regulation 5-201-Project Delivery Methods Authorized

CODE PROVISION:

§5-201 Project Delivery Methods Authorized.

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

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

COMMENTARY:

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

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

R5-201.01 Project Delivery Methods Authorized.

R5-201.01.1 *Flexibility.* It is intended that the [State] have significant new flexibility in configuring and applying the project delivery methods authorized by this Section of the Code to fit not only the particular needs and requirements of each project, but to apply these delivery methods to the overall goal of configuring all of the [State's] Infrastructure Facility contracts to meet long-term needs, requirements, and constraints. The [State's] acquisition planners may now focus upon excluding project delivery methods that cannot be effectively applied to a particular Infrastructure Facility, and to then make reasoned choices of project delivery method to single projects with the configuration of the entire collection of projects in mind.

R5-201.01.2 *Use of Regulation.* This Regulation is intended to guide [State] personnel in selecting an appropriate project delivery method.

R5-201.02 Participation in Prior Reports or Studies.

R5-201.02.1 Before awarding a contract for a report or study that could subsequently be used in the creation of design requirements for an infrastructure facility or service, the Procurement Official should address, to the extent practical, the contractor's ability to compete for follow-on work.

R5-201.02.2 Before issuing a request for proposals for an infrastructure facility or service, the Procurement Official should take reasonable steps to determine if prior participation in a report or study could provide a firm with a

substantial competitive advantage, and, if so, the Procurement Officer should take appropriate steps to eliminate or mitigate that advantage.

Regulation 5-202-Source Selection Methods Assigned

CODE PROVISION:

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

(1) *Scope*

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

(2) *Design-bid-build*

(a) Design: Architectural and Engineering Services.

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

(b) Construction.

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

COMMENTARY:

The bracketed language should be adopted by those jurisdictions wishing to include “construction management at-risk” as one of the available purchasing options for the construction component of design-bid-build procurement. The intent of the Code is to permit the procurement of a construction manager, prior to the completion of design, to perform the construction function.

(3) *Operations and Maintenance.*

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

COMMENTARY:

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

(4) *Design-build.*

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

COMMENTARY:

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

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

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

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

COMMENTARY:

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

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

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

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

R5-202.01 Construction Management (At-Risk).

R5-202.01.1 *Procurement of Construction Management (At-Risk).* The [State] is authorized to use competitive sealed proposals, as set forth in Section 3-203 of the Code, for contracts for construction management at-risk. This regulation is intended to permit the procurement of a construction manager (at-risk) to perform the functions that a construction manager may provide to a public owner, including constructability review, schedule and cost review, and the construction function prior to the completion of the design of the project by the Designer.

R5-202.02 Proposal Development Documents Not Required in Certain Design-Build Procurements.

R5-202.02.1 The Procurement Officer may exempt a Design-build procurement from the requirement in Section 5-204(2)(b) of the [State] Procurement Code to submit proposal development documents under the following circumstances:

- (a) the expected value of the design-build contract is less than [\$10,000,000];
- (b) a fixed contract price has been established by the Purchasing Agency that is also the limit of publicly available funds; and
- (c) the head of the Purchasing Agency has approved the exemption in writing.

COMMENTARY:

Proposal development documents require sufficient detail to be included in the proposal to permit firm-fixed pricing. Where the Purchasing Agency has already established a firm fixed price, exemption from this requirement makes sense. Having established a ceiling price for the project, the Purchasing Agency and prospective offerors may then focus the design-build competition on which offeror provides the greatest value, in terms of quality, performance, and timing for the price. By pre-establishing the contract price, the Purchasing Agency is no longer confronted with the impossible task of attempting to compare multiple proposals, with different content, quality, and performance attributes, that are also insufficiently detailed to be priced.

Regulation 5-203-Choice of Project Delivery Methods

CODE PROVISION:

§5-203 Choice of Project Delivery Methods.

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

- (a) set forth criteria to be used in determining which project delivery method is to be used for a particular project;
- (b) grant to the Chief Procurement Officer, or the head of the Purchasing Agency responsible for carrying out the project, the discretion to select an appropriate project delivery method for a particular project;
- (c) describe the bond, insurance, and other security provisions contained in Part C of this Article that apply to each project;

- (d) describe the appropriate contract clauses and fiscal responsibility requirements contained in Part D of this Article that apply to each project; and
- (e) require the procurement officer to execute and include in the contract file a written statement setting forth the facts which led to the selection of a particular project delivery method for each project.

COMMENTARY:

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

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

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

R5-203.01 Application of Regulation and General Policy.

R5-203.01.1 *Application.* This Regulation contains provisions applicable to the selection of an appropriate competitive method for acquiring infrastructure facilities and services.

R5-203.01.2. *Selecting An Appropriate Project Delivery Method.* In selecting an appropriate project delivery method for each of the [State's] Infrastructure Facilities and services, the Chief Procurement Officer or the head of a Purchasing Agency should consider all authorized project delivery methods, the comparative advantages and disadvantages of each, and how these methods may be appropriately configured and applied to fulfill [State] requirements. Factors to consider include:

- (a) the extent to which the [State's] design requirements for the Infrastructure Facility are known, stable, and established in writing;
- (b) the extent to which qualified and experienced [State] personnel are available to provide the decision-making and administrative contributions required by the Project Delivery Method selected by the [State];

- (c) the extent to which decision-making and administrative contributions may be appropriately assigned to Designers, Builders, Construction-Managers (At-Risk), Design-Builders, DBO Producers, DBFO Producers, Peer Reviewers, or Operators, as appropriate to the Project Delivery Method selected by the [State];
- (d) the extent to which outside consultants, including Construction Managers (Agent), may be able to assist the [State] with decision-making and administrative contributions required by the Project Delivery Method selected by the [State];

COMMENTARY:

Contracting with consultants, however, does not eliminate the need for active, effective participation by [State] personnel, and, in most cases, using a consultant will not relieve the [State] of primary responsibility since the consultant may act merely as an intermediary or advisor.

- (e) the [State's] projected cash flow for the Infrastructure Facility to be acquired (both sources and uses of the funds necessary to support design, construction, operations, maintenance, repairs, and demolition over the facility life cycle);
- (f) the type of Infrastructure Facility or service to be acquired – for example, public buildings, schools, water distribution, wastewater collection, highway, bridge, or specialty structure, together with possible sources of funding for the Infrastructure Facility – for example, state or federal grants, state or federal loans, local tax appropriations, special purpose bonds, general obligation bonds, user fees, or tolls;
- (g) the required delivery date of the Infrastructure Facility to be acquired;
- (h) the location of the Infrastructure Facility to be acquired;
- (i) the size, scope, complexity, and technological difficulty of the Infrastructure Facility to be acquired;
- (j) the [State's] current and projected sources and uses of public funds that are currently generally available (and will be available in the future) to support operation, maintenance, repair, rehabilitation, replacement, and demolition of existing and planned Infrastructure Facilities;
- (k) the current condition of existing Infrastructure Facilities; and
- (l) the current financial condition of the [State], including, for example, debt structure and bond rating.

R5-203.01.3. *Use of Regulation.* This Regulation is intended to guide [State] personnel in selecting the appropriate contracting method. It is not intended to create any third party rights.

R5-203.01.4 Lease, Buy, or Build. Before initiating a procurement in which a new Infrastructure Facility will be constructed or service provided, consideration should be given to other acquisition options, including leasing or buying comparable facilities. Factors to consider when considering such alternatives include, but are not limited to:

- (a) whether the [State's] requirements for infrastructure services are permanent, continuing, fluctuating, or temporary;
- (b) whether the [State] must be in custodial control of the Infrastructure Facility in order to meet the [State's] particular needs;
- (c) the condition, current operating cost, projected life cycle cost, and functional adequacy of the [State's] existing infrastructure facilities;
- (d) the adequacy of available space to fit [State] needs;
- (e) the life-cycle costs associated with leasing, buying, contracting for infrastructure services, or building; and
- (f) environmental effects.

Regulation 5-204-Additional Procedures

CODE PROVISION:

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

- (1) *Applicability.* In addition to the requirements of Section 3-203 (Competitive Sealed Proposals), the procedures in this Section shall apply to procurements for design-build (Section 5-202(4)), design-build-operate-maintain (Section 5-202-(5)), and design-build-finance-operate-maintain (Section 5-202(6)).
- (2) *Content of Request for Proposals.* Each Request for Proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain:
 - (a) shall include design requirements;
 - (b) shall solicit proposal development documents; and

- (c) may, when the [Purchasing Agency] determines that the cost of preparing proposals is high in view of the size, estimated price, and complexity of the procurement:
 - (i) prequalify offerors by issuing a Request for Qualifications in advance of the Request for Proposals; and
 - (ii) select a short list of responsible offerors prior to discussions and evaluations under Subsection 3-203(6), provided that the number of proposals that will be short-listed is stated in the Request for Proposals and prompt public notice is given to all offerors as to which proposals have been short-listed; or
 - (iii) pay stipends to unsuccessful offerors, provided that the amount of such stipends and the terms under which stipends will be paid are stated in the Request for Proposals.

COMMENTARY:

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

- (3) *Evaluation Factors.* Each Request for Proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain:
 - (a) shall state the relative importance of (1) demonstrated compliance with the design requirements, (2) offeror qualifications, (3) financial capacity, (4) project schedule, (5) price (or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements), and (6) other factors, if any; and
 - (b) shall require each offeror, [when the contract price is estimated to exceed \$10,000,000 or when the contract period of operations and maintenance is ten years or longer] [in circumstances established by regulation], to identify an Independent Peer Reviewer whose competence and qualifications to provide such services shall be an additional evaluation factor in the award of the contract.

COMMENTARY:

Subsection (3) applies to design-build, design-build-operate-maintain, and design-build-finance-operate-maintain procurements only. Complex numerical analysis of numerous factors is likely to diffuse, rather than focus, competition among potential offerors. Competitive proposals can be sought through the simple statement of five or six evaluation factors: e.g. (1) demonstrated compliance with the design requirements, (2) offeror qualifications, (3)

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

R5-204.01 Additional Procedures for Design-Build; Design-Build-Operate-Maintain; and Design-Build-Finance-Operate-Maintain.

R5-204.01.1 *Content of Request for Proposals.* Each Request for Proposal (RFP) issued by the [State] for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain services shall contain a cover sheet that: (a) confirms that design requirements are included in the RFP, (b) confirms that proposal development documents are solicited in each offeror's response to the RFP, and (c) states the [State's] determination for that procurement (i) whether offerors will be pre-qualified through a Request for Qualifications; (ii) whether the [State] will select a short list of responsible offerors prior to discussions and evaluations (along with the number of proposals that will be short-listed); and (iii) whether the [State] will pay stipends to unsuccessful offerors (along with the amount of such stipends and the terms under which stipends will be paid).

R5-204.01.2 *Purpose of Design Requirements.* The purpose and intent of including Design Requirements in the RFP is to provide prospective and actual offerors a common, and transparent, written description of the starting point for the competition and to provide the [State] with the benefit of having responses from competitors that meet the same RFP requirements. In order to be effective, the [State] must first come to understand and then to communicate its basic requirements for the Infrastructure Facility to those who are considering whether they will participate in the procurement competition. To encourage competition for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain over long periods of time, and over numerous projects, the [State's] written description of its

Design Requirements in such procurements must be perceived within the procurement community as stable, fair, and reliable.

R5-204.01.3 Purpose of Requirement for Proposal Development Documents in the Response to . The purpose and intent of including the requirement for submittal of Proposal Development Documents in each RFP for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain is to provide actual offerors with a common, and transparent, written description of the finish point for the competition. To be responsive, each offeror must submit drawings and other design related documents that are sufficient to fix and describe the size and character of the infrastructure facility to be acquired, including price (or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements). To encourage competition for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain over long periods of time, and over numerous projects, the [State's] requirements for Proposal Development Documents must be perceived within the procurement community to be stable, fair, and reliable.

R5-204.01.4 Content of Request for Proposals: Evaluation Factors. Each Request for Proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain shall state the relative importance of (1) demonstrated compliance with the design requirements, (2) offeror qualifications, (3) financial capacity, (4) project schedule, (5) price (or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements), and (6) other factors, if any. The [State] may comply with this requirement by listing the required factors in descending order of importance (without numerical weighting), or by listing each factor along with a numerical weight to be associated with that factor in the [State's] evaluation. Subfactors, if any, must be disclosed in the RFP, as required by Section 3-203(5) of the Code, and listed, pursuant to the requirements of this Regulation, either in descending order, or with numerical weighting assigned to each subfactor. The purpose and intent of disclosing the relative importance of factors (and subfactors) is to provide transparency to prospective and actual competitors from the date the RFP is first published.

R5-204.01.5 Identification of Independent Peer Reviewer. In each RFP for design-build-operate-maintain, or design-build-finance-operate-maintain where the contract price is estimated to exceed [\$10,000,000], and for any

[design-build,] design-build-operate-maintain, or design-build-finance-operate-maintain procurement in which the scope of work includes: the design and construction of a public school, the design, construction, and operation of a public water supply system, a public wastewater collection and treatment system, or [], each offeror shall identify an Independent Peer Reviewer whose competence and qualifications to provide such services under contract to the [State] shall be an additional evaluation factor in the award of the contract.

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

Regulation 5-205-Architectural and Engineering Selection Procedures

CODE PROVISION:

§5-205 Architectural and Engineering Services.

(1) Policy.

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

COMMENTARY:

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

(2) Architectural and Engineering Selection Committee.

In the procurement of Architectural and Engineering Services, the Chief Procurement Officer or the head of a Purchasing Agency shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. [The Chief Procurement Officer or the head of a Purchasing Agency, the Procurement Officer, and [the State Architect]] shall comprise the Architect-Engineer Selection Committee for each Architectural and Engineering Services contract over [\$]. The Selection Committee for Architectural and Engineering Services contracts under this amount shall be established in accordance with regulations promulgated by the [Policy Office] [Chief Procurement Officer] [State]. The Selection Committee shall evaluate current statements of qualifications and performance data on file with the [State], together with those that may be submitted by other firms regarding the proposed contract.

The Selection Committee shall conduct discussions with no less than three firms regarding the contract and the relative utility of alternative methods of approach for furnishing the required services, and then shall select therefrom, in order of preference, based upon criteria established and published by the Selection Committee, no less than three of the firms deemed to be the most highly qualified to provide the services required.

(3) *Negotiation.*

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

COMMENTARY:

(1) This Section applies to procurement of all services within the scope of architecture and engineering services. The language in this section is unchanged from that contained in the 1979 Code. See Section 5-501 (1979 Code).

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

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

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

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

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

R5-205.01 Application.

The provisions of this Regulation apply to every procurement of services within the scope of the practice of architecture, professional engineering, or land surveying, as defined by the laws of this [State], [as defined in Section 5-101 (a) of this Code], except as authorized by Section 3-204 (Small Purchases), Section 3-205 (Sole Source Procurement), and Section 3-206 (Emergency Procurements) of the [State] Procurement Code.

R5-205.02 Policy.

It is the policy of this [State] to:

- (a) give public notice of all requirements for architectural and engineering services; and
- (b) negotiate contracts for such services on the basis of demonstrated competence and qualification for the type of service required, and at fair and reasonable prices.

R5-205.03 Architectural and Engineering Selection Committee.

When a contract for architectural and engineering services is expected to exceed [\$15,000], the Chief Procurement Officer shall designate as members of the Architectural and Engineering Selection Committee:

- (a) two employees of the [State] who are well qualified in the professions of architecture, engineering, or land surveying, as appropriate; and
- (b) one employee of the [State] who is a representative of the Using Agency requiring the services, and preferably one who is qualified in the professions of architecture, engineering, or land surveying, as appropriate.

The Chief Procurement Officer shall designate one member of such committee as chairman and to act as the Procurement Officer to negotiate a contract with the most qualified firm in accordance with Section 5-501(3) (Architectural and Engineering Services, Negotiation) of the [State] Procurement Code.

Editorial Note: It should be noted that, regardless of any exemption from procuring architectural and engineering services through the Office of Chief Procurement Officer pursuant to Section 2-303 (Exemptions) of the [State] Procurement Code, the Chief Procurement Officer has the authority to designate the members of Architectural and Engineering Selection Committees.

Section 5-501(2) (Architectural and Engineering Services, - Architectural and Engineering Selection Committee) of the Model Procurement Code presents a suggested composition of the Architectural and Engineering Selection Committee. Section R5-205.03 contains the suggested implementation of that statutory section.

It is important that members of the Architectural and Engineering Selection Committee possess out-standing professional qualifications.

When a contract for architectural and engineering services is expected to be less than [\$15,000], the provisions of Section R3-204.06 (Small Purchase of Services Specified in Section 2-302 (Authority to Contract for Certain Services) and Architectural and Engineering Services) shall apply.

R5-205.04 Determinations Required Prior to Procurement of Services.

Prior to announcing the need for any architectural and engineering services, the head of the Using Agency or a designee of such officer shall determine in writing:

- (a) that the services to be acquired are services defined in Section 5-101(1) (Architectural and Engineering Services,) of the [State] Procurement Code;
- (b) that a reasonable inquiry has been conducted and it has been determined that [State] personnel are unable, unavailable, or otherwise not appropriately assigned to perform the services required under the proposed contract;
- (c) the nature of the relationship to be established between the Using Agency and the contractor by the proposed contract; and
- (d) that the Using Agency has developed, and fully intends to implement, a written plan for utilizing such services, which shall be included in the contractual statement of work.

R5-205.05 Annual Statement of Qualifications and Performance Data.

The Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer shall encourage firms engaged in providing architectural and engineering services to submit annually a statement of qualifications and performance data which shall include, but not be limited to, the following:

- (a) the name of the firm and the location of all of its offices, specifically indicating the principal place of business;

- (b) the age of the firm and its average number of employees over the past five] years;
- (c) the education, training, and qualifications of members of the firm and key employees;
- (d) the experience of the firm reflecting technical capabilities and project experience;
- (e) the names of [five] clients who may be contacted, including at least [two] for whom services were rendered in the last year;
- (f) any other pertinent information requested by the Procurement Officer.

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

COMMENTARY:

Section 5-501 (Architectural and Engineering Services) of the Model Procurement Code, and this Regulation, both use the word "firm". It is intended that a firm would fit within the Code definition of "person" (Section 1-301 (Definitions)) as a "business", "individual", or "other organization."

R5-205.06 Public Announcement of Required Architectural and Engineering Services.

R5-205.06.1 *Notice of Need.* Notice of need for architectural and engineering services shall be given by the Procurement Officer as provided in Section R3-202.06 (Public Notice). Such notice shall be published sufficiently in advance of when responses must be received in order that firms have an adequate opportunity to submit a statement of qualifications and performance data. The notice shall contain a brief statement of the services required which adequately describes the project and specifies how a solicitation containing specific information on the project may be obtained.

R5-205.06.2 *Solicitations.* A solicitation shall be prepared which describes the [State's] requirements and sets forth the evaluation criteria. It shall be distributed upon request and payment of a fee, if any.

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

- (a) competence to perform the services as reflected by technical training and education; general experience; experience in providing the required services; and the qualifications and competence of persons who would be assigned to perform the services;

- (b) ability to perform the services as reflected by workload and the availability of adequate personnel, equipment, and facilities to perform the services expeditiously; and
- (c) past performance as reflected by the evaluations of private persons and officials of other governmental entities that have retained the services of the firm with respect to such factors as control of costs, quality of work, and an ability to meet deadlines.

COMMENTARY:

(1) Examples of the type of information which may be included in the solicitation are: the type of services required; a description of the work involved and its location; the estimated commencement and completion dates of the work; the type of contract that may be used; the estimated cost range and cost limitations; the date by which statements of qualifications and performance data must be submitted in response to the notice; any limitations on eligibility for consideration; and a statement that discussions will be held with three or more firms considered to be the most highly qualified to provide the required services.

(2) In addition to the information set forth in Subsection R5-205.06.2 of this Section and the Commentary, the solicitations for architectural and engineering services may contain a requirement that firms interested in providing the required services submit a supplemental statement of qualifications and performance data by a specified date. Such supplemental statement may include, but need not be limited to, the following information:

(a) the abilities, qualifications, and experience of all persons who would be assigned to provide the required services; and

(b) a listing of other contracts under which services or projects similar in scope, size, or discipline to the required services were performed or undertaken within a previous period of time, as specified in the solicitation.

A standard form or format may be developed for these supplemental statements of qualifications and performance data.

R5-205.07 Evaluation of Statements of Qualifications and Performance Data; Selection of Firms for Discussions.

R5-205.07.1 *Evaluation.* The Selection Committee shall evaluate:

- (a) annual statement of qualifications and performance data submitted under Section R5-205.05 (Annual Statement of Qualifications and Performance Data);
- (b) statements that may be submitted in response to the solicitation for architectural and engineering services, including proposals for joint ventures; and
- (c) supplemental statements of qualifications and performance data, if their submission was required.

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

R5-205.07.2 Fewer Than Three Responses to Public Announcement. If fewer than three responses are received in response to the public announcement provided for in Section R5-205.06 (Public Announcement of Required Architectural and Engineering Services), a second public announcement shall be made. If, after this announcement, there remain fewer than three responses, the Selection Committee shall evaluate the responding firm or firms in accordance with this Regulation. If the firm or firms responding are qualified, the procedures set forth in Section R5-205.10 (Negotiation and Award of Contract) shall be followed.

R5-205.07.3 Selection of Firms for Discussion. The Selection Committee shall select for discussions no fewer than three firms evaluated as being professionally and technically qualified. The Procurement Officer shall notify each firm in writing of the date, time, and place of discussions, and, if necessary, shall provide each firm with additional information on the project and the services required. Such notice shall provide that a representative of each firm must attend discussions in order for the firm to be considered further.

R5-205.08 Discussions.

Following evaluation of the statements of qualifications and performance data, the Selection Committee shall hold discussions with the firms selected pursuant to Section R5-205.07.3 (Evaluation of Statements of Qualifications and Performance Data; Selection of Firms for Discussions, Evaluation) regarding the proposed contract. The purposes of such discussions shall be to:

- (a) determine each firm's general capabilities and qualifications for performing the contract; and
- (b) explore the scope and nature of the required services and the relative utility of alternative methods of approach.

R5-205.09 Selection of the Most Qualified Firms.

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

R5-205.10 Negotiation and Award of Contract.

R5-205.10.1 *Elements of Negotiation.* The Procurement Officer shall negotiate a contract with the most qualified firm for the required services at compensation determined in writing to be fair and reasonable to the [State]. Contract negotiations shall be directed toward:

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

R5-205.10.2 *Submission of Cost and Pricing Data.* The firm selected for award shall submit and certify cost and pricing data in accordance with Regulation 3-403 (Cost Data or Price Data and Analysis).

R5-205.10.3 *Successful Negotiation of Contract with the Most Qualified Firm.* If fair and reasonable compensation, contract requirements, and contract documents can be agreed upon with the most qualified firm, the contract shall be awarded to that firm.

R5-205.10.4 *Failure to Negotiate Contract with the Most Qualified Firm.*

- (a) If fair and reasonable compensation, contract requirements, and contract documents cannot be agreed upon with the most qualified firm, the Procurement Officer shall advise the firm in writing of the termination of negotiations.
- (b) Upon failure to negotiate a contract with the most qualified firm, the Procurement Officer shall enter into negotiations with the next most qualified firm. If fair and reasonable compensation, contract requirements, and contract documents can be agreed upon, then the contract shall be awarded to that firm. If negotiations again fail, negotiations shall be terminated as provided in Subsection R5-205.10.4(a) of this Section and commenced with the next most qualified firm.

R5-205.10.5 *Notice of Award.* Written notice of the award shall be sent to the firm with whom the contract is successfully negotiated. Each firm with whom discussions were held shall be notified of the award. Notice of award shall be made available to the public.

R5-205.10.6 *Failure to Negotiate Contract with Firms initially Selected as Most Qualified.* Should the Procurement Officer be unable to negotiate a contract with any of the firms initially selected as the most highly qualified firms, additional firms shall be selected in preferential order based on their respective qualifications, and negotiations shall continue in accordance with Subsection R5-502.10.4 of this Section until an agreement is reached and the contract awarded.

R5-205.10.7 *Record of Negotiations.* After award of the proposed contract, a memorandum setting forth the principal elements of the negotiation with each firm shall be prepared by the Procurement Officer. Such memorandum shall contain sufficient detail to reflect the significant considerations controlling price and the other terms of the contract. Such memorandum shall be included in the procurement file and be available to the public upon request in accordance with the [State Freedom of Information Act].

COMMENTARY:

[State] officials may wish to consider the written request of any unsuccessful firm for a debriefing. In such debriefing sessions, the Procurement Officer should emphasize the affirmative aspects of the selection process. The debriefing shall not be permitted to interfere with the award process.

R5-205.11 Reports.

The Chief Procurement Officer or the head of each Purchasing Agency shall submit annually to the [Governor] [and the legislature] a listing of all contracts awarded in the preceding fiscal year by such officer under Section 5-501 (Architectural and Engineering Services) of the [State] Procurement Code. The report shall identify the parties to the contract, the contract amount, duration, and the services to be performed thereunder.

Part C – Bonds, Insurance, Guarantees

Regulation 5-301-Bid Bonds

CODE PROVISION:

§5-301 Bid Security.

- (1) *Requirement for Bid Security.* Bid security shall be required for all competitive sealed bidding for construction contracts in a design-bid-build procurement when the price is estimated by the Procurement Officer to exceed [\$100,000] [an amount established by regulation]. Bid security shall be a bond provided by a surety company authorized to do business in this State, or the equivalent in cash, or otherwise supplied in a form satisfactory to the [State]. Nothing herein prevents the

requirement of such bonds on such contracts under [\$100,000] [the amount set by regulation] when the circumstances warrant.

- (2) *Amount of Security.* Bid security shall be in an amount equal to at least [5%] of the amount of the bid.
- (3) *Rejection of Bids for Noncompliance with Bid Security Requirements.* When the Invitation for Bids requires security, noncompliance requires that the bid be rejected unless, pursuant to regulations, it is determined that the bid fails to comply in a non-substantial manner with the security requirements.
- (4) *Withdrawal of Bids.* After bids are opened, they shall be irrevocable for the period specified in the Invitation for Bids (except as provided for bids in Section 3-202(6)). If a bidder is permitted to withdraw its bid (or proposal) before award, or is excluded from the competition before award, no action shall be had against the bidder or the bid security.

COMMENTARY:

It is suggested that the bonding and security requirements be applicable to construction contracts in excess of \$25,000. However, it should be recognized that existing (State) law on this subject is varied. Jurisdictions reviewing these regulations should carefully consider the differences between existing laws and Section 5-301 (Bid Security) and Section 5-302 (Contract Performance and Payment Bonds) of the Model Procurement Code.

R5-301.01 Bid Security.

R5-301.01.1 *General.* Invitations for Bids on [State] construction contracts shall require the submission of bid security in an amount equal to at least [____%] of the bid, at the time the bid is submitted. If a contractor fails to accompany its bid with the required bid security, the bid shall be deemed nonresponsive, in accordance with Section R3-202.14.2 (Bid Evaluation and Award, Responsibility and Responsiveness) of these regulations except as provided by Subsection R5-301.01.3 of this Section.

COMMENTARY:

Bid security protects the [State] against the failure or refusal of the low bidder to supply the necessary performance and payment bonds, as required, and to proceed with performance under the contract.

R5-301.01.2 *Acceptable Bid Security.* Acceptable bid security shall be limited to:

- (a) an [annual or one-time] bid bond in a form satisfactory to the [State] underwritten by a company licensed to issue bid bonds in this State; or
- (b) a bank certified check or cash.

R5-301.01.3 *Nonsubstantial Failure to Comply.* If a bid does not comply with the security requirements of this Regulation, the bid shall be rejected as nonresponsive, unless the failure to comply is determined by the Chief Procurement Officer, the head of a Purchasing Agency, or the designee of such officer to be nonsubstantial where:

(a) only one bid is received, and there is not sufficient time to rebid the contract;

(b) the amount of the bid security submitted, though less than the amount required by the Invitation for Bids, is equal to or greater than the difference in the price stated in the next higher acceptable bid; or

(c) the bid guarantee becomes inadequate as a result of the correction of a mistake in the bid or bid modification in accordance with Section R3-202.13 (Mistakes in Bids) of these regulations, if the bidder increases the amount of guarantee to required limits within [48] hours after the bid opening.

Regulation 5-302-Performance and Payment Bonds

CODE PROVISION:

§5-302 Contract Performance and Payment Bonds.

- (1) *When Required – Amounts.* When a construction, design-build, design-build-operate-maintain, or design-build-finance-operate-maintain contract is awarded in excess of [\$100,000], the following bonds or security shall be delivered to the [State] and shall become binding on the parties upon the execution of the contract:
 - (a) a performance bond satisfactory to the [State], executed by a surety company authorized to do business in this State or otherwise secured in a manner satisfactory to the [State], in an amount equal to 100% of the portion of the contract price that does not include the cost of operation, maintenance, and finance; and
 - (b) a payment bond satisfactory to the [State], executed by a surety company authorized to do business in this State or otherwise secured in a manner satisfactory to the [State], for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the construction work provided for in the contract. The bond shall be in an amount equal to 100% of the portion of the contract price that does not include the cost of operation, maintenance, and finance.

COMMENTARY:

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

- (2) *Reduction of Bond Amounts.* Regulations may authorize the Chief Procurement Officer or head of a Purchasing Agency to reduce the amount of performance and payment bonds to [50%] of the amounts established in Subsection (1) of this Section.
- (3) *Authority to Require Additional Bonds.* Nothing in this Section shall be construed to limit the authority of the [State] to require a performance bond or other security in addition to such bonds, or in circumstances other than specified in Subsection (1) of this Section.
- (4) *Suits on Payment Bonds – Right to Institute.* Every person who has furnished labor or material to the contractor or its subcontractors for the work provided in the contract, in respect of which a payment bond is furnished under this Section, and who has not been paid in full therefor before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by such person or material was furnished or supplied by such person for which such claim is made, shall have the right to sue on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action for the sum or sums justly due such person; provided, however, that any person having a direct contractual relationship with a subcontractor of the contractor, but no contractual relationship express or implied with the contractor furnishing said payment bond, shall have a right of action upon the payment bond upon giving written notice to the contractor within 90 days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material upon which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be personally served or served by other form of receipted transmittal that confirms actual delivery to the contractor at any place the contractor maintains an office or conducts its business.
- (5) *Suits on Payment Bonds – Where and When Brought.* Every suit instituted upon a payment bond shall be brought in a court of competent jurisdiction for the county or district in which the construction contract was to be performed, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was

performed or material was supplied by the person bringing suit. The obligee named in the bond need not be joined as a party in any such suit.

COMMENTARY:

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

R5-302.01 Performance Bonds.

R5-302.01.1 General. A performance bond is required for all construction, design-build, design-build-operate-maintain, or design-build-finance-operate-maintain contracts in excess of [\$100,000], in the following amounts:

(a) for construction contracts (with a Builder or Construction Manager – At Risk) -- 100% of the construction contract price;

(b) for contracts for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain with a Design Builder, a DBO Producer, or a DBFO Producer, respectively, that portion of the contract price that does not include the cost of operation, maintenance, and finance.

The performance bond shall be delivered by the contractor to the [State] at the same time the contract is executed. If a contractor fails to deliver the required performance bond, the contractor's bid (or offer) shall be rejected, its bid security shall be enforced, and award of the contract shall be made to the next ranked bidder (or offeror) as otherwise provided by these regulations.

COMMENTARY:

A performance bond indemnifies the [State] against loss resulting from the failure of the contractor to perform construction work in accordance with contract requirements.

R5-302.01.2 Reduction of Amount Prior to Solicitation. The Chief Procurement Officer or the head of a Purchasing Agency may reduce the amount of the performance bond required prior to solicitation to not less than [50%] of the contract price if, after completing appropriate analysis, it is determined in writing by the Chief Procurement Officer or the head of a Purchasing Agency to be less costly or more advantageous to the [State] to self-insure a part of the performance of the contractor. An analysis may be made for groups of contracts, for example, contracts in excess of \$100 million, or may be made on particular contracts, as the Chief Procurement Officer or the head of a Purchasing Agency chooses. A copy of the analysis shall be available for public inspection.

R5-302.01.3 *Reduction of Amount During Performance.* If permitted by the contract and solicitation, the Chief Procurement Officer or the head of a Purchasing Agency may reduce the amount of the performance bond as work is completed if such officer determines in writing that such reduction is in the best interest of the [State].

COMMENTARY:

(1) Analysis should be made of the costs associated with performing the contract versus the risk of the contractor's defaulting. Thus it involves a balancing of these costs and risks. Such an analysis can only be performed by an experienced risk and insurance manager in consultation with appropriate technical personnel.

(2) Factors to be considered include:

(a) any savings derivable from a reduction; and

(b) the capacity of the available surety business to absorb additional bonding.

It is probable that a reduction of the amount of the bond will not result in reduced premiums in most cases. However, the option to reduce or dispense with the bonds should not be totally foreclosed.

R5-302.02 Payment Bonds.

R5-302.02.1 *General.* A payment bond is required for all construction, design-build, design-build-operate-maintain, or design-build-finance-operate-maintain contracts in excess of [\$100,000], in the following amounts:

(a) for construction contracts (with a Builder or Construction Manager – At Risk) -- 100% of the contract price;

(b) for contracts for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain with a Design Builder, a DBO Producer, or a DBFO Producer, respectively, that portion of the contract price that does not include the cost of operation, maintenance, and finance.

The payment bond shall be delivered by the contractor to the [State] at the same time the contract is executed. If a contractor fails to deliver the required payment bond, the contractor's bid (or offer) shall be rejected, its bid security shall be enforced, and award of the contract shall be made to the next ranked bidder (or offeror) as otherwise provided by these regulations.

COMMENTARY:

A payment bond guarantees payment and protection for those furnishing labor and materials to the contractor or its subcontractors for the construction work bonded.

R5-302.02.2 *Reduction of Amount Prior to Solicitation.* Prior to solicitation, the Chief Procurement Officer or the head of a Purchasing Agency may

reduce the amount of the payment bond to not less than [50%] of the contract price if a written determination is made that it is in the best interest of the [State] to do so. Factors to be considered in order to make such a determination include, but are not limited to:

- (a) the value and number of subcontracts to be awarded by the contractor; and
- (b) the value of the contract.

R5-302.02.3 Reduction of Amount During Performance.

During performance, the Chief Procurement Officer or the head of a Purchasing Agency may reduce the required coverage of the payment bond as payments are made by the contractor.

Regulation 5-303-Bond Forms

CODE PROVISION:

§5-303 Bond Forms and Copies.

- (1) *Bond Forms.* The [Policy Office] [State] shall promulgate by regulation the form of the bonds required by this Part.
- (2) *Certified Copies of Bonds.* Any person may request and obtain from the [State] a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond shall be *prima facie* evidence of the contents, execution, and delivery of the original.

R5-303.01 Forms.

R5-303.01.1 Bid Bond. The required bid bond shall be in substantially the following form:

BID BOND

Bond No. _____

KNOW ALL MEN BY THESE PRESENTS, that we, _____ as
Principal,

hereinafter called the Principal, and [Bonding Company], a corporation duly organized under the laws of the [State], as Surety, hereinafter called the Surety, are held and firmly bound unto [State] for the sum of Dollars (\$ _____), for the payment of which sum well and truly to be made, the said

Principal and the said Surety bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has submitted a bid for [Identify project by number and brief description].

NOW, THEREFORE, if the [State] shall accept the bid of the Principal and the Principal shall enter into a Contract with the [State] in accordance with the terms of such bid, and give such bond or bonds as may be specified in the bidding or Contract Documents with good and sufficient surety for the faithful performance of such Contract and for the prompt payment of labor and material furnished in the prosecution thereof, or in the event of the failure of the Principal to enter such Contract and give such bond or bonds, if the Principal shall pay to the [State] the difference not to exceed the penalty hereof between the amount specified in said bid and such larger amount for which the [State] may in good faith contract with another party to perform work covered by said bid or an appropriate liquidated amount as specified in the Invitation for Bids then this obligation shall be null and void, otherwise to remain in full force and effect.

Signed and sealed this _____ day of _____, 19____.

(Principal) (Seal)

(Witness)

(Title)

(BONDING COMPANY)

(Witness)

By _____
(Attorney-in-Fact)

R5-303.01.2 *Performance Bond*. The required performance bond shall be in substantially the following form:

PERFORMANCE BOND

Bond No. _____

KNOW ALL MEN BY THESE PRESENTS that [Here insert full name and address or legal title of Contractor] as Principal, hereinafter called Contractor, and [Bonding Company], a corporation duly organized under the laws of the [State], as Surety, hereinafter called Surety, are held and firmly bound unto [State] as Obligee, in the amount of [Here insert a sum equal to at least one half of the Contract price] Dollars (\$____), for the payment whereof Contractor and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, Contractor has by written agreement dated _____, 19____, entered into a contract with [State] for [Describe project and insert project number] in accordance with drawings and specifications prepared by [Here insert full name and address or legal title of Architect] which contract is by reference made a part hereof, and is hereinafter referred to as the Contract.

NOW, THEREFORE THE CONDITION OF THIS OBLIGATION is such that, if Contractor shall promptly and faithfully perform said Contract then this obligation shall be null and void; otherwise it shall remain in full force and effect. The Surety hereby waives notice of any alteration or extension of time made by the [State] and its obligation is not affected by any such alteration or extension provided the same is within the scope of the contract. Whenever Contractor shall be, and is declared by [State] to be in default under the Contract, the [State] having performed [State's] obligations thereunder, the Surety may promptly remedy the default or shall promptly:

- 1) Complete the Contract in accordance with its terms and conditions;
- or
- 2) Obtain a bid or bids for completing the Contract in accordance with its terms and

conditions, and upon determination by the [State] and the Surety jointly of the lowest responsive, responsible bidder, arrange for a contract between such bidder and the [State], and make available as work progresses (even though there should be a default or a succession of defaults under the contract or

contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the balance of the contract price; but not exceeding, including other costs and damages for which the Surety may be liable hereunder, the amount set forth in the first paragraph hereof. The term "balance of the contract price," as used in this paragraph, shall mean the total amount properly paid by [State] to Contractor under the Contract and any amendments thereto, less the amount properly paid by [State] to Contractor. No right of action shall accrue on this bond to or for the use of any person or corporation other than the [State] or successors of the [State].

Signed and sealed this _____ day of _____, 19____.

(Principal) (Seal)

(Witness)

(Title)
(BONDING COMPANY)

(Witness)

By _____
(Attorney-in-Fact)

R5-303.01.3 *Payment Bond*. The required payment bond shall be in substantially the following form:

LABOR AND MATERIAL PAYMENT BOND

Bond No. _____

KNOW ALL MEN BY THESE PRESENTS that [Here insert full name and address or legal title of Contractor] as Principal, hereinafter called principal, and [Bonding Company], a corporation duly organized under the laws of the

[State], as Surety, hereinafter called Surety, are held and firmly bound unto the [State] as Obligee, hereinafter called [State], for the use and benefit of claimants as herein below defined, in the amount of [Here insert a sum equal to at least on half of the Contract price] Dollars (\$) for the payment whereof Principal and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, Principal has by written agreement dated _____, 19____, entered into a contract with [State] for [Describe project and insert project number] in accordance with drawings and specifications prepared by [Here insert full name and address or legal title of Architect] which contract is by reference made a part hereof, and is hereinafter referred to as the Contract.

NOW, THEREFORE, THE CONDITION OF THIS Obligation is such that, if Principal shall promptly make payment to all claimants as hereinafter defined, for all labor and material used or reasonably required for use in the performance of the Contract, then this obligation shall be void; otherwise it shall remain in full force and effect, subject, however, to the following conditions:

1) A claimant is defined as one having a direct contract with the Principal or with a Subcontractor of the Principal for labor, material, or both, used or reasonably required for use in the performance of the Contract, labor and material being construed to include that part of water, gas, power, light, heat, oil, gasoline, telephone service, or rental of equipment directly applicable to the Contract.

2) The above-named Principal and Surety hereby jointly and severally agree with the [State] that every claimant as herein defined, who has not been paid in full before the expiration of a period of ninety (90) days after the date on which the last of such claimant's work or labor was done or performed, or materials were furnished by such claimant, may sue on this bond for the use of such claimant, prosecute the suit to final judgment for such sum or sums as may be justly due claimant, and have execution thereon. The [State] shall not be liable for the payment of any costs or expenses of any such suit.

3) No suit or action shall be commenced hereunder by any claimant:

a) Unless claimant, other than one having a direct contract with the Principal, shall have given written notice to any two of the following: the Principal, the [State], or the Surety above named, within ninety (90) days after such claimant did or performed the last of the work or labor, or furnished the last of the materials for which said claim is made, stating with substantial

accuracy the amount claimed and the name of the party to whom the materials were furnished, or for whom the work or labor was done or performed. Such notice shall be personally served or served by mailing the same by registered mail or certified mail, postage prepaid, in an envelope addressed to the Principal at any place the Principal maintains an office or conducts its business.

b) After the expiration of one (1) year following the date on which the last of the labor was performed or material was supplied by the party bringing suit.

c) Other than in a court of competent jurisdiction for the county or district in which the construction contract was to be performed.

4) The amount of this bond shall be reduced by and to the extent of any payment or payments made in good faith hereunder, inclusive of the payment by Surety of mechanics' liens which may be filed of record against said improvement, whether or not claim for the amount of such lien be presented under and against this bond.

Signed and sealed this _____ day of _____, 19____.

(Principal) (Seal)

(Witness)

(Title)
(BONDING COMPANY)

(Witness)

By _____
(Attorney-in-Fact)

Regulation 5-304 - Errors and Omissions Insurance

CODE PROVISION:

§5-304 Errors and Omissions Insurance.

Regulations shall be promulgated that specify when the Chief Procurement Officer or head of a Purchasing Agency shall require offerors to provide appropriate errors and omissions insurance to cover architectural and engineering services under the project delivery methods set forth in Section 5-201 (1) (a), (c), (d), and (e).

COMMENTARY:

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

R5-304.01 Errors and Omissions Insurance.

R5-304.01.1 For design services in design-bid-build procurements. The Purchasing Agency shall include in the solicitation such requirements as the Procurement Officer deems appropriate for errors and omissions insurance (commonly called “professional liability insurance” in trade usage) coverage of architectural and engineering services in the solicitation for design services in Design-bid-build procurements (See Section 5-202(2)(a) of the [State] Procurement Code).

R5-304.01.2 For design services to be provided as part of design-build procurements. The Purchasing Agency shall include in the solicitation for design-build such requirements as the Procurement Officer deems appropriate for errors and omissions insurance coverage of architectural and engineering services to be provided as part of such procurements (See Section 5-202(4) of the [State] Procurement Code). Prior to award, the Chief Procurement Officer or head of a Purchasing Agency, or their delegatee, shall review and approve the errors and omissions insurance coverage for all design-build contracts in excess of [\$25,000,000]

R5-304.01.3 For design services to be provided as part of design-build-operate-maintain and design-build-finance-operate-maintain procurements. The Purchasing Agency shall include in the solicitation for design-build-operate-maintain and design-build-finance-operate-maintain such requirements as the Procurement Officer deems appropriate for errors and

omissions insurance coverage of architectural and engineering services to be provided as part of such procurements (See Sections 5-202(5) and (6), respectively, of the [State] Procurement Code). Prior to award, the Chief Procurement Officer or head of a Purchasing Agency, or their delegee, shall review and approve the errors and omissions insurance coverage for all design-build-operate-maintain and design-build-finance-operate-maintain contracts in excess of [\$25,000,000].

R5-304.01.4 *For Construction Management (Agency) services.* The Purchasing Agency shall include in the solicitation for Construction Management (Agency) Services such requirements as the Procurement Officer deems appropriate for errors and omissions insurance coverage. Errors and omissions (or professional liability) insurance coverage is typically not required when the Purchasing Agency is conducting a Construction Management (At-Risk) procurement.

Regulation 5-305 – Other Forms of Security

CODE PROVISION:

§5-305 Other Forms of Security.

Regulations shall be promulgated authorizing the Chief Procurement Officer or head of a Purchasing Agency to require a Request for Proposals to include one or more of the following forms of security to assure the timely, faithful, and uninterrupted provision of operations and maintenance services procured separately, or as one element of design-build-operate-maintain or design-build-finance-operate-maintain services:

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

COMMENTARY:

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

R5-305.01 Other Forms of Security.

R5-302.01.1 *Purpose.* To assure the timely, faithful, and uninterrupted provision of operations and maintenance services procured separately (as provided in Section 5-201(1)(b)), or as one element of design-build-operate-maintain or design-build-finance-operate-maintain services (as provided in Section 5-201(1)(d) and (e), respectively), the Purchasing Agency shall identify, in the solicitation, one or more of the other forms of security identified in Section 5-305 of the [State] Procurement Code that shall be furnished to the [State] by the offerors (or bidders) in order to be considered to be responsive. Offers (and bids) that are not responsive to these requirements shall be rejected.

R5-305.02 Operations Period Performance Bonds.

R5-302.02.1 If required in a solicitation for operation and maintenance, design-build-operate-maintain, or design-build-finance-operate-maintain (as set forth in Section 5-201 (1) (b), (d) and (e) of the [State] Procurement Code), each offeror shall demonstrate in its offer that it is prepared to provide, and upon award of the contract, to maintain in effect an operations period performance bond that secures the timely, faithful, and uninterrupted performance of operations and maintenance services required under the contract, in the amount of 100% of that portion of the contract price that includes the cost of such operation and maintenance services during the period covered by the bond. In those procurements in which the contract period for operation and maintenance is longer than 5 years, the Procurement Officer may accept an operations period performance bond of five years' duration, provided that such bond is renewable by the Contractor every five (5) years during the contract, and provided further, that the contractor has made a firm contractual commitment to maintain such bond in full force and effect throughout the contract term.

The operations period performance bond shall be delivered by the contractor to the [State] at the same time the contract is executed. If a contractor fails to deliver the required bond, the contractor's bid (or offer) shall be rejected, its

bid security shall be enforced, award of the contract shall be made to the next ranked bidder (or offeror), or the contractor shall be declared to be in default, as otherwise provided by these regulations.

COMMENTARY:

This performance bond indemnifies the [State] against loss resulting from the failure of the contractor to perform operations and maintenance work in accordance with contract requirements.

R5-305.03 Form of Operations Performance Bond

R5-305.03.1 The required operations period performance bond shall be in substantially the following form:

OPERATIONS PERIOD PERFORMANCE BOND

[to be established by the Agency following input from surety industry]

R5-305.04 Letters of Credit to Cover Interruptions in Operation.

R5-302.04.1 If required in a solicitation for operation and maintenance, design-build-operate-maintain, or design-build-finance-operate-maintain (as set forth in Section 5-201 (1) (b), (d) and (e) of the [State] Procurement Code), each offeror shall demonstrate in its offer that it is prepared to post, and upon award of the contract shall post, and in each succeeding year adjust and maintain in place, an irrevocable letter of credit with a banking institution in this [State] that secures the timely, faithful, and uninterrupted performance of operations and maintenance services required under the contract, in an amount established under the contract that is sufficient to cover 100% of the cost of performing such operation and maintenance services during the next 12 months.

The letter of credit required under this Section shall be posted by the contractor at the same time the contract is executed, and thereafter, shall be annually adjusted in amount and maintained by the contractor. If an offeror or bidder fails to demonstrate in its offer that it is prepared to post the required letter of credit, the bid (or offer) shall be rejected, the bid security shall be enforced, and award of the contract shall be made to the next ranked bidder (or offeror), as otherwise provided by these regulations. If the contractor fails to place and maintain the required letter of credit, the contractor shall be declared to be in default, as otherwise provided by these regulations.

COMMENTARY:

This letter of credit secures the [State] against a temporary interruption in the provision of infrastructure services by providing a ready source of cash to procure covering services on an emergency basis in the event of a contractor default on its contract performance of operations and maintenance services.

R5-305.05 Form of Letters of Credit

R5-305.05.1 If required by the solicitation, letters of credit shall be in substantially the following form:

LETTER OF CREDIT

[to be established by the Agency following input from industry]

R5-305.06 Guarantees.

R5-302.06.1 If required in a solicitation for operation and maintenance, design-build-operate-maintain, or design-build-finance-operate-maintain (as set forth in Section 5-201 (1) (b), (d) and (e) of the [State] Procurement Code), the contractor and affiliated organizations (including parent corporations) shall provide a written guarantee that secures the timely, faithful, and uninterrupted performance of operations and maintenance services required under the contract, in an amount established under the contract that is sufficient to cover 100% of the cost of performing such operation and maintenance services during the contract period.

The written guarantee required under this Section shall be submitted by each offeror at the time the proposal is submitted. If the contractor fails to submit the required guarantee, the contractor's bid (or offer) shall be rejected, its bid security shall be enforced, and award of the contract shall be made to the next ranked bidder (or offeror) as otherwise provided by these regulations.

COMMENTARY:

This written guarantee secures the [State] against an interruption in the provision of infrastructure services.

R5-305.07 Form of Written Guarantees

R5-305.03.1 If required by the solicitation, guarantees shall be in substantially the following form:

WRITTEN GUARANTEE

[to be established by the Agency following input from industry]

Part D – Contract Clauses and Fiscal Responsibility

Regulation 5-401 – Contract Clauses and Their Administration

CODE PROVISION:

§5-401 Contract Clauses and Their Administration.

(1) *Contract Clauses.*

Regulations shall be promulgated requiring the inclusion in [State] contracts issued under this Article 5 of clauses providing for adjustments in prices, time of performance, or other contract provisions, as appropriate, and covering the following subjects:

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

COMMENTARY:

(1) This language is unchanged from Section 5-401(1) of the 1979 Code. The addition of four new delivery methods – operations and maintenance, design-build, design-build-operate-maintain, and design-build-finance-operate-maintain – does not eliminate the need for regulations that incorporate standard contract clauses. The

Changes, Suspension of Work, and Variations clauses are standard mechanisms for government to maintain flexibility, and should be applicable to all procurement methods in Article 5. The principles underlying the Differing Site Conditions clause still apply to the design-bid-build process, and may apply to the negotiated processes (design-build, design-build-operate-maintain, design-build-finance-operate-maintain), depending upon the government's structuring of the competition. Procurement officials may properly decide to collect and furnish subsurface information to prospective offerors, with the intent of asking those offerors to rely on the information furnished in submitting offers. In such circumstances, a standard Differing Site Conditions clause is appropriate.

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

(2) *Price Adjustments.*

- (a) Adjustments in price pursuant to clauses promulgated under Subsection (1) of this Section shall be computed in one or more of the following ways:
 - (i) by agreement on a fixed-price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
 - (ii) by unit prices specified in the contract or subsequently agreed upon;
 - (iii) by the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;
 - (iv) in such other manner as the contracting parties may mutually agree; or
 - (v) in the absence of agreement by the parties, by a unilateral determination by the [State] of the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as computed by the [State] in accordance with applicable sections of the regulations promulgated under Article 7 (Cost Principles) and subject to the provisions of Article 9 (Legal and Contractual Remedies).
- (b) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of Section 3-403 (Substantiation of Offered Prices).

(3) *Additional Contract Clauses.*

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

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

(4) *Modification of Required Clauses.*

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

COMMENTARY:

- (1) The language is unchanged in all material respects from Sections 5-401 (2) through (4) of the 1979 Code. This Section directs the [Policy Office] [Chief Procurement Officer] to promulgate contract clauses that call for adjustment of price, time for performance, or other contract provisions as appropriate with respect to situations that continually develop on construction projects. It does not require these situations to be treated in any particular way, but it does require that they be anticipated and addressed.
- (2) Subsection (2) permits price adjustments pursuant to any clauses promulgated under Subsection (1) to be determined in accordance with the contract terms or by agreement. Absent an agreement, the Procurement Officer will make a unilateral determination of the price adjustment which is subject to appeal under Article 9 (Legal and Contractual Remedies).
- (3) In using unit prices it must be remembered that great variations in the number of units required may necessitate adjustments in the unit price.
- (4) Other clauses not normally subject to the pricing formulas of Subsection (2) are also required to be included in the contract as appropriate by Subsection (3).

R5-401.01 Introduction.

The contract clauses presented in this Regulation are promulgated for use in construction, design-build, design-build-operate-maintain, and design-build-finance-operate-maintain contracts in accordance with Section 5-401 (Contract Clauses and Their Administration) of the [State] Procurement Code. Alternative clauses are provided in one instance to permit accommodation of differing contract situations.

COMMENTARY:

Section 5-401 (Contract Clauses and Their Administration) mandates the promulgation of regulations requiring the inclusion of contract clauses covering situations that continually develop in construction, design-build, design-build-operate-maintain, and design-build-finance-operate-maintain contracts. It does not require these situations to be treated in any particular way but does require that they be anticipated and addressed.

R5-401.02 Revisions to Contract Clauses.

The clauses set forth in this Regulation may be varied for use in a particular contract when, pursuant to the provisions of Section 5-401(4) (Contract Clauses and Their Administration, Modification of Required Clauses) of the [State] Procurement Code, the Chief Procurement Officer or the head of a Purchasing Agency makes a written determination describing the circumstances justifying the variation or variations.

Any material variation from these clauses shall be described in the solicitation documents in substantially the following form:

"Clause No. _____, entitled _____ is not a part of the general terms and conditions of this contract, and has been replaced by Special Clause No. _____ entitled _____. Your attention is specifically directed to this clause."

R5-401.03 Changes Clause.

"CHANGES

(1) *Change Order.* The Procurement Officer, at any time, and without notice to the sureties, in a signed writing designated or indicated to be a change order, may order:

- (a) changes in the work within the scope of the contract; and
- (b) changes in the time for performance of the contract that do not alter the scope of the contract.

(2) *Adjustments of Price or Time for Performance.* If any such change order increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract.

Failure of the parties to agree to an adjustment shall not excuse a contractor from proceeding with the contract as changed, provided that the [State] promptly and duly make such provisional adjustments in payments or time for performance as may be reasonable. By proceeding with the work, the contractor shall not be deemed to have prejudiced any claim for additional compensation, or an extension of time for completion.

(3) *Written Certification.* The contractor shall not perform any change order in excess of [\$ _____] unless it bears, or the contractor has separately

received, a written certification, signed by [appropriate fiscal officer or other responsible person] that funds are available therefor; and, if acting in good faith, the contractor may rely upon the validity of such certification.

Editorial Note: The amount and official specified here should conform with those specified in Section 5-402 (Fiscal Responsibility) of the [State] Procurement Code.

(4) *Time Period for Claim.* Within [30] days after receipt of a written change order under Paragraph (1) (Change Order) of this clause, unless such period is extended by the Procurement Officer in writing, the contractor shall file notice of intent to assert a claim for an adjustment. Later notification shall not bar the contractor's claim unless the [State] is prejudiced by the delay in notification.

(5) *Claim Barred after Final Payment.* No claim by the contractor for an adjustment hereunder shall be allowed if notice is not given prior to final payment under this contract.

(6) *Claims Not Barred.* In the absence of such a change order, nothing in this clause shall restrict the contractor's right to pursue a claim arising under the contract, if pursued in accordance with the clause entitled 'Claims Based on a Procurement Officer's Actions or Omissions Clause' or for breach of contract."

R5-401.04 Variations in Estimated Quantities Clause.

The following clause shall be inserted only in those construction contracts which contain estimated quantity items:

"VARIATIONS IN ESTIMATED QUANTITIES

(1) *Variations Requiring Adjustments.* Where the quantity of a pay item in this contract is an estimated quantity and where the actual quantity of such pay item varies more than 15% above or below the estimated quantity stated in this contract, an adjustment in the contract price shall be made upon demand of either party. The adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115% or below 85% of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the Procurement Officer shall, upon receipt of a timely written request for an extension of time, prior to the date of final settlement of the contract, ascertain the facts and make such adjustment for extending the completion date as in the judgment of the Procurement Officer the findings justify.

(2) *Adjustments of Price.* Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract;

R5-401.05 Suspension of Work Clause.

SUSPENSION OF WORK

(1) *Suspension for Convenience.* The Procurement Officer may order the contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as the Procurement Officer may determine to be appropriate for the convenience of the [State].

(2) *Adjustment of Cost.* If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Procurement Officer in the administration of this contract, or by the failure of the Procurement Officer to act within the time specified in this contract (or if no time is specified, within reasonable time), an adjustment shall be made for any increase in the cost of performance of this contract necessarily caused by such unreasonable suspension, delay, interruption and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent:

(a) that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the contractor; or

(b) for which an adjustment is provided for or excluded under any other provision of this contract.

(3) *Time Restriction on Claim.* No claim under this clause shall be allowed:

(a) for any costs incurred more than 20 days before the contractor shall have notified the Procurement Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order); and

(b) unless the claim is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption, but not later than the date of final payment under the contract.

(4) *Adjustments of Price.* Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract."

R5-401.06 Differing Site Conditions Clause.

Set forth below are alternative differing site conditions clauses to be used as appropriate.

[ALTERNATIVE A]

"DIFFERING SITE CONDITIONS: PRICE ADJUSTMENTS

(1) *Notice.* The contractor shall promptly, and before such conditions are disturbed, notify the Procurement Officer of:

(a) subsurface or latent physical conditions at the site differing materially from those indicated in this contract; or

(b) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this contract.

(2) *Adjustments of Price or Time for Performance.* After receipt of such notice, the Procurement Officer shall promptly investigate the site, and if it is found that such conditions do materially so differ and cause an increase in the contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract.

(3) *Timeliness of Claim.* No claim of the contractor under this clause shall be allowed unless the contractor has given the notice required in this clause; provided, however, that the time prescribed therefor may be extended by the Procurement Officer in writing.

(4) *No Claim After Final Payment.* No claim by the contractor for an adjustment thereunder shall be allowed if asserted after final payment under this contract.

(5) *Knowledge.* Nothing contained in this clause shall be grounds for an adjustment in compensation if the contractor had actual knowledge of the existence of such conditions prior to the submission of bids."

[END OF ALTERNATIVE A]

[ALTERNATIVE B]

"SITE CONDITIONS CONTRACTOR'S RESPONSIBILITY

The contractor accepts the conditions at the construction site as they eventually may be found to exist and warrants and represents that the contract can and will be performed under such conditions, and that all materials, equipment, labor, and other facilities required because of any unforeseen conditions (physical or otherwise) shall be wholly at the contractor's own cost and expense, anything in this contract to the contrary notwithstanding."

[END OF ALTERNATIVE B]

COMMENTARY:

Alternative A may be omitted if the risk of differing site conditions has been assumed by the contractor. For example, where the contractor provides the site, the contractor is responsible for design and site investigation, or the parties have otherwise agreed with respect to the risk of differing site conditions. In such situations, Alternative B may be used unless other clauses are deemed more appropriate in the particular procurement.

R5-401.07 Price Adjustment Clause.

"PRICE ADJUSTMENT"

(1) Price Adjustment Methods. Any adjustment in contract price pursuant to clauses in this contract shall be made in one or more of the following ways:

- (a) by agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
- (b) by unit prices specified in the contract or subsequently agreed upon;
- (c) by the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as specified in the contract or subsequently agreed upon;
- (d) in such other manner as the parties may mutually agree; or
- (e) in the absence of agreement between the parties, by a unilateral determination by the Procurement Officer of costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as computed by the Procurement Officer in accordance with generally accepted accounting principles and applicable sections of the regulations promulgated under Article 7 (Cost Principles) and subject to the provisions of Article 9 (Legal and Contractual Remedies) of the [State] Procurement Code.

(2) *Submission of Cost or Pricing Data.* The contractor shall submit cost or pricing data for any price adjustments subject to the provisions of Section 3-403 (Cost or Pricing Data) of the [State] Procurement Code."

R5-401.08 Claims Based on a Procurement Officer's Actions or Omissions Clause.

"CLAIMS BASED ON A PROCUREMENT OFFICER'S
ACTIONS OR OMISSIONS

(1) *Notice of Claim.* If any action or omission on the part of a Procurement Officer or designee of such officer, requiring performance changes within the scope of the contract constitutes the basis for a claim by the contractor for additional compensation, damages, or an extension of time for completion, the contractor shall continue with performance of the contract in compliance with the directions or orders of such officials, but by so doing, the contractor shall not be deemed to have prejudiced any claim for additional compensation, damages, or an extension of time for completion; provided:

(a) the contractor shall have given written notice to the Procurement Officer or designee of such officer:

(i) prior to the commencement of the work involved, if at that time the contractor knows of the occurrence of such action or omission;

(ii) within [30] days after the contractor knows of the occurrence of such action or omission, if the contractor did not have such knowledge prior to the commencement of the work; or

(iii) within such further time as may be allowed by the Procurement Officer in writing.

This notice shall state that the contractor regards the act or omission as a reason which may entitle the contractor to additional compensation, damages, or an extension of time. The Procurement Officer or designee of such officer, upon receipt of such notice, may rescind such action, remedy such omission, or take such other steps as may be deemed advisable in the discretion of the Procurement Officer or designee of such officer;

(b) the notice required by Subparagraph (a) of this Paragraph describes as clearly as practicable at the time the reasons why the contractor believes that additional compensation, damages, or an extension of time may be remedies to which the contractor is entitled; and

(c) the contractor maintains and, upon request, makes available to the Procurement Officer within a reasonable time, detailed records to the extent practicable, of the claimed additional costs or basis for an extension of time in connection with such changes.

2) *Limitation of Clause.* Nothing herein contained, however, shall excuse the contractor from compliance with any rules of law precluding any [State] officers and any contractors from acting in collusion or bad faith in issuing or performing change orders which are clearly not within the scope of the contract.

(3) *Adjustments of Price.* Any adjustment in the contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract."

R5-401.09 Default-Delay-Time Extensions Clause.

"TERMINATION FOR DEFAULT FOR NONPERFORMANCE OR DELAY-DAMAGES FOR DELAY-TIME EXTENSIONS"

(1) *Default.* If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will assure its completion within the time specified in this contract, or any extension thereof, fails to complete said work within such time, or commits any other substantial breach of this contract, and further fails within [14] days after receipt of written notice from the Procurement Officer to commence and continue correction of such refusal or failure with diligence and promptness, the Procurement Officer may, by written notice to the contractor, declare the contractor in breach and terminate the contractor's right to proceed with the work or such part of the work as to which there has been delay. In such event the [State] may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of, and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor. Whether or not the contractor's right to proceed with the work is terminated, the contractor and the contractor's sureties shall be liable for any damage to the [State] resulting from the contractor's refusal or failure to complete the work within the specified time.

(2) *Liquidated Damages Upon Termination.* If fixed and agreed liquidated damages are provided in the contract, and if the [State] so terminates the contractor's right to proceed, the resulting damage will consist of such liquidated damages for such reasonable time as may be required for final completion of the work

(3) *Liquidated Damages in Absence of Termination.* If fixed and agreed liquidated damages are provided in the contract; and if the [State] does not terminate the contractor's right to proceed; the resulting damage will consist of such liquidated damages until the work is completed or accepted

(4) *Time Extension.* The contractor's right to proceed shall not be so terminated nor the contractor charged with resulting damage if:

(a) the delay in the completion of the work arises from causes such as:

acts of God; acts of the public enemy; acts of the [State] and any other governmental entity in either a sovereign or contractual capacity; acts of

another contractor in the performance of a contract with the [State]; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; unusually severe weather; delays of subcontractors due to causes similar to those set forth above; or shortage of materials; provided, however, that no extension of time will be granted for a delay caused by a shortage of materials, unless the contractor furnishes to the Procurement Officer proof that the contractor has diligently made every effort to obtain such materials from all known sources within reasonable reach of the work, and further proof that the inability to obtain such materials when originally planned did in fact cause a delay in final completion of the entire work which could not be compensated for by revising the sequence of the contractor's operations; and

(b) the contractor, within ten days from the beginning of any such delay (unless the Procurement Officer grants a further period of time before the date of final payment under the contract), notifies the Procurement Officer in writing of the causes of delay. the Procurement Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in the judgment of the Procurement Officer, the findings of fact justify such an extension.

(5) *Erroneous Termination for Default* If, after notice of termination of the contractor's right to proceed under the provisions of this clause, it is determined for any reason that the contractor was not in default under the provisions of this clause, or that the delay was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the [State], be the same as if the notice of termination has been issued pursuant to such clause. If, in the foregoing circumstances, this contract does not contain a clause providing for termination for convenience of the [State], the contract shall be adjusted to compensate for such termination and the contract modified accordingly.

(6) *Additional Rights and Remedies*. The rights and remedies of the [State] provided in this clause are in addition to any other rights and remedies provided by law or under this contract."

R5-401.10 Liquidated Damages Clause.

The following clause may be used in construction contracts when it is difficult to determine with reasonable accuracy damage to the [State] due to delays caused by late contractor performance or nonperformance.

LIQUIDATED DAMAGES

When the contractor fails to complete the work or any portion of the work within the time or times fixed in the contract or any extension thereof, the contractor shall pay to the [State] [\$_____] per calendar day of delay pursuant to the clause of this contract entitled, Termination for Default for Nonperformance or Delay-Damages for Delay-Time Extensions."

R5-401.11 Termination for Convenience Clause.

"TERMINATION FOR CONVENIENCE"

(1) *Termination.* The Procurement Officer may, when the interests of this [State] so require, terminate this contract in whole or in part, for the convenience of the [State]. The Procurement Office shall give written notice of the termination to the contractor specifying the part of the contract terminated and when termination becomes effective

(2) *Contractor's Obligations.* The contractor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination the contractor will stop work to the extent specified. The contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The Procurement Officer may direct the contractor to assign the contractor's right, title, and interest under terminated orders or subcontracts to the [State]. The contractor must still complete the work not terminated by the notice of termination and may incur obligations as necessary to do so.

(3) *Right to Construction and Supplies.* The Procurement Officer may require the contractor to transfer title and deliver to the [State] in the manner and to the extent directed by the Procurement Officer:

(a) any completed construction; and

(b) such partially completed construction, supplies, materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "construction material") as the contractor has specifically produced or specially acquired for the performance of the terminated part of this contract.

The contractor shall protect and preserve property in the possession of the contractor in which the (State] has an interest. If the Procurement Officer does not exercise this right, the contractor shall use best efforts to sell such construction, supplies, and construction materials in accordance with the standards of Uniform Commercial Code Section 2-706. [U.C.C. §2-706 is quoted in the Editorial Note at the end of this Section.] This in no way implies

that the [State] has breached the contract by exercise of the Termination for Convenience Clause.

(4) *Compensation.*

(a) The contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data: submitted to the extent required by Section 3-403 (Cost or Pricing Data) of the [State] Procurement Code, bearing on such claim. If the contractor fails to file a termination claim within one year from the effective date of termination, the Procurement Officer may pay the contractor, if at all, an amount set in accordance with Subparagraph (c) of this Paragraph.

(b) The Procurement Officer and the contractor may agree to a settlement provided the contractor has filed a termination claim supported by cost or pricing data submitted as required by Section 3-403 (Cost or Pricing Data) of the [State] Procurement Code and that the settlement does not exceed the total contract price plus settlement costs reduced by payments previously made by the [State], the proceeds of any sales of construction, supplies, and construction materials under Paragraph (3) of this clause, and the contract price of the work not terminated.

(c) Absent complete agreement under Subparagraph (b) of this Paragraph, the Procurement Officer shall pay the contractor the following amounts, provided payments under Subparagraph (b) shall not duplicate payments under this Paragraph:

(i) with respect to all contract work performed prior to the effective date of the notice of termination, the total (without duplication of any items) of:

(A) the cost of such work plus a fair and reasonable profit on such portion of the work (such profit shall not include anticipatory profit or consequential damages) less amounts paid or to be paid for completed portions of such work; provided, however, that if it appears that the contractor would have sustained a loss if the entire contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;

(B) costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to Paragraph (2) of this clause. These costs must not include costs paid in accordance with Subparagraph (c)(1)(A) of this Paragraph;

(C) the reasonable settlement costs of the contractor including accounting, legal, clerical, and other expenses reasonably necessary for the

preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to the terminated portion of this contract.

The total sum to be paid the contractor under this Paragraph shall not exceed the total contract price plus the reasonable settlement costs of the contractor reduced by the amount of any sales of construction, supplies, and construction materials under paragraph (3) of this clause, and the contract price of work not terminated.

(d) Cost claimed, agreed to, or established under Subparagraphs (b) and (c) of this Paragraph shall be in accordance with Chapter 7 (Cost Principles) of the [State] Procurement Regulations."

COMMENTARY:

Payment of amounts pursuant to this clause should be in accordance with Section 5-402 (Fiscal Responsibility) of the [State] Procurement Code.

R5-401.12 Remedies Clause.

[ALTERNATIVE A – IF Article 9 of the Model Procurement Code is Adopted]]

"REMEDIES

Any dispute arising under or out of this contract is subject to the provisions of Article 9 (Legal and Contractual Remedies) of the [State] Procurement Code."

[END OF ALTERNATIVE A]

[ALTERNATIVE B – If Article 9 of MPC not Adopted]

“REMEDIES

Any dispute arising under or out of this contract shall be determined in accordance with the dispute resolution procedures afforded pursuant to [State] law.”

[END OF ALTERNATIVE B]

Regulation 5-402-Fiscal Responsibility

CODE PROVISION:

§5-402 Fiscal Responsibility.

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

R5-402 [RESERVED]

ARTICLE 6 – MODIFICATION AND TERMINATION OF CONTRACTS FOR SUPPLIES AND SERVICES

Regulation 6-101 Contract Clauses and Their Administration

CODE PROVISION:

§6-101 Contract Clauses and Their Administration.

- (1) *Contract Clauses.* The [Policy Office] [Chief Procurement Officer] may promulgate regulations permitting or requiring the inclusion of clauses providing for adjustments in prices, time of performance, or other contract provisions as appropriate covering the following subjects:
 - (a) the unilateral right of the [State] to order in writing:
 - (i) changes in the work within the scope of the contract; and
 - (ii) temporary stopping of the work or delaying performance; and
 - (b) variations occurring between estimated quantities of work in a contract and actual quantities.

COMMENTARY:

The phrase "or other contract provisions" of this Subsection is not intended to alter the price adjustment provisions set forth at Subsection (2) of this Section. It is intended to enable the parties to deal with the effects of changes, temporary work stoppages, and variations in estimated quantities. For example, where a change order requires the delivery of alternate products, not only price or time of performance may be affected, but other terms or conditions such as insurance or inspection may be affected.

- (2) *Price Adjustments.*
 - (a) Adjustments in price pursuant to clauses promulgated under Subsection (1) of this Section shall be computed in one or more of the following ways:
 - (i) by agreement on a fixed-price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
 - (ii) by unit prices specified in the contract or subsequently agreed upon;
 - (iii) by the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;

- (iv) in such other manner as the contracting parties may mutually agree; or
 - (v) in the absence of agreement by the parties, by a unilateral determination by the [State] of the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as computed by the [State] in accordance with applicable sections of the regulations promulgated under Article 7 (Cost Principles) and subject to the provisions of Article 9 (Legal and Contractual Remedies).
- (b) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of Section 3-403 (Cost or Pricing Data).
- (3) *Additional Contract Clauses.* The [Policy Office] [Chief Procurement Officer] may promulgate regulations including, but not limited to, regulations permitting or requiring the inclusion in [State] contracts of clauses providing for appropriate remedies and covering the following subjects:
- (a) liquidated damages as appropriate;
 - (b) specified excuses for delay or nonperformance;
 - (c) termination of the contract for default; and
 - (d) termination of the contract in whole or in part for the convenience of the (State).
- (4) *Modification of Clauses.* The Chief Procurement Officer or the head of a Purchasing Agency may vary the clauses promulgated by the [Policy Office] [Chief Procurement Officer] under Subsection (1) and Subsection (3) of this Section for inclusion in any particular [State] contract; provided that any variations are supported by a written determination that states the circumstances justifying such variation and provided that notice of any such material variation be stated in the Invitation for Bids or Request for Proposals.

COMMENTARY:

- (1) This Section permits the [Policy Office] [Chief Procurement Officer] to promulgate contract clauses covering situations that frequently develop. It does not require these situations to be treated in any particular way.
- (2) Subsection (2) permits price adjustments to be determined in accordance with the contract terms or by agreement. Absent an agreement, the Procurement Officer will make a unilateral determination of the price adjustment which is subject to appeal under Article 9 (Legal and Contractual Remedies).
- (3) In using unit prices it must be remembered that great variations in the number of units required may necessitate adjustments in the unit price.
- (4) Other useful clauses not normally subject to the pricing formulas of Subsection (2) may be promulgated under Subsection (3).

DEFINITIONAL CROSS-REFERENCES:

"Chief Procurement Officer"	Section	1-301(3)
"Contract"	Section	1-301(5)
"Contractor"	Section	1-301(7)
"Data"	Section	1-301(8)
"May"	Section	1-301(14)
"Regulation"	Section	1-301(20)
"Shall"	Section	1-301(22)
"Written" or "In Writing"	Section	1-301(26)

R6-101.01 Introduction.

The following contract clauses are available for use in supply and service contracts at the discretion of the Chief Procurement Officer, the head of a Purchasing Agency, or the designee of either officer in accordance with Section 6-101 (Contract Clauses and Their Administration) of the [State] Procurement Code. Alternative clauses are provided in some instances to permit accommodation of differing contract situations.

Editorial Note: This Chapter permits but does not require use of the following contract clauses. It should be noted that Section 6-101 (Contract Clauses and Their Administration) of the Model Procurement Code authorizes regulations that may require the use of those contract clauses promulgated and, while certain situations are listed that may be appropriately covered by contract clauses, this Code Section does not require these situations to be treated in any particular way.

R6-101.02 Variations in Contract Clause.

If the clauses set forth in this Chapter are utilized, they may be varied for use in a particular contract when, pursuant to the provisions of Section 6-101(4)(Contract Clauses and Their Administration, Modification of Clauses) of the [State] Procurement Code, the Chief Procurement Officer or the head of a Purchasing Agency makes a written determination describing the circumstances justifying the variation or variations.

Any material variation from these clauses shall be described in; the solicitation documents in substantially the following form:

"Clause No. _____, entitled _____, is not a part of the general terms and conditions of this contract and has been replaced by Special Clause No. _____, entitled _____.

R6-101.03 Changes Clause.

R6-101.03.1 Changes Clause in Fixed-Price Contracts. In fixed-price contracts the following clause [may] [shall] be inserted:

"CHANGES

(1) *Change Order.* By a written order, at any time, and without notice to any surety, the Procurement Officer may, subject to all appropriate

adjustments, make changes within the general scope of this contract in any one or more of the following:

- (a) drawings, designs, or specifications, if the supplies to be furnished are to be specially manufactured for the [State] in accordance therewith;
- (b) method of shipment or packing; or
- (c) place of delivery.

(2) *Adjustments of Price or Time for Performance.* If any such change order increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract.

Failure of the parties to agree to an adjustment shall not excuse the contractor from proceeding with the contract as changed, provided that the [State] promptly and duly make such provisional adjustments in payment or time for performance as may be reasonable. By proceeding with the work, the contractor shall not be deemed to have prejudiced any claim for additional compensation, or an extension of time for completion.

(3) *Time Period for Claim.* Within [30] days after receipt of a written change order under Paragraph (1) (Change Order) of this clause, unless such period is extended by the Procurement Officer in writing, the contractor shall file notice of intent to assert a claim for an adjustment. Later notification shall not bar the contractor's claim unless the [State] is prejudiced by the delay in notification.

(4) *Claim Barred After Final Payment.* No claim by the contractor for an adjustment hereunder shall be allowed if notice is not given prior to final payment under this contract.

(5) *Other Claims Not Barred.* In the absence of such a change order, nothing in this clause shall be deemed to restrict the contractor's right to pursue a claim arising under the contract [if pursued in accordance with the clause entitled, Claims Based on a Procurement Officer's Actions or Omissions, Notice of Claim Clause,] or for breach of contract."

R6-101.03.2 *Changes Clause in Cost-Reimbursement Contracts.*

[RESERVED]

R6-101.04 Stop Work Order Clause.

R6-101.04.1 *Use of Clause.* The clause set forth in Subsection R6-101.04.3 of this Section is authorized for use in any fixed-price contract under which work stoppage may be required for reasons such as advancements in the state of the art, production modifications, engineering changes, or realignment of programs.

R6-101.04.2 *Use of Orders.*

(a) Because stop work orders may result in increased costs by reason of standby costs, such orders shall be issued only with prior approval of the Chief Procurement Officer, the head of a Purchasing Agency, or designees of either officer. Generally, use of a stop work order will be limited to situations in which it is advisable to suspend work pending a decision to proceed by the [State], and a supplemental agreement providing for such suspension is not feasible. A stop work order may not be used in lieu of the issuance of a termination notice after a decision to terminate has been made.

(b) Stop work orders shall not exceed [90] consecutive days and shall include, as appropriate:

- (i) a clear description of the work to be suspended;
- (ii) instructions as to the issuance of further orders by the contractor for material or services;
- (iii) guidance as to action to be taken on subcontracts; and
- (iv) other instructions and suggestions to the contractor for minimizing costs.

Promptly after issuance, stop work orders should be discussed with the contractor and should be modified, if necessary, in the light of such discussions.

(c) As soon as feasible after a stop work order is issued:

- (i) the contract will be terminated; or
- (ii) the stop work order will be cancelled or extended in writing beyond the period specified in the order.

In any event, some such action must be taken before the specified stop work period expires. If an extension of the stop work order is necessary, it must be evidenced by a supplemental agreement. Any cancellation of a stop work order shall be subject to the same approvals as were required for the issuance of the order.

R6-101.04.3 *Clause.*

"STOP WORK ORDER"

(1) *Order to Stop Work.* The Procurement Officer, may, by written order to the contractor, at any time, and without notice to any surety, require the contractor to stop all or any part of the work called for by this contract. This order shall be for a specified period not exceeding [90] days after the order is delivered to the contractor, unless the parties agree to any further period. Any such order shall be identified specifically as a stop work order issued pursuant to this clause. Upon receipt of such an order, the contractor shall forthwith comply with its terms and take all reasonable steps to minimize the occurrence of costs allocable to the work covered by the order during the period of work stoppage. Before the stop work order expires, or within any further period to which the parties shall have agreed, the Procurement Officer shall either:

- (a) cancel the stop work order; or
- (b) terminate the work covered by such order as provided in the 'Termination for Default Clause' or the 'Termination for Convenience Clause' of this contract.

(2) *Cancellation or Expiration of the Order.* If a stop work order issued under this clause is cancelled at any time during the period specified in the order, or if the period of the order or any extension thereof expires, the contractor shall have the right to resume work. An appropriate adjustment shall be made in the delivery schedule or contract price, or both, and the contract shall be modified in writing accordingly, if:

- (a) the stop work order results in an increase in the time required for, or in the

contractor's cost properly allocable to, the performance of any part of this contract; and

- (b) the contractor asserts a claim for such an adjustment within 30 days after the end of the period of work stoppage; provided that, if the Procurement Officer decides that the facts justify such action, any such claim asserted may be received and acted upon at any time prior to final payment under this contract.

(3) *Termination of Stopped Work.* If a stop work order is not cancelled and the work covered

by such order is terminated for default or convenience, the reasonable costs resulting from the stop work order shall be allowed by adjustment or otherwise.

(4) *Adjustments of Price.* Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract."

R6-101.05 Variations in Estimated Quantities Clause.

R6-101.05.1 *Definite Quantity Contracts.* The following clause is authorized for use in definite quantity supply or service contracts:

"VARIATION IN QUANTITY

Upon the agreement of the parties, the quantity of supplies or services or both specified in this contract may be increased by a maximum of ten percent provided:

- (a) the unit prices will remain the same (except for any price adjustments otherwise applicable); and
- (b) the Procurement Officer makes a written determination that such an increase will either be more economical than awarding another contract or that it would not be practical to award another contract."

R6-101.05.2 *Indefinite Quantity Contracts.* No clause is provided here because in indefinite quantity contracts the flexibility as to the [State's] obligation to order and the contractor's obligation to deliver should be designed to meet Using Agency needs while making the contract as attractive as possible to potential contractors, thereby attempting to obtain maximum practicable competition in order to assure the best economy for the [State]. However, in each case, the contract should state:

- (a) the minimum quantity, if any, the [State] is obligated to order and the contractor to provide;
- (b) whether there is a quantity the [State] expects to order and how this quantity relates to any minimum and maximum quantities that may be ordered under the contract;
- (c) any maximum quantity the [State] may order and the contractor must provide; and
- (d) whether the [State] is obligated to order its actual requirements under the contract, or in the case of a multiple award as defined in Regulation 3-504 (Multiple Source Contracting), that the [State] will order its actual requirements from the contractors under the multiple award subject to any minimum or maximum quantity stated.

R6-101.06 Price Adjustment Clause.

"PRICE ADJUSTMENT"

(1) *Price Adjustment Methods.* Any adjustment in contract price pursuant to a clause in this contract shall be made in one or more of the following ways:

- (a) by agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
- (b) by unit prices specified in the contract or subsequently agreed upon;
- (c) by the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as specified in the contract or subsequently agreed upon;
- (d) in such other manner as the parties may mutually agree; or
- (e) in the absence of agreement between the parties, by a unilateral determination by the Procurement Officer of the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as computed by the Procurement Officer in accordance with generally accepted accounting principles and applicable sections of the regulations promulgated under Article 7 (Cost Principles), subject to the provisions of Article 9 (Legal and Contractual Remedies) of the [State] Procurement Code.

(2) *Submission of Price or Cost Data.* Upon request of the Procurement Officer, the contractor shall provide reasonably available factual information to substantiate that the price or cost offered, for any price adjustments is reasonable, consistent with the provisions of Section 3-403 (Substantiation of Offered Prices) of the [State] Procurement Code."

R6-101.07 Claims Based on a Procurement Officer's Actions or Omissions Clause.

The clause set forth in Section R5-401.08 (Claims Based on a Procurement Officer's Actions or Omissions Clause) of these regulations may be used in supply or service contract.

R6-101.08 Termination for Default Clause.

"TERMINATION FOR DEFAULT"

(1) *Default.* If the contractor refuses or fails to perform any of the provisions of this contract with such diligence as will ensure its completion within the time specified in this contract, or any extension thereof, otherwise fails to timely satisfy the contract provisions, or commits any other substantial breach of this contract, the Procurement Officer may notify the contractor in writing of the delay or non-performance and if not cured in [ten days] or any

longer time specified in writing by the Procurement Officer, such officer may terminate the contractor's right to proceed with the contract or such part of the contract as to which there has been delay or a failure to properly perform. In the event of termination in whole or in part the Procurement Officer may procure similar supplies or services in a manner and upon terms deemed appropriate by the Procurement Officer. The contractor shall continue performance of the contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services.

(2) *Contractor's Duties.* Notwithstanding termination of the contract and subject to any directions from the Procurement Officer, the contractor shall take timely, reasonable, and necessary action to protect and preserve property in the possession of the contractor in which the [State] has an interest.

(3) *Compensation.* Payment for completed supplies delivered and accepted by the [State] shall be at the contract price. Payment for the protection and preservation of property shall be in an amount agreed upon by the contractor and Procurement Officer; if the parties fail to agree, the Procurement Officer shall set an amount subject to the contractor's rights under Article 9 (Legal and Contractual Remedies) of the [State] Procurement Code. The [State] may withhold from amounts due the contractor such sums as the Procurement Officer deems to be necessary to protect the [State] against loss because of outstanding liens or claims of former lien holders and to reimburse the [State] for the excess costs incurred in procuring similar goods and services.

(4) *Excuse for Nonperformance or Delayed Performance.* Except with respect to defaults of subcontractors, the contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms (including any failure by the contractor to make progress in the prosecution of the work hereunder which endangers such performance) if the contractor has notified the Procurement Officer within 15 days after the cause of the delay and the failure arises out of causes such as: acts of God; acts of the public enemy; acts of the [State] and any other governmental entity in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather. If the failure to perform is caused by the failure of a subcontractor to perform or to make progress, and if such failure arises out of causes similar to those set forth above, the contractor shall not be deemed to be in default, unless the supplies or services to be furnished by the subcontractor were reasonably obtainable from other sources in sufficient time to permit the contractor to meet the contract requirements.

Upon request of the contractor, the Procurement Officer shall ascertain the facts and extent of such failure, and, if such officer determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, the contractor's progress and performance would have met the terms of the contract, the delivery schedule shall be revised accordingly, subject to the rights of the [State] under the clause entitled (in fixed-price contracts, 'Termination for Convenience', in cost-reimbursement contracts, 'Termination'). (As used in this Paragraph of this clause, the term 'subcontractor' means subcontractor at any tier.)

(5) *Erroneous Termination for Default.* If, after notice of termination of the contractor's right to proceed under the provisions of this clause, it is determined for any reason that the contractor was not in default under the provisions of this clause, or that the delay was excusable under the provisions of Paragraph (4) (Excuse for Nonperformance or Delayed Performance) of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the [State], be the same as if the notice of termination had been issued pursuant to such clause. If, in the foregoing circumstances, this contract does not contain a clause providing for termination for convenience of the [State], the contract shall be adjusted to compensate for such termination and the contract modified accordingly subject to the contractor's rights under Article 9 (Legal and Contractual Remedies) of the [State] Procurement Code.

(6) *Additional Rights and Remedies.* The rights and remedies provided in this clause are in addition to any other rights and remedies provided by law or under this contract."

R6-101.09 Liquidated Damages Clause.

R6-101.09.1 *With Termination for Default Clause.* The following clause is authorized for use in supply or service contracts when it is difficult to determine with reasonable accuracy the amount of damage to the [State] due to delays caused by late contractor performance or nonperformance and the contract contains the termination for default clause set forth in Section R6-101.08.

"LIQUIDATED DAMAGES

When the contractor is given notice of delay or nonperformance as specified in Paragraph (1) (Default) of the Termination for Default Clause of this contract and fails to cure in the time specified, the contractor shall be liable for damages for delay in the amount of [\$_____] per calendar day from date set for cure until either the [State] reasonably obtains similar supplies or services if the contractor is terminated for default, or until the contractor

provides the supplies or services if the contractor is not terminated for default. To the extent that the contractor's delay or nonperformance is excused under Paragraph (4) (Excuse for Nonperformance or Delayed Performance) of the Termination for default Clause of this contract, liquidated damages shall not be due the [State]. The contractor remains liable for damages caused other than by delay."

R6-101.09.2 *In Other Situations*. If the contract will not have a Termination for default Clause or the liquidated damages are to be assessed for reasons other than delay, the Chief Procurement Officer or the head of a Purchasing Agency may approve the use of any appropriate liquidated damages clause.

R6-101.10 Termination for Convenience Clause.

"TERMINATION FOR CONVENIENCE

(1) *Termination*. The Procurement Officer may, when the interests of the [State] so require, terminate this contract in whole or in part, for the convenience of the [State]. The Procurement Officer shall give written notice of the termination to the contractor specifying the part of the contract terminated and when termination becomes effective.

(2) *Contractor's Obligations*. The contractor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination the contractor will stop work to the extent specified. The contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The Procurement Officer may direct the contractor to assign the contractor's right, title, and interest under terminated orders or subcontracts to the [State]. The contractor must still complete the work not terminated by the notice of termination and may incur obligations as are necessary to do so.

(3) *Right to Supplies*. The Procurement Officer may require the contractor to transfer title and deliver to the [State] in the manner and to the extent directed by the Procurement Officer:

- (a) any completed supplies; and
- (b) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing material") as the contractor has specifically produced or specially acquired for the performance of the terminated part of this contract.

The contractor shall, upon direction of the Procurement Officer, protect and preserve property in the possession of the contractor in which the [State] has an interest. If the Procurement Officer does not exercise this right, the contractor shall use best efforts to sell such supplies and manufacturing materials in a accordance with the standards of Uniform Commercial Code Section 2-706. [U.C.C. §2-706 is quoted in the Editorial Note at the end of this Section.] Utilization of this Section in no way implies that the [State] has breached the contract by exercise of the Termination for Convenience Clause.

(4) Compensation.

(a) The contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data to the extent required by Section 3-403 (Cost or Pricing Data) of the [State] Procurement Code bearing on such claim. If the contractor fails to file a termination claim within one year from the effective date of termination, the Procurement Officer may pay the contractor, if at all, an amount set in accordance with Subparagraph (c) of this Paragraph.

(b) The Procurement Officer and the contractor may agree to a settlement provided the contractor has filed a termination claim supported by cost or pricing data to the extent required by Section 3-403 (Cost or Pricing Data) of the [State] Procurement Code and that the settlement does not exceed the total contract price plus settlement costs reduced by payments previously made by the [State], the proceeds of any sales of supplies and manufacturing materials under Paragraph (3) of this clause, and the contract price of the work not terminated;

(c) Absent complete agreement under Subparagraph (b) of this Paragraph, the

Procurement Officer shall pay the contractor the following amounts, provided payments agreed to under Subparagraph (b) shall not duplicate payments under this Subparagraph:

- (i) contract prices for supplies or services accepted under the contract;
- (ii) costs incurred in preparing to perform and performing the terminated portion of the work plus a fair and reasonable profit on such portion of the work (such profit shall not include anticipatory profit or consequential damages) less amounts paid or to be paid for accepted supplies or services; provided, however, that if it appears that the contractor would have sustained a loss if the entire contract would have been completed, no profit shall be

allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;

(iii) costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to Paragraph (2) of this clause. These costs must not include costs paid in accordance with Subparagraph (c)(ii) of this paragraph;

(iv) the reasonable settlement costs of the contractor including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to the terminated portion of this contract.

The total sum to be paid the contractor under this Subparagraph shall not exceed the total contract price plus the reasonable settlement costs of the contractor reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under Subparagraph (b) of this Paragraph, and the contract price of work not terminated.

(d) Cost claimed, agreed to, or established under Subparagraphs (b) and (c) of this Paragraph shall be in accordance with Chapter 7 (Cost Principles) of the [State] Procurement Regulations."

COMMENTARY:

Settlement and payment determinations made by the Procurement Officer pursuant to these contract clauses should be made in accordance with any applicable fiscal accountability requirements.

Editorial Note: Section 2-706 of the Uniform Commercial Code states:

"§2-706. Seller's Resale Including Contract for Resale.

(1) Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary

that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

(4) Where the resale is at public sale:

(a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

(c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

(d) the seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(6) The seller is not accountable to the buyer for any profits made on any resale. A person in the position of a seller (Section 2-707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subsection (3) of Section 2-711)."

R6-101.11 Termination Clause for Cost-Reimbursement Contracts.

[RESERVED]

R6-101.12 Remedies Clause.

The clause set forth in Section R5-401.12 (Remedies Clause) of these regulations may be used in supply or service contracts.

ARTICLE 7 – COST PRINCIPLES

Regulation 7-101 Cost Principles

CODE PROVISION:

§7-101 Cost Principles Regulations Required.

The [Policy Office] [Chief Procurement Officer] shall promulgate regulations setting forth cost principles which shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions which provide for the reimbursement of costs, provided that if a written determination is approved at a level above the Procurement Officer, such cost principles may be modified by contract.

COMMENTARY:

- (1) The cost principles regulations may be authorized for use by [State] officials as guidelines: when negotiating estimated costs or fixed prices; when the absence of open market competition precludes the use of competitive sealed bidding; when negotiating adjustments for [State]-directed changes or modifications in contract performance; when negotiating settlements of contracts which have been terminated; or as appropriate in other situations where the determination of estimated or incurred costs is involved. They should not be construed as establishing requirements to be used when negotiating. In such negotiations, the basic consideration should be whether the cost information used to determine prices, adjustments, and settlements is based on generally accepted accounting principles.
- (2) In cost-reimbursement contracts the cost principles may be modified by contract as a matter of legislative right.
- (3) The authority to promulgate regulations conferred in Section 2-102 (Authority and Duties of the Policy Office) or Section 2-204 (Authority of the Chief Procurement Officer) includes the power to promulgate regulations providing for price analysis and using cost principles for guidance in negotiations, adjustments, and settlements.

DEFINITIONAL CROSS-REFERENCES:

"Contract"	Section	1-301(5)
"May"	Section	1-301(14)
"Regulation"	Section	1-301(20)
"Shall"	Section	1-301(22)

R7-101.01 Definitions.

R7-101.01.1 *Actual Costs* are all direct and indirect costs which have been incurred for services rendered, supplies delivered, or construction built, as distinguished from allowable costs only.

R7-101.01.2 *Cost Objective* is any unit of work such as a function, an organizational subdivision, or a contract for which provision is made to accumulate and measure separately the cost of processes, products, jobs, capitalized projects, and similar items. A final cost objective is one that has allocated to it both direct and indirect costs and, in the contractor's accumulation system, is one of the final accumulation points.

COMMENTARY:

Cost objectives are those entities or things within a business organization that the management of the business desires to know the cost of. Once all appropriate costs are allocated to such an objective, management knows what that object cost. For example, the corporate headquarters might be a cost objective and when all appropriate costs were allocated to it, anyone examining this allocation would know what it cost to maintain the headquarters. However, the corporate headquarters is not a final cost objective because its costs must be further allocated to the products or contracts or both that produce income to support the business. These products or contracts would be final cost objectives.

R7-101.02 Applicability of Cost Principles.

R7-101.02.1 Application.

- (a) The cost principles and procedures contained in this Chapter shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions which provide for the reimbursement of costs, provided that any deviation from these cost principles may be made as provided in Section R7-101.11 (Authority to Deviate from Cost Principles).
- (b) The cost principles and procedures set forth in this Chapter may be used as guidance in:
 - (i) the establishment of contract cost estimates and prices under contracts awarded on the basis of competitive sealed proposals where the award may not be based on substantiation of offered prices (Section 3-203); sole source procurement (Section 3-205); competitive selection procedures (Section 3-207); and architectural and engineering services (Section 5-205);
 - (ii) the establishment of price adjustments for contract changes including contracts that have been let on the basis of competitive sealed bidding or otherwise based on adequate price competition;
 - (iii) the pricing of termination for convenience settlements; and
 - (iv) any other situation in which cost analysis is used. Cost analysis is defined in Section R3-101.01.2.

R7-101.02.2 Limitation. These cost principles regulations are not applicable to:

- (a) the establishment of prices under contracts awarded on the basis of competitive sealed bidding or otherwise based on adequate price competition rather than the analysis of individual, specific cost elements, except that this Chapter does apply to the establishment of adjustments of price for changes made to such contracts;
- (b) prices which are fixed by law or regulation; and

(c) prices which are based on established catalogue prices as defined in Section 3-403 (Substantiation of Offered Prices) of the [State] Procurement Code or established market prices.

R7-101.03 Allowable Costs.

R7-101.03.1 *General.* Any contract cost proposed for estimating purposes or invoiced for cost-reimbursement purposes shall be allowable to the extent provided in the contract and, if inconsistent with these cost principles, approved as a deviation under Section R7-101.11 (Authority to Deviate from Cost Principles). The contract shall provide that the total allowable cost of a contract is the sum of the allowable direct costs actually incurred in the performance of the contract in accordance with its terms, plus the properly allocable portion of the allowable indirect costs, less any applicable credits (such as discounts, rebates, refunds, and property disposal income).

R7-101.03.2 *Accounting Consistency.* All costs shall be accounted for in accordance with generally accepted accounting principles and in a manner that is consistent with the contractor's usual accounting practices in charging costs to its other activities. In pricing a proposal, a contractor shall estimate costs in a manner consistent with its cost accounting practices used in accumulating and reporting costs.

R7-101.03.3 *When Allowable.* The contract shall provide that costs shall be allowed to the extent they are:

- (a) reasonable, as defined in Section R7-101.04 (Reasonable Costs);
- (b) allocable, as defined in Section R7-101.05 (Allocable Costs);
- (c) lawful under any applicable law;
- (d) not unallowable under Section R7-101.06 (Treatment of Specific Costs) or Section R7-101.07 (Costs Requiring Prior Approval to be Allowable as Direct Costs); and
- (e) in the case of costs invoiced for reimbursement, actually incurred or accrued and accounted for in accordance with generally accepted accounting principles.

R7-101.04 Reasonable Costs.

Any cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by an ordinarily prudent person in the conduct of competitive business in that industry. In determining the reasonableness of a given cost, consideration shall be given to:

- (a) requirements imposed by the contract terms and conditions;

- (b) whether the cost is of a type generally recognized as ordinary and necessary for the conduct of the contractor's business or the performance of the contract;
- (c) the restraints inherent in, and the requirements imposed by, such factors as generally accepted sound business practices, arms' length bargaining, and federal and State laws and regulations;
- (d) the action that a prudent business manager would take under the circumstances, including general public policy and considering responsibilities to the owners of the business, employees, customers, and the [State];
- (e) significant deviations from the contractor's established practices which may unjustifiably increase the contract costs; and
- (f) any other relevant circumstances.

R7-101.05 Allocable Costs.

R7-101.05.1 *General.* A cost is allocable if it is assignable or chargeable to one or more cost objectives in accordance with relative benefits received and if it:

- (a) is incurred specifically for the contract;
- (b) benefits both the contract and other work, and can be distributed to both in reasonable proportion to the benefits received; or
- (c) is necessary to the overall operation of the business, although a direct relationship to any particular cost objective may not be evident.

R7-101.05.2 *Allocation Consistency.* Costs are allocable as direct or indirect costs. Similar costs (those incurred for the same purpose, in like circumstances) shall be treated consistently either as direct costs or indirect costs except as provided by these regulations. When a cost is treated as a direct cost in respect to one cost objective, it and all similar costs shall be treated as a direct cost for all cost objectives. Further, all costs similar to those included in any indirect cost pool shall be treated as indirect costs. All distributions to cost objectives from a cost pool shall be on the same basis.

R7101.05.3 *Direct Costs.* A direct cost is any cost which can be identified specifically with a particular final cost objective. A direct cost shall be allocated only to its specific cost objective. To be allowable, a direct cost must be incurred in accordance with the terms of the contract.

R7-101.05.4 *Indirect Costs.*

(a) An indirect cost is one identified with no specific final cost objective or with more than one final cost objective. Indirect costs are those remaining to be allocated to the several final cost objectives after direct costs have been determined and charged directly to the contract or other work as appropriate. Any direct costs of minor dollar amount may be treated as indirect costs, provided that such treatment produces substantially the same results as treating the cost as a direct cost.

(b) Indirect costs shall be accumulated into logical cost groups (or pools), with consideration of the reasons for incurring the costs. Each group should be distributed to cost objectives benefiting from the costs in the group. Each indirect cost group shall be distributed to the cost objectives substantially in proportion to the benefits received by the cost objectives. The number and composition of the groups and the method of distribution should not unduly complicate indirect cost allocation where substantially the same results could be achieved through less precise methods.

(c) The contractor's method of distribution may require examination when:

(i) any substantial difference exists between the cost patterns of the work performed under the contract and the contractor's other work;

(ii) any significant change occurs in the nature of the business, the extent of subcontracting, fixed asset improvement programs, inventories, the volume of sales and production, manufacturing processes, the contractor's products, or other relevant circumstances; or

(iii) indirect cost groups developed for a contractor's primary location are applied to off-site locations. Separate cost groups for costs allocable to off-site locations may be necessary to distribute the contractor's costs on the basis of the benefits accruing to the appropriate cost objectives.

(d) The base period for indirect cost allocation is the one in which such costs are incurred and accumulated for distribution to work performed in that period. Normally, the base period is the contractor's fiscal year. A different base period may be appropriate under unusual circumstances. In such cases, an appropriate period should be agreed to in advance.

R7-101.06 Treatment of Specific Costs.

R7-101.06.1 Advertising.

(a) Advertising costs are those incurred in using any advertising media when the advertiser has control over the form and content of what will appear, the media in which it will appear, or when it will appear. Advertising media include newspapers, magazines, radio, television, direct mail, trade papers,

billboards, window displays, conventions, exhibits, free samples, and the like. All advertising costs except those set forth in Subsection R7-101.06.1(b) of this Section are unallowable.

(b) The only allowable advertising costs are those for:

- (i) the recruitment of personnel;
- (ii) the procurement of scarce items;
- (iii) the disposal of scrap or surplus materials; and
- (iv) the listing of a business's name and location in a classified directory.

COMMENTARY:

Advertising costs are unallowable because government sales are generated by soliciting specific offers for specific requirements-the [State] is not subject to impulse buying-and the advertising costs other than for those purposes set forth in Subsection R7-101.06.1(b) are not allocable to [State] contracts.

R7-101.06.2 *Bad Debts.* Bad debts include losses arising from uncollectible accounts and other claims, such as dishonored checks, uncollected employee advances, and related collection and legal costs. All bad debt costs are unallowable.

COMMENTARY:

Bad debts are unallowable because these costs are not allocable to government contracts. When the nature of the work performed under a cost-reimbursement type contract requires the contractor to deal with third parties in a way which may generate bad debts, a deviation from this Subsection may be appropriate.

R7-101.06.3 Contingencies.

(a) Contingency costs are contributions to a reserve account for unforeseen costs. Such contingency costs are unallowable except as provided in Subsection R7-101.06.3(b) of this Section.

(b) For the purpose of establishing a contract cost estimate or price in advance of performance of the contract, recognition of uncertainties within a reasonably anticipated range of costs may be required and is not prohibited by this Subsection. However, where contract clauses are present which serve to remove risks from the contractor, there shall not be included in the contract price a contingency factor for such risks. Further, contributions to a reserve for self-insurance in lieu of, and not in excess of, commercially available liability insurance premiums are allowable as an indirect charge.

COMMENTARY:

Contingency costs are unallowable because they are speculative in nature and represent a mere risk rather than an actual incurred cost. Realistic risks are recognized properly in both the selection of the type of contract used and the amount of profit or fee paid, but are not considered to be a cost

for the purpose of cost-reimbursement. In estimating future costs, reasonable amounts may be recognized as necessary to cover realistic foreseeable uncertainties, such as inflation and spoilage. However, unsupported general contingencies are not allowable.

R7-101.06.4 Depreciation and Use Allowances.

- (a) Depreciation and use allowances, that is, the allowance made for fully depreciated assets, are allowable to compensate contractors for the use of buildings, capital improvements, and equipment or for the provision of such facilities on a standby basis for subsequent use when such facilities are temporarily idle because of suspensions or delays not caused by the contractor, not reasonably foreseeable, and not otherwise avoidable when the contract was awarded. Depreciation is a method of allocating the acquisition cost of an asset to periods of its useful life. Useful life refers to the asset's period of economic usefulness in the particular contractor's operation as distinguished from its physical life. Use allowances provide compensation in lieu of depreciation or other equivalent costs. Consequently, these two methods may not be combined to compensate contractors for the use of any one type of property.
- (b) The computation of depreciation or use allowances shall be based on acquisition costs. When the acquisition costs are unknown, reasonable estimates may be used.
- (c) Depreciation shall be computed using any generally accepted method, provided that the method is consistently applied and results in equitable charges considering the use of the property. The straight-line method of depreciation is preferred unless the circumstances warrant some other method. However, the [State] will accept any method which is accepted by the Internal Revenue Service.
- (d) In order to compensate the contractor for use of depreciated, contractor-owned property which has been fully depreciated on the contractor's books and records and is being used in the performance of a contract, use allowances may be allowed as a cost of that contract. Use allowances are allowable, provided that they are computed in accordance with an established industry or government schedule or other method mutually agreed upon by the parties. If a schedule is not used factors to consider in establishing the allowance are the original cost, remaining estimated useful life, the reasonable fair market value, and the effect of any increased maintenance or decreased efficiency.

COMMENTARY:

When it is economical for contractors to continue using fully depreciated property and equipment, they should be encouraged to do so. Failure to allow contractors to charge [State] contracts with

costs for the use of such property and equipment could serve to encourage wasteful scrapping and disposal and the incurrence of administrative and rental costs in excess of the otherwise allowable use allowance.

R7-101.06.5 Entertainment.

(a) Entertainment costs include costs of amusements, social activities, and incidental costs relating thereto, such as meals, beverages, lodging, transportation, and gratuities. Entertainment costs are unallowable.

(b) Nothing herein shall make unallowable a legitimate expense for employee morale, health, welfare, food service, or lodging costs; except that, where a net profit is generated by such services, it shall be treated as a credit as provided in Section R7-101.08 (Applicable Credits). This Section shall not make unallowable costs incurred for meetings or conferences, including, but not limited to, costs of food, rental facilities, and transportation where the primary purpose of incurring such cost is the dissemination of technical information or the stimulation of production.

COMMENTARY:

Entertainment costs are not allocable to [State] contracts, and thus are unallowable because:

- (a) like advertising, they are not necessary to obtain [State] contracts;
- (b) like contributions and donations, entertainment costs would constitute an improper disposition of tax revenues;
- (c) acceptance of entertainment from a contractor by a [State] employee may be unethical and might constitute an apparent conflict of interest under Chapter 12 (Ethics in Public Contracting); and
- (d) from a public policy point of view, it would be unacceptable to use [State] money to pay for a contractor's entertainment or gifts. Reasonable costs of business conferences and activities designed to maintain employee morale are not considered entertainment costs within the meaning of this Subsection.

R7-101.06.6 *Fines and Penalties.* Fines and penalties include all costs incurred as the result of violations of, or failure to comply with, federal, State, and local laws and regulations. Fines and penalties are unallowable costs unless incurred as a direct result of compliance with specific provisions of the contract or written instructions of the Procurement Officer. [To the extent that worker's compensation is considered by State law to constitute a fine or penalty, it shall not be an unallowable cost under this Subsection.]

COMMENTARY:

Fines and penalties are unallowable because incurrence of the costs is not a reasonably necessary cost of doing business. Furthermore, allowing these costs would be contrary to good public policy.

R7-101.06.7 *Gifts, Contributions, and Donations.* A gift is property transferred to another person without the other person providing return

consideration of equivalent value. Reasonable costs for employee morale, health, welfare, food services, or lodging are not gifts and are allowable. Contributions and donations are property transferred to a non-profit institution which are not transferred in exchange for supplies or services of equivalent fair market value rendered by a nonprofit institution. Gifts, contributions, and donations are unallowable.

COMMENTARY:

Contributions and donations are unallowable because allowing these costs would amount to an improper disposition of tax revenues by making a payment from the [State] treasury to an institution or activity selected by a single private taxpayer, without the consent of the taxpaying public or its elected representatives. Therefore, allowing these costs would be contrary to good public policy. An exception is provided for the bona fide purchase of supplies or services rendered by nonprofit, volunteer organizations.

R7-101.06.8 *Interest Costs.*

(a) Interest is generally an unallowable cost for purposes of determining the original contract price. Compensation for any interest expense incurred in connection with work originally contemplated under the contract will be deemed to be included in the fee or profit negotiated on the contract.

(b) Imputed interest on a contractor's expenditures made to pay allowable costs which are allocable to the performance of work required by change orders, suspension of work, or other acts of the [State] requiring additional work over and above that required by the original contract (hereinafter called "Additional Work") shall be an allowable cost. Imputed interest is an allowable cost in relation to such Additional Work in a negotiated settlement, if one can be agreed upon, or to the extent that it is determined administratively or judicially that the [State] is liable for such Additional Work. Such imputed interest shall be computed on expenditures from the date or dates on which the contractor made expenditures for the performance of such Additional Work until the date of payment therefor by the [State]. The rate of interest shall be the prevailing prime rate charged by banks in this [State] as determined by the [State Auditor or Comptroller], at the time or times the contractor made such expenditures for Additional Work. Imputed interest on the costs of Additional Work shall not be allowable to the extent that it is otherwise recovered as profit, fee, or as interest on contractor claims pursuant to Section 9-301 (Interest) of the [State] Procurement Code.

COMMENTARY:

(1) Interest cost is unallowable because dividends are unallowable. The payment of both interest and dividends is necessary to raise capital to finance contract performance (dividends for equity capital; interest for borrowed capital). Dividends are properly considered a distribution of profit and thus are not allowed as charges against contracts. To allow interest but not dividends would be an unfair bias in favor of borrowed capital over equity capital. Thus fairness dictates that interest not

be allowed as costs charged against contracts. However, both interests and dividends are deemed to be included in the fee or profit negotiated on the contract.

(2) However, when the contractor is directed to perform additional work over and above that required by the original contract, and for which the [State] is liable, the costs of financing such additional work should be reimbursed. Thus, Subsection R7-101.06.8(b) provides for the recognition of imputed interest on expenditures for allowable costs allocable to the performance of such additional work. If provision for such expenditures is made in a settlement, imputed interest should be included. In addition, if the liability of the [State] for such work is established administratively or judicially, imputed interest on such expenditures is an allowable cost. Such an allowance recognizes the real cost of financing such additional work without differentiating unfairly between borrowed and equity capital. It should also be noted that by limiting the base to which imputed interest is applied to expenditures for allowable costs allocable to additional work, the computation of such interest is not unduly complicated. In addition, imputed interest should not be recovered to the extent it is otherwise recovered as profit or fee.

R7-101.06.9 *Losses Incurred Under Other Contracts.* A loss is the excess of costs over income earned under a particular contract. Losses may include both direct and indirect costs. A loss incurred under one contract may not be charged to any other contract.

COMMENTARY:

Losses incurred on other contracts or jobs of any nature are unallowable because each contract is a separate agreement and the allowable costs must stand by themselves on their own merits as reasonable, necessary, and allocable to the performance of each contract.

R7-101.06.10 Material Costs.

(a) Material costs are the costs of all supplies, including raw materials, parts, and components (whether acquired by purchase from an outside source or acquired by transfer from any division, subsidiary, or affiliate under the common control of the contractor), which are acquired in order to perform the contract. Material costs are allowable, subject to Subsection R7-101.06.10(b) and Subsection R7-101.06.10(c) of this Section. In determining material costs, consideration shall be given to reasonable spoilage, reasonable inventory losses, and reasonable overages.

(b) Material costs shall include adjustments for all available discounts, refunds, rebates, and allowances which the contractor reasonably should take under the circumstances, and for credits for proceeds the contractor received or reasonably should receive from salvage and material returned to suppliers.

(c) Allowance for all materials transferred from any division (including the division performing the contract), subsidiary, or affiliate under the common control of the contractor shall be made on the basis of costs incurred by the transferor (determined in accordance with this Chapter), except the transfer may be made at the established price provided that the price of materials is

not determined to be unreasonable by the Procurement Officer, the price is not higher than the transferor's current sales price to its most favored customer for a like quantity under similar payment and delivery conditions, and the price is established either:

- (i) by the established catalogue price, as defined in Section 3-101(2) of the [State] Procurement Code; or
- (ii) by the lowest price offer obtained as a result of competitive sealed bidding or competitive sealed proposals conducted with other businesses that normally produce the item in similar quantities.

R7-101.06.11 Taxes.

- (a) Except as limited in Subsection R7-101.06.11(b) of this Section, all allocable taxes which the contractor is required to pay and which are paid and accrued in accordance with generally accepted accounting principles are allowable.
- (b) The following costs are unallowable:
 - (i) federal, [state and local income taxes] and federal excess profit taxes;
 - (ii) all taxes from which the contractor could have obtained an exemption, but failed to do so, except where the administrative cost of obtaining the exemption would have exceeded the tax savings realized from the exemption;
 - (iii) any interest, fines, or penalties paid on delinquent taxes unless incurred at the written direction of the Procurement Officer; and
 - (iv) income tax accruals designed to account for the tax effects of differences between taxable income and pretax income as reflected by the contractor's books of account and financial statements.
- (c) Any refund of taxes which were allowed as a direct cost under the contract shall be credited to the contract. Any refund of taxes which were allowed as an indirect cost under a contract shall be credited to the indirect cost group applicable to any contracts being priced or costs being reimbursed during the period in which the refund is made.
- (d) Direct government charges for services, such as water, or capital improvements, such as sidewalks, are not considered taxes and are allowable costs.

COMMENTARY:

Income taxes are levied on taxable income, which is total income less costs. As such, income taxes are considered to be a distribution of profit and are not allowable as a cost. To allow income taxes

as a cost would have the inequitable result of paying higher prices to highly profitable contractors and lower prices to contractors who make little or no profit - and higher prices to a single contractor in a highly profitable year and lower prices in an unprofitable year. Further, the higher prices paid by treating income taxes as an allowable cost would result in higher income and higher income taxes, which in turn would generate higher allowable costs and give rise to still higher prices, and so on to infinity; thus, treating income taxes as an allowable cost simply is impracticable.

Editorial Note: Unlike federal taxes, which are levied on the same basis against all contractors regardless of where they are located, different States and localities tax at different rates and on different bases. As a consequence, this Section and applicable tax laws should be closely reviewed by enacting jurisdictions to determine which taxes should be recognized as costs and how they should be treated.

R7-101.07 Costs Requiring Prior Approval to be Allowable as Direct Costs.

R7-101.07.1 General. The costs described in Subsections R7-101.07.2 through R7-101.07.5 of this Section are allowable as direct costs to cost reimbursement type contracts to the extent that they have been approved in advance by the Procurement Officer. In other situations the allowability of these costs shall be determined in accordance with general standards set out in these cost principles.

COMMENTARY:

Some discretionary expenditures, incurred without the benefit of competitive pressure under cost-reimbursement type contracts, can give rise to very serious and difficult questions of reasonableness and allocability. Thus, specific advance approval by the Procurement Officer is required in order for these costs to be allowed.

R7-101.07.2 Pre-Contract Costs. Pre-contract costs are those incurred in anticipation of, and prior to, the effective date of the contract. Such costs are allowable to the extent that they would have been allowable if incurred after the date of the contract; provided that, in the case of a cost-reimbursement type contract, a special provision must be inserted in the contract setting forth the period of time and maximum amount of cost which will be covered as allowable pre-contract costs.

COMMENTARY:

Normally, only costs incurred under a cost-reimbursement contract for actions taken within the contract period are allowable. Costs incurred for actions prior to or after the period covered by the contract may be considered to be legally not allocable to the contract. -In order to extend the contract period to cover actions taken prior to the date of contract execution, a special provision setting forth the limits of this extension is required.

R7-101.07.3 Bid and Proposal Costs. Bid and proposal costs are the costs incurred in preparing, submitting, and supporting bids and proposals. Reasonable ordinary bid and proposal costs are allowable as indirect costs in accordance with these cost principles regulations. Bid and proposal costs are

allowable as direct costs only to the extent that they are specifically permitted by a provision of the contract or solicitation document. Where bid and proposal costs are allowable as direct costs, to avoid double accounting, the same bid and proposal costs shall not be charged as indirect costs.

COMMENTARY:

When bids and proposals are used for market development purposes, the cost of preparing these bids and proposals are closely related to advertising costs.

R7-101.07.4 Insurance.

(a) Ordinary and necessary insurance costs are normally allowable as indirect costs. Direct insurance costs are the costs of obtaining insurance in connection with performance of the contract or contributions to a reserve account for the purpose of self-insurance. Self-insurance contributions are allowable only to the extent of the cost to the contractor to obtain similar insurance.

(b) Insurance costs may be approved as a direct cost only if the insurance is specifically required for the performance of the contract.

(c) Actual losses which should reasonably have been covered by permissible insurance or were expressly covered by self-insurance are unallowable unless the parties expressly agree otherwise in the terms of the contract.

R7-101.07.5 Litigation Costs. Litigation costs include all filing fees, legal fees, expert witness fees, and all other costs involved in litigating claims in court or before an administrative board. Litigation costs incident to the contract are allowable as indirect costs in accordance with these cost principles regulations except that costs incurred in litigation by or against the [State] are unallowable.

COMMENTARY:

Costs of litigating claims generally are unallowable because they are properly allocable to the claim and not to the performance of the contract. Further; allowing costs incurred in the litigation of unsuccessful claims would encourage needless litigation, which is contrary to public policy. These costs may be awarded to successful claimants only at the discretion of the court or the administrative board which hears the claim. This does not preclude the allowance of reasonable indirect costs for legal counsel, incurred on a regular basis, whether provided by employees or outside counsel.

R7-101.08 Applicable Credits.

R7-101.08.1 Definitions and Examples. Applicable credits are receipts or price reductions which offset or reduce expenditures allocable to contracts as direct or indirect costs. Examples include purchase discounts, rebates,

allowances, recoveries or indemnification for losses, sale of scrap and surplus equipment and materials, adjustments for overpayments or erroneous charges, and income from employee recreational or incidental services and food sales.

R7-101.08.2 *Reducing Costs*. Credits shall be applied to reduce related direct or indirect costs.

R7-101.08.3 *Refund*. The [State] shall be entitled to a cash refund if the related expenditures have been paid to the contractor under a cost-reimbursement type contract.

R7-101.09 Advance Agreements.

R7-101.09.1 *Purpose*. Both the [State] and the contractor should seek to avoid disputes and litigation arising from potential problems by providing in the terms of the solicitation and the contract the treatment to be accorded special or unusual costs which are expected to be incurred.

R7-101.09.2 *Form Required*. Advance agreements may be negotiated either before or after contract award, depending upon when the parties realize the cost may be incurred, but shall be negotiated before a significant portion of the cost covered by the agreement has been incurred. Advance agreements shall be in writing, executed by both contracting parties, and incorporated in the contract.

R7-101.09.3 *Limitation on Costs Covered*. An advance agreement shall not provide for any treatment of costs inconsistent with these costs principles regulations unless a determination has been made pursuant to Section R7-101.11 (Authority to Deviate from Cost Principles).

R7-101.10 Use of Federal Cost Principles.

R7-101.10.1 *Cost Negotiations*. In dealing with contractors operating according to federal cost principles, such as the Federal Acquisition Regulation, the Procurement Officer, after notifying the contractor, may use the federal cost principles as guidance in contract negotiations, subject to Subsection R7-101.10.2 of this Section.

R7-101.10.2 *Incorporation of Federal Cost Principles; Conflicts Between Federal Principles and this Chapter*. All requirements set forth in federal assistance instruments applicable to contracts let by the [State] under a federal assistance program must be satisfied. Therefore, to the extent that the cost principles which are specified in the assistance instrument conflict with the cost principles issued pursuant to Article 7 (Cost Principles) of the [State] Procurement Code, the former shall control.

R7-101.11 Authority to Deviate from Cost Principles.

When the best interest of the [State] would be served by a deviation, the Procurement Officer may deviate from the cost principles set forth in these regulations; provided that a written determination shall be made by such officer specifying the reasons for the deviation. A copy of such determination shall be filed promptly with the Chief Procurement Officer and such determination shall be effective only upon approval by the Chief Procurement Officer and upon incorporation into the contract. However, all costs must be reasonable, lawful, allocable, and accounted for in accordance with generally accepted accounting principles to be reimbursed, and a deviation shall not contravene this principle.

ARTICLE 8 – SUPPLY MANAGEMENT

Part A – Definitions

CODE PROVISION:

§8-101 Definitions of Terms Used in this Article.

- (1) *Excess Supplies* means any supplies other than expendable supplies having a remaining useful life but which are no longer required by the Using Agency in possession of the supplies.
- (2) *Expendable Supplies* means all tangible supplies other than nonexpendable supplies.
- (3) *Nonexpendable Supplies* means all tangible supplies having an original acquisition cost of over (\$100] per unit and a probable useful life of more than one year.
- (4) *Supplies* means, for purposes of this Article, supplies owned by the [State]. (See Section 1-301(21) (Supplies)).
- (5) *Surplus Supplies* means any supplies other than expendable supplies no longer having any use to the [State]. This includes obsolete supplies, scrap materials, and nonexpendable supplies that have completed their useful life cycle.

DEFINITIONAL CROSS-REFERENCES:

"Chief Procurement Officer"	Section	1-301(3)
"Employee"	Section	1-301(10)
"Regulation"	Section	1-301(18)
"Shall"	Section	1-301(20)
"Using Agency"	Section	1-301(22)

R8-101.01 Definitions.

R8-101.01.1 *Supplies*, for purposes of this Chapter, means tangible personal property owned by the [State].

Part B – Regulations Required

Regulation 8-201 – Supply Management Regulations

CODE PROVISION:

§8-201 Supply Management Regulations Required.

The [Policy Office] [Chief Procurement Officer] shall promulgate regulations governing:

- (a) the management of supplies during their entire life cycle;
- (b) the sale, lease, or disposal of surplus supplies by public auction, competitive sealed bidding, or other appropriate method designated by regulation, provided that no employee of the owning or disposing agency shall be entitled to purchase any such supplies; and
- (c) transfer of excess supplies.

R8-201.01 General.

Objectives of [State] supply management include preventing waste; continuing utilization of supplies; and obtaining a fair return of value upon disposal of supplies. In order to achieve these objectives, sound inspection, testing, warehousing, and inventory practices are called for, and effective means of transferring and disposing of property must be employed.

R8-201.02 Quality Assurance, Inspection, and Testing.

The Chief Procurement Officer shall take such steps as deemed desirable to ascertain or verify that supplies, services, or construction items procured by such officer conform to specifications. In performing this duty, the Chief Procurement Officer may establish inspection and testing facilities, employ inspection personnel, enter into arrangements for the joint or cooperative use of laboratories and inspection and testing facilities, and contract with others for inspection or testing work as needed. The Chief Procurement Officer may delegate authority for inspection and testing to Using Agencies.

R8-201.03 Inventory Management.

The Chief Procurement Officer shall have general supervision of all inventories of tangible personal property, whether warehoused or in use, belonging to the [State] or any of its agencies. This responsibility shall not, however, relieve any agency of accountability for tangible personal property and other supplies under its control. All warehouses and similar storage areas shall be inventoried at least annually.

R8-201.04 Warehousing and Storage.

The Chief Procurement Officer shall exercise general supervision of any receiving, storage, and distribution facilities and services maintained and operated by the Office of the Chief Procurement Officer or Using Agencies.

R8-201.05 Authority of the Chief Procurement Officer.

No Using Agency shall transfer, sell, trade-in, or otherwise dispose of supplies owned by the [State] without written authorization of the Chief Procurement Officer.

R8-201.06 Report of Supplies.

Using Agencies shall notify the Chief Procurement Officer, on such forms and at such times as that officer may prescribe, of all excess supplies. In so doing, a Using Agency may suggest a dollar value per item or per lot that it desires to receive from any transfer or disposition of such excess supplies, but the suggestion shall not constitute the minimum sale or transfer amount. Any such figures shall not be public information prior to transfer or sale.

R8-201.07 Transfer of Excess and Surplus Supplies.

Insofar as feasible and practical, the Chief Procurement Officer shall transfer excess supplies to other [State] agencies and other units of government. The price of the supply transferred shall be the fair market price based, where possible, on previous sales of similar products in the open market, or on an appraised value, and shall be one mutually agreed upon between the owning agency and the recipient, and approved by the Chief Procurement Officer. If agreement cannot be reached, the Chief Procurement Officer shall establish the price. When a supply is transferred to a political subdivision of the [State], the recipient shall agree in writing not to transfer title or otherwise dispose of the supply within 12 months without prior approval of the Chief Procurement Officer.

COMMENTARY:

Enacting jurisdictions may also consider allowing transfer to be made directly to charitable organizations, provided the supplies will be exclusively owned and used by one or more such organizations, and provided further that, unless disposition is authorized sooner by the Chief Procurement Officer, the supplies will be retained by the organization at least 12 months before disposal. Such jurisdictions must utilize existing law for defining a charitable organization and, if necessary, require the Chief Procurement Officer to ascertain that the organizations meet the definition.

R8-201.08 Disposition of Surplus Supplies.

R8-201.08.1 *General Requirements.* Surplus supplies shall be offered through competitive sealed bids, public auction, established markets, or posted prices. It is recognized, however, that some types and classes of items can be sold or disposed of more readily and advantageously by other means, including barter. In such cases, and also where the nature of the supply or unusual circumstances call for its sale to be restricted or controlled, the Chief Procurement Officer may employ such other means, including appraisal, provided such officer makes a written determination that such

procedure is advantageous to the [State]. Only United States Postal Money Orders, certified checks, or cashiers' checks shall be accepted for sales of surplus property except cash or a personal check may be accepted for petty cash sales of less than [\$100]. A copy of all sales notifications or invoices shall be sent to the [State Comptroller or Auditor].

R8-201.08.2 Competitive Sealed Bidding.

(a) Solicitation and Opening. When making sales by competitive sealed bidding, notice of the sale should be given at least [ten] days before the date set for opening bids. Notice shall be given by mailing a Request for Sale Bids to prospective bidders, including those bidders on lists maintained for this purpose, and by making the Request for Sale Bids publicly available. Newspaper advertisement may also be used. The Request for Sale Bids shall list the supplies offered for sale; designate their location and how they may be inspected; and state the terms and conditions of sale and instructions to bidders including the place, date, and time set for bid opening. Bids shall be opened publicly.

(b) Award. Award shall be made in accordance with the provisions of the Request for Sale Bids to the highest responsive and responsible bidder, provided that the price offered by such bidder is acceptable to the Chief Procurement Officer. Where such price is not acceptable, the Chief Procurement Officer may reject the bids in whole or in part and negotiate the sale provided the negotiated sale price is higher than the highest responsive and responsible bidder's price, or such officer may resolicit bids.

R8-201.08.3 Auctions. Supplies may be sold at auction. When appropriate, an experienced auctioneer should be used to cry the sale and assist in preparation of the sale. The solicitation to bidders should stipulate, at a minimum, all the terms and conditions of any sale; that a deposit may be required in order to participate in the bidding; that the purchaser must remove within a stated time all surplus supplies purchased; and that the [State] retains the right to reject any and all bids.

COMMENTARY:

(1) It is recommended that the [State] confer with professional auctioneers and auctioneer associations as to methods and strategies available that will conform to the general practice in the [State].

(2) Where [State] statutes already prescribe procedures for conducting an auction, such as for tax sales or confiscated property, it may be appropriate to specify that these procedures be used for the auction sale of surplus property.

R8-201.08.4 *Established Markets*. Established markets are places where supplies such as livestock and produce are regularly sold in wholesale lots

and prices are set by open competition. Surplus supplies may be sold in established markets for such supplies.

R8-201.08.5 *Posted Prices*. Surplus supplies may be sold at posted prices as determined by the Chief Procurement Officer when such prices are based on fair market value and the sale is conducted pursuant to written procedures established by the Chief Procurement Officer

R8-201.08.6 *Trade-In*. Surplus supplies may be traded-in only when the Chief Procurement Officer determines the trade-in value is expected to exceed the value estimated to be obtained through the sale or other disposition of such supplies.

Part C – Proceeds

CODE PROVISION:

§8-301 Allocation of Proceeds from Sale or Disposal of Surplus Supplies.

Unless otherwise provided by law, the Chief Procurement Officer shall be empowered, pursuant to regulations, to allocate proceeds from the sale, lease, or disposal of surplus supplies.

R8-301.01 Disposition of Proceeds.

Net proceeds from the disposition of excess or surplus supplies shall be credited to the Using Agency, unless otherwise provided by law.

ARTICLE 9 – LEGAL AND CONTRACTUAL REMEDIES

COMMENTARY:

(1) The American Bar Association notes that the North American Free Trade Agreement and the World Trade Organization Government Procurement Agreement, to which the United States is a signatory, require “sub-units” of national government (state and local governments) to have an appropriate bid protest procedure.

(2) Nothing in this Article is intended to preclude the use of alternative dispute resolution methods in the resolution of procurement-related disputes, or in the use of contract clauses that provide for the avoidance, negotiation, or mediation of disputes.

Part A – Pre-Litigation Resolution of Controversies

CODE PROVISION:

§9-101 Authority to Resolve Protested Solicitations and Awards.

- (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 Chief Procurement Officer or the head of a Purchasing Agency. The protest shall be submitted in writing within [14 days] after such aggrieved person knows or should have known of the facts giving rise thereto.
- (2) *Authority to Resolve Protests.* The Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer shall have the authority, prior to the commencement of an action in court concerning the controversy, to settle and resolve a protest of an aggrieved bidder, offeror, or contractor, actual or prospective, concerning the solicitation or award of a contract. This authority shall be exercised in accordance with regulations promulgated by the [Policy Office] [Chief Procurement Officer].
- (3) *Decision.* If the protest is not resolved by mutual agreement, the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer shall promptly issue a decision in writing. The decision shall,
 - (a) state the reasons for the action taken; and
 - (b) inform the protestant of its right to judicial *or administrative * review as provided in this Article.
- (4) *Notice of Decision.* A copy of the decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the protestant and any other party intervening.

- (5) *Finality of Decision.* A decision under Subsection (3) of this Section shall be final and conclusive, unless fraudulent, or:
- (a) any person adversely affected by the decision commences an action in court in accordance with Section 9-401(1) (Waiver of Sovereign Immunity in Connection with Contracts, Solicitation and Award of Contracts); or
 - (b) *any person adversely affected by the decision appeals administratively to the Procurement Appeals Board in accordance with Section 9-506 (Protest of Solicitations or Awards).*
- (6) *Stay of Procurements During Protests.* In the event of a timely protest under Subsection (1) of this Section, under Section 9-401(1)(Waiver of Sovereign Immunity in Connection with Contracts, Solicitation and Award of Contracts), or under * Section 9-505 (Jurisdiction of Procurement Appeals Board), * the [State] shall not proceed further with the solicitation or with the award of the contract until the Chief Procurement Officer, after consultation with the head of the Using Agency or the head of a Purchasing Agency, makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the [State].
- (7) *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.

* Language between asterisks to be enacted if Article 9, Part E (Procurement Appeals Board) is enacted.

COMMENTARY:

- (1) It is essential that bidders, offerors, and contractors have confidence in the procedures for soliciting and awarding contracts. This can best be assured by allowing an aggrieved person to protest the solicitation, award, or related decision. This Section and Section 9-506 (Protest of Solicitations or Awards) would permit actual or prospective bidders or offerors, or contractors, to:
- (a) promptly protest the solicitation or award to the procurement officials;
 - (b) promptly seek relief in the State courts; or
 - (c) have the protest decision reviewed by the Procurement Appeals Board provided in Part F, if enacted.
- (2) Nothing in this Section is intended to affect the power of the [Attorney General] to settle actions pending before the Procurement Appeals Board or the courts.
- (3) Whether or not citizen or taxpayer remedies would be available would be controlled by existing local law.
- (4) In general, the filing of a protest should halt the procurement until the controversy is resolved. In order to allow essential governmental functions to continue, Subsection (6) provides that the [State] may proceed with the solicitation or award of the contract, despite the protest, upon a determination in writing by the Chief Procurement Officer or the head of the Purchasing Agency that such action is necessary. It is expected that such a determination will occur only in those few circumstances where it is necessary to protect a substantial interest of the [State].
- (5) The award of costs under Subsection (7) is intended to compensate a party for reasonable expenses incurred in connection with a solicitation for which that party was wrongfully denied a contract award. No party can recover

profits which it anticipates would have been made if that party had been awarded the contract. Attorney's fees associated with the filing and prosecution of the protest are not recoverable.

(6) Note that new definitions of "electronic," "signature," "public notice," and "written" or "in writing" contained in 1-301 will permit notices, decisions, and filings to be issued or made electronically.

CHAPTER 9-LEGAL AND CONTRACTUAL REMEDIES

Editorial Note: Chapter 9 (Legal and Contractual Remedies) contains procedures relating to the authority of the Chief Procurement Officer and the head of a Purchasing Agency to decide protests, to impose suspensions and debarments, and to decide contract claims and controversies. The procedures set forth are not necessarily explicitly mandated by Article 9 (Legal and Contractual Remedies) of the Model Procurement Code but arise in part from what the drafters considered might be typical due process requirements. Thus, jurisdictions considering these procedural requirements should carefully evaluate them in light of applicable due process and other legal requirements.

R9-101.01 Definitions.

R9-101.01.1 *Interested party* means an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest.

R9-101.01.2 *Protestor* means any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or the award of a contract and who files a protest.

R9-101.02 Complaint to Procurement Officer.

Complainants should seek resolution of their complaints initially with the Procurement Officer or the office that issued the solicitation. Such complaints may be made verbally or in writing.

R9-101.03 Filing of Protest.

R9-101.03.1 *When Filed.* Protests shall be made in writing to the Chief Procurement Officer or the head of a Purchasing Agency, and shall be filed in duplicate within [14 days] after the protestor knows or should have known of the facts giving rise thereto. A protest is considered filed when received by the Chief Procurement Officer or the head of a Purchasing Agency. Protests filed after the [14 day] period shall not be considered.

Editorial Note: Jurisdictions may wish to allow consideration of protests filed after [14 days] for good cause shown. If so, Section 9-101(1) (Authority to Resolve Protested solicitations and Awards, right to Protest) of the statute and this Subsection should be amended appropriately.

R9-101.03.2 *Subject of Protest.* Protestors may file a protest on any phase of solicitation or award including but not limited to specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer.

R9-101.03.3 *Form.* To expedite handling of protests, the envelope should be labeled "Protest." The written protest shall include as a minimum the following:

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

R9-101.03.4 *Notification of the [Attorney General].* The Chief Procurement Officer or the head of a Purchasing Agency shall submit a copy of the protest to the [Attorney General] within [three] days of receipt of the written protest.

R9-101.04 Requested Information; Time for Filing.

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

R9-101.05 Stay of Procurements During Protest.

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

R9-101.06 Making Information on Protests Available.

The Chief Procurement Officer or the head of a Purchasing Agency shall upon written request make available to any interested party information submitted that bears on the substance of the protest except where information is proprietary, confidential, or otherwise permitted or required to be withheld by law or regulation. Persons who wish to keep such information submitted by them confidential should so request by specifically identifying

such information within documents submitted, and indicating on the front page of each document that it contains such information.

R9-101.07 Decision by the Chief Procurement Officer or the Head of a Purchasing Agency.

R9-101.07.1 *Time for Decisions.* A decision on a protest shall be made by the Chief Procurement Officer or the head of a Purchasing Agency as expeditiously as possible after receiving all relevant, requested information. If a protest is sustained, the available remedies include, but are not limited to, those set forth in Subsection R9-101.07.2 of this Section, and Regulation 9-201 (Determination that Solicitation or Award Violates Law), Regulation 9-202 (Violation of Law Found Prior to Award), and Regulation 9-203 (Ratification, Termination, or Cancellation of Contract to Comply with Law).

R9-101.07.2 *Bid Preparation Costs.* In addition to any other relief, the Chief Procurement Officer or the head of a Purchasing Agency shall award the protesting bidder or offeror the reasonable costs incurred in connection with the solicitation, including bid preparation costs other than attorney's fees, when a protest is sustained and the protesting bidder or offeror should have been but was not awarded the contract under the solicitation.

R9-101.08 Request for Reconsideration.

R9-101.08.1 *Request.* Reconsideration of a decision of the Chief Procurement Officer or the head of a Purchasing Agency may be requested by the protestor, appellant, any interested party who submitted comments during consideration of the protest, or any agency involved in the protest. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

R9-101.08.2 *Time for Filing.* Requests for reconsideration of a decision of the Chief Procurement Officer or the head of a Purchasing Agency shall be filed not later than [ten] days after receipt of such decision.

R9-101.08.3 *Time for Acting.* A request for reconsideration shall be acted upon as expeditiously as possible. The Chief Procurement Officer or the head of a Purchasing Agency may uphold the previous decision or reopen the case as such officer deems appropriate.

R9-101.09 Effect of Judicial or Administrative Proceedings.

[The Chief Procurement Officer or the head of a Purchasing Agency may refuse to decide any protest when a matter involved is the subject of a proceeding before the Procurement Appeals Board or has been decided on

the merits by the Board.] If an action concerning the protest has commenced in court, the Chief Procurement Officer or the head of a Purchasing Agency shall not act on the protest but refer the protest to the [Attorney General]. This Section shall not apply where [the Board or] a court requests, expects, or otherwise expresses interest in the decision of the Chief Procurement Officer or the head of a Purchasing Agency.

CODE PROVISION:

§9-102 Authority to Debar or Suspend.

- (1) *Authority.* After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Chief Procurement Officer or the head of a Purchasing Agency, after consultation with the Using Agency and the [Attorney General], shall have authority to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than [three years]. The same officer, after consultation with the Using Agency and the [Attorney General], shall have authority to suspend a person from consideration for award of contracts if there is probable cause for debarment. The suspension shall not be for a period exceeding [three months]. The authority to debar or suspend shall be exercised in accordance with regulations.

COMMENTARY:

(1) It is intended that the Attorney General or equivalent legal officer in the enacting jurisdiction will be consulted concerning any proposed suspension or debarment.

(2) The National Association of State Procurement Officials suggests that regulations provide the option to debar a person from doing business with one or more agencies, or all agencies. It also recommends that regulations permit debarment to be limited to units within a corporation, as appropriate.

- (2) *Causes for Debarment or Suspension.* The causes for debarment or suspension include the following:
 - (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 [State] 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 Chief Procurement Officer or the head of a Purchasing Agency 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 Chief Procurement Officer or the head of a Purchasing Agency determines to be so serious and compelling as to affect responsibility as a [State] contractor, including debarment by another governmental entity for any cause listed in regulations; and
 - (f) for violation of the ethical standards set forth in Article 12 (Ethics in Public Contracting).
- (3) *Decision.* The Chief Procurement Officer or the head of a Purchasing Agency shall issue a written decision to debar or suspend. The decision shall:
- (a) state the reasons for the action taken; and
 - (b) inform the debarred or suspended person involved of its rights to judicial * or administrative * review as provided in this Article.
- (4) *Notice of Decision.* A copy of the decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening.
- (5) *Finality of Decision.* A decision under Subsection (3) of this Section shall be final and conclusive, unless fraudulent, or
- (a) the debarred or suspended person commences an action in court in accordance with Section 9-403(2) (Waiver of Sovereign Immunity in Connection with Contracts, Debarment or Suspension); or
 - (b) * the debarred or suspended person appeals administratively to the Procurement Appeals Board in accordance with Section 9-507 (Suspension or Debarment Proceedings).*

* Language between asterisks to be enacted if Article 9, Part E (Procurement Appeals Board) is enacted.

R9-102.01 Application.

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

R9-102.02 Suspension.

R9-102.02.1 *Initiation.* After consultation with the affected Using Agency, the [Attorney General], and, where practicable, the contractor or prospective contractor who is to be suspended, and upon written determination by the Chief Procurement Officer or the head of a Purchasing Agency that probable cause exists for debarment as set forth in Section 9-102 (Authority to Debar or Suspend) of the [State] Procurement Code, a contractor or prospective contractor shall be suspended. A notice of suspension, including a copy of such determination, shall be sent to the suspended contractor or prospective contractor. Such notice shall state that:

- (a) the suspension is for the period it takes to complete an investigation into possible debarment including any appeals of a debarment decision but not for a period in excess of [three months];
- (b) bids or proposals will not be solicited from the suspended person, and, if they are received, they will not be considered during the period of suspension; and
- (c) if a hearing has not been held, the suspended person may request a hearing in accordance with Section R9-102.04 (Request for Hearing).

R9-102.02.2 *Effect of Decision.* A contractor or prospective contractor is suspended upon issuance of the notice of suspension. The suspension shall remain in effect during any appeals. The suspension may be ended by the officer who issued the notice of suspension, by a court, [or by the Procurement Appeals Board] but otherwise shall only be ended when the suspension has been in effect for [three months] or a debarment decision taken effect

R9-102.03 Initiation of Debarment Action.

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

- (a) state that debarment is being considered;
- (b) set forth the reasons for the action;

(c) state that if the contractor or prospective contractor so requests a hearing will be held, provided such request is received by the Chief Procurement Officer or the head of a Purchasing Agency within [ten] days after the contractor or prospective contractor receives notice of the proposed action; and

(d) state that the contractor or prospective contractor may be represented by counsel.

Such notice shall also be sent to the [Attorney General] and the affected Using Agency. The affected Using Agency is that agency that has used the supplies, services, or construction supplied by the contractor. If more than one affected Using Agency is involved the Chief Procurement Officer or the head of a Purchasing Agency may designate one or more representatives to be consulted in respect to this action.

R9-102.04 Request for Hearing.

A contractor or prospective contractor that has been notified of a proposed debarment action may request in writing that a hearing be held. Such request must be received by the official proposing the action within [ten] days of receipt of notice of the proposed action under Section R9-102.03 (Initiation of Debarment Action). If no request is received within the [ten] day period, a final determination may be made as set forth in Section R9-102.08 (Determination of Hearing Officer; Final Decision) after consulting with the [Attorney General] and the affected Using Agency.

R9-102.05 Notice of Hearing.

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

R9-102.06 Authority of Hearing Officer.

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

(a) hold informal conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious

disposition of the proceeding either by consent of the parties or upon such officer's own motion;

- (b) require parties to state their positions with respect to the various issues in the proceeding;
- (c) require parties to produce for examination those relevant witnesses and documents under their control;
- (d) rule on motions, and other procedural items on matters pending before such officer;
- (e) regulate the course of the hearing and conduct of participants therein;
- (f) receive, rule on, exclude, or limit evidence, and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;
- (g) fix time limits for submission of written documents in matters before such officer;
- (h) impose appropriate sanctions against any party or person failing to obey an order under these procedures, which sanctions may include:
 - (i) refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
 - (ii) excluding all testimony of an unresponsive or evasive witness; and
 - (iii) expelling any party or person from further participation in the hearing;
- (i) take official notice of any material fact not appearing in evidence in the record,
if such fact is among the traditional matters of judicial notice; and
- (j) administer oaths or affirmations.

Editorial Note: In order to administer oaths or affirmations, a hearing officer must be so authorized by statute. If the law of an enacting jurisdiction does not confer such authority on hearing officers, Subsection R9-102.06(j) should be deleted.

R9-102.07 Hearings Procedures.

(a) Hearings shall be as informal as may be reasonable and appropriate under the circumstances and in accordance with applicable due process requirements. The weight to be attached to evidence presented in any particular form will be within the discretion of the hearing officer. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a

witness if the witness were present. The hearing officer may require evidence in addition to that offered by the parties.

(b) A hearing may be recorded but need not be transcribed except at the request and expense of the contractor or prospective contractor. A record of those present, identification of any written evidence presented, and copies of all written statements and a summary of the hearing shall be sufficient record.

COMMENTARY:

Since all appeals are reviewed de novo, maintenance of a transcript is an unnecessary expense.

(c) Opening statements may be made unless a party waives this right.

(d) Witnesses shall testify under oath or affirmation. All witnesses may be cross-examined.

Editorial Note: Enacting jurisdictions should determine if the [State] Administrative Procedure Act specifies hearing procedures. If so, they may be referenced here.

R9-102.08 Determination of Hearing Officer; Final Decision.

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

R9-102.09 Effect of Debarment Decision.

A debarment decision will take effect upon issuance and receipt by the contractor or prospective contractor. After the debarment decision takes effect, the contractor shall remain debarred until a court, [the Procurement Appeals Board,] or the head of the Agency that issued the decision, orders otherwise or until the debarment period specified in the decision expires.

R9-102.10 Maintenance of List of Debarred and Suspended Persons.

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

CODE PROVISION:

§9-103 Authority to Resolve Contract and Breach of Contract Controversies.

- (1) *Applicability.* This Section applies to controversies between the [State] and a contractor and which arise under, or by virtue of, a contract between them. This includes without limitation controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.
- (2) *Authority.* The Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer is authorized, prior to commencement of an action in a court concerning the controversy, to settle and resolve a controversy described in Subsection (1) of this Section. This authority shall be exercised in accordance with regulations,
- (3) *Decision.* If such a controversy is not resolved by mutual agreement, the Chief Procurement Officer, the head of a Purchasing Agency, or the designee of either officer shall promptly issue a decision in writing. The decision shall:
 - (a) state the reasons for the action taken; and
 - (b) inform the contractor of its right to judicial * or administrative * review as provided in this Article.
- (4) *Notice of Decision.* A copy of the decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the contractor.
- (5) *Finality of Decision.* The decision under Subsection (3) of this Section shall be final and conclusive, unless fraudulent, or:
 - (a) the contractor commences an action in court in accordance with Section 9-401(3) (Waiver of Sovereign Immunity in Connection

with Contracts, Actions Under Contracts or for Breach of Contract); or

(b) * the contractor appeals administratively to the Procurement Appeals Board in accordance with Section 9-508 (Contract and Breach of Contract Controversies). *

(6) *Failure to Render Timely Decision.* If the Chief Procurement Officer, the head of a Purchasing Agency, or the designee of either officer does not issue the written decision required under Subsection (3) of this Section within [120 days] after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

* Language between asterisks to be enacted if Article 9, Part E (Procurement Appeals Board) is enacted.

COMMENTARY:

(1) The word "controversy" is meant to be broad and all-encompassing. It includes the full spectrum of disagreements from pricing of routine contract changes to claims of breach of contract.

(2) Subsection (2) gives the Chief Procurement Officer and any Purchasing Agencies the authority to settle all contract claims and controversies prior to the filing of a suit. This may avoid unnecessary litigation and often is essential for fair treatment of parties contracting with the [State]. On the other hand, some safeguards are needed. Limitations upon the power to settle, including prerequisite approvals, should be established by appropriate regulation.

(3) It is important that administrative action upon claims be expeditious. Subsection (6) recognizes, however, that there can be complicated problems which require a considerable time for good faith investigation and negotiation, and that often claimants do not submit adequate documentation in support of their claims.

R9-103.01 General.

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

R9-103.02 Scope of Regulation.

Section 9-103 (Authority to Resolve Contract and Breach of Contract Controversies) of the [State] Procurement Code is applicable to controversies between the [State] and a contractor which arise under, or by virtue of, a contract between them. This includes without limitation controversies based upon breach of contract, mistake, misrepresentation, or other cause for

contract modification, reformation, or rescission. The word "controversy" is meant to be broad and all-encompassing. It includes the full spectrum of disagreements from pricing of routine contract changes to claims of breach of contract.

R9-103.03 Delegation of Authority to Procurement Officer.

R9-103.03.1 *Procurement Officer Authority.* Subject to Subsection R9-103.03.2 of this Section, unless a provision of the contract specifies that the authority to settle and resolve controversies and to issue decisions is reserved to the Chief Procurement Officer or the head of a Purchasing Agency, such authority is hereby delegated to the Procurement Officer. Within this Regulation, therefore, "Procurement Officer" denotes the person with such authority whether that is the Procurement Officer, the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of such officer.

R9-103.03.2 *Prior Approval of Large Settlements.* The settlement or resolution of controversies involving claims in excess of [\$______] is subject to the prior written approval of the Chief Procurement Officer or the head of a Purchasing Agency. In such cases the Procurement Officer shall prepare a recommended decision for the Chief Procurement Officer or the head of a Purchasing Agency.

R9-103.04 Procurement Officer's Decision.

R9-103.04.1 *Procedures Prior to Issuing Decision.* When a controversy cannot be resolved by mutual agreement, the Procurement Officer shall, after written request by the contractor for a final decision, promptly issue a written decision. Before issuing a final decision, the Procurement Officer shall:

- (a) review the facts pertinent to the controversy; and
- (b) secure any necessary assistance from legal, fiscal, and other advisors.

R9-103.04.2 *Final Decision.* The Procurement Officer shall immediately furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt, and include in the decision:

- (a) a description of the controversy;
- (b) a reference to pertinent contract provisions;
- (c) a statement of the factual areas of agreement or disagreement;
- (d) a statement of the Procurement Officer's decision, with supporting rationale;

(e) a paragraph substantially as follows:

"This is the final decision of the Procurement Officer. [This decision may be appealed to the Procurement Appeals Board. If you decide to make such an appeal, you must mail or otherwise furnish written notice of appeal to the Procurement Appeals Board within sixty days from the date you receive this decision. A copy of the notice of appeal shall be furnished to the Procurement Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference the decision from which the appeal is being taken, and identify the contract involved. In lieu of appealing to the Procurement Appeals Board] [Y]ou may obtain judicial review of this decision by bringing an action in the [designated court or courts of the State]."

Editorial Note: The bracketed language pertinent to the Procurement Appeals Board should only

be adopted if a Procurement Appeals Board is adopted.

R9103.04.3 *Failure to Timely Issue Final Decision.* If the Procurement Officer does not issue a written decision within [120] days after written request by the contractor for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

Editorial Note: The suggested time period of 120 days may not be sufficient for complex claims requiring detailed review and analysis. This is especially true where the contracts within a particular Procurement Officer's responsibility are generating numerous controversies which must also be resolved within the stated time period. A rigid time period for the issuance of final decisions under the above circumstances may foster a number of decisions by the Procurement Officer which are summarily issued without adequate consideration or dialogue with the contractor. Accordingly, the following alternate regulation is suggested which provides greater flexibility for the issuance of the Procurement Officer's decisions:

[ALTERNATE R9-104.04.3]

R9-104.04.3 *Failure to Issue Timely Decision.*

The Procurement Officer shall issue a written decision within the following time limitations:

- (a) For claims not exceeding \$50,000: 120 days after receipt of the claim.
- (b) For claims exceeding \$50 000: 120 days after receipt of the claim; provided, however, if a decision is not issued within 120 days, the Procurement Officer shall notify the contractor of the time within which such officer will make the decision. The reasonableness of this time period will depend on the size and complexity of the claim and the adequacy of the contractor's supporting data and other relevant factors. [A contractor may request the [State] Procurement Appeals Board to direct the Procurement Officer to issue a decision in a specified period of time where the Procurement Officer has indicated an unreasonable period for the issuance of a decision or has failed to provide the prescribed notice concerning the planned date of issuance.]

If the Procurement Officer fails to issue a decision on a claim not exceeding \$50,000 within 120 days after receipt, or does not issue a decision within the time promised [or as directed by the [State] Procurement Appeals Board] for a claim in excess of \$50,000, the contractor may proceed as if an adverse decision had been received.

[END OF ALTERNATIVE]

R9-103.04.4 *Payments of Amounts Found Due.* The amount determined payable pursuant to the decision, less any portion already paid, normally should be paid without awaiting contractor action concerning appeal. Such payment shall be without prejudice to the rights of either party and where such payments are required to be returned by a subsequent decision, interest on such payments shall be paid at the statutory rate from the date of payment.

R9-103.05 Controversies Involving [State] Claims Against the Contractor.

All controversies involving claims asserted by the [State] against a contractor which cannot be resolved by mutual agreement shall be the subject of a decision by the Procurement Officer, the Chief Procurement Officer, or the head of a Purchasing Agency, as applicable.

R9-103.06 Interest.

R9-103.06.1 *Payable on Claims.* Pursuant to Section 9-301 (Interest) of the [State] Procurement Code, interest on amounts ultimately determined to be due to a contractor or the [State] shall be payable at the statutory rate applicable to judgments from the date the claim arose through the date of decision or judgment, whichever is later.

R9-103.06.2 *Contract Clause.* Each contract between the [State] and a contractor shall contain a paragraph substantially similar to Subsection R9-103.06.1 of this Section.

R9-103.07 Disputes Clause.

Language substantially similar to the following clause shall be inserted in all [State] contracts:

"Disputes

(1) All controversies between the [State] and the contractor which arise under, or are by virtue of, this contract and which are not resolved by mutual agreement, shall be decided by the Procurement Officer in writing, within [120] days after a written request by the contractor for a final decision concerning the controversy; provided, however, that if the Procurement Officer does not issue a written decision within [120] days after written request for a final decision, or within such longer period as may be agreed

upon by the parties, then the contractor may proceed as if an adverse decision had been received.

(2) The Procurement Officer shall immediately furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt.

(3) Any such decision shall be final and conclusive, unless fraudulent, or:

(a) the contractor brings an action seeking judicial review of the decision in the [designated court or courts of this State]; or

(b) [within the sixty days from the date of receipt of the decision, the contractor mails or otherwise furnishes written notice of appeal to the Procurement Appeals Board].

(4) The contractor shall comply with any decision of the Procurement Officer and proceed diligently with performance of this contract pending final resolution by [the Procurement Appeals Board or] the [designated court or courts of this State] of any controversy arising under, or by virtue of, this contract, except where there has been a material breach of the contract by the [State]; provided, however, that in any event the contractor shall proceed diligently with the performance of the contract where the Chief Procurement Officer has made a written determination that continuation of work under the contract is essential to the [public health and safety]."

Editorial Note: Bracketed paragraph (3)(b) of the Disputes Clause is to be adopted only if the Procurement Appeals Board is adopted.

Regulation 9-201-Determination that Solicitation or Award Violates Law

Part B – Solicitations or Awards in Violation of Law

CODE PROVISION:

§9-201 Applicability of this Part.

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

R9-201.01 Determination that Solicitation or Award Violates Law.

R9-201.01.1 *Determination.* A solicitation or award may be in violation of the law due to actions of [State] employees, bidders, offerors, contractors, or other persons. After consultation with the [Attorney General], the Chief Procurement Officer or the head of a Purchasing Agency may determine that

a solicitation or contract award is in violation of the provisions of the [State] Procurement Code or the [State] Procurement Regulations. After consultation with the [Attorney General], the [Ethics Commission] may determine that a solicitation or award violates Article 12 (Ethics in Public Contracting) of the [State] Procurement Code or the regulations promulgated thereunder. Any such determination shall be made in writing after an opportunity to be heard is given, and such determination is subject to appropriate appeal. [The Procurement Appeals Board may determine that a solicitation or contract award is in violation of the provisions of the [State] Procurement Code or the [State] Procurement Regulations.] The courts designated in Section 9-401 (Waiver of Sovereign Immunity in Connection with Contracts) of the [State] Procurement Code may find that a solicitation or award is in violation of law.

R9-201.01.2 Finding of Bad Faith or Fraud. Bad faith or fraud shall not be assumed. Specific findings showing reckless disregard of clearly applicable laws or regulations must support a finding of bad faith. A finding of fraud must be supported by specific findings showing knowing, willful acts in disregard of such laws or regulations.

COMMENTARY:

Generally a violation of a contract provision is not covered by Part B of Article 9 of the [State] Procurement Code and will not result in a contract award being determined illegal. Such violations may be a breach of the contract and give rise to a claim for damages or other appropriate relief. Violation of contract clauses also may be reason to terminate the contract under the appropriate termination clause if such termination clause is included in the contract. An exception to this rule is when a contract provision implements a provision of law. In such cases the award may be found in violation of law; for example, a contract clause which prohibits gratuities which implements Section 12-206 (Gratuities and Kickbacks) of the [State] Procurement Code.

Editorial Note: It is recognized that some [States] may have legislation which hold [State] employees personally liable to the vendor if they authorize or make a solicitation or award of a contract in violation of law or a contract provision, but such a provision is not included in the Model Procurement Code or the Recommended Regulations.

Regulation 9-202-Violation of Law Found Prior to Award

CODE PROVISION:

§9-202 Remedies Prior to an Award.

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

- (a) cancelled; or
- (b) revised to comply with the law.

R9-202.01 Canceling or Revising Solicitation or Proposed Award to Comply with Law.

A finding by the Procurement Officer, after consultation with the [Attorney General], that the solicitation or proposed award is in violation of law will constitute a cogent and compelling reason to cancel or revise a solicitation or proposed award. Such cancellation shall be made in accordance with Regulation 3-301 (Cancellation of Solicitations).

*Regulation 9-203-Ratification, Termination, or Cancellation of
Contract to Comply with Law*

CODE PROVISION:

§9-203 Remedies After an Award.

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

- (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 [State];
or
 - (ii) the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.
- (b) if the person awarded the contract has acted fraudulently or in bad faith:
 - (i) the contract may be declared null and void; or
 - (ii) the contract may be ratified and affirmed if such action is in the best interests of the (State), without prejudice to the [State's] rights to such damages as may be appropriate.

R9-203.01 No Fraud or Bad Faith by Contractor.

R9-203.01.1 *General.* Upon finding after award that a [State] employee has made an unauthorized award of a contract or that a solicitation or contract award is otherwise in violation of law where there is no finding of fraud or bad faith, the Chief Procurement Officer or the head of a Purchasing Agency may ratify or affirm the contract or terminate it in accordance with this Section after consultation with the [Attorney General].

R9-203.01.2 *Ratification and Affirmation.*

- (a) If the violation can be waived without prejudice to the [State] or other bidders or offerors, the preferred action is to ratify and affirm the contract.
- (b) If the violation cannot be waived without prejudice to the [State] or other bidders or offerors, if performance has not begun, and if there is time for resoliciting bids or offers, the contract shall be terminated. If there is no time for resoliciting bids or offers either formally, or informally under the emergency authority, the contract may be amended appropriately, ratified, and affirmed.
- (c) If the violation cannot be waived without prejudice to the [State] or other bidders or offerors and if performance has begun, the Chief Procurement Officer or the head of a Purchasing Agency shall determine in writing whether it is in the best interest of the [State] to terminate or to amend, ratify, and affirm the contract. Termination is the preferred remedy. The following factors are among those pertinent in determining the [State's] best interest:
 - (i) the costs to the [State] in terminating and resoliciting;
 - (ii) the possibility of returning supplies delivered under the contract and thus decreasing the costs of termination;
 - (iii) the progress made toward performing the whole contract; and
 - (iv) the possibility of obtaining a more advantageous contract by resoliciting.

R9-203.01.3 *Termination.* Contracts based on awards or solicitations that were in violation of law shall be terminated at no cost to the [State], if possible, unless the determination required under Subsection R9-203.01.2 of this Section is made. If the contract is terminated, the [State] shall, where possible and by agreement with the supplier, return the supplies delivered for a refund at no cost to the [State] or at a minimal restocking charge. If a termination claim is made, settlement shall be made in accordance with the contract. If there are no applicable termination provisions in the contract, settlement shall be made on the basis of actual costs directly or indirectly allocable to the contract through the time of termination. Such costs shall be established in accordance with generally accepted accounting principles. Profit shall be proportionate only to the performance completed up to the time of termination and shall be based on projected gain or loss on the contract as though performance were completed. Anticipated profits are not allowed.

R9-203.02 Fraud or Bad Faith by the Contractor.

R9-203.02.1 *General.* Upon finding after award that a solicitation or award is in violation of law and that the recipient of the contract acted fraudulently or in bad faith, the Chief Procurement Officer or the head of a Purchasing Agency

may, after consulting with the [Attorney General], declare the contract null and void or ratify and affirm it in accordance with this Section.

R9-203.02.2 *Declaration of Contract Null and Void.* The contract shall be declared null and void unless ratification and affirmation is found to be in the [State's] best interest under Subsection R9-203.02.3 of this Section.

R9-203.02.3 *Ratification and Affirmation.* The contract shall not be modified, ratified, and affirmed unless it is determined in writing that there is a continuing need for the supplies, services, or construction under the contract and:

- (a) there is no time to reward the contract under emergency procedures or otherwise; or
- (b) the contract is being performed for less than it could be otherwise performed.

R9-203.02.4 *Effect of Declaring a Contract Null and Void.* In all cases where a contract is voided, the [State] shall endeavor to return those supplies delivered under the contract that have not been used or distributed. No further payments shall be made under the contract and the [State] is entitled to recover the greater of:

- (a) the difference between payments made under the contract and the contractor's actual costs up until the contract was voided; or
- (b) the difference between payments under the contract and the value to the [State] of the supplies, services, or construction it obtained under the contract.

The [State] may in addition claim damages under any applicable legal theory.

R9-203.02.5 *Effect of Ratification.* The [State] shall be entitled to any damages it can prove under any theory including but not limited to contract and tort regardless of its ratification and affirmation of the contract.

COMMENTARY:

In a number of jurisdictions, if a [State] employee knowingly and willfully lets a contract contrary to law, such employee may be personally liable for his or her actions.

Regulation 9-301-Interest

Part C – Interest

CODE PROVISION:

§9-301 Interest.

Interest on amounts ultimately determined to be due to a contractor or the [State] shall be payable at the statutory rate applicable to judgments from the date the claim arose through the date of decision or judgment, whichever is later.

R9-301 [RESERVED]

Part D – Waiver of Sovereign Immunity; Limitations on Actions

CODE PROVISION:

§9-401 Waiver of Sovereign Immunity in Connection with Contracts.

- (1) *Solicitation and Award of Contracts.* The [designated court or courts of the State] shall have jurisdiction over an action between the [State] and a bidder, offeror, or contractor, prospective or actual, to determine whether a solicitation or award of a contract is in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation. The [designated court or courts of the State] shall have such jurisdiction, whether the actions are at law or in equity, and whether the actions are for monetary damages or for declaratory, injunctive, or other equitable relief.
- (2) *Debarment or Suspension.* The [designated court or courts of this State] shall have jurisdiction over an action between the [State] and a person who is subject to a suspension or debarment proceeding, to determine whether the debarment or suspension is in accordance with the Constitution, statutes, and regulations. The [designated court or courts of the State] shall have such jurisdiction, whether the actions are at law or in equity, and whether the actions are for declaratory, injunctive, or other equitable relief.
- (3) *Actions Under Contracts or for Breach of Contract.* The [designated court or courts of this State] shall have jurisdiction over an action between the [State] and a contractor, for any cause of action which arises under, or by virtue of, the contract, whether the action is at law or in equity, whether the action is on the contract or for a breach of the contract, and whether the action is for monetary damages or declaratory, injunctive, or other equitable relief.
- (4) *Limited Finality for Administrative Determinations.* In any judicial action under this Section, factual or legal determinations by employees, agents, or other persons appointed by the [State] shall have no finality and shall not be conclusive, notwithstanding any contract provision, regulation, or rule of law to the contrary, except to the extent provided in:

- (a) Section 3-701 (Finality of Determinations);
- (b) * Section 9-506(4) (Protest of Solicitations or Awards, Standard of Review for Factual Issues); *
- (c) * Section 9-507(4) (Suspension or Debarment Proceedings, Standard of Review for Factual Issues); * and
- (d) * Section 9-508(4) (Contract and Breach of Contract Controversies, Standard of Review for Factual Issues). *

* Language between asterisks to be enacted if Article 9, Part E (Procurement Appeals Board) is enacted.

COMMENTARY:

Where the court issues a temporary or preliminary injunction *pendente lite*, in order to protect the [State] and/or successful bidder from further loss due to rising costs or other causes, the court may, under applicable local law, condition the granting of such temporary or preliminary relief upon the posting of reasonable security.

R9-401 [RESERVED]

CODE PROVISION:

§9-402 Time Limitations on Actions.

- (1) *Protested Solicitations and Awards.* Any action under Section 9-401(1) (Waiver of Sovereign Immunity in Connection with Contracts, Solicitations and Award of Contracts) shall be initiated as follows:
 - (a) within [30] days after the aggrieved person knows or should have known of the facts giving rise to the action; or
 - (b) within [14] days after receipt of a final administrative decision pursuant to either Section 9-101(3) (Authority to Resolve Protested Solicitations and Awards, Decision) or * Section 9-506(3) (Protest of Solicitations or Awards, Decision), whichever is applicable. *
- (2) *Debarments and Suspensions for Cause.* Any action under Section 9-401(2) (Waiver of Sovereign Immunity in Connection with Contracts, Debarment or Suspension) shall be commenced within [six] months after receipt of the decision of the Chief Procurement Officer or head of a Purchasing Agency under Section 9-102(3) (Authority to Debar or Suspend, Decision), the decision of the [Ethics Commission] under Section 12-302(2)(c) (Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards, Supplemental Remedies), or * the decision of the Procurement Appeals Board under Section 9-507(3) (Suspension or Debarment Proceedings, Decision),* whichever is applicable.

- (3) *Actions Under Contracts or for Breach of Contract.* The statutory limitations on an action between private persons on a contract or for breach of contract shall apply to any action commenced pursuant to Section 9-401(3) (Waiver of Sovereign Immunity in Connection with Contracts, Actions Under Contracts or for Breach of Contract), * except notice of appeals from the Procurement Appeals Board pursuant to Section 9-510(1) (Appeal and Review of Procurement Appeals Board Decisions, Appeal) concerning actions on a contract or for breach of contract shall be filed within [12] months after the date of the Procurement Appeals Board decision. *

* Language between asterisks to be enacted if Article 9, Part E (Procurement Appeals Board) is enacted.

COMMENTARY:

(1) The requirement that lawsuits be filed within a stipulated time is necessary to guard against stale claims and to provide the [State] with certainty regarding the extent of its liability in a particular controversy.

(2) Some preference has been expressed for prescribing uniform limitation periods for actions under this Article. However, in contract and breach of contract actions, this Article applies the same limitations to actions involving the [State] as are applied to contract actions between private persons.

R9-402 [RESERVED]

Editorial Note: Regulations 9-501 through 9-511 implement optional Part E (Procurement Appeals Board) of Article 9 (Legal and Contractual Remedies) of the Model Procurement Code.

Regulation 9-501-Creation of the Procurement Appeals Board

[OPTIONAL PART]

Part E – Procurement Appeals Board

CODE PROVISION:

§9-501 Creation of the Procurement Appeals Board.

There is hereby established in the executive branch of this [State] a Procurement Appeals Board to be composed of a chairperson and at least two other members, but not more than [_____] members. The chairperson and members of the Board shall be appointed by the [Governor], [and confirmed by the Senate], and shall serve full-time.

COMMENTARY:

(1) An independent, full-time Procurement Appeals Board can provide informal, expeditious, and inexpensive procedures for the resolution of controversies. Further, creation of a Board can advance the development of a uniform set of precedents in procurement law.

(2) The size of the Board beyond the minimum of three members is left to the discretion of the [State]. It is believed that a Board should be full-time, although its members may have other duties in their job descriptions, in order to be independent and to develop the desired expertise. It is vital that the members of the Board be highly competent, fair, and impartial.

R9-501 [RESERVED]

CODE PROVISION:

§9-502 Terms and Qualifications of Members of the Procurement Appeals Board.

- (1) *Term.* The term of office of the chairperson and each member of the Procurement Appeals Board shall be six years, except that in making the initial appointments, the [Governor] shall appoint one member for a term of two years, one member for a term of four years, and the chairperson for a term of six years, so that a term of office shall expire every two years. Thereafter, their successors shall be appointed for terms of six years, or for the balance of any unexpired term, but members may continue to serve beyond their terms until their successors take office. Members may be reappointed for succeeding terms. If there is no chairperson, or if such officer is absent or unable to serve, the senior member in length of service shall be temporary chairperson.
- (2) *Authority of the Chairperson.* The chairperson may adopt operational procedures and issue such orders, not inconsistent with this Code, as may be necessary in the execution of the Board's functions. The chairperson's authority may be delegated to the Board's members and employees, but only members of the Board may issue decisions on appeals.
- (3) *Administrative Support.* [Insert appropriate executive agency] is authorized to provide for the Board such services as the chairperson requests, on such basis, reimbursable or otherwise, as may be agreed upon between the [insert appropriate executive agency] and the chairperson.
- (4) *Qualifications for Board Membership.* The chairperson and members of the Board shall be members in good standing of the State Bar for at least five years, and experienced in contract or commercial matters.

COMMENTARY:

It is important that all the members of the Board be qualified in terms of experience and education to examine facts and apply legal principles to the controversies falling within the Board's jurisdiction.

R9-502 [RESERVED]

CODE PROVISION:

§9-503 Rules of Procedure.

The Procurement Appeals Board shall adopt rules of procedure which, to the fullest extent possible, will provide for the expeditious resolution of controversies. The Board may adopt Small Claims Procedures for the resolution of controversies involving claims of less than [\$15,000].

R9-503 [RESERVED]

Editorial Note: The rules of procedure are set forth in appendices to the Recommended Regulations because they implement an optional Part of the Model Procurement Code and because they are to be promulgated by the Procurement Appeals Board rather than the Policy Office.

CODE PROVISION:

§9-504 Decisions of the Procurement Appeals Board.

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

R9-504 [RESERVED]

CODE PROVISION:

§9-505 Jurisdiction of the Procurement Appeals Board.

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

- (a) any protest of a solicitation or award of a contract addressed to the Board by an aggrieved actual or prospective bidder or offeror, or a contractor; and
- (b) any appeal by an aggrieved party from a determination by the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer which is authorized by:
 - (i) Section 9-101 (Authority to Resolve Protested Solicitations and Awards);
 - (ii) Section 9-102 (Authority to Debar or Suspend); and
 - (iii) Section 9-103 (Authority to Resolve Contract and Breach of Contract Controversies).

R9-505 [RESERVED]

Regulation 9-506-Protests

CODE PROVISION:

§9-506 Protest of Solicitations or Awards.

- (1) *Scope.* This Section applies to:
 - (a) a protest of a solicitation or award of a contract addressed to the Procurement Appeals Board by an aggrieved actual or prospective bidder or offeror, or a contractor; and
 - (b) an appeal addressed to the Board of a decision under Section 9-101(3) (Authority to Resolve Protested Solicitations and Awards, Decision).
- (2) *Time Limitations on Filing a Protest or an Appeal.*
 - (a) For a protest under Subsection (1)(a) of this Section, the aggrieved person shall file a protest with the Board within [14] days after the aggrieved person knew or should have known of the facts and circumstances upon which the protest is based.
 - (b) For an appeal under Subsection (1)(b) of this Section, the aggrieved person shall file an appeal within [seven] days of receipt of a decision under Section 9-101(3) (Authority to Resolve Protested Solicitations and Awards, Decision).
- (3) *Decision.* On any direct protest under Subsection (1)(a) of this Section or appeal under Subsection (1)(b) of this Section, the Board shall promptly decide whether the solicitation or award was in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation. The proceeding shall be *de novo*. Any prior determinations by administrative officials shall not be final or conclusive.
- (4) *Standard of Review for Factual Issues.* A determination of an issue of fact by the Board under Subsection (3) of this Section shall be final and conclusive unless arbitrary, capricious, fraudulent, or clearly erroneous.

R9-506 [RESERVED]

Editorial Note: Appendix 9-506 contains rules of procedure for the Board when deciding protests

CODE PROVISION:

§9-507 Suspension or Debarment Proceedings.

- (1) *Scope.* This Section applies to a review by the Procurement Appeals Board of a decision under Section 9-102 (Authority to Debar or Suspend).

- (2) *Time Limitation on Filing an Appeal.* The aggrieved person shall file its appeal with the Board within [60] days of the receipt of a decision under Section 9-102(3) (Authority to Debar or Suspend, Decision).
- (3) *Decision.* The Board shall promptly decide whether, or the extent to which, the debarment or suspension was in accordance with the Constitution, statutes, regulations, and the best interests of the [State], and was fair. The proceeding shall be *de novo*. Any prior determinations by administrative officials shall not be final or conclusive.
- (4) *Standard of Review for Factual Issues.* A determination of an issue of fact by the Board under Subsection (3) of this Section shall be final and conclusive unless arbitrary, capricious, fraudulent, or clearly erroneous.

R9-507 [RESERVED]

Editorial Note: Appendix 9-507 contains rules of procedure for the Board when deciding appeals of suspensions and debarments.

CODE PROVISION:

§9-508 Contract and Breach of Contract Controversies.

- (1) *Scope.* This Section applies to a review by the Procurement Appeals Board of a decision under Section 9-103 (Authority to Resolve Contract and Breach of Contract Controversies).
- (2) *Time Limitation on Filing an Appeal.* The aggrieved contractor shall file its appeal with the Board within [60] days of the receipt of the decision under Section 9-103(3) (Authority to Resolve Contract and Breach of Contract Controversies, Decision).
- (3) *Decision.* The Board shall promptly decide the contract or breach of contract controversy. The proceeding shall be *de novo*. Any prior determinations by administrative officials shall not be final or conclusive.
- (4) *Standard of Review for Factual Issues.* A determination of an issue of fact by the Board under Subsection (3) of this Section shall be final and conclusive unless arbitrary, capricious, fraudulent, or clearly erroneous.

R9-508 [RESERVED]

Editorial Note: Appendix 9-508 contains rules of procedure for the Board when resolving contract and breach of contract controversies.

Regulation 9-509-No Finality to a Decision on an Issue of Law

CODE PROVISION:

§9-509 No Finality to a Decision on an Issue of Law.

No determination by the Procurement Appeals Board on an issue of law shall be final or conclusive.

R9-509 [RESERVED]

CODE PROVISION:

§9-510 Appeal and Review of Procurement Appeals Board Decisions.

- (1) *Appeal.* Any person receiving an adverse decision, the [State], or both may appeal from a decision by the Procurement Appeals Board to the [designated court or courts of the State].
- (2) *Authorization of Appeal by the [State].* No such appeal shall be made by the [State] unless recommended by the Chief Procurement Officer or the head of the Purchasing Agency involved and approved by the [Attorney General].

R9-510 [RESERVED]

CODE PROVISION:

§9-511 Discontinuance of Contractor's Appeal.

After notice of an appeal to the Procurement Appeals Board has been filed with the Chief Procurement Officer or the head of a Purchasing Agency, a contractor may not discontinue such appeal without prejudice, except as authorized by the Board.

[END OF OPTIONAL PART]

DEFINITIONAL CROSS-REFERENCES:

"Chief Procurement Officer"	Section	1-301(3)
"Contract"	Section	1-301(5)
"Contract Modification"	Section	1-301(6)
"Contractor"	Section	1-301(7)
"Designee"	Section	1-301(9)
"Electronic"	Section	1-301(10)
"Employee"	Section	1-301(11)
"May"	Section	1-301(14)
"Person"	Section	1-301(15)
"Purchasing Agency"	Section	1-301(19)
"Regulation"	Section	1-301(20)
"Shall"	Section	1-301(22)

R9-511 [RESERVED]

ARTICLE 10 – INTERGOVERNMENTAL RELATIONS

Part A – Definitions

Regulation 10-101- Definitions

CODE PROVISION:

§10-101 Definitions of Terms Used in this Article.

- (1) *Cooperative Purchasing* means procurement conducted by, or on behalf of, one or more Public Procurement Units, as defined in this Code.
- (2) *External Procurement Activity* means any buying organization not located in this State which, if located in this State, would qualify as a Public Procurement Unit. Agencies of the United States and of any other State in the United States of America are External Procurement Activities.
- (3) *Local Public Procurement Unit* means any county, city, town, and any other subdivision of the State or public agency of any such subdivision, public authority, educational, health, or other institution, and to the extent provided by law, any other entity which expends public funds for the procurement of supplies, services, and construction, and any nonprofit corporation operating a charitable hospital.
- (4) *Public Procurement Unit* means any one of the following:
 - (a) a Local Public Procurement Unit,
 - (b) an External Procurement Activity,
 - (c) a State Public Procurement Unit, and
 - (d) any not-for-profit entity comprised of more than one Unit or Activity listed in subparagraphs (a), (b), or (c).
- (5) *State Public Procurement Unit* means the Office of the Chief Procurement Officer of this or any other State and any other Purchasing Agency of this State or any other State.

COMMENTARY:

(1) The term "State Public Procurement Unit" in Subsection (5) relates to each entity within a State government which carries out procurement functions for the State government. In those States where procurement is completely centralized, the term "State Public Procurement Unit" refers to the centralized procurement unit of that State. In those States where procurement is partially centralized, the term "State Public Procurement Unit" describes the established

primary procurement unit of the State government and such other units within the State government as are authorized to conduct procurement functions independent of the established primary State Public Procurement Unit. In those States where State procurement activities are completely decentralized, the term "State Public Procurement Unit" refers to any and all units of State government which are authorized to carry out procurement functions for the State government.

(2) The term "Local Public Procurement Unit" in Subsection (3) includes a nonprofit corporation which operates a charitable hospital. It is recognized that, in many communities, churches operate such hospitals. If church-operated hospitals are involved, and if the local doctrine of separation of State and church activities so requires, this provision may have to be removed. Similarly, some State constitutions prohibit the lending of public credit to private corporations. Such provisions would also necessitate removal of this provision from the definition set forth in Subsection (3).

(3) The term "External Procurement Activity" in Subsection (2) includes, but is not limited to, the Federal Supply Service (General Services Administration) of the United States, the Defense Logistics Agency of the United States, and any Public Procurement Unit in States other than the enacting jurisdiction.

(4) The definition of "Public Procurement Unit" is very broad. It includes any one or more of State Public Procurement Units, External Procurement Activities, and Local Public Procurement Units. It also includes any not-for-profit entity comprised of more than one such Unit or Activity.

DEFINITIONAL CROSS-REFERENCES:

"Chief Procurement Officer"	Section	1-301(31)
"Construction"	Section	1-301(41)
"Contract"	Section	1-301(5)
"Contractor"	Section	1-301(7)
"Governmental Body"	Section	1-301(11)
"Invitation for Bids"	Section	3-101(3)
"May"	Section	1-301(14)
"Purchasing Agency"	Section	1-301(19)
"Request for Proposals"	Section	3-101(5)
"Services"	Section	1-301(21)
"Shall"	Section	1-301(22)
"Specification"	Section	4-101(1)
"Supplies"	Section	1-301(24)
"Written" or "In Writing"	Section	1-301(26)

R10-101 [RESERVED]

Regulation 10-102-Effect of Cooperative Purchasing

R10-102.01 Cooperative Purchasing Shall Not Adversely Affect Employees.

No employee of any Public Procurement Unit participating in any cooperative purchasing activity authorized by Article 10 (Intergovernmental Relations) of the [State] Procurement Code shall suffer any loss of salary, seniority, tenure, or pension rights, or be adversely affected as a result of any such activity.

COMMENTARY:

Section R10-102.01 must be considered in relation to [State] civil service legislation and [State] collective bargaining agreements.

Regulation 10-201-Cooperative Purchasing Agreement

Part B – Cooperative Purchasing

CODE PROVISION:

§10-201 Cooperative Purchasing Authorized.

- (1) Any Public Procurement Unit may either participate in, sponsor, conduct, or administer a Cooperative Purchasing agreement for the procurement of any supplies, services, or construction with one or more Public Procurement Units in accordance with an agreement entered into between the participants. Such Cooperative Purchasing may include, but is not limited to, joint or multi-party contracts between Public Procurement Units and open-ended Public Procurement Unit contracts that are made available to other Public Procurement Units.
- (2) All Cooperative Purchasing conducted under this Article shall be through contracts awarded through full and open competition, including use of source selection methods substantially equivalent to those specified in Article 3 (Source Selection and Contract Formation) of this Code.

R10-201.01 Cooperative Purchasing Agreement in Form of Open-Ended [State] Contract.

Any agreement between the [State] and a Public Procurement Unit, entered into pursuant to Section 10-201 (Cooperative Purchasing Authorized) of the [State] Procurement Code, which provides that certain open-ended [State] procurement contracts (requirements contracts) shall be available to the Public Procurement Unit shall also provide that:

- (a) the [State] shall conduct the procurements in compliance with the [State] Procurement Code;
- (b) when the Public Procurement Unit agrees to procure any supply or service under the [State] contract, all of its requirements for such supply or service shall be obtained by placing purchase orders against the appropriate [State] contract in accordance with the terms and conditions of such contract;
- (c) payment for supplies or services ordered by the Public Procurement Unit under [State] contracts shall be the exclusive obligation of such jurisdiction;
- (d) inspection and acceptance of supplies or services ordered by the Public Procurement Unit under [State] contracts shall be the exclusive obligation of such jurisdiction;
- (e) the [State] may terminate the cooperative agreement for failure of the Public Procurement Unit to comply with the terms of the contract or pay a contractor to whom the [State] has awarded an open-ended contract;
- (f) the exercise of any warranty rights attaching to supplies or services received by the Public Procurement Unit under [State] contracts shall be the exclusive obligation of such jurisdiction; and

(g) failure of a Public Procurement Unit which is procuring supplies or services under a [State] contract to secure performance from the contractor in accordance with the terms and conditions of its purchase order will not necessarily require the [State] or any other Public Procurement Unit to consider the default or to discontinue procuring under the contract.

See Appendix 10-201 (Cooperative Purchasing Agreements). *Regulation 10-202-Sale, Acquisition, or Use of Supplies by a Public Procurement Unit.*

CODE PROVISION:

§10-202 Sale, Acquisition, or Use of Supplies by a Public Procurement Unit.

Any Public Procurement Unit may sell to, acquire from, or use any supplies belonging to another Public Procurement Unit independent of the requirements of Article 3 (Source Selection and Contract Formation) and Article 8 (Supply Management) of this Code.

R10-202 [RESERVED]

Regulation 10-203-Cooperative Use of Supplies or Services

CODE PROVISION:

§10-203 Cooperative Use of Supplies or Services.

Any Public Procurement Unit may enter into an agreement, independent of the requirements of Article 3 (Source Selection and Contract Formation) and Article 8 (Supply Management) of this Code, with any other Public Procurement Unit for the cooperative use of supplies or services under the terms agreed upon between the parties.

COMMENTARY:

Jurisdictions are increasingly joining together through cooperative purchasing arrangements to acquire common goods from single vendors. One practical effect of the success of such arrangements is that the number of public entities seeking to participate in a particular Cooperative Purchasing arrangement increases after the vendor is awarded a contract by the awarding Public Procurement Unit. The vendor may have calculated its price on the basis of a specific or reasonable "guess" of the number of transactions and the volume of goods to be sold. To ensure fairness to vendors and to protect the viability of cooperative purchasing arrangements, awarding jurisdictions should give vendors the option to accept or reject purchase orders from purchasing entities not identified during the competition. Conversely, to maximize economies of scale, jurisdictions are encouraged to identify as many participants in a particular cooperative purchase at the outset.

R10-203 [RESERVED]

See Appendix 10-203 (Agreement for Cooperative Use of Services).

Regulation 10-204 Joint Use of Facilities

CODE PROVISION:

§10-204 Joint Use of Facilities.

Any Public Procurement Unit may enter into agreements for the common use or lease of warehousing facilities, capital equipment, and other facilities with another Public Procurement Unit under the terms agreed upon between the parties.

R10-204 [RESERVED]

Regulation 10-205-Supply of Personnel, Information, and Technical Services

CODE PROVISION:

§10-205 Supply of Personnel, Information, and Technical Services.

- (1) *Supply of Personnel.* Any Public Procurement Unit is authorized, in its discretion, upon written request from another Public Procurement Unit to provide personnel to the requesting Public Procurement Unit. The Public Procurement Unit making the request shall pay the Public Procurement Unit providing the personnel the direct and indirect cost of furnishing the personnel, in accordance with an agreement between the parties.
- (2) *Supply of Services.* The informational, technical, and other services of any Public Procurement Unit may be made available to any other Public Procurement Unit. The requesting Public Procurement Unit shall pay for the expenses of the services so provided, in accordance with an agreement between the parties.

[ALTERNATIVE A]

- (3) *State Information Services.* Upon request, the Chief Procurement Officer may make available to Public Procurement Units the following services, among others:
 - (a) standard forms;
 - (b) printed manuals;
 - (c) product specifications and standards;
 - (d) quality assurance testing services and methods;
 - (e) qualified products lists;
 - (f) source information;
 - (g) common use commodities listings;
 - (h) supplier pre-qualification information;
 - (i) supplier performance ratings;

- (j) debarred and suspended bidders lists;
 - (k) forms for Invitations for Bids, Requests for Proposals, Instructions to Bidders, General Contract Provisions, and other contract forms; and
 - (l) contracts or published summaries thereof, including price and time of delivery information.
- (4) *State Technical Services.* The State, through the Chief Procurement Officer, may provide the following technical services, among others:
- (a) development of products specifications;
 - (b) development of quality assurance test methods, including receiving, inspection, and acceptance procedures;
 - (c) use of product testing and inspection facilities; and
 - (d) use of personnel training programs.
- (5) *Fees.* The Chief Procurement Officer may enter into contractual arrangements and publish a schedule of fees for the services provided under Subsections (3) and (4) of this Section.

[END OF ALTERNATIVE A]

COMMENTARY:

Alternative A is specifically intended to be enacted by States who wish to extend procurement services to units of local government.

R10-205.01 Supply of Personnel, Information, and Services.

Requests made to a Public Procurement Unit by another Public Procurement Unit to provide or make available personnel, services, information, or technical services pursuant to Section 10-205 (Supply of Personnel, Information, and Technical Services) of the [State] Procurement Code shall be complied with only to the extent that the Chief Procurement Officer determines that it is practical to do so in terms of personnel, time, and other resources. See Appendix 10-205 (Agreements to Supply Personnel, Information, and Technical Services).

*Regulation 10-206-Use of Payments Received by a Supplying
Public Procurement Unit*

CODE PROVISION:

§10-206 Use of Payments Received by a Supplying Public Procurement Unit.

All payments from any Public Procurement Unit or External Procurement Activity received by a Public Procurement Unit supplying personnel or services shall be available [to the supplying Public Procurement Unit] [as authorized by law].

R10-206 [RESERVED]

Regulation 10-207-Public Procurement Units To Comply with Code

CODE PROVISION:

§10-207 Public Procurement Units in Compliance with Code Requirements.

Where the Public Procurement Unit administering a Cooperative Purchase complies with the requirements of this Code, any Public Procurement Unit participating in such a purchase shall be deemed to have complied with this Code. Public Procurement Units may not enter into a Cooperative Purchasing agreement for the purpose of circumventing this Code.

R10-207 [RESERVED]

[ALTERNATIVE B]

Regulation 10-208- Review of Procurement Requirements

CODE PROVISION:

§10-208 Review of Procurement Requirements.

To the extent possible, the Chief Procurement Officer of any Public Procurement Unit may collect information concerning the type, cost, quality, and quantity of commonly used supplies, services, or construction being procured or used by Public Procurement Units. The Chief Procurement officer may make available all such information to any other Public Procurement Unit upon request.

[END OF ALTERNATIVE B]

COMMENTARY:

Section 10-208 is primarily intended to be enacted by state governments, for the purpose of identifying appropriate groups of Public Procurement Units, either inside a single state, or among multiple states, to engage in Cooperative Purchasing efforts. Large local or regional Public Procurement Units may find it advantageous to collect such information.

R10-208 [RESERVED]

Regulation 10-301-Contract Controversies

Part C – Contract Controversies

CODE PROVISION:

§10-301 Contract Controversies.

- (1) *Public Procurement Unit Subject to Article 9 (Legal and Contractual Remedies)*. Under a Cooperative Purchasing agreement, controversies arising between an administering Public Procurement Unit and its bidders, offerors, or contractors shall be resolved between the ordering Public Procurement Unit and the supplying bidders, offerors, or contractors in accordance with [Article 9 (Legal and Contractual Remedies)] [the [administering] [ordering] Public Procurement Unit's existing procedures].
- (2) *Public Procurement Unit Not Subject to Article 9 (Legal and Contractual Remedies)*. Any Public Procurement Unit which is not subject to Article 9 (Legal and Contractual Remedies), Part E (Procurement Appeals Board), is authorized to:
 - (a) enter into an agreement with the [State] Procurement Appeals Board [or other State administrative agency designated to resolve disputes] to use such board [or agency] to resolve controversies between the Public Procurement Unit and its contractors, whether or not such controversy arose from a Cooperative Purchasing agreement; and
 - (b) enter into an agreement with another Public Procurement Unit to establish procedures or use such unit's or activity's existing procedures to resolve controversies with contractors, whether or not such controversy arose under a cooperative purchasing agreement.

COMMENTARY:

If the State does not enact the Procurement Appeals Board, this Section should be amended to refer to any administrative remedies for resolving contract disputes that the State has established and authorize the Local Public Procurement Unit to enter into an agreement to utilize those administrative remedies.

R10-301 [RESERVED]

See Appendix 10-301 (Agreement Designating [State Procurement Appeals Board] to Hear and Resolve Controversies).

ARTICLE 11 – ASSISTANCE TO SMALL AND DISADVANTAGED BUSINESSES; FEDERAL ASSISTANCE OR CONTRACT PROCUREMENT REQUIREMENTS

Part A – Definitions

CODE PROVISION:

§11-101 Definitions of Terms Used in this Article.

The [Policy Office] [Chief Procurement Officer] shall promulgate regulations establishing detailed definitions of the following terms, using, in addition to the criteria set forth in this Section, such other criteria as it may deem desirable, including the number of employees and the dollar volume of business. As used in this Article:

- (1) *Disadvantaged Business* means 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.
- (2) *Small Business* means 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.

COMMENTARY:

It is believed that the problems of small and disadvantaged businesses are widespread and may be addressed more broadly than solely through the public procurement process. For a jurisdiction to do so effectively would perhaps require the creation of a specialized agency or division of the [State] government, such as a small business administration. In the event that the broader approach is taken, such specialized governmental body should be given the authority to promulgate regulations defining the terms "small business" and "disadvantaged business."

DEFINITIONAL CROSS-REFERENCES:

"Business"	Section	1-301(1)
"Chief Procurement Officer"	Section	1-301(3)
"Contract"	Section	1-301(5)
"May"	Section	1-301(14)
"Person"	Section	1-301(15)
"Procurement"	Section	1-301(16)
"Regulation"	Section	1-301(20)
"Shall"	Section	1-301(22)
"Written" or "In Writing"	Section	1-301(26)

R11-101 [RESERVED]

Regulation 11-201-Statement of Policy and Its Implementation

Part B – Assistance to Small and Disadvantaged Businesses

CODE PROVISION:

§11-201 Statement of Policy and Its Implementation.

- (1) *Statement of Policy.* It shall be the policy of this [State] to assist small and disadvantaged businesses in learning how to do business with the [State].
- (2) *Implementation.* The Chief Procurement Officer shall implement the policy set forth in Subsection (1) of this Section in accordance with regulations under this Article.

R11-201 [RESERVED]

Regulation 11-202-Mandatory Duties of the Chief Procurement Officer

CODE PROVISION:

§11-202 Mandatory Duties of the Chief Procurement Officer.

- (1) *Assistance Within [State] Agencies.* Where feasible, the Chief Procurement Officer shall provide appropriate staff who shall be responsible to the Chief Procurement Officer and who shall serve within designated [State] agencies to assist [State] small and disadvantaged businesses in learning how to do business with the [State].
- (2) *Special Publications.* The Chief Procurement Officer shall give special publicity to procurement procedures and issue special publications designed to assist small and disadvantaged businesses in learning how to do business with the [State].
- (3) *Source Lists.* The Chief Procurement Officer shall compile, maintain, and make available source lists of small and disadvantaged businesses for the purpose of encouraging procurement from small and disadvantaged businesses.
- (4) *Solicitation Mailing Lists.* To the extent deemed by such officer to be appropriate and as may be required by regulation, the Chief Procurement Officer shall include small and disadvantaged businesses on solicitation mailing lists.
- (5) *Solicitation of Small and Disadvantaged Businesses.* The Chief Procurement Officer shall assure that small and disadvantaged businesses are solicited on each procurement for which such businesses may be suited.

- (6) *Training Programs.* The Chief Procurement Officer shall develop special training programs to be conducted by the [State] to assist small and disadvantaged businesses in learning how to do business with the [State].

R11-202 [RESERVED]

Regulation 11-203-Discretionary Duties of the Chief Procurement Officer

CODE PROVISION:

§11-203 Discretionary Duties of the Chief Procurement Officer.

- (1) *Bonding.* Notwithstanding other provisions of this Code, the Chief Procurement Officer may reduce the level or change the types of bonding normally required or accept alternative forms of security to the extent reasonably necessary to encourage procurement from small and disadvantaged businesses.
- (2) *Progress Payments.* The Chief Procurement Officer may make such special provisions for progress payments as such officer may deem reasonably necessary to encourage procurement from small and disadvantaged businesses.

COMMENTARY:

- (1) In reducing for small businesses the level or types of bonding normally required, the Chief Procurement Officer should take precautions to ensure that the government and any third parties will be adequately protected.
- (2) Where federal assistance or contract requirements are stricter with regard to procurement from small and disadvantaged businesses than the procedures set forth in Section 11-202 (Mandatory Duties of the Chief Procurement Officer) and Section 11-203 (Discretionary Duties of the Chief Procurement Officer), Section 11-301 (Compliance with Federal Requirements) mandates that the Chief Procurement Officer comply with those requirements when expending such funds.

R11-203 [RESERVED]

Regulation 11-204-Business Assistance Offices

CODE PROVISION:

§11-204 Business Assistance Offices.

The Chief Procurement Officer may establish, as such officer may deem appropriate, business assistance offices throughout the [State] to assist in carrying out the provisions of this Part.

COMMENTARY:

The providing of staff support under Section 11-202(1) (Mandatory Duties of the Chief Procurement Officer, Assistance Within [State] Agencies), will help ensure that the needs of small and disadvantaged businesses are considered during the procurement process. Establishment of business assistance offices throughout the [State], as provided in this Section, will make [State] assistance to small and disadvantaged businesses more accessible to them.

R11-204 [RESERVED]

Regulation 11-205-Report to the Policy Office and the [Legislature]

CODE PROVISION:

§11-205 Report to [the Policy Office and] the [Legislature].

The Chief Procurement Officer shall annually, before [insert appropriate date], report in writing to [the Policy Office and] the [legislature] concerning the awarding of contracts to small and disadvantaged businesses during the preceding fiscal year.

COMMENTARY:

To the extent practicable, the report required by this Section should include the total dollar value of awards made in the fiscal year to small and disadvantaged businesses.

R11-205 [RESERVED]

Regulation 11-301-Compliance with Federal Requirements

Part C – Federal Assistance or Contract Procurement Requirements

CODE PROVISION:

§11-301 Compliance with Federal Requirements.

Where a procurement involves the expenditure of federal assistance or contract funds, the Chief Procurement Officer shall comply with such federal law and authorized regulations which are mandatorily applicable and which are not presently reflected in this Code.

COMMENTARY:

Where a [State] chooses to accept federal assistance or contract funds, this provision ensures [State] compliance with federal assistance or contract procurement requirements where they are not presently reflected in this Code. The drafters contemplate that most of the requirements falling within this provision will be socioeconomic in nature.

R11-301 [RESERVED]

Part D – Other Socioeconomic Procurement Programs

[Reserved]

Regulation 11-401-Other Socioeconomic Procurement Programs

R11-401 [RESERVED]

REGULATIONS

EDITORIAL NOTE:

A [State] enacting the Code should place any legislatively authorized socioeconomic procurement programs here.

ARTICLE 12 – ETHICS IN PUBLIC CONTRACTING

Part A – Definitions

Regulation 12-101- Definitions

CODE PROVISION:

§12-101 Definitions of Terms Used in this Article.

- (1) *Blind Trust* means 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.
- (2) *Confidential Information* means any information which is available to an employee only because of the employee's status as an employee of this [State] and is not a matter of public knowledge or available to the public on request.
- (3) *Conspicuously* means written in such special or distinctive format, print, or manner that a reasonable person against whom it is to operate ought to have noticed it.
- (4) *Direct or Indirect Participation* means 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.
- (5) *Financial Interest* means:
 - (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 such interest in any property or any business as may be specified by the [Ethics Commission]; or
 - (c) holding a position in a business such as an officer, director, trustee, partner, employee, or the like, or holding any position of management.
- (6) *Gratuity* means a payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or

promised, unless consideration of substantially equal or greater value is received.

- (7) *Immediate Family* means a spouse, children, parents, brothers and sisters, [and such other relatives as may be designated by the Ethics Commission].
- (8) *Official Responsibility* means direct administrative or operating authority, whether intermediate or final, either exercisable alone or with others, either personally or through subordinates, to approve, disapprove, or otherwise direct [State] action.
- (9) *Purchase Request* means that document whereby a Using Agency requests that a contract be entered into for a specified need, and may include, but is not limited to, the technical description of the requested item, delivery schedule, transportation, criteria for evaluation, suggested sources of supply, and information supplied for the making of any written determination required by this Code.

COMMENTARY:

(1) Examples of a conspicuously written item within the meaning of Subsection (3) are printed heading in capitals, such as "COVENANT RELATING TO CONTINGENT FEES," or the use of a different typeface or larger typeface than other materials in proximity to the clause.

(2) In Subsection (5)(a), a dollar value of yearly entitlements has been omitted. The amount to be inserted in that subparagraph is an optional matter for enacting jurisdictions.

DEFINITIONAL CROSS-REFERENCES:

"Business"	Section	1-301(1)
"Construction"	Section	1-301(4)
"Contract"	Section	1-301(5)
"Contractor"	Section	1-301(7)
"Employee"	Section	1-301(10)
"Governmental Body"	Section	1-301(11)
"May"	Section	1-301(14)
"Person"	Section	1-301(15)
"Procurement"	Section	1-301(16)
"Regulation"	Section	1-301(20)
"Services"	Section	1-301(21)
"Shall"	Section	1-301(22)
"Specification"	Section	4-101(1)
"Supplies"	Section	1-301(24)
"Written" or "In Writing"	Section	1-301(26)

R12-101.01 Definitions.

R12-101.01.1 *Bona Fide Employee* means a person employed by a prospective contractor and subject to the prospective contractor's supervision and control as to the time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain [State] contracts. In determining whether a bona fide employment relationship exists, the following factors should be considered:

- (a) whether the employment is continuous;
- (b) whether the person is subject to the supervision and control of the prospective contractor;
- (c) whether the size of any contingent fee is reasonable in relation to the services performed;
- (d) whether the method of payment of the contingent fee is customary in the trade; and
- (e) whether the person is employed solely by the prospective contractor.

R12-101.01.2 *Bona Fide Established Commercial Selling Agency* means a business that neither exerts nor proposes to exert improper influence to solicit or obtain [State] contracts. In determining whether a business is a bona fide established commercial selling business, the following factors should be considered:

- (a) whether the business is one which has either been active for a considerable period of time or is presently a going concern and is likely to continue as such;
- (b) whether the business uses its own name and is characterized by the customary indicia of the conduct of a regular business;
- (c) the degree to which the business's activities are directed toward the solicitation of contracts of the [State];
- (d) whether the size of any contingent fee is reasonable in relation to the services performed; and
- (e) whether the method of payment of the contingent fee is customary in the trade.

R12-101.01.3 *Business Employee* means a person, whether compensated or not, who performs personal services for a business.

R12-101.01.4 *Employee*, as defined in Section 1-301(10) (Definitions, Employee) of the [State] Procurement Code, is hereinafter referred to as "[State] employee." As used throughout this Chapter, the term "[State] employee" shall include:

- (a) a person elected to a [State] office;
- (b) a nonelected person, whether appointed or selected through a personnel selection procedure, receiving a salary, wages, or other compensation from the [State]; and

(c) a noncompensated or minimally compensated person who is performing personal services for the [State].

The term "[State] employee" does not include a person who, as an independent contractor, performs professional, scientific, technical, or advisory service for a [State] agency and who receives a fee, honorarium, or similar consideration for the services performed.

R12-101.01.5 *Financial Interest.*

[RESERVED]

COMMENTARY:

The definition of "financial interest" in Section 12-101(5) of the [State] Procurement Code leaves the ownership interest in Subsection (b) to be defined in regulations of the [Ethics Commission]. This is to enable the enacting jurisdiction to set different thresholds for different types of ownership if it desires. For instance, a jurisdiction may wish to set a different threshold for real property than for stock ownership in a large multinational corporation.

R12-101.01.6 *Gratuity*, as defined in Section 12-101(6) (Definitions, Gratuity) of the [State] Procurement Code, means a payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received. In this Chapter, a gratuity may include any tangible and intangible benefit in the nature of gifts favors, entertainment, discounts, passes, transportation, accommodation, hospitality or offers of employment. "Nominal value," as used in Section 12-101(6) of the [State] Procurement Code, means actual worth or actual cost, which ever is greater, which does not exceed [\$25] individually or cumulatively.

R12-101.01.7 *Immediate Family.*

[RESERVED]

COMMENTARY:

The definition of "immediate family" in Section 12-101(7) of the [State] Procurement Code provides that the [Ethics Commission] may further define the term "immediate family." In so doing, the [Ethics Commission] may wish to take into consideration factors such as whether or not the individual lives in the same household with the [State] employee.

Regulation 12-201-Statement of Policy

Part B – Standards of Conduct

CODE PROVISION:

§12-201 Statement of Policy.

Public employment is a public trust. It is the policy of the [State] to promote and balance the objective of protecting government integrity and the objective of facilitating the recruitment and retention of personnel needed by the [State]. Such policy is implemented by prescribing essential standards of ethical conduct without creating unnecessary obstacles to entering public service.

Public employees must discharge their duties impartially so as to assure fair competitive access to governmental procurement by responsible contractors. Moreover, they should conduct themselves in such a manner as to foster public confidence in the integrity of the [State] procurement organization.

To achieve the purpose of this Article, it is essential that those doing business with the [State] also observe the ethical standards prescribed herein.

R12-201 [RESERVED]

Regulation 12-202-General Standards of Ethical Conduct

CODE PROVISION:

§12-202 General Standards of Ethical Conduct.

- (1) *General Ethical Standards for Employees.* Any attempt to realize personal gain through public employment by conduct inconsistent with the proper discharge of the employee's duties is a breach of a public trust.

In order to fulfill this general prescribed standard, employees must also meet the specific standards set forth in: Section 12-204 (Employee Conflict of Interest); Section 12-205 (Employee Disclosure Requirements); Section 12-206 (Gratuities and Kickbacks); Section 12-207 (Prohibition Against Contingent Fees); Section 12-208 (Restrictions on Employment of Present and Former Employees); and Section 12-209 (Use of Confidential Information).

- (2) *General Ethical Standards for Non-Employees.* Any effort to influence any public employee to breach the standards of ethical conduct set forth in this Section and Section 12-204 through Section 12-209 of this Article is also a breach of ethical standards.

COMMENTARY:

- (1) The six specific standards of ethical conduct which must be met by employees and non-employees are incorporated into this Section. Non-employees, as well as employees, are required to meet ethical standards of conduct. Any effort by any person to influence a public employee to breach the standards of ethical conduct applicable to employees constitutes a breach of ethical standards.
- (2) Some governmental agencies have adopted a practice of requiring each new employee dealing with the award or administration of governmental funds to certify that the employee has received, read, and understood the standards or conduct for governmental agencies. It is essential that those dealing with the [State] also observe the ethical standards of this Code and that procedures be implemented to make sure that contractors understand the required standards of ethical conduct.

R12-202.01 Required Compliance with Ethical Standards as a Condition of Employment; Notice and Acknowledgement Procedures.

R12-202.01.1 *Dissemination of Regulations.* The [Ethics Commission] shall make available and disseminate to every governmental body a copy of this Chapter and amendments thereto so that every [State] employee will be given notice of the requirements of Article 12 (Ethics in Public Contracting) of the [State] Procurement Code and this Chapter.

R12-202.01.2 *[State] Employee Statement.* Each [State] employee shall be given a copy of this Chapter by the head of the governmental body by which such employee is employed and shall be required to sign a statement, supplied by the [Ethics Commission], that such employee is familiar with and will abide by the [State] Procurement Code and this Chapter.

R12-202.01.3 *Filing of [State] Employee Statements.* Each [State] employee statement shall be filed with the [Ethics Commission]. As a condition of employment, new [State] employees shall file such statement within [ten] days of the first day of such employee's employment. Other [State] employees shall file such statement within [ten] days of the effective date of this Chapter. This statement shall constitute the notice required by Section 12-204(4) (Employee Conflict of Interest, Notice), Section 12-205(3) (Employee Disclosure Requirements, Notice), and Section 12-208(1) (Restrictions on Employment of Present and Former Employees, Contemporaneous Employment Prohibited) of the [State] Procurement Code.

COMMENTARY:

The head of each governmental body or such official's designee is encouraged to explain and to discuss at least annually with such official's employees the provisions of these regulations.

R12-202.02 Clause Regarding [State] Employee and Former [State] Employee Ethical Standards.

The following clause shall be conspicuously set forth in every contract and solicitation therefor:

"REPRESENTATION REGARDING ETHICAL STANDARDS FOR [STATE] EMPLOYEES AND FORMER [STATE] EMPLOYEES

The bidder, offeror, or contractor represents that it has not knowingly influenced and promises that it will not knowingly influence a [State] employee or former [State] employee to breach any of the ethical standards set forth in Article 12 (Ethics in Public Contracting) of the [State] Procurement Code and in Chapter 12 of the [State] Procurement Regulations."

Regulation 12-203-Criminal Sanctions

CODE PROVISION:

§12-203 Criminal Sanctions.

To the extent that violations of the ethical standards of conduct set forth in this Part constitute violations of the [State Criminal Code], they shall be punishable as provided therein. Such sanctions shall be in addition to the civil remedies set forth in this Article.

R12-203 [RESERVED]

Regulation 12-204-Conflict of Interest

CODE PROVISION:

§12-204 Employee Conflict of Interest.

- (1) *Conflict of Interest.* It shall be a breach of ethical standards for any employee to participate directly or indirectly in a procurement when the employee knows that:
 - (a) the employee or any member of the employee's immediate family has a financial interest pertaining to the procurement;
 - (b) a business or organization in which the employee, or any member of the employee's immediate family, has a financial interest pertaining to the procurement; or
 - (c) any other person, business, or organization with whom the employee or any member of the employee's immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement.
- (2) *Financial Interest in a Blind Trust.* Where an employee or any member of the employee's immediate family holds a financial interest in a blind trust, the employee shall not be deemed to have a conflict of interest with regard to matters pertaining to that financial interest, provided that disclosure of the existence of the blind trust has been made to the [Ethics Commission].
- (3) *Discovery of Actual or Potential Conflict of Interest, Disqualification, and Waiver.* Upon discovery of an actual or potential conflict of interest, an employee shall promptly file a written statement of disqualification and shall withdraw from further participation in the transaction involved. The employee may, at the same time, apply to the [Ethics Commission] in accordance with Section 12-401(3) ([Ethics Commission], Waiver) for

an advisory opinion as to what further participation, if any, the employee may have in the transaction.

- (4) *Notice.* Notice of this prohibition shall be provided in accordance with regulations promulgated by the [Ethics Commission].

COMMENTARY:

The term "financial interest" used in this Section is defined in Section 12-101(5).

COMMENTARY:

Section 12-204 (Employee Conflict of Interest) of the [State] Procurement Code covers instances in which a [State] employee involved in procurement is actively negotiating for employment with a contractor or prospective contractor. Such an employee must disqualify himself or herself from participation in a procurement involving such contractor or prospective contractor and apply to the [Ethics Commission] for a waiver of the conflict of interest prohibition regarding any further participation in that procurement. Offers of employment under certain circumstances may also be gratuities which are prohibited by Section 12-206(1) (Gratuities and Kickbacks, Gratuities) of the [State] Procurement Code.

R12-204.01 Definitional Cross References.

The following terms used in this Regulation are defined in the following Sections of the [State] Procurement Code which are quoted in Regulation 12-101:

- (a) "blind trust," as defined in Section 12-101(1) (Definitions, Blind Trust);
- (b) "financial interest," as defined in Section 12-101(5) (Definitions, Financial Interest); and [State] Procurement Code;
- (c) "immediate family," as defined in Section 12-101(7) (Definitions, Immediate Family).

R12-204.02 Disclosure of a Blind Trust.

Within [60] calendar days of the creation of a blind trust or, if such trust exists on the effective date of the [State] Procurement Code, within [60] calendar days of such effective date, the [State] employee who has a financial interest in a blind trust shall file a disclosure report with the [Ethics Commission] which shall contain the following:

- (a) a copy of the trust instrument;
- (b) the name and address of the trustee; and
- (c) a statement that the [State] employee does not and will not receive notice of changes in the trust property.

R12-204.03 [Ethics Commission] Ruling on a Blind Trust.

Within [30] days of the receipt of a disclosure report, the [Ethics Commission] shall determine in writing whether the particular trust arrangement complies with the policy set forth in Section 12-101(1) (Definitions, Blind Trust) of the [State] Procurement Code. Upon a determination by the [Ethics Commission] that the particular trust arrangement does not comply with the policy set forth in Section 12-101(1) of the [State] Procurement Code, such employee may revise the trust arrangement and may submit a new disclosure report to the [Ethics Commission].

R12-204.04 Application for a Waiver of Prohibition Against Conflict of Interest.

R12-204.04.1 *Application for Waiver.* When a [State] employee knows that he or she has an actual or potential conflict of interest or when the [Ethics Commission] has determined that an actual conflict of interest exists, such employee shall disqualify himself or herself from the procurement involved and may apply to the [Ethics Commission] for a waiver of the conflict of interest prohibition under the authority of Section 12-204(3) (Employee Conflict of Interest, Discovery of Actual or Potential Conflict of Interest, Disqualification and Waiver) of the [State] Procurement Code.

R12-204.04.2 *Grant or Denial of Waiver.* Under Section 12-401(3) ([Ethics Commission], Waiver) of the [State] Procurement Code, the [Ethics Commission] may grant a waiver of the conflict of interest prohibition where the interests of the [State] so require or when the ethical conflict is insubstantial or remote. Prior to granting or denying a waiver, the [Ethics Commission] shall make such investigation as it may deem appropriate and which is not in violation of the [State] employee's rights, privileges, and immunities. Factors to be considered by the [Ethics Commission] when determining whether to grant a waiver shall include:

- (a) the degree of involvement of the [State] employee in the particular procurement;
- (b) the size and character of the financial interest of the [State] employee or a member of such employee's immediate family which relates to the particular procurement;
- (c) the likelihood of the appearance of impropriety;
- (d) the availability of supplier or contractors, if any, with which a contract would not a conflict; and
- (e) the extent to which the [State] interest will be affected by a waiver.

COMMENTARY:

Undue hardship may also be a factor to be considered in granting a waiver. For example, the mayor of a town has the authority to procure for the town. The mayor, whose public salary is small, owns the local hardware store. Enforcement of the contemporaneous employment restriction would result in an undue hardship on both the town and the mayor.

Regulation 12-205-Disclosure of Benefit from Contract

CODE PROVISION:

§12-205 Employee Disclosure Requirements.

- (1) *Disclosure of Benefit Received from Contract.* Any employee who has, or obtains any benefit from, any [State] contract with a business in which the employee has a financial interest shall report such benefit to the [Ethics Commission]; provided, however, this Section shall not apply to a contract with a business where the employee's interest in the business has been placed in a disclosed blind trust.
- (2) *Failure to Disclose Benefit Received.* Any employee who knows or should have known of such benefit, and fails to report such benefit to the [Ethics Commission], is in breach of the ethical standards of this Section.
- (3) *Notice.* Notice of this requirement shall be provided in accordance with regulations promulgated by the [Ethics Commission].

R12-205.01 Definitional Cross-Reference.

Section 12-201(5) (Definitions, Financial Interest) of the [State] Procurement Code which defines "financial interest" is quoted in Regulation 12-101 (Definitions).

R12-205.02 "Benefit" Defined.

A [State] employee receives a benefit for purposes of the disclosure requirement of Section 12-205 (Employee Disclosure Requirement) of the [State] Procurement Code when a [State] contract is awarded to a business in which such employee has a financial interest and the contract exceeds [\$100,000].

Editorial Note: The contract amount in this Section may vary with the size of the jurisdiction adopting this Regulation.

R12-205.03 Disclosure Requirement.

The disclosure required by Section 12-205 (Employee Disclosure Requirement) of the [State] Procurement Code shall be made to the [Ethics Commission] within [30] days after the [State] employee has actual or constructive notice of a benefit received or to be received. Such disclosure shall be made in a written report which sets forth:

- (a) the name of the [State] employee and the name of the business involved;
- (b) the name of the governmental body with which the business has a contract;
- (c) the dollar amount and nature of the contract; and
- (d) the nature and extent of the benefit received or to be received.

This requirement applies regardless of whether such employee is subject to the conflict of interest prohibition set forth in Section 12-204 (Employee Conflict of Interest) of the [State] Procurement Code.

Regulation 12-206-Gratuities and Kickbacks

CODE PROVISION:

§12-206 Gratuities and Kickbacks.

- (1) *Gratuities.* It shall be a breach of ethical standards for any person to offer, give, or agree to give any employee or former employee, or for any employee or former 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, 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 a breach of ethical standards 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.

R12-206.01 Definitional Cross-References.

The following terms used in this Regulation are defined in the following Sections of the [State] Procurement Code which are quoted in Regulation 12-101:

- (a) "gratuity," as defined in Section 12-101(6) (Definitions, Gratuity); and
- (b) "purchase request," as defined in Section 12-101(9) (Definitions, Purchase Request).

R12-206.02 Gratuities Prohibition.

R12-206.02.1 *Breach*. It is a breach of Section 12-206(1) (Gratuities and Kickbacks, Gratuities) of the [State] Procurement Code:

- (a) for any person to offer, give, or agree to give any [State] employee or former [State] employee a gratuity or offer of employment; or
- (b) for any [State] employee or former [State] employee to solicit, demand, accept, or agree to accept a gratuity or an offer of employment; provided that the gratuity or offer of employment is in relation to a particular matter in accordance with R12-206.02.2 and pertains to any program requirement, contract, subcontract, or solicitation or proposal therefor.

R12-206.02.2 *Relationship of Gratuity*. In addition, the gratuity or offer of employment must be made in relation to any proceeding or application, request for a ruling, determination, claim or controversy, or other particular matter, to constitute a breach, and in connection with any:

- (a) decision;
- (b) approval;
- (c) disapproval;
- (d) recommendation;
- (e) preparation of any part of a program requirement or a purchase request;
- (f) action to influence the content of any specification or procurement standard;
- (g) rendering of advice;
- (h) investigation;
- (1) auditing; or
- (j) other advisory capacity.

R12-206.02.3 *Family*. This prohibition extends to the giving of gratuities to anyone on the [State] employee's or former [State] employee's behalf such as a member of that employee's immediate family.

R12-206.03 When Prohibition Against Gratuities Not Applicable.

Section 12-206(1) (Gratuities and Kickbacks, Gratuities) does not prohibit:

- (a) the solicitation or acceptance of anything of monetary value from a friend, parent, spouse, child, or other close relative when the circumstances make it clear that the motivation for the transaction is unrelated to any procurement or program requirement with the [State] and is based upon a personal or family relationship;
- (b) the participation in the activities of, or the acceptance of an award for, a meritorious public contribution or achievement from a charitable, religious, professional, social, or fraternal organization, or from a non-profit educational, recreational, public service, or civic organization;
- (c) acceptance only on current customary terms of finance of a loan from a bank or other financial institution for proper and usual activities of [State] employees, such as home mortgage loans; or
- (d) acceptance of unsolicited advertising products or promotional material, such as pens, pencils, note pads, calendars, and other items under nominal value as described in Section R12-101.01.6 (Definitions, Gratuity) of this Chapter.

COMMENTARY:

The gratuities prohibition set forth in Section 12-206(1) (Gratuities and Kickbacks, Gratuities) of the [State] Procurement Code should not be construed to apply to instances in which the interests of the [State] are served by [State] participation in widely attended luncheons, dinners, and similar gatherings sponsored by industrial, technical, and professional associations for the discussion of matters of mutual interest to the [State] and such organizations. However, payment by the [State] for attendance at such functions by [State] employees is encouraged.

R12-206.04 Payment of a Kickback.

The prohibition against kickbacks set forth in Section 12-206(2) (Gratuities and Kickbacks, Kickbacks) of the [State] Procurement Code applies whether a kickback is made prior to or after the award of a [State] contract or order.

R12-206.05 Contract Clause.

The following clause shall be conspicuously set forth in every contract and solicitation therefor:

REPRESENTATION REGARDING GRATUITIES AND KICKBACKS

The bidder, offeror, or contractor represents that it has not violated, is not violating, and promises that it will not violate the prohibition against gratuities and kickbacks set forth in Section 12-206 (Gratuities and Kickbacks) of the [State] Procurement Code."

CODE PROVISION:

§12-207 Prohibition Against Contingent Fees.

- (1) *Contingent Fees.* It shall be a breach of ethical standards for a person to be retained, or to retain a person, to solicit or secure a [State] 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.
- (2) *Representation of Contractor.* Every person, before being awarded a [State] contract, shall represent, in writing, that such person has not retained anyone in violation of Subsection (1) of this Section. Failure to do so constitutes a breach of ethical standards.
- (3) *Contract Clause.* The representation prescribed in Subsection (2) of this Section shall be conspicuously set forth in every contract and solicitation therefor.

COMMENTARY:

The proscription stated in Subsection (1) shall not be understood to prevent an attorney, an accountant, or other professional person from representing a client in the pursuit of professional duties. For example, it would not prevent an attorney from representing a client in a bid protest nor would it prevent an attorney or an accountant from entering into contract negotiations with a [State] agency. However, it would preclude a professional or any other person engaged in the actual act of soliciting or selling to the [State] from being paid on a contingent basis.

§12-207 Prohibition Against Contingent Fees.

R12-207.01 Definitional Cross-References.

The following terms used in this Regulation are defined in Regulation 12-101:

- (a) "bona fide employee," as defined in Section R12-101.01.1 (Definitions, Bona Fide Employee);
- (b) "bona fide established commercial selling agency," as defined in Section R12-101.01.2 (Definitions, Bona Fide Established Commercial Selling Agency); and
- (c) "business employee," as defined in Section R12-101.01.3 (Definitions, Business Employee).

R12-207.02 Influence Peddling.

The prohibition in Section 12-207(1) (Prohibition Against Contingent Fees, Contingent Fees) of the [State] Procurement Code covers influence peddling and particularly that which might occur when a former [State] official is hired on a contingent basis by a business seeking [State] contracts.

R12-207.03 Relationship of Commercial Selling Business to the Prospective Contractor.

The relationship between a bona fide established commercial selling business and the prospective contractor should be characterized by the following:

- (a) the fees charged by the business are commensurate with the nature and extent of the business's services actually rendered to the prospective contractor;
- (b) the business has adequate knowledge of the supply, service, or construction item of the prospective contractor which it represents to judge whether the item may be able to meet the [State's] requirements; and
- (c) the relationship between the business and the prospective contractor is or is contemplated to be continuing.

R12-207.04 Improper Influence.

A business employee or a commercial selling business should be conclusively presumed not to be bona fide if the [Ethics Commission] determines that improper influence has been or is being used to secure a [State] contract.

R12-207.05 Solicitation Clause.

Every solicitation for a supply, service, or construction item shall conspicuously set forth the following provision to be completed and submitted with every prospective contractor's bid or proposal:

"PROSPECTIVE CONTRACTOR'S REPRESENTATION REGARDING CONTINGENT FEES

The prospective contractor represents as a part of such contractor's bid or proposal that such contractor has/has not (circle applicable word or words) retained any person or agency on a percentage, commission, or other contingent arrangement to secure this contract."

R12-207.06 Information on Contingent Fees.

Any prospective contractor who has completed the clause set forth in Section R12-207.05 (Solicitation Clause) in the affirmative and is the apparently successful bidder or offeror shall submit the following information:

- (a) the full name and business address of the business or person retained, and the type of business organization;
- (b) the relationship of the business or person to the prospective contractor;

- (c) the terms of the retention agreement or a copy of such agreement;
- (d) if such person is a business employee:
 - (i) the duration of employment;
 - (ii) whether that employee is on the contractor's payroll for purposes of social security and federal income tax withholding;
 - (iii) whether that employee represents other businesses and, if so, the names and addresses of such businesses;
- (e) whether the business or person represents the prospective contractor on:
 - (i) both government and commercial business;
 - (ii) only government business; or
 - (iii) only the present contract;
- (f) the extent of the duties of the business or person; and
- (g) the duration the business or person has been engaged in a particular type of work and has performed this type of work for the contractor.

R12-207.07 Contract Clause.

The following clause shall be conspicuously set forth in every contract and solicitation therefor:

"REPRESENTATION REGARDING CONTINGENT FEES

The contractor represents that it has not retained a person to solicit or secure a [State] 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."

Regulation 12-208-Employment Prohibitions and Restrictions

CODE PROVISION:

§12-208 Restrictions on Employment of Present and Former Employees.

- (1) *Contemporaneous Employment Prohibited.* Except as may be permitted by regulations or rulings of the [Ethics Commission], it shall be a breach of ethical standards for any employee who is participating directly or indirectly in the procurement process to become or be, while such an employee, the employee of any person contracting with the governmental body by whom the employee is employed. Notice of this provision shall

be provided in accordance with regulations promulgated by the [Ethics Commission].

- (2) *Restrictions on Former Employees in Matters Connected with Their Former Duties.*
- (a) *Permanent Disqualification of Former Employee Personally Involved in a Particular Matter.* It shall be a breach of ethical standards for any former employee knowingly to act as a principal, or as an agent for anyone other than the [State], in connection with any:
- (i) judicial or other proceeding, application, request for a ruling, or other determination;
 - (ii) contract;
 - (iii) claim; or
 - (iv) charge or controversy,
in which the employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise while an employee, where the [State] is a party or has a direct and substantial interest.
- (b) *One Year Representation Restriction Regarding Matters for Which a Former Employee Was Officially Responsible.* It shall be a breach of ethical standards for any former employee, within one year after cessation of the former employee's official responsibility, knowingly to act as a principal, or as an agent for anyone other than the [State], in connection with any:
- (i) judicial or other proceeding, application, request for a ruling, or other determination;
 - (ii) contract;
 - (iii) claim; or
 - (iv) charge or controversy,
in matters which were within the former employee's official responsibility, where the [State] is a party or has a direct or substantial interest.

COMMENTARY:

Where considered appropriate, a jurisdiction may desire to enact a more stringent provision which provides that, for a period of one year following termination of employment, an employee may not enter into any arrangement with any contractor if the employee had personally and substantially dealt with such contractor or had official responsibility concerning a contract with the contractor.

- (3) *Disqualification of Business When an Employee Has a Financial Interest.* It shall be a breach of ethical standards for a business in which an employee has a financial interest knowingly to act as a principal, or as an agent for anyone other than the [State], in connection with any:
- (a) judicial or other proceeding, application, request for a ruling, or other determination;
 - (b) contract;
 - (c) claim; or
 - (d) charge or controversy,

in which the employee either participates personally and substantially through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of the employee's official responsibility, where the [State] is a party or has a direct and substantial interest.

- (4) *Selling to the [State] After Termination of Employment is Prohibited.* It shall be a breach of ethical standards for any former employee, unless the former employee's last annual salary did not exceed [\$_____] to engage in selling or attempting to sell supplies, services, or construction to the [State] for one year following the date employment ceased.

The term "sell" as used herein means signing a bid, proposal, or contract; negotiating a contract; contacting any employee for the purpose of obtaining, negotiating, or discussing changes in specifications, price, cost allowances, or other terms of a contract; settling disputes concerning performance of a contract; or any other liaison activity with a view toward the ultimate consummation of a sale although the actual contract therefor is subsequently negotiated by another person; provided, however, that this Section is not intended to preclude a former employee from accepting employment with private industry solely because the former employee's employer is a contractor with this [State], nor shall a former employee be precluded from serving as a consultant to this [State].

COMMENTARY:

(1) This Section places restrictions on the contemporaneous employment of present employees who are involved in the procurement process. It also places permanent and temporary disqualifications on the employment of former employees.

(2) Subsection (1) provides that no employee participating directly or indirectly in the procurement process may become an employee of parties contracting with the particular governmental body in which the employee is employed except as may be permitted under [Ethics Commission] regulations. For the definition of "direct or indirect participation," Section 12-101(4) should be consulted.

(3) Subsection (2)(a) provides that former employees are permanently disqualified from knowingly acting as a principal, or agent for anyone other than the [State], in certain matters in which the employee had participated personally and substantially while employed by the [State] where the [State] is a party or has a direct and substantial interest.

(4) Under Subsection (2)(b) a former employee is also prevented from appearing for one year after cessation of the employee's official responsibility before any court, department, or agency in connection with any matter which was within the employee's official responsibility where the [State] is a party or directly and substantially interested.

(5) Subsection (3) prohibits businesses in which the employee has a financial interest from knowingly acting as principals, or as agents for anyone other than the [State], in any matters in which the [State] employee personally and substantially participates or which is the subject of the employee's official responsibility where the [State] is a party or has a direct and substantial interest. The definition of "financial interest" is found in Section 12-101(5). This provision, which applies to businesses of employees, is distinguishable from Subsection (1), which is applicable to employees themselves. Section 12-204 (Employee Conflict of Interest) is also applicable only to employees and, unlike the immediate Section which relates to employment and business arrangements, is aimed at a broader array of financial interests.

(6) Subsection (4) provides that former high-level employees above a salary level to be prescribed by the enacting jurisdiction are prohibited from selling to the [State] for one year following termination of their employment.

R12-208.01 Contemporaneous Employment Prohibition.

R12-208.01.1 *Definition.* Section 12-101(4) (Definitions, Direct or Indirect Participation) of the [State] Procurement Code which defines "direct or indirect participation" is quoted in Regulation 12-101 (Definitions).

R12-208.01.2 *Scope.* Section 12-208(1) (Restrictions on Employment of Present and Former Employees, Contemporaneous Employment Prohibited) of the [State] Procurement Code prohibits the contemporaneous employment of a [State] employee by persons contracting with the governmental body with which such employee is employed. "Contracting" as used in this Section includes performing a [State] contract actively seeking award of a [State] contract.

COMMENTARY:

The [Ethics Commission] may determine what constitutes a "governmental body" for purposes of the prohibition set forth in Section 12-208(1) of the [State] Procurement Code. Such determination should be based on the separate and distinct function of a particular smaller unit.

R12-208.01.3 *Waiver.* Under the provisions of Section 12-208(1)(Restrictions on Employment of Present and Former Employees, Contemporaneous Employment Prohibited) of the [State] Procurement Code, the [Ethics Commission] may waive the prohibition set forth in that Section on a case-by-case basis. Prior to granting a waiver, the [Ethics Commission] shall make written determinations that:

(a) the contemporaneous employment of the [State] employee has been publicly disclosed;

- (b) the [State] employee will be able to perform his or her procurement functions without actual or apparent bias or favoritism; and
- (c) the best interest of the [State] will not be impaired.

COMMENTARY:

The commentary under Section R12-204.04 (Application for a Waiver of Prohibition Against Conflict of Interest) is equally applicable under this Section.

R12-208.02 Permanent Disqualification of Former [State] Employee.

R12-208.02.1 *Personal and Substantial Participation.* For a [State] employee to have "participated personally and substantially" in a matter, such employee's involvement must have been more than merely ministerial in nature. Factors to be considered in determining personal and substantial participation of a former [State] employee while a [State] employee shall include but are not limited to:

- (a) the former [State] employee's degree of involvement in the particular matter;
- (b) the degree of involvement of the former employee with a subordinate who had substantial participation in the matter;
- (c) the effect or appearance of the involvement of the former [State] employee; and
- (d) the relative time spent on the particular matter by the former [State] employee.

R12-208.02.2 *Matter Must be a Particular Matter Involving Identifiable Parties.* The activities listed in Section 12-208(2)(a) (Restrictions on Employment of Present and Former Employees, Permanent Disqualification of Former Employee Personally Involved in a Particular Matter) of the [State] Procurement Code generally describe matters in which issues are defined and parties are identified, such as specific proceedings affecting the legal rights of parties, or isolated transactions or related sets of transactions between identifiable parties.

Matters of general application, such as regulation and policy formulation, are not intended to be covered under those activities listed under Section 12-208(2)(a). Therefore, only a particular matter involving an identifiable party or parties is subject to the permanent prohibition set forth under Section 12-208(2)(a).

R12-208.02.3 *The Same Particular Matter Must be Involved.* The prohibition set forth in Section 12-208(2)(a) (Restrictions of Employment of Present and

Former Employees, Disqualification of Former Employee Personally Involved in a Particular Matter) of the [State] Procurement Code applies only with regard to those same particular matters in which the former [State] employee participated personally and substantially while a [State] employee. In determining whether two particular matters are the same, the following factors should be considered:

- (a) the factual basis of the matters;
- (b) the relationship of the issues involved in each matter;
- (c) the identity of the parties involved in each matter; and
- (d) the continued existence of an important [State] interest.

R12-208.03 One Year Restriction for a Former [State] Employee.

R12-208.03.1 Official Responsibility.

(a) Definition. Section 12-101(8) (Definitions, Official Responsibility) of the [State] Procurement Code which defines "official responsibility" is quoted in Regulation 12-101 (Definitions).

(b) Scope. The scope of a [State] employee's official responsibility is determined by the [State] constitution, statutes, regulations, executive orders, case law, or job descriptions, or may result from the lawful delegation of another [State] employee's duties.

(c) Requirement That Matters Have Been Actually Pending. In order for a matter to have been within a former [State] employee's official responsibility, it must have in fact been assigned to or under consideration by persons under the former [State] employee's official responsibility.

R12-208.03.2 One Year Restriction. The one year restriction set forth in Section 12-208(2)(b) (Restrictions on Employment of Present and Former Employees, Restrictions on Former Employees in Matters Connected with Their Former Duties) of the [State] Procurement Code is measured from the time the former [State] employee's official responsibility ended in a particular matter.

R12-208.04 Disqualification of a Business.

R12-208.04.1 *Personal and Substantial Participation.* "Personal and substantial participation" is discussed in Section R12-208.02.1 (Permanent Disqualification of Former [State] Employee, Personal and Substantial Participation) of this Chapter.

R12-208.04.2 *Official Responsibility*. Section 12-101(8) (Definitions, Official Responsibility) of the [State] Procurement Code, which defines "official responsibility," is quoted in Regulation 12-101 (Definitions) and is discussed in Section R12-208.03.1 (One Year Restriction for a Former [State] Employee, Official Responsibility) of this Chapter.

R12-208.04.3 *Determination of Business Knowledge*. In ascertaining whether a business has knowledge that a [State] employee has a financial interest in that business for the purpose of applying the prohibition in Section 12-208(3) (Restrictions on Employment of Present and Former Employees, Disqualification of a Business When an Employee Has a Financial Interest) of the [State] Procurement Code, the factors to be considered should include the following:

- (a) the size of the business;
- (b) the percentage of ownership in the business by the [State] employee;
- (c) the nature of the dealings of the [State] employee with the business regarding such employee's financial interest; and
- (d) such other evidence as may be relevant and material.

R12-208.05 Prohibition Against Selling to the [State].

R12-208.05.1 *Prohibition; Applicability*. Section 12-208(4) (Restrictions on Employment of Present and Former Employees, Selling to the [State] After Termination of Employment is Prohibited) of the [State] Procurement Code prohibits a former [State] employee whose annual salary exceeded [\$____] from selling or attempting to sell to any governmental body of the [State] within one year following the date employment ceased. This prohibition applies with regard to any [State] governmental body and not just to the governmental body with which the former [State] employee used to be employed.

R12-208.05.2 *"Sell" Defined*. Section 12-208(4) (Restrictions on Employment of Present and Former Employees, Selling to the [State] After Termination of Employment is Prohibited) of the [State] Procurement Code, defines "sell" for the purpose of prohibiting selling to the [State] to mean:

- (a) signing a bid, proposal, or contract;
- (b) negotiating a contract;
- (c) contacting any employee for the purpose of obtaining, negotiating, or discussing changes in specifications, price, cost allowances, of other terms of a contract;

- (d) settling disputes concerning performance of a contract; and
- (e) any other liaison activity with a view toward the ultimate consummation of a sale although the actual contract therefor is subsequently negotiated by another person.

Requests for information are not included within the term "sell".

R12-208.06 Employment with a [State] Contractor.

The one year prohibition against selling contained in Section 12-208(4) of the [State] Procurement Code shall not prohibit a former [State] employee from obtaining employment with a contractor but such employee shall not sell to the [State] as defined in Section R12-208.05.2 (Prohibition Against Selling to the [State], "Sell" Defined).

Regulation 12-209-Use of Confidential Information

CODE PROVISION:

§12-209 Use of Confidential Information.

It shall be a breach of ethical standards 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.

COMMENTARY:

The term "confidential information" is limited by its definition in Section 12-101(2) to information which is available only because of one's status as a [State] employee.

R12-209 [RESERVED]

Part C – Remedies

Regulation 12-301-Civil and Administrative Remedies Against Employees Who Breach Ethical Standards

CODE PROVISION:

§12-301 Civil and Administrative Remedies Against Employees Who Breach Ethical Standards.

- (1) *Existing Remedies Not Impaired.* Civil and administrative remedies against employees which are in existence on the effective date of this Code shall not be impaired.
- (2) *Supplemental Remedies.* In addition to existing remedies for breach of the ethical standards of this Article or regulations promulgated

hereunder, the [Ethics Commission] may impose any one or more of the following:

- (a) oral or written warnings or reprimands;
 - (b) suspension with or without pay for specified periods of time; and
 - (c) termination of employment.
- (3) *Right to Recovery from Employee Value Received in Breach of Ethical Standards.* The value of anything received by an employee in breach of the ethical standards of this Article or regulations promulgated hereunder shall be recoverable by the [State] as provided in Section 12-303 (Recovery of Value Transferred or Received in Breach of Ethical Standards).
- (4) *Due Process.* All procedures under this Section shall be in accordance with due process requirements and existing law. In addition, notice and an opportunity for a hearing shall be provided prior to imposition of any suspension or termination of employment.

R12-301 [RESERVED]

Regulation 12-302-Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards

CODE PROVISION:

§12-302 Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards.

- (1) *Existing Remedies Not Impaired.* Civil and administrative remedies against non-employees which are in existence on the effective date of this Code shall not be impaired.
- (2) *Supplemental Remedies.* In addition to existing remedies for breach of the ethical standards of this Article or regulations promulgated hereunder, the [Ethics Commission] may impose any one or more of the following:
 - (a) written warnings or reprimands;
 - (b) termination of transactions; and
 - (c) debarment or suspension from being a contractor or subcontractor under [State] contracts.
- (3) *Right to Recovery from Non-Employee Value Transferred in Breach of Ethical Standards.* The value of anything transferred in breach of the

ethical standards of this Article or regulations promulgated hereunder by a non-employee shall be recoverable by the [State] as provided in Section 12-303 (Recovery of Value Transferred or Received in Breach of Ethical Standards).

- (4) *Right of the [State] to Debar or Suspend.* Debarment or suspension may be imposed by the [Ethics Commission] in accordance with the procedures set forth in Section 9-102 (Authority to Debar or Suspend) for breach of the ethical standards of this Article, provided that such action may not be taken without the concurrence of the [Attorney General].
- (5) *Due Process.* All procedures under this Section shall be in accordance with due process requirements, including, but not limited to, a right to notice and an opportunity for a hearing prior to imposition of any termination, debarment, or suspension from being a contractor or subcontractor under a [State] contract.

COMMENTARY:

The power to debar or suspend, with appropriate safeguards, is primarily entrusted to the Chief Procurement Officer under procedures and conditions set forth in Section 9-102 (Authority to Debar or Suspend). The supplementary and limited jurisdiction of the [Ethics Commission] to debar or suspend the violations or ethical standards is granted by Subsection (4) in the interest of providing a procedure which may be utilized in those cases where it is desirable for an outside, independent agency to proceed with debarment or suspension.

R12-302 [RESERVED]

Regulation 12-303- Recovery of Value Transferred or Received in Breach of Ethical Standards

CODE PROVISION:

§12-303 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 Article or regulations promulgated hereunder by an employee or a non-employee may be recovered from both the employee and non-employee.
- (2) *Recovery of Kickbacks by the [State].* 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 [State] and will be recoverable hereunder from the recipient. In addition, said value may also be recovered from the subcontractor

making such kickbacks. Recovery from one offending party shall not preclude recovery from other offending parties.

COMMENTARY:

The definition of "kickback" may be found in Section 12-206(2).

R12-303 [RESERVED]

Part D – [Ethics Commission]

Regulation 12-401- Ethics Commission

CODE PROVISION:

§12-401 [Ethics Commission].

- (1) *Regulations.* The [Ethics Commission] shall promulgate regulations to implement this Article and shall do so in accordance with the applicable provisions of the [Administrative Procedure Act] of this State.

COMMENTARY:

The [Ethics Commission] may particularly wish to require disclosure of substantial political contributions of contractors under applicable State or local laws.

- (2) *Advisory Opinions.* On written request of employees or contractors, the [Ethics Commission] may render written advisory opinions regarding the appropriateness of the course of conduct to be followed in proposed transactions. Such requests and advisory opinions must be duly published in the manner in which regulations of this [State] are published. Compliance with requirements of a duly promulgated advisory opinion of the [Ethics Commission] shall be deemed to constitute compliance with the ethical standards of this Article.
- (3) *Waiver.* On written request of an employee, the [Ethics Commission] may grant an employee a written waiver from the application of Section 12-204 (Employee Conflict of Interest) and grant permission to proceed with the transaction to such extent and upon such terms and conditions as may be specified. Such waiver and permission may be granted when the interests of the [State] so require or when the ethical conflict is insubstantial or remote.

COMMENTARY:

(1) Some jurisdictions may want to use existing agencies to issue regulations pertaining to standards of ethical conduct. Other jurisdictions may wish to create a special "Ethics Commission" for this purpose. Therefore, the words "Ethics Commission" are bracketed wherever they appear in this Article.

(2) If an enacting jurisdiction chooses to create an [Ethics Commission], it will be necessary to adopt a regulation pertaining to its structure, duties, powers, and the appointment of its members.

(3) Subsection (2) authorizes an advisory opinion procedure which will provide guidance to public employees and contractors as to whether a prospective course of conduct is proper.

(4) Subsection (3) authorizes the [Ethics Commission] to waive the application of specified provisions of Article 12 to public employees when the public good will be served.

(5) If invoked, the waiver provision provides an administrative mechanism for averting the necessity of litigating such questions as whether an employee has a conflict of interest, and if so, to what extent that employee's further participation in the matter is barred. In *Graham v. McGrail*, 345 N.E.2d 888 (Mass. 1976), a dispute over such questions resulted in litigation which could have been avoided if a provision similar to Subsection (3) had been available.

R12-401 [RESERVED]

COMMENTARY:

Section 12-401(1) of the [State] Procurement Code requires that the [Ethics Commission] promulgate regulations to implement Article 12 (Ethics in Public Contracting) of the Code. Code Section 12-301(4) (Civil and Administrative Remedies Against Employees Who Breach Ethical Standards, Due Process) and Section 12-302(5) (Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards, Due Process) also require that the procedures implementing the [Ethics Commission's] powers to take action against those breaching the ethical standards must accord with due process requirements and existing law in the State. However, such procedural regulations should deal with the following subjects:

- (a) the conduct of investigations necessary for the [Ethics Commission's] decisions and opinions (that is, confidentiality, privilege, subpoena power, jurisdiction);
- (b) the assignment of enforcement responsibility for civil and criminal remedies available for violations of the Code;
- (c) hearings, notice requirements, the form and content of charges, briefs and other papers, and deadlines for decisions;
- (d) the review of decisions; and
- (e) the compilation and publication of advisory and other opinions.

Regulation 12-402-Appeal of Decisions of the [Ethics Commission]

CODE PROVISION:

§12-402 Appeal of Decisions of the [Ethics Commission].

- (1) *General.* Except as provided under Subsection (2) of this Section, a decision of the [Ethics Commission] under Section 12-301 (Civil and Administrative Remedies Against Employees Who Breach Ethical Standards) or Section 12-302 (Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards) shall be reviewable in accordance with the [Administrative Procedure Act] of this State.
- (2) *Debarment or Suspension.* A decision of the [Ethics Commission] regarding debarment or suspension under Section 12-302(2)(c) (Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards, Supplemental Remedies) shall be reviewable as provided in

Section 9-402(2) (Time Limitations on Actions, Debarments and
Suspensions for Cause).

R12-402 **[RESERVED]**

REGULATIONS APPENDICES

Editorial Note: The Appendices to Chapter 9 (Legal and Contractual Remedies) contain procedures relating to the authority of the Procurement Appeals Board to decide protests, to impose suspensions and debarments, and to decide contract claims and controversies. The procedures set forth are not necessarily explicitly mandated by Article 9 (Legal and Contractual Remedies) of the Model Procurement Code but arise in part from what the drafters considered might be typical due process requirements. Thus, jurisdictions considering these procedural requirements should carefully evaluate them in light of applicable due process and other legal requirements. To the extent that local court rules cover the procedures which are the subject of Appendices 9-506, 9-507, and 9-508, the Procurement Appeals Board of an enacting jurisdiction may wish to adopt such rules in lieu of or to supplement these rules.

Appendix 9-506-Rules of Procedure of the Procurement Appeals Board for the Protest of Solicitations or Awards

A9-506 Rule 1 Definitions.

- (1) *Appellant* means a person who appeals a decision of the Chief Procurement Officer, the head of a Purchasing Agency, or the designee of such officer.
- (2) *File and submit* mean receipt in the offices of the Board, the Chief Procurement Officer, or the head of a Purchasing Agency, as the case may be.
- (3) *Interested Party* means an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest.
- (4) *Protestor* means any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract and who files a protest. Such a protestor is sometimes referred to herein as an "aggrieved person."

A9-506 Rule 2 Filing of Protest or Appeal.

- (1) *Who May File*-An aggrieved person may protest a solicitation or award of a contract or an interested party may appeal a decision issued under Section 9-101 (Authority to Resolve Protested Solicitations and Awards) of the [State] Procurement Code.
- (2) *Must Be Written*-Such protests or appeals must be in writing and addressed to the Board.
- (3) *Contents*-The initial protest or appeal filed with the Board shall:
 - (a) include the name and address of the aggrieved person or appellant;
 - (b) identify the contracting activity and the number of the solicitation and, if awarded, the contract;
 - (c) contain a statement of the grounds of protest or appeal;

- (d) include supporting exhibits, evidence or documents to substantiate any claims unless not available within the filing time in which case the expected availability date shall be indicated; and
- (e) specify the ruling requested from the Board.

Appeals from a decision by the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer shall include a copy of any such decision. A copy of the protest or appeal shall also be filed concurrently with the agency that issued the solicitation and the communication to the Board should so indicate. The grounds for protest filed with the Board must be fully supported to the extent feasible.

A9-506 Rule 3 Pleadings.

No formal briefs or other technical forms of pleading or motion are required, but protests, appeals, and other submissions should be concise, logically arranged, and direct.

A9-506 Rule 4 Time for Filing.

(1) *Protest*-A direct protest of a solicitation or award of a contract addressed to the Board must be filed with the Board by the protestor within [14] days after the protestor knew or should have known of the facts and circumstances upon which the protest is based.

(2) *Appeal*-An appeal from a decision authorized by Section 9-101 (Authority to Resolve Protested Solicitations and Awards) of the [State] Procurement Code by the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer must be filed with the Board by the appellant within [seven] days of receipt by the appellant of such a decision.

(3) *Waiver of Time Limits*-The Board, for good cause shown or where it determines that a protest or appeal raises issues significant to procurement practices or procedures, may consider any protest or appeal which is not filed timely. However, unless the Board orders otherwise, the procurement shall not be stayed during such an appeal.

(4) *Additional Information*-If an additional statement is required by the Board from the protestor or appellant, or from interested parties, a copy shall be mailed or otherwise furnished to the Board, and a copy shall be mailed or otherwise furnished to the agency which issued the solicitation, not later than [five] days after receipt of notification from the Board of the need for such additional statement. If it is necessary to obtain additional information from the Agency, the Board will request that such information be furnished as expeditiously as possible. Failure to timely

comply may result in consideration and resolution of the protest without the information untimely filed.

A9-506 Rule 5 Dismissal for Lack of Jurisdiction.

Any motion addressed to the jurisdiction of the Board shall be promptly filed. Objection to the Board hearing the appeal under Section 9-505 (Jurisdiction of the Procurement Appeals Board) of the [State] Procurement Code shall be filed within [15] days after the [notice of appeal or protest] is filed. A hearing on any such motion shall be afforded on application of either party, unless the Board determines that decision on the motion will be deferred pending hearing on both the merits of the appeal and the motion. The Board shall have the right at any time and on its own motion to raise the issue of its jurisdiction to proceed with an appeal and shall do so by an appropriate order, affording the parties an opportunity to be heard thereon.

A9-506 Rule 6 Notice of Appeal or Protest, Submission of Agency Report, and Time for

Filing of Comments on Report.

(1) *Notice of Appeal or Protest*-The Board shall notify the Agency that issued the solicitation by telephone and in writing within one day of the receipt of a protest or appeal, and request that the Agency give notice of the protest or appeal to the contractor if award has been made or, if no award has been made, to all bidders or offerors who appear to have a substantial and reasonable prospect of receiving an award if the protest or appeal is denied. The Agency shall be requested to furnish copies of the protest documents to such parties with instructions to communicate further directly with the Board.

(2) *Agency Report*-The Board shall direct the Agency to submit a report on the protest or appeal to the Board as expeditiously as possible or, in any event, within [25] working days, and to furnish a copy of the report to the protestor or appellant and other interested parties. Such report should include:

- (a) a copy of the protest;
- (b) a copy of the bid or offer submitted by the protestor and a copy of the bid or offer that is being considered for award or whose bid or offer is being protested;
- (c) a copy of the solicitation, including the specifications or portions thereof, relevant to the protest;
- (d) a copy of the abstract of bids or offers or relevant portions thereof;
- (e) any other documents which are relevant to the protest; including the contract, if one has been awarded; and

(f) a statement setting forth findings, actions, and recommendations in the matter together with any additional evidence or information deemed necessary in determining the validity of the protest or appeal. The statement shall be fully responsive to the allegations of the protest. If the award was made after receipt of the protest, the report will include the determination required under A9-506 Rule 7 (Withholding of Award).

(3) *Comments on Report*-Comments on the Agency report shall be filed with the Board within ten days after receipt of the report, with a copy of the comments sent to the Agency and other interested parties. Any rebuttal a protestor, appellant, or interested parties may care to make shall be filed with the Board within [five] days after receipt of the comments to which rebuttal is directed, with a copy to the Agency, and protestor or appellant, and interested parties, as the case may be. An unsolicited Agency response shall be considered if filed within [five] days after receipt by the Agency of the comments to which the response is directed.

(4) *Failure to File Timely Comments*-The failure of a protestor, appellant, or any interested party to comply with the time limits stated in this Rule may result in resolution of the protest without consideration of the comments untimely filed.

A9-506 Rule 7 Withholding of Award.

In the event of a timely protest or appeal, the [State] shall not proceed further with the solicitation or award of the contract until the Chief Procurement Officer, after consultation with the head of the Using Agency or the head of the Purchasing Agency, makes a written determination pursuant to Section 9-101(6)(Authority to Resolve Protested Solicitations and Awards, Stay of Procurements During Protests) of the [State] Procurement Code that the award of the contract without delay is necessary to protect substantial interests of the [State]. In the event the Chief Procurement Officer determines that award is to be made during the pendency of a protest or appeal, such officer will so notify the Board.

A9-506 Rule 8 Furnishing of Information on Protests or Appeals.

(1) *Information Generally Available*-The Board shall, upon written request, make available to any party information bearing on the substance of the protest or appeal which has been submitted by the parties or agencies, except to the extent that withholding of information is permitted or required by law or regulation.

(2) *Confidentiality of Information*-If the party considers that information submitted contains material which should be withheld, a statement advising of this fact must be affixed to the front page of the document, and the information requested to be kept confidential must be so identified wherever it appears. Upon such written request, material submitted by a party shall be made available except to the extent that the withholding of information is permitted or required by law or regulation.

(3) *Comments on Information*-Any party may file comments on the information provided such comments are filed within 10 days of receipt of the information.

A9-506 Rule 9 Conference.

(1) *Requests for Conference*-A conference or hearing on the merits of the protest or appeal may be held at the discretion of the Board, upon its own motion, or upon the request of the protestor, appellant, interested parties, or the Agency. The Board member conducting the conference shall establish any necessary procedures. Hearings shall be held in accordance with A9-507 Rule 19 (Hearings: Nature; Examination of Witnesses). Requests for conferences or hearings should be made prior to the expiration of the time period allowed for filing comments on the Agency report. Except in unusual circumstances, requests for a conference or hearing received after such time will not be honored.

(2) *When Held*-Conferences or hearings normally will be held prior to expiration of the period allowed for filing comments on the Agency report. All parties shall be invited to attend the conference or hearing, and the Board can [require] [request] attendance of parties it deems appropriate. Ordinarily, only one conference or hearing will be held on a bid protest. Such conference or hearing may be held by telephone conference call.

(3) *Comments on Conference*-Any written comments to be submitted as a result of the conference or hearing must be received by the Board within [five] days of the date on which the conference or hearing was held.

A9-506 Rule 10 Decision by Board.

(1) *Decision*-On any direct protest of a solicitation or award of a contract, or any appeal of a decision of any such protest, the Board shall promptly decide whether the solicitation or award was in accordance with the Constitution, statutes, regulations, and terms and conditions of the solicitation. Protests and appeals may be heard and decided by a single board member at the discretion of the Chairperson. The proceedings shall be *de novo*. Any prior determinations by administrative officials shall not be final or conclusive. A determination of fact by the Board under these regulations shall be final and conclusive unless arbitrary, capricious, fraudulent, or clearly erroneous.

(2) *Goal of [25] Days*-The Board establishes a goal of [25] days for issuing a decision on a protest or appeal after receipt of all information submitted by all parties, and the conclusion of any conference or hearing.

(3) *Relief*-In addition to any other relief, decisions rendered by the Board under these regulations:

- (a) may order improperly awarded contracts to be terminated for the convenience of the [State];
- (b) may prohibit the awarding of a contract;
- (c) shall award the protesting bidder or offeror the reasonable costs incurred in connection with the solicitation, including bid preparation costs other than attorney's fees, when a protest is sustained and the protesting bidder or offeror should have been awarded the contract under the solicitation but is not.

A9-506 Rule 11 Request for Reconsideration.

(1) *Request*-Reconsideration of a decision of the Board may be requested by the protestor, appellant, any interested party who submitted comments during the Board proceeding, and any agency involved in the protest. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

(2) *When to File*-Requests for reconsideration of a decision of the Board shall be filed not later than ten days after receipt of such decision.

A9-506 Rule 12 Ex Parte Communication.

No member of the Board or of the Board's staff shall receive, nor shall any person directly or indirectly involved in a protest or appeal submit to the Board or the Board's staff, ex parte, any evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in an appeal.

*Appendix 9-507-Rules of Procedure of the Procurement Appeals Board for
Suspension or Debarment Proceedings*

A9-507 Rule I Appeals, How Taken.

Notice of an appeal from a suspension or debarment must be in writing and the original, together with two copies, must be mailed or otherwise filed with the Board within [60] days of the receipt of the determination under Section 9-102(3) (Authority to Debar or Suspend, Decision) of the [State] Procurement Code. A copy of the appeal shall be furnished to the Chief Procurement officer or the head of a Purchasing Agency, whichever issued the decision from which the appeal is taken.

A9-507 Rule 2 Contents of Notice of Appeal.

A notice of appeal should indicate that an appeal of the decision to debar or suspend is intended and attach as an appendix a copy of the decision that ordered the suspension or debarment. The notice of appeal should be signed personally by the ap-

pellant, by an officer of the appellant corporation or a member of the appellant firm, or by the appellant's duly authorized representative or attorney.

A9-507 Rule 3 Docketing of Appeals.

When a notice of appeal in any form has been received by the Board, it shall be docketed promptly. A notice of docketing shall be forwarded to both parties and a copy of the Rules of the Board shall be furnished appellant.

A9-507 Rule 4 Counsel for Respondent.

The Chief Procurement Officer or the head of a Purchasing Agency, whichever issued the decision to debar or suspend, or a designee, shall act as the respondent for the appeal. Within 30 days of notice from the Board that an appeal from a debarment decision has been docketed, or ten days when the appeal is from a suspension decision, the [Attorney General] shall designate a trial attorney to represent the respondent before the Board. The respondent's trial attorney shall file a notice of appearance with the Board, and a copy thereof will be given appellant or its attorney.

A9-507 Rule 5 Dismissal for Lack of Jurisdiction.

Any motion addressed to the jurisdiction of the Board shall be promptly filed. Objections to the Board hearing the appeal under Section 9-505 (Jurisdiction of the Procurement Appeals Board) of the [State] Procurement Code shall be filed within [15] days after the notice of appeal is filed. A hearing on any such motion shall be afforded on application of either party, unless the Board determines that decision on the motion will be deferred pending hearing on both the merits of the appeal and the motion. The Board shall have the right at any time to raise on its own motion the issue of its own jurisdiction to proceed with an appeal, and shall do so by an appropriate order, affording the parties an opportunity to be heard thereon.

A9-507 Rule 6 Show Cause Hearing on Suspensions.

Upon receipt of an appeal from a suspension decision, the Chairperson shall appoint one of the Board members to schedule and conduct a hearing to show cause why the suspension should not be lifted. This hearing shall be held within [30] days of the appeal. The [State] (respondent) shall be required to show at such hearing probable cause for debarment. Respondent shall have the right to start or continue any debarment proceedings (including appeals) regardless of the decision in this show cause hearing.

A9-507 Rule 7 Pleadings.

(1) *Respondent*-Within [60] days after receipt of notice of docketing of the appeal, the respondent shall file a complaint with the Board and shall serve appellant with a copy. The complaint shall set forth simple, concise, and direct statements of each of the grounds for debarment. This pleading shall fulfill the generally recognized

requirements of a complaint, although no particular form or formality is required. Should the complaint not be filed within the time specified or any extension the Board may grant, the debarment action shall be dismissed with prejudice.

(2) *Appellant*-Within 30 days from receipt of said complaint, appellant shall file with the Board and shall serve the respondent with an answer thereto. This pleading shall fulfill the generally recognized requirements of an answer, and shall set forth any affirmative defenses available. Should an answer not be received in 30 days or within any extension granted by the Board, it may, in its discretion, consider the complaint generally denied or affirm the debarment decision being appealed.

(3) *Scope of Complaint and Answer*-Neither the complaint nor the answer shall be limited to issues raised in the prior proceeding.

(4) *Copies, Caption, and Title*-Every pleading shall contain a caption setting forth the name of the Board, the title of the appeal including the address of appellant, the contract number, and the docket number assigned by the Board. Under the caption shall be placed a statement of the nature of the pleading and the relief, if any, sought. The following illustrates the required format:

[STATE]

PROCUREMENT APPEALS BOARD	
In the Matter of	Docket No.
the [Suspension or	[S]PAB 1000
Debarment] of	
XYZ CONTRACTING CO.	
100 Main Street	
Anywhere, [State] 00000	
[NAME OF AGENCY]	

[Nature of Pleading]

(5) *Paper Size*-Pleadings shall be on white paper, size 8 1/2" x 11", without back or cover.

A9-507 Rule 8 Amendment of Pleadings or Record.

The Board upon its own initiative or upon application by a party may, in its discretion, order a party to make a more definite statement of the complaint or answer, or to reply to an answer. The Board may, in its discretion and within the proper scope of

the appeal, permit either party to amend its pleading upon conditions just to both parties. When issues within the proper scope of the appeal but not raised by the pleadings are tried by express or implied consent of the parties or by permission of the Board, they shall be treated in all respects as if they had been raised therein. In such instances, a motion to amend the pleadings to conform to the proof may be entered, but is not required. If evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings, it may be admitted if within the proper scope of the appeal, provided, however, that the objecting party may be granted a continuance if necessary to enable it to meet such evidence.

A9-507 Rule 9 Prehearing Briefs.

The Board may, in its discretion, require the parties to submit prehearing briefs. In the absence of a Board requirement therefor, either party may, in its discretion and upon appropriate and sufficient notice to the other party, furnish a prehearing brief to the Board. In any case where a prehearing brief is submitted, it shall be furnished so as to be received by the Board at least 15 days prior to the date set for hearing, and a copy shall simultaneously be furnished to the other party.

A9-507 Rule 10 Prehearing or Presubmission Conference.

The Board may upon its own initiative or upon the application of either party arrange a telephone conference or call upon the parties to appear before a member of the Board for a conference to consider:

- (a) the simplification or clarification of the issues;
- (b) the possibility of obtaining stipulations, admissions, agreements on documents, understandings on matters considered in the prior proceeding, or similar agreements which will avoid unnecessary proof;
- (c) agreements and rulings to facilitate discovery;
- (d) the limitation of the number of expert witnesses, or avoidance of similar cumulative evidence, if the case is to be heard;
- (e) the possibility of an agreement disposing of all or any issues in dispute; and
- (f) such other matters as may aid in the disposition of the appeal.

The results of the conference, including any rulings or orders, shall be reduced to writing by the Board member and this writing shall thereafter constitute part of the record.

A9-507 Rule 11 Summary Judgment Motion.

Either party may move for summary judgment in accordance with the summary judgment rule of the [State] Rules of Civil Procedure. The Board may act on such motion as provided in such rule.

A9-507 Rule 12 Settling the Record.

(1) *Context*-The record upon which the Board's decision will be rendered consists of the following documents to the extent they have been filed or otherwise made a part of the record by the Board: pleadings, prehearing conference memoranda or orders, prehearing briefs, depositions or interrogatories received in evidence, admissions, stipulations, transcripts of conferences and hearings, hearing exhibits, [posthearing briefs,] and [exceptions taken and arguments made pursuant to any proposed decision]. The record will at all reasonable times be available for inspection by the parties at the office of the Board.

Editorial Note: The bracketed language is to be adopted if Rule 25.1 (Proposed Decisions) is adopted.

(2) *Acceptance of Evidence*-No proof shall be received in evidence without giving the parties an opportunity to examine and object to such evidence, and proof shall not be received after the hearing is complete except as provided in Subdivision (3) (Weight of Evidence) of this Rule.

(3) *Weight of Evidence*-The weight to be attached to any evidence of record will rest within the sound discretion of the Board. The Board may in any case require either party, with appropriate notice to the other party, to submit additional evidence on any matter relevant to the appeal.

A9-507 Rule 13 Discovery-Depositions.

(1) *General Policy*-Parties may obtain discovery regarding any matter, not privileged, which is relevant to subject matter involved in the appeal. It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. The parties are encouraged to engage in voluntary discovery procedures.

(2) *When Depositions Permitted*-After an appeal has been docketed and complaint filed, the parties may mutually agree to, or the Board may, upon application of either party and for good cause shown, order the taking of testimony of any person by written interrogatories or by deposition upon oral examination before any officer authorized to administer oaths at the place of examination, for use as evidence or for the purpose of discovery. The application for order shall specify whether the purpose of the deposition is discovery or for use as evidence.

(3) *Orders on Depositions*-The time, place, and manner of taking depositions shall be as mutually agreed upon by the parties, or failing such agreement, governed by order of the Board.

(4) *Protective Orders*-The Board may in connection with the taking of any deposition make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, and those orders may include limitations on the scope, method, time, and place for discovery, and provisions for protecting the secrecy of confidential information or documents.

(5) *Use As Evidence*-No testimony taken by depositions shall be considered as part of the evidence in the hearing of an appeal unless and until such testimony is offered and received in evidence at such hearing. It will not ordinarily be received in evidence if the deponent is present and can testify personally at the hearing. In such instances, however, the deposition may be used to contradict or impeach the testimony of the witness given at the hearing.

(6) *Deposition of Experts*-Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of Subdivision (1) of this Rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(a) a party may through interrogatories require the other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. Upon motion, the Board may order further discovery by other means, subject to such restrictions as to scope and, pursuant to Subdivision (6)(c) of this Rule, such provisions concerning fees and expenses as the Board may deem appropriate.

(b) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by the other party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except upon a showing of circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(c) Unless manifest injustice would result:

(i) the Board shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Subdivisions (6)(a) and (6)(b) of this Rule; and

(ii) with respect to discovery obtained under Subdivision (6)(a) of this Rule the Board may require, and with respect to discovery obtained

under Subdivision (6)(b) of this Rule, the Board shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(7) *Expenses*-Except as provided for in Subdivision (6)(c) of this Rule, each party shall bear its own expenses associated with the taking of any deposition.

A9-507 Rule 14 Interrogatories to Parties, Admission of Facts,
and Production and Inspection of Documents.

(1) *Interrogatories to Parties*-After an appeal has been docketed and complaint filed with the Board, a party may serve on the other party written interrogatories to be answered separately in writing, signed under oath by the person making the answer, and returned within 30 days, or such other time period as agreed to by the parties. All answers to interrogatories shall be prepared in the following form:

- (a) the interrogatory in full;
- (b) the answer in full, if any, filed thereto;
- (c) the basis for any exception taken thereto. Upon timely objection by the party, the Board will determine the extent to which the interrogatories will be permitted.

(2) *Admission of Facts*-After an appeal has been filed with the Board, a party may serve upon the other party a request for the admission of specified facts. Within 30 days after service, or such other time period as agreed by the parties, the party served shall answer each requested fact or file objections thereto. The factual propositions set out in the request shall be deemed admitted upon the failure of a party to respond to the request for admission.

(3) *Production and Inspection of Documents*-After an appeal has been filed with the Board, a party may serve upon the other a request for production, inspection, and copying of any documents or objects not privileged which reasonably may lead to the discovery of admissible evidence. Such production and inspection shall be made available within [30] days after such request.

(4) *Order to Compel Discovery, Protective Orders*-Any discovery engaged in under this Rule shall be subject to the provisions of Rules 13(1) (Discovery-Depositions, General Policy) and 13(4) (Discovery-Depositions, Protective Orders). The Board may, upon motion of any party showing good cause therefor and upon notice, order any party to fulfill the requirements of this rule.

A9-507 Rule 15 Service of Papers [Other Than Subpoenas].

Papers shall be served personally or by mailing the same, addressed to the party upon whom service is to be made. Copies of complaints, answers and simultaneous briefs shall be filed directly with the Board. The party filing any paper with the Board shall also send a copy thereof to the opposing party, noting on the paper filed with the Board, or on the letter transmitting the same, that a copy has been so furnished.

Editorial Note: The bracketed language is to be adopted if Rule 18.1 is adopted.

A9-507 Rule 16 Hearings--Where and When Held.

Hearings will ordinarily be held at the Board's location, except that upon request reasonably made and upon good cause shown, the Board may set the hearing at another location. Hearings will be scheduled at the discretion of the Board with due consideration to the regular order of appeals, and other pertinent factors. On request or motion by either party and upon good cause shown, the Board may, in its discretion, adjust the date of a hearing.

A9-507 Rule 17 Notice of Hearings.

The parties shall be given at least 15 days notice of the time and place set for hearings. In scheduling hearings, the Board will give due regard to the desires of the parties and to the requirement for just and inexpensive determination of appeals without unnecessary delay. Notices of hearings shall be promptly acknowledged by the parties.

A9-507 Rule 18 Unexcused Absence of a Party.

The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in A9-508 Rule 11 (Submission Without a Hearing).

A9-507 Rule 19 Hearings: Nature; Examination of Witnesses.

(1) *Nature of Hearings*-Hearings shall be as informal as may be reasonable and appropriate under the circumstances. Hearings may be conducted by a single board member at the discretion of the Chairperson. Appellant and respondent may offer at a hearing on the merits such relevant evidence as they deem appropriate and as would be admissible in proceedings before the [designated court or courts of the State], subject, however, to the sound discretion of the presiding member in supervising the extent and manner of presentation of such evidence, [the guidelines set forth in the [State] Administrative Procedure Act], and applicable case law. In general, admissibility will depend on relevancy and materiality. Letters or copies thereof, affidavits, or other evidence which may not be admissible under prevailing rules followed by the [designated court or courts of the State] may be admitted in the discretion of the presiding member. The weight to be attached to evidence presented

in any particular form will be within the discretion of the Board, taking into consideration all the circumstances of the particular case. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Board may in any case require evidence in addition to that offered by the parties.

Editorial Note: Bracketed language is to be adopted where [State] Administrative Procedure Act applies.

COMMENTARY:

The practice of boards of contract appeals in the federal sphere is to assign a single board member to preside at a hearing. This procedure allows a greater number of cases to be heard throughout the year and expedites the ultimate decision making process. While a similar provision is here recommended to state and local boards of contract appeals, applicable statutes and case law should be researched to assure that such a practice is not prohibited.

(2) *Examination of Witnesses*-Witnesses before the Board will be examined orally under [oath or affirmation], unless the facts are stipulated or the presiding Board member orders otherwise.

Editorial Note: In order for the Procurement Appeals Board to administer oaths or affirmations, it may be necessary for enacting jurisdictions to provide statutory authorization. If such authority is not provided, the bracketed material should be deleted.

(3) *Exchange of Exhibits*-The parties are required whenever possible to exchange exhibits in advance of the hearing. Where such an exchange is not possible, exhibits must be exchanged at the hearing so as not to delay the progress of the hearing and to avoid unwarranted surprise.

(4) *Voluntary Cooperation*-Each party is expected:

(a) to cooperate and make available witnesses and books, papers, documents, or tangible things under its control as needed for its own case or as requested by the other party, without issuance of an order; and

(b) to secure voluntary attendance of desired third-party witnesses and production of desired third-party books, papers, documents, or tangible things whenever possible.

Editorial Note: In order to optimize due process and provide parties a full opportunity to obtain and present evidence, State and local governments may elect to enact legislation providing subpoena power to the Procurement Appeals Board. Where such legislation is enacted, the following rule of procedure is recommended for insertion following Rule 18:

Rule 18.1 Subpoenas

(1) *General*--Upon written request of either party filed with the [clerk, recorder], or on his or her own initiative, the Board member to whom a case is assigned or who is otherwise designated by the Chairperson may issue a subpoena requiring:

- (a) *testimony at a deposition*-the deposing of a witness in the city or county where he or she resides or is employed or transacts his or her business in person, or at another location convenient for him or her that is specifically determined by the Board;
- (b) *testimony at a hearing*-the attendance of a witness for the purpose of taking testimony at a hearing; and
- (c) *production of books, papers, documents, or tangible things*-in addition to (a) or (b), the production by the witness at the deposition or hearing of relevant books, papers, documents, or tangible things designated in the subpoena.

(2) *Requests for Subpoenas*

A request for a subpoena shall normally be filed at least:

- (a) 15 days before a scheduled deposition where the attendance of a witness at deposition is sought;
- (b) 30 days before a scheduled hearing where the attendance of a witness at hearing is sought.

In its discretion the Board may honor requests for subpoenas not made within these time limitations.

(3) *Requests to Quash or Modify*

Upon written request by the person subpoenaed or by a party, made within 19 days after service but in any event not later than the time specified in the subpoena for attendance, the Board may:

- (a) quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown, or;
- (b) require the person in whose behalf the subpoena was issued to advance the reasonable cost of subpoenaed books, papers, documents, or tangible things. Where circumstances require, the Board may act upon such a request at any time after a copy has been served upon the opposing party.

(4) *Form; Issuance*

Every subpoena shall state the name of the Board and the title of the appeal, and shall command each person to whom it is directed to attend and give testimony, and if appropriate, to produce specified books, papers, documents, or tangible things, at a time and place therein specified. In issuing a subpoena to a requesting party, the Board member shall sign the subpoena and may, in his or her discretion, enter the name of the witness and otherwise leave it blank. The party to whom the subpoena is issued shall complete the subpoena before service.

(5) *Service*

- (a) Subpoenas shall be served in the manner specified in the [State Rules of Procedure].
- (b) The party at whose instance a subpoena is issued shall be responsible for the payment of fees and mileage of the witness and of the officer who serves the subpoena. The failure to make payment of such charges on demand may be deemed by the Board as a sufficient ground for striking the testimony of the witness and the books, papers, documents, or tangible things he or she has produced.

(c) Where the witness is located in a foreign country, a letter rogatory or subpoena may be issued and served in the manner provided in the [State Rules of Procedure].

(6) *Contumacy or Refusal to Obey a Subpoena*

In cases of contumacy or refusal to obey a subpoena by a person, the Board will apply to the appropriate court through the [Attorney General] for an order requiring the person to appear before the Board or a member thereof to give testimony or produce evidence or both. Any failure of any such person to obey the order of the court may be punished by the court as a contempt thereof.

A9-507 Rule 20 Copies of Papers.

When books, records, papers, or documents have been received in evidence, a true copy or such part thereof as may be material or relevant may be substituted during the hearing or at the conclusion thereof.

A9-507 Rule 21 Post-Hearing Briefs.

(1) *General*-Briefs must be compact, concise, logically arranged, and free from burdensome, irrelevant, immaterial, and scandalous matter. All briefs are required to contain a table of contents and table of statutes, regulations, and cases cited.

(2) *Number and Time of Submission*-Briefs, including reply briefs, shall be submitted in triplicate at such times and upon such terms as may be agreed upon by the parties and the presiding member, or otherwise determined by the presiding member at the conclusion of the hearing.

(3) *Length of Briefs*-Except by permission of the Board on motion, principal briefs shall not exceed 100 8 1/2" x 11" pages typewritten double spaced, exclusive of any table of contents and table of statutes, regulations, and cases cited. Reply briefs shall not exceed 20 such pages.

A9-507 Rule 22 Transcript of Proceedings.

Testimony and argument at hearings shall be reported verbatim, unless the Board otherwise orders. Transcripts of the proceedings shall be supplied to the parties at the actual cost to the Board.

A9-507 Rule 23 Withdrawal of Exhibits.

After all appeals have been exhausted, the Board may, upon request and after notice to the other party, in its discretion permit the withdrawal of original exhibits or any part thereof by the party entitled hereto. The substitute of true copies of exhibits or any part thereof may be required by the Board in its discretion as a condition of granting permission for such withdrawal.

A9-507 Rule 24 Appellant Representation.

An individual appellant may appear before the Board in person, a corporation may appear by an officer thereof, a partnership or joint venture by a member thereof, or any of these by an attorney-at-law duly licensed in any state, commonwealth, territory, or in the District of Columbia. An attorney representing an appellant shall file a written notice of appearance with the Board.

A9-507 Rule 25 Suspension of Proceedings.

Whenever at any time it appears that appellant and respondent are in agreement as to the disposition of the controversy or are actively negotiating such an agreement, the Board may suspend further processing of the appeal; provided, however, that if the Board is advised thereafter by either party that the controversy hasn't been disposed of by agreement, the case shall be restored to the Board's calendar without loss of position, whenever possible.

A9-507 Rule 26 Decisions.

Decisions of the Board will be made in writing and authenticated copies thereof will be forwarded simultaneously to both parties. The decision of a majority of three Board members shall constitute the decision of the Board. Decisions of the Board will be based solely upon the record, as described in Rule 12 (Settling the Record). The rules of the Board and all final orders and decisions shall be open for public inspection at the offices of the Board.

Editorial Note: In those states where an Administrative Procedure Act exists and is applicable to the Board proceedings, it must be closely scrutinized for effect on the Rules. The Model State Administrative Procedure Act (APA) approved in 1946 by the American Bar Association and the National Conference of Commissioners on Uniform State Laws contains, for example, the following provision:

"Whenever in a contested case, a majority of the officials of the agency who are to render the final decision have not heard or read the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision, including findings of fact and conclusions of law, has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties." (emphasis supplied)

A number of States have deleted the words "or read" from the aforesaid model act provision thereby requiring a proposal for decision where a majority of the agency officials who are to render an opinion have read but not heard the evidence. If either form of this APA provision is applicable to the Board, and less than the full Board may conduct a hearing, an additional rule of procedure should be inserted following Rule 25 and the title of Rule 26 should be changed to "Formal Decisions." The additional rule is as follows:

Rule 25.1 Proposed Decisions-In those appeals where a majority of the Board members who are to render a decision have not heard [or read] the evidence adduced at hearing, the decision of the Board, if adverse to the contractor, shall not be issued until a proposed decision, including findings of fact and conclusions of law, has been served upon the parties Either party may, within 30 days

from receipt of this proposed decision in an appeal of a debarment and 15 days in a suspension appeal, file written exceptions thereto and request oral argument before a majority of the Board members who are to render the decision. A copy of said exceptions and/or request for oral argument must be served on opposing counsel who shall have 15 days from receipt thereof to respond.

(1) *Form of Written Exceptions to Proposed Decision*

Written exceptions must specifically set forth the proposed finding of fact or conclusion of law being excepted to and those portions of the record and/or applicable law which are contrary to the proposed finding or conclusion of law specified.

(2) *Receipt of Further Evidence*

Except as the Board may otherwise order in its discretion, no proof shall be received in evidence in support of any exception taken to the proposed decision.

(3) *Provision for Oral Argument*

Requests by either party to appear and offer oral argument to a majority of the Board members who will issue the formal decision will be granted as a matter of right, provided that a written request is filed within 30 days from the date of receipt of the proposed decision. The parties thereafter shall be given notice of the time and place set for such argument.

A9-507 Rule 27 Motion for Reconsideration.

A motion for reconsideration, if filed by either party, shall set forth specifically the ground or grounds relied upon to sustain the motion, and shall be filed within 30 days from the date of receipt of a copy of the decision of the Board by the party filing the motion.

A9-507 Rule 28 Dismissal without Prejudice.

In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with the disposition thereof for reasons not within its control. In any such case where the suspension has continued, or it appears that it will continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeal from its docket without prejudice to the restoration of the appeal when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

A9-507 Rule 29 Dismissal with Prejudice.

Whenever a record discloses the failure of either party to file documents required by these rules, respond to notice or correspondence from the Board, comply with orders of the Board, or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may issue an order requiring the offending party to

show cause why the appeal should not be either dismissed or granted, as appropriate. If the offending party fails to show such cause, the Board may take such action as it deems reasonable and proper under the circumstances, including dismissal of an appeal with prejudice.

A9-507 Rule 30 Remand from Court.

Whenever any court remands a case to the Board for further proceedings, each of the parties shall, within 20 days of such remand, submit a report to the Board recommending procedures to be followed so as to comply with the court's order. The Board shall consider the reports and enter special orders governing the handling of the remanded case. To the extent the court's directive and time limitations permit, such orders shall conform to these rules.

A9-507 Rule 31 Ex Parte Communications.

Members of the Board or of the Board's staff shall not receive, and no person shall attempt to submit to such persons, ex parte, any evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in an appeal.

A9-507 Rule 32 Computations and Extensions of Time.

(1) *Maximums*-All time limitations specified for various procedural actions under these rules are computed as maximum, and are not to be fully exhausted if the action described can be accomplished in a lesser period. These time limitations are similarly eligible for extension when good cause is shown.

(2) *Computations*-Except as otherwise provided by law, in computing any period of time prescribed by these rules or by any order of the Board, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a [State] holiday, in which event the period shall run to the end of the next business day.

Editorial Note: This time computation provision should be conformed to any existing [State] law covering the subject.

(3) *Extensions*-Requests for extension of time from either party shall be made in writing and state good cause therefor.

A9-507 Rule 33 Sanctions.

If any party fails or refuses to obey an order issued by the Board, the Board may make such order in regard to the failure as it considers necessary to the just and expeditious conduct of the appeal

Appendix 9-508-Rules of Procedure of the Procurement Appeals Board for the Resolution of Contract and Breach of Contract Controversies

A9-508 Rule 1 Appeals, How Taken.

Notice of an appeal from a decision concerning a contract controversy must be in writing and the original, together with two copies, must be mailed or otherwise filed with the Board within [60] days of the receipt of the determination under Section 9-103(3) (Authority to Resolve Contract and Breach of Contract Controversies, Decision) of the [State] Procurement Code. A copy of the notice of appeal shall be furnished to the Chief Procurement Officer, or head of a Purchasing Agency, whichever issued the decision from which the appeal is taken. As provided in Section 9-103(6) (Authority to Resolve Contract and Breach of Contract Controversies, Failure to Render Timely Decision) of the [State] Procurement Code, if the Chief Procurement Officer, the head of a Purchasing Agency, or the designee of either officer fails to render a decision within [120] days of a written request for final decision or such longer time as the parties have agreed to in writing, an appeal may be taken but a notice of appeal must be filed within [60] days of the time established for a decision to be rendered by such officer.

A9-508 Rule 2 Contents of Notice of Appeal.

A notice of appeal should indicate that an appeal is thereby intended, the amount in dispute if known, the contract (by number), and the Purchasing Agency cognizant of the dispute. A copy of the decision from which the appeal is taken or the request for final decision and any agreement to extend the deadline should be attached. The notice of appeal should be signed personally by the appellant (the aggrieved contractor making the appeal), or by an officer of the appellant corporation or member of the appellant firm, or by the appellant's duly authorized representative or attorney. The complaint required by Rule 6 (Pleadings) may be filed with the notice of appeal, or the appellant may designate the notice of appeal as a complaint, if it otherwise fulfills the requirements of a complaint.

A9-508 Rule 3 Docketing of Appeals.

Apply A9-507 Rule 3 (Docketing of Appeals).

A9-508 Rule 4 Appeal File.

(1) *Duties of the Chief Procurement Officer and the Head of a Purchasing Agency*- Within 30 days of notice from the Board that an appeal has been filed, the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer (hereafter "Respondent") shall assemble and transmit to the Board through the [Attorney General] with a copy to the appellant (except those documents specified in Subdivision (1) (b)) an appeal file consisting of all documents pertinent to the appeal, including:

- (a) the decision from which the appeal is taken;
- (b) the contract including specifications and pertinent amendments, plans

and drawings;

- (c) all correspondence between the parties pertinent to the appeal, including the letter or letters of claim in response to which the decision was issued;
- (d) any transcripts of testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board; and
- (e) any additional information considered pertinent.

(2) *Duties of the [Attorney General]*-Within the same time above specified, the [Attorney General] shall designate a trial attorney to represent the respondent before the Board. This attorney shall file a notice of appearance with the Board and a copy will be given appellant or its attorney.

(3) *Duties of the Appellant*-Within 30 days after receipt of a copy of the appeal file assembled by the respondent, the appellant shall supplement the same by transmitting to the Board any documents not contained therein which it considers pertinent to the appeal, and furnishing two copies of such documents to the respondent's trial attorney.

(4) *Organization of Appeal File*-Documents in the appeal file may be originals, or legible facsimile or authenticated copies thereof, and shall be arranged in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the contents of the file.

(5) *Lengthy Documents*-The Board may waive the requirement of furnishing to the other party copies of the bulky, lengthy, or out-of-size documents in the appeal file when a party has shown that doing so would impose an undue burden. At the time a party files with the Board a document for which a waiver has been granted, it shall notify the other party that such document or a copy is available for inspection at the offices of the Board or of the party filing same.

(6) *Status of Documents in Appeal File*-Documents in the appeal file or supplements thereto shall become part of the historical record but shall not be included in the record upon which the Board's decision will be rendered unless each individual document has been offered and admitted into evidence.

(7) *Waiver*-Notwithstanding the foregoing, the filing of documents under Subdivision (1) of this rule may be dispensed with by the Board, either upon request of appellant in the notice of appeal, or thereafter upon stipulation of the parties.

A9-508 Rule 5 Dismissal for Lack of Jurisdiction.

Apply A9-507 Rule 5 (Dismissal for Lack of Jurisdiction).

A9-508 Rule 6 Pleadings.

(1) *Appellant*-Within 30 days after receipt of notice of docketing of the appeal, the appellant shall file with the Board an original and two copies of a complaint setting forth simple, concise and direct statements of each of its claims, alleging the basis, with appropriate references to contract provisions, for each claim and the dollar amount claimed. This pleading shall fulfill the generally recognized requirements of a complaint, although no particular form or formality is required. Upon receipt thereof, the Board shall serve a copy upon the respondent. Should the complaint not be received within 30 days, appellant's claim and appeal may, if in the opinion of the Board the issues before the Board are sufficiently defined, be deemed to be set forth in its notice of appeal and the respondent shall be so notified.

(2) *Respondent*-Within 30 days from receipt of said complaint, or the notice from the Board specified in Subdivision (1) of this Rule, respondent shall prepare and file with the Board an original and two copies of an answer thereto, setting forth simple, concise and direct statements of respondent's defenses to each claim asserted by appellant. This pleading shall fulfill the generally recognized requirement of an answer, and shall set forth any affirmative defenses available and counter-claims may be included as deemed appropriate by the respondent, provided, however, that counter-claims arising from the same contract shall be included. Upon receipt thereof, the Board shall serve a copy upon appellant. Should the answer not be received within 30 days, the Board may, in its discretion, enter a general denial on behalf of the respondent and the appellant shall be so notified.

(3) *Scope of Complaint and Answer*-Neither the complaint nor the answer is limited to issues raised in the prior proceeding.

(4) *Caption and Title*-Every pleading shall contain a caption setting forth the name of the Board, the title of the appeal including the address of appellant, the contract number, and the docket number assigned by the Board. Under the caption shall be placed a statement of the nature of the pleading and the relief, if any, sought. The following illustrates the required format:

[STATE] PROCUREMENT APPEALS BOARD

In the Appeal of	
XYZ CONTRACTING CO.	
100 Main Street	
Anywhere, [State] 00000	
Docket No.	

Under [NAME OF PURCHASING AGENCY] |
1000

[S]PAB

CONTRACT NO. |

(Nature of Pleading)

(5) *Paper Size*-Pleadings shall be on white paper, size 8 1/2" x 11", without back or cover.

A9-508 Rule 7 Amendment of Pleadings or Record.

The Board upon its own initiative or upon application by a party may, in its discretion, order a party to make a more definite statement of the complaint or answer, or to reply to an answer. The Board may, in its discretion, and within the proper scope of the appeal, permit either party to amend its pleadings upon conditions just to both parties. When issues within the proper scope of the appeal, but not raised by the pleadings or the documentation described in Rule 4 (Appeal File), are tried by express or implied consent of the parties, or by permission of the Board, they shall be treated in all respects as if they had been raised therein. In such instances, a motion to amend the pleadings to conform to the proof may be entered, but is not required. If evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings or the Rule 4 (Appeal File) documentation which shall be deemed part of the pleadings for this purpose), it may be admitted if within the proper scope of the appeal, provided, however, that the objecting party may be granted a continuance if necessary to enable him to meet such evidence.

A9-508 Rule 8 Hearing - Election.

After filing of respondent's answer or issuance of a general denial by the Board pursuant to Rule 6(2) (Pleadings, Respondent) each party shall advise the Board in writing whether it desires a hearing as prescribed in Rules 17 through 24 or whether, in the alternative, it elects to submit its case on the record without a hearing as prescribed in Rule 11 (Submission Without a Hearing). By agreement among the parties and the Board, the hearing may be held by telephone conference call.

A9-508 Rule 9 Prehearing Briefs.

Based on an examination of the documentation described in Rule 4 (Appeal File), the pleadings, and a determination of whether the arguments and authorities addressed to the issues are adequately set forth therein, the Board may, in its discretion, require the parties to submit prehearing briefs in any case in which a hearing has been elected pursuant to Rule 8 (Hearing-Election). In the absence of a Board requirement

therefor, either party may, in its discretion and upon appropriate and sufficient notice to the other party, furnish a prehearing brief to the Board. In any case where a prehearing brief is submitted, it shall be furnished so as to be received by the Board at least 15 days prior to the date set for hearing, and a copy shall simultaneously be furnished to the other party.

A9-508 Rule 10 Prehearing or Presubmission Conference.

Whether the case is to be submitted pursuant to Rule 11 (Submission without a Hearing), or heard pursuant to Rules 17 through 24, the Board may upon its own initiative or upon the application of either party, arrange a telephone conference or call upon the parties to appear before a member of the Board for a conference to consider:

- (a) the simplification or clarification of the issues;
- (b) the possibility of obtaining stipulations, admissions, agreements on documents, understandings on matters already of record, or similar agreements which will avoid unnecessary proof;
- (c) agreements and rulings to facilitate discovery;
- (d) the limitation of the number of expert witnesses, or avoidance of similar cumulative evidence, if the case is to be heard;
- (e) the possibility of agreement disposing of all or any of the issues in dispute; and
- (f) such other matters as may aid in the disposition of the appeal.

The results of the conference, including any rulings or orders, shall be reduced to writing by the Board member and this writing shall thereafter constitute part of the record.

A9-508 Rule 11 Submission without a Hearing.

Either party may elect to waive a hearing and to submit its case upon the record before the Board, as settled pursuant to Rule 13 (Settling the Record). Submission of a case without hearing does not relieve the parties from the necessity of proving the facts supporting any allegation or defense. Affidavits, depositions, admissions, answers to interrogatories, and stipulations may be employed to supplement other documentary evidence in the Board record. The Board may permit such submission to be further supplemented by oral argument (transcribed if requested), and by briefs arranged in accordance with Rule 22 (Post-Hearing Briefs).

A9-508 Rule 12 Optional SMALL CLAIMS PROCEDURE.

- (1) *Election to Use*

(a) In appeals where the amount in dispute is [\$25,000] or less, the appellant may elect to have the appeal processed under a SMALL CLAIMS procedure requiring decision of the appeal, whenever possible, within 120 days after the Board receives written notice of the appellant's election to utilize this procedure. Such election must be made by written notice within 60 days after receipt of notice of docketing the appeal unless an extension is granted by the Board for good cause. This procedure is available solely at the election of the appellant. However, the election may not be withdrawn except with permission of the Board for good cause.

(b) The Board shall determine the amount in dispute if the parties disagree as to the propriety of using the small claims procedure. The amount in controversy will be determined by the sum of the amounts claimed by appellant unless the sum of respondent's claims exceed [\$25,000]. If no specific amount of claim is stated, a case will be considered to fall within this Rule if the total amount which each party represents in writing that it could recover as a result of a Board decision favorable to it does not exceed [\$25,000].

(c) Upon such election, a case shall be processed under this Rule unless the respondent objects and shows good cause why the substantive nature of the dispute requires processing under the Board's regular procedures and the Board sustains such objection.

(2) *Conference*-Promptly upon receipt of an appellant's election of the SMALL CLAIMS procedure, the Board will assign a Board member to hear and decide the appeal. Such member shall take the following actions, if feasible, in an informal meeting or a telephone conference with both parties:

(a) identify and simplify the issues;

(b) identify all areas of the prior decision, if any, which the parties contest or assent to;

(c) establish a simplified procedure appropriate to the particular appeal involved;

(d) determine whether either party wants a hearing, and if so, fix a time and place therefor;

(e) require the respondent to furnish all correspondence between the parties pertinent to the appeal, including the letter or letters of claim in response to which the decision was issued; and

(f) establish an expedited schedule for resolution of the appeal.

(3) *Prehearing Activities*-Pleadings, discovery and other prehearing activity will be allowed only as consistent with the requirement to conduct the hearing on the date

scheduled, or if no hearing is scheduled, to close the record on a date that will allow decisions within the 120-day limit. The Board, in its discretion, may impose shortened time periods for any actions prescribed or allowed under these rules, as necessary to enable the Board to decide the appeal within the 120-day limit, allowing whatever time, up to 30 days, that the Board considers necessary for the preparation of the decision after closing the record and the filing of briefs, if any.

(4) *Hearing*-Hearings shall be conducted as provided in A9-507 Rule 19 (Hearings: Nature; Examination of Witnesses).

(5) *Decision*-Written decisions by the Board in cases processed under the SMALL CLAIMS procedure will be short and contain only summary findings of fact and conclusions. Decisions will be rendered by the assigned Board member. If there has been a hearing, the assigned Board member may, in his or her discretion, at the conclusion of the hearing and after entertaining such oral arguments as deemed appropriate, render on the record oral summary findings of fact, conclusions, and a decision of the appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a typed copy of such oral decision for the record and for payment purposes and to establish the starting date for the period for filing a motion for reconsideration under A9-507 Rule 27 (Motion for Reconsideration).

(6) *No Precedential Value*-A decision against the respondent or the appellant shall have no value as precedent, and in the absence of fraud shall be final and conclusive and may not be appealed or set aside.

[(7) *Proposed Decision* -Proposed decisions as provided for hereafter under A9-507 Rule 25.1 (Proposed Decisions) will not be issued for appeals decided under the SMALL CLAIMS procedure.]

Editorial Note: Paragraph (7) is to be adopted if A9-507 Rule 25.1 (Proposed Decisions) is adopted.

A9-508 Rule 13 Settling the Record.

(1) *Content*-The record upon which the Board's decision will be rendered consists of the documents furnished under Rule 4 (Appeal File) which the Board has specifically designated as evidence be made a part of the record and, the following items, to the extent they have been filed: pleadings, prehearing conference memoranda or orders, prehearing briefs, depositions or interrogatories received in evidence, admissions, stipulations, transcripts of conferences and hearings, hearing exhibits, [posthearing briefs,] and [exceptions taken and arguments made pursuant to any proposed decision]. The record will at all reasonable times be available for inspection by the parties at the office of the Board.

Editorial Note: The bracketed language is to be adopted if A9-507 Rule 25.1 (Proposed Decisions) is adopted.

(2) *Acceptance of Evidence*-Except as the Board may otherwise order in its discretion, no proof shall be received in evidence after completion of the hearing or, in cases submitted on the record, after notification by the Board that the case is ready for decision.

(3) *Weight of Evidence*-The weight to be attached to any evidence of record will rest within the sound discretion of the Board. The Board may in any case require either party, with appropriate notice to the other party, to submit additional evidence on any matter relevant to the appeal.

A9-508 Rule 14 Discovery-Depositions.

Apply A9-507 Rule 13 (Discovery - Depositions).

A9-508 Rule 15 Interrogatories to Parties, Admission of Facts,
and Production and

Inspection of Documents.

Apply A9-507 Rule 14 (Interrogatories to Parties, Admission of Facts, and Production and Inspection of Documents).

A9-508 Rule 16 Service of Papers [Other Than Subpoenas].

Apply A9-507 Rule 15 (Service of Papers [Other Than Subpoenas]).

A9-508 Rule 17 Hearings-Where and When Held.

Hearings will ordinarily be held at the Board's location, except that upon request reasonably made and upon good cause shown, the Board may set the hearing at another location. Hearings will be scheduled at the discretion of the Board with due consideration to the regular order of appeals, Rule 12 (Optional SMALL CLAIMS PROCEDURE) requirements, and other pertinent factors. On request or motion by either party and upon good cause shown, the Board may, in its discretion, adjust the date of the hearing.

A9-508 Rule 18 Notice of Hearings.

Apply A9-507 Rule 17 (Notice of Hearings).

A9-508 Rule 19 Unexcused Absence of a Party.

The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in Rule 11 (Submission without a Hearing).

A9-508 Rule 20 Hearings: Nature; Examination of Witnesses.

Apply A9-507 Rule 19 (Hearings: Nature; Examination of Witnesses).

A9-508 Rule 21 Copies of Papers.

Apply A9-507 Rule 20 (Copies of Papers).

A9-508 Rule 22 Post-Hearing Briefs.

Apply A9-507 Rule 21 (Post-Hearing Briefs).

A9-508 Rule 23 Transcript of Proceedings.

Apply A9-507 Rule 22 (Transcript of Proceedings).

A9-508 Rule 24 Withdrawal of Exhibits.

Apply A9-507 Rule 23 (Withdrawal of Exhibits).

A9-508 Rule 25 Appellant Representation.

Apply A9-507 Rule 24 (Appellant Representation).

A9-508 Rule 26 Suspension of Proceedings.

Apply A9-507 Rule 25 (Suspension of Proceedings).

A9-508 Rule 27 Decisions.

Decisions of the Board will be made in writing and authenticated copies thereof will be forwarded simultaneously to both parties. Except as provided for in Rule 12 (Optional SMALL CLAIMS PROCEDURE), the decision of a majority of the three Board members shall constitute the decision of the Board. Decisions of the Board will be based solely upon the record, as described in Rule 13 (Settling the Record). The rules of the Board and all final orders and decisions shall be open for public inspection at the offices of the Board.

Editorial Note: See Editorial Note after A9-507 Rule 26 (Decisions) concerning proposed decisions.

A9-508 Rule 28 Motion for Reconsideration.

Apply A9-507 Rule 27 (Motion for Reconsideration).

A9-508 Rule 29 Dismissal without Prejudice.

Apply A9-507 Rule 28 (Dismissal without Prejudice).

A9-508 Rule 30 Dismissal with Prejudice.

Apply A9-507 Rule 29 (Dismissal with Prejudice).

A9-508 Rule 31 Remand from Court.

Apply A9-507 Rule 30 (Remand from Court).

A9-508 Rule 32 Ex Parte Communications.

Apply A9-507 Rule 31 (Ex Parte Communications).

A9-508 Rule 33 Computations and Extensions of Time.

Apply A9-507 Rule 32 (Computations and Extensions of Time).

A9-508 Rule 34 Sanctions.

Apply A9-507 Rule 33 (Sanctions).

Appendix 10-201-- Cooperative Purchasing Agreements

Editorial Note: The following model agreement is based on the general authorization for cooperative purchasing contained in Section 10-201 (Cooperative Purchasing Authorized) of the Model Procurement Code. Section 10-201 permits such agreements between many different types of jurisdictions, and gives wide latitude as to how they can be structured. This model highlights the matters that must be addressed in a typical cooperative agreement but leaves the details to be negotiated by the cooperating parties.

The model is in the form of a Memorandum of Understanding between two independent jurisdictions. It is assumed that one jurisdiction has a purchasing system based on the Code, although bracketed material suggests alternate language for use when both jurisdictions have adopted the Code. Under the terms of the Memorandum, the jurisdictions agree on general procedures for cooperative purchasing of commonly used supplies and services. These procedures are to be implemented by agreement in advance of issuance of the Invitation for Bids or Request for Proposals for each supply or service to be jointly procured. This agreement would specify which jurisdiction would be responsible for the procurement, the quantity or quality of the supplies or services, delivery and payment terms, and other requirements. Specifications are to be agreed upon in advance by a committee consisting of representatives from each jurisdiction.

MEMORANDUM OF UNDERSTANDING FOR COOPERATIVE PURCHASING

This Memorandum of Understanding entered into this _____ day of _____ 19____, between [the State of Jurisdiction A] [Jurisdiction A, a political subdivision of the State of _____], hereinafter called ["Jurisdiction A"], and [the State of Jurisdiction B] [Jurisdiction B, a political subdivision of the State of _____], hereinafter called ["Jurisdiction B"], is to provide a basis for cooperative purchasing of commonly used supplies and services pursuant to the authority contained in [Section 10-201 of the State Procurement Code] and [cite any other statutes or ordinances that provide the basis of legal authority for the agreement].

It is the desire of the parties that no employee of either shall suffer any loss of salary, seniority, tenure, or pension rights, or be adversely affected as a result of this cooperative program.

In consideration of the mutual promises contained in this Memorandum of Understanding and of the mutual benefits to result therefrom, the parties agree as follows:

1. Commonly used supplies and services shall, to the maximum extent feasible, practical, and economical, be jointly purchased for the period commencing with this Memorandum of Understanding and continuing until this Memorandum is terminated.

2. Within 30 days following the execution of this Memorandum of Understanding, and periodically thereafter, each party shall list those supplies and services it believes are appropriate for cooperative purchasing. The lists shall then be exchanged. Accompanying each list shall be any specifications necessary to describe a supply or service, and information indicating the quantity required, the quality of the services, the time and location for delivery and other requirements. Following receipt of the list, [the Chief Procurement Officer of each party] [the Chief Procurement Officer of Jurisdiction [A] [B] and the appropriate officials of any using agencies of Jurisdiction [A] [B] wishing to obtain supplies under this Memorandum] shall compare the items and determine the supplies or services that lend themselves to cooperative procurement. Thereafter, the [Chief Procurement Officers] [the Chief Procurement Officer and the appropriate officials of any using agencies] shall agree on the specific supplies and services that shall be cooperatively procured, and shall set forth in writing, as a minimum, the following for each supply or service to be cooperatively procured:

- (a) a description of the supply or service to be procured, the quantity or quality required and delivery dates;
- (b) the party that shall act as the lead jurisdiction with responsibility for the procurement and administration of the contract with the supplier of the required supply or service;
- (c) that the procurement shall be made by the lead jurisdiction in compliance with the [State] Procurement Code;
- (d) that the supplier shall:
 - 1. deliver a specific number or amount of the supplies or services to each jurisdiction and be paid by each jurisdiction, respectively;
 - 2. deliver the entire quantity to the lead jurisdiction and be paid by that jurisdiction; or
 - 3. any combination of Subparagraphs (1) and (2) of this Paragraph;
- (e) that the supplier shall allow inspection in the course of fabrication or performance by:
 - 1. each jurisdiction; or
 - 2. the lead jurisdiction;
- (f) that the contract shall be:
 - 1. a definite quantity contract for specific services or supplies at a specified price or

2. an indefinite quantity contract specifying estimated quantities to be delivered according to the terms of the solicitation during the term of the contract;

(g) that the supplier shall provide warranties to:

1. each jurisdiction; or
2. the lead jurisdiction;

(h) that the lead jurisdiction shall be paid an agreed percentage of its costs by the

cooperating jurisdiction. Costs may include salaries and wages of employees, travel expenses, prorated overhead, depreciation on equipment, and all other costs and expenses incidental to the performance of such work. For the purpose of fixing the compensation to be paid to the lead jurisdiction, it is hereby agreed that there shall be included in each billing, to cover overhead costs, an amount equal to ____% of the total cost of labor to the lead jurisdiction. The [Chief Procurement Officer] of the lead jurisdiction shall keep reasonably itemized and detailed records covering such officer's costs, including all categories of items listed in this Paragraph, and shall render to the cooperating jurisdiction at the close of each calendar month an itemized statement covering all such categories of items. The cooperating jurisdiction shall pay the lead jurisdiction for such services within 30 days after receipt of such statement; and

(i) that any controversy arising with a bidder, offeror, or contractor shall be resolved in accordance with [Article 9 (Legal and Contractual Remedies) of the State Procurement Code]. The parties shall agree on the basis for sharing the costs of resolving any controversy, provided, however, that the lead jurisdiction may, at the request of the cooperating jurisdiction, assign and subrogate its right to represent both parties to the cooperating jurisdiction, which request shall not be unreasonably refused.

3. To further advance cooperative purchasing efforts the parties shall form a joint Specifications Committee consisting of representatives from each jurisdiction which shall prepare or adapt specifications for supplies and services to be jointly procured in accordance with the provisions of [Article 4 (Specifications) of the State Procurement Code] and accompanying regulations.

4. Nothing in this Memorandum of Understanding shall prevent either party from awarding contracts individually or in its own behalf, provided, however, that such an Invitation for Bids or Request for Proposals shall not be issued, nor bids or proposals

received, during the period in which a cooperative contract is being sought for the same supplies or services, except in the case of emergency.

5. This Memorandum of Understanding shall take effect upon execution by the parties and shall continue in effect from the date of execution. Either party may terminate this Memorandum upon written notice to the other of not less than [90] days prior to the date of termination.

IN WITNESS WHEREOF, the parties to this Memorandum have caused their names to be affixed hereto by their proper officers this _____ day of _____, 19____.

[Jurisdiction A]

Attest: _____
By: _____

[Jurisdiction B]

Attest: _____
By: _____

Editorial Note: The following model agreement also is based on the general authorization for cooperative purchasing contained in Section 10-201 (Cooperative Purchasing Authorized) of the Model Procurement Code. It illustrates an agreement in which a State will enter into open-ended procurement contracts that are available to local public procurement units upon their issuance of appropriate purchase orders. In contrast to the preceding Memorandum of Understanding for Cooperative Purchasing, under which the responsibility for procurements is shared by the jurisdictions, this purchase agreement provides that the State shall award contracts under which the participating local jurisdiction may place orders and make purchases. If the local jurisdiction desires to procure under a State's open-ended procurement contract, then it must agree to procure all of its requirements for the respective supplies or services under the State contract.

PURCHASE AGREEMENT

This Agreement entered into this _____ day of _____, 19____, between the [State] of _____ hereinafter called "[State]", and [Jurisdiction A], a political subdivision of the State of _____ hereinafter called ["Jurisdiction A"], is to make available to [Jurisdiction A] such supplies and services at the prices and terms as are available to the [State] under contracts entered into by the [State's Chief Procurement Officer] pursuant to the authority contained in [Section 10-201 of the State Procurement Code] and [cite any other statutes or ordinances that provide the basis of legal authority for the agreement].

In consideration of the mutual promises contained in this Agreement and of the mutual benefits to result therefrom, the parties agree as follows:

1. The [State] shall make available to [Jurisdiction A] information concerning future procurements of commonly used supplies or services so as to allow [Jurisdiction A] the opportunity to request that an open-ended procurement be made. Whenever [Jurisdiction A] desires to procure any such supplies or services using the [State's] contract, a written request shall be sent to the [State's Chief Procurement Officer], and if feasible, an open-ended procurement shall be made so as to allow [Jurisdiction A] to procure under the [State's] contract.

2. The specifications for the supplies and services to be purchased jointly shall be prepared by the [State's Chief Procurement Officer] after consultation with [Jurisdiction A]. The [Chief Procurement Officer] shall send a copy of the completed specifications to [Jurisdiction A] prior to issuance of Invitations for Bids or Requests for Proposals, and request that [Jurisdiction A] advise such officer by a specified date whether it intends to procure its requirements for such supplies and services under the [State] contracts.

3. Whenever [State] standard specifications exist for any supplies or services, such specifications shall be used. If testing is necessary to determine whether or not any supplies or services meet the required specifications, [State] testing facilities shall be used.

4. The [State's Chief Procurement Officer] shall conduct the procurement in compliance with the [State] Procurement Code. The [State] shall be paid an agreed percentage of its costs by [Jurisdiction A]. Costs may include salaries and wages of employees, travel expenses, prorated overhead including the costs of clerical work, office supplies, and depreciation on equipment, and all other costs and expenses incidental to the performance of such work. For the purpose of fixing the compensation to be paid to the [State], it is hereby agreed that there shall be included in each billing, to cover overhead costs, an amount equal to ____% of the total costs of labor to the [State]. The [State's Chief Procurement Officer] shall keep reasonably itemized and detailed records covering such costs, including all categories of items listed in this Paragraph, and shall render to [Jurisdiction A] at the close of each calendar month an itemized statement covering all such categories of items. [Jurisdiction A] shall pay the [State] for such services within 30 days after receipt of such statement.

5. Except in the case of emergency, if [Jurisdiction A] has requested that an open-ended procurement be made by the [State], [Jurisdiction A] shall procure all of its requirements for such supplies and services as they arise by placing purchase orders against [State] contracts in accordance with all specifications, terms, conditions, and prices stated in such contracts. Purchase orders shall be issued by [Jurisdiction A] in accordance with its regularly authorized procurement procedure.

6. Each party agrees that the ordering of all supplies or services through this Agreement shall be its own responsibility, and that the successful contractor or contractors shall bill each party directly for the supplies or services ordered and delivered to such party.

7. The failure of [Jurisdiction A] to make timely payment to the contractor in accordance with the terms and conditions of the contract shall not constitute a default on the part of the [State].

8. Any controversy arising between the [State] and a contractor, or between [Jurisdiction A] and a contractor, shall be resolved by the disputing parties in accordance with [Article 9 (Legal and Contractual Remedies) of the State Procurement Code]; however, the [State] may join in the resolution of any controversy should it so desire.

9. This Agreement shall take effect upon execution by the parties and shall continue in effect from the date of execution. Either party may terminate this Agreement upon prior written notice to the other of [90] days.

10. All contracts awarded under this Agreement shall be executed by the [State's Chief Procurement Officer] and adopted by the [duly authorized representatives of Jurisdiction A]. An executed copy of each such contract shall be kept by the [Office of the Chief Procurement Officer] and by the [authorized representative of Jurisdiction A], and made available for public inspection.

IN WITNESS WHEREOF, the parties to this Agreement have caused their names to be affixed hereto by their proper officers this _____ day of _____, 19____.

[Jurisdiction A]

Attest: _____
By: _____

[Jurisdiction B]

Attest: _____
By: _____

Appendix 10-203-Agreement for Cooperative Use of Services

Editorial Note: The following model agreement illustrates a possible cooperative use of services by three local governments authorized by Section 10-203 (Cooperative Use of Supplies or Services) of the Model Procurement Code. Each jurisdiction agrees to provide "backup" fire and police service in the event a fire or disturbance cannot be dealt with adequately by the resources of the jurisdiction in which it occurs. The agreement is "streamlined" as it directs the jurisdictions to work out the details of requesting such services. It does not outline a scheme of compensation as it is based on the assumption that the jurisdictions are sufficiently similar so that one would not be requesting aid more than the other two. Local jurisdictions that are dissimilar in size or level of services might want to include a reimbursement scheme in such an agreement.

It is recognized that arrangements involving fire and police services generally are outside the scope of the procurement function and that negotiating such an agreement would generally be the responsibility of the heads of the fire and police departments. The principles set forth in this model agreement could also be applied to a matter solely within the procurement function; as indicated above, the agreement is for illustrative purposes only.

COOPERATIVE AGREEMENT FOR FURNISHING SUPPLEMENTAL FIRE AND POLICE SERVICE

This Agreement entered into this _____ day of _____, 19____, between [Jurisdiction A], [Jurisdiction B], and [Jurisdiction C], all political subdivisions of the State of _____ (hereinafter "the parties"), is for the purpose of agreeing to render supplemental fire and police protection in the event of a fire, disturbance, or other local emergency of a magnitude that has developed or appears to develop beyond the control of one party and therefore requires the forces of one or all of the other parties. This Agreement is made pursuant to the authority contained in [Section 10-203 of the State Procurement Code] and [cite any other statutes or ordinances that provide the basis of legal authority for the agreement].

In consideration of the mutual promises contained in this Agreement, the parties agree as follows:

1. In the event of any fire, disturbance, or other local emergency which cannot be met with the facilities of one party, the other parties agree, upon request, to furnish aid in coping with such disaster or local emergency to the party requesting such aid upon either an actual or standby basis. The extent of aid to be furnished under this Agreement shall be determined solely by the party or department thereof furnishing such aid, and it is understood that the aid so furnished may be recalled at the sole discretion of the furnishing party.

2. Details as to methods of requesting mutual aid and the names of persons authorized to send and receive such requests, together with lists of equipment and personnel which will be subject to call, will be covered by correspondence between the appropriate departments of the parties from time to time.

3. Personnel who are furnished will work as much as possible under their own supervisors, and equipment furnished will ordinarily be operated by personnel of the department of the party furnishing the equipment. General directions relative to the

work will be given by the appropriate officers or persons of the party receiving such aid.

4. No party shall be required to pay any compensation to any other party for services rendered hereunder, the mutual advantages and protections afforded by this Agreement being considered adequate compensation to all of the parties. [Alternatively, the parties may specify terms of compensation.]

5. This Agreement is intended to cover day-to-day mutual aid only and shall be of no force and effect in cases in which a state of emergency has been proclaimed [by the Governor of this State or the President of the United States].

6. It is mutually understood and agreed that this Agreement does not relieve any party from the necessity and obligation of providing adequate fire and police protection within its own jurisdiction, and each party agrees that it shall use reasonable diligence in keeping the fire-fighting equipment in its possession up to the minimum requirements established by the National Board of Fire Underwriters for jurisdictions of comparable size.

7. It is further understood and agreed that the provisions of this Agreement will be invoked only when, in the opinion of the fire or police chiefs of the party requesting aid it is deemed necessary to request outside assistance because all of the normal facilities at their command have been exhausted and outside assistance is needed to control and suppress a fire, disturbance, or other local emergency.

8. This Agreement shall not be construed as or deemed to be an agreement for the benefit of any third party or parties, and no third party or parties shall have any right of action hereunder for any cause whatsoever. Any services performed or expenditures made in connection with furnishing mutual aid under this Agreement by any parties hereto shall be deemed conclusively to be for the direct protection and benefit of the inhabitants and property of such party.

9. Any party may withdraw from this Agreement at any time upon written notice to each of the other parties of not less than [30] days prior to the date of withdrawal, and thereafter, such jurisdiction shall no longer be a party to this Agreement; but this Agreement shall continue to exist among the remaining parties.

IN WITNESS WHEREOF, the parties to this Agreement have caused their names to be affixed hereto by their proper officers this _____ day of _____, 19____.

[Jurisdiction A]

Attest: _____
By: _____

[Jurisdiction B]

Attest: _____
By: _____

[Jurisdiction C]

Attest: _____
By: _____

Appendix 10-204-Agreements for Joint Use of Facilities

Editorial Note: Common use or lease of a warehouse facility is specifically provided for in Section 10-204 (Joint Use of Facilities) of the Model Procurement Code. The following model agreement contains the key points that should be covered when one jurisdiction leases space in a warehouse owned by a second jurisdiction

JOINT USE OF WAREHOUSE FACILITIES

This agreement is entered into this _____ day of _____, 19_____, between [the State of Jurisdiction A] [Jurisdiction A, a political subdivision of the State of _____] hereinafter called ["Jurisdiction A"], and the [State of Jurisdiction B]

[Jurisdiction B, a political subdivision of the State of _____], hereinafter called ["Jurisdiction B"], pursuant to [Section 10-204 of the State Procurement Code] and [cite any other statutes or ordinances that provide the basis of legal authority for the agreement].

In consideration of the mutual promises contained in this Agreement, the parties agree as follows:

1. [Jurisdiction A] agrees to make available to [Jurisdiction B] _____ square feet of storage area (hereinafter called the "storage space") in its warehouse located at _____.

2. [Jurisdiction B] shall pay [Jurisdiction A] for use of the storage space \$_____ per month payable, without demand, in advance on the _____ day of each month commencing, 19_____.

3. The storage space shall be used for supplies owned or controlled by [Jurisdiction B] and for no other use, subject to such regulations as [Jurisdiction A]

may have or make respecting the space, its use, and ingress thereto and egress therefrom. A copy of such regulations has been provided to [Jurisdiction B].

4. In the event that any of [Jurisdiction A's] employees are used in the receiving, piling, stocking, or handling of any property belonging to [Jurisdiction B], such employees shall continue to be employees of [Jurisdiction A] and subject to its sole discretion and control. As compensation for the use of all such employees, [Jurisdiction B] shall pay [Jurisdiction A] the current rate per hour for warehouse labor which rate shall include overhead costs.

5. [Jurisdiction A] shall not be liable for any loss or injury to the property of [Jurisdiction B] however caused unless such loss or injury shall result from the failure of [Jurisdiction A] to exercise ordinary care and diligence. [Jurisdiction B] shall insure its own property placed in the warehouse. Property of [Jurisdiction B] in the warehouse but not placed in the storage space shall be subject to charges and regulations of [Jurisdiction A] pertaining to the warehouse while remaining in the custody of that party.

6. No perishable or hazardous property shall be placed in the storage space by [Jurisdiction B]. Upon default in the performance of this condition, this Agreement shall terminate at the option of [Jurisdiction A].

7. This Agreement may be terminated by either party upon written notice to the other party of not less than [90] days prior to the date of termination.

IN WITNESS WHEREOF, the parties to this Agreement have caused their names to be affixed hereto by their proper officers this _____ day of _____, 19_____.

Attest: _____ [Jurisdiction A]
By: _____

Attest: _____ [Jurisdiction B]
By: _____

Editorial Note: The following model agreement illustrates how capital equipment belonging to one jurisdiction but unused or underutilized by it may be loaned/leased to another jurisdiction. It is essentially a bailment contract where the owning jurisdiction retains the right, at will, to revoke the loan/lease of a particular piece of equipment should it have a need for its use.

AGREEMENT TO LEASE/LOAN EQUIPMENT

This Agreement is entered into this _____ day of _____, 19____, between the [State of Jurisdiction A] [Jurisdiction A, a political subdivision of the State of _____], hereinafter called ["Jurisdiction A"], and the [State of Jurisdiction B] [Jurisdiction B, a political subdivision of the State of _____] hereinafter called ["Jurisdiction B"], pursuant to [Section 10-204 of the State Procurement Code] and [cite any other statutes or ordinances that provide the basis of legal authority for the agreement].

In consideration of the mutual promises contained in this Agreement, the parties agree as follows:

1. [Jurisdiction A] agrees to lease/loan to [Jurisdiction B] equipment (hereinafter "equipment") named and described in the attached Schedule or in any Schedule which may hereafter be made a part of this Agreement.
2. [Jurisdiction B] shall pay [Jurisdiction A] for use of the equipment the amount referred to in the Schedule, without demand, in advance on the _____ day of each month commencing _____, 19____. [Alternatively, the parties may provide that no payment shall be made but that services or leases/loans of equipment may serve in lieu of payment.]
3. The equipment shall be delivered to the location named in the Schedule by [Jurisdiction A] and remain there during all of the lease/loan term, and shall not be removed from such location without [Jurisdiction A's] consent. [Jurisdiction A] shall have the right to enter the premises where the equipment is located and inspect the equipment.
4. [Jurisdiction B] shall immediately inspect each item of equipment delivered pursuant to this Agreement, and shall notify [Jurisdiction A] in writing of any discrepancies between said item of equipment and the description, statement of condition, and valuation of said item of equipment as agreed to in the Schedule. If [Jurisdiction A] receives no such written notice within _____ days after delivery of any item of equipment, [Jurisdiction B] will be conclusively presumed to have accepted the equipment as specified in the Schedule.
5. [Jurisdiction B] shall require the equipment to be used in a careful and proper manner, and operated only by competent and qualified employees.
6. [Jurisdiction B] agrees to keep the equipment in good repair and operating condition, allowing for reasonable wear and tear, and agrees to pay all expenses of

maintaining and repairing the equipment to keep it in peak operating condition and to return it to [Jurisdiction A] in as good condition as when received, normal wear and tear excepted.

7. [Jurisdiction B] shall be liable for injury, disability, or death of workers and other persons caused by the operation, handling, or transportation of the equipment during the term set forth in the Schedule.

8. Should [Jurisdiction A] have a need for the equipment described in the Schedule, it may notify [Jurisdiction B] of the need and [Jurisdiction B] shall, at its own cost and expense, immediately deliver the equipment to _____ or such other location as [Jurisdiction A] may designate that does not increase the cost of delivery.

[This is an optional clause and should be used when [Jurisdiction A] cannot specifically indicate the term during which the equipment will not be required for its own use.]

9. On expiration of the term specified in the Schedule for any particular item of equipment, [Jurisdiction B] agrees to deliver, at its own expense, that item to _____ or to such other location as [Jurisdiction A] may designate that does not increase the cost of delivery.

10. This Agreement shall be in full force and effect upon execution by the parties, and, unless sooner terminated as provided herein, shall run for a period ending _____. The Agreement may be renewed for successive periods not to exceed [5] years each.

Notwithstanding any other provisions of this Agreement, either party may terminate this Agreement upon written notice to the other party of not less than [180] days prior to the date of such termination.

IN WITNESS WHEREOF, the parties to this Agreement have caused their names to be affixed hereto by their proper officers this _____ day of _____, 19_____.

[Jurisdiction A]

Attest: _____
By: _____

[Jurisdiction B]

Attest: _____
By: _____

EQUIPMENT LEASE SCHEDULE NO. _____

Equipment item No. _____, leased pursuant to the Agreement made _____, 19____, between [Jurisdiction A] and [Jurisdiction B].

1. Common name of leased item: _____.
2. Manufacturer's trade name of leased item: _____.
3. Serial number of leased item: _____.
4. Manufacturer of leased item: _____.
5. Condition of leased item: _____ (specify age and condition of item).
6. Purchase price of leased item: _____.
7. The term of rental of this item of equipment is _____ months, commencing _____, 19_____.
8. The rental rate of this item of equipment is _____ Dollars (\$_____) per month.

Rental for the first month shall be pro-rated from the date of delivery. All rentals shall be paid by [Jurisdiction B] to such person or organizations as [Jurisdiction A] shall designate in writing.

[9. Other terms as agreed.]

This schedule is approved and agreed to on _____, 19____, and the item of equipment described is hereby made subject to the above-mentioned Agreement.

(Signature of [Chief Procurement Officer] of Jurisdiction A)

Appendix 10-205 - Agreements to Supply

Personnel, Information, and Technical Services

Editorial Note: The following model agreement is based on the authorization for temporary assignment of personnel contained in Section 10-205(1) (Supply of Personnel, Information, and Technical Services, Supply of Personnel) of the Model Procurement Code. It directs the personnel offices of the two jurisdictions to work out the details of requesting and temporarily assigning per-

sonnel, including the development of a standard form agreement to document the type of assignment and fiscal obligations.

It is recognized that personnel matters are generally outside the scope of the procurement function, and that negotiations and agreements for the loan of personnel would usually be the responsibility of the Personnel Department. The principles set forth in this agreement, however, could apply to matters solely within the procurement function, as well as other branches of government; the model is included, therefore, for illustrative purposes.

AGREEMENT TO PROVIDE PERSONNEL

This Agreement entered into this _____ day of _____, 19_____ between [the State of Jurisdiction A] Jurisdiction A, a political subdivision of the State of _____] hereinafter called ["Jurisdiction A"], and [the State of Jurisdiction B] [Jurisdiction B, a political subdivision of the State of _____] hereinafter called ["Jurisdiction B"], is for the purpose of strengthening the personnel resources of the parties by facilitating the temporary assignment of personnel between the parties pursuant to the authority contained in [Section 10-205(1) of the State Procurement Code] and [cite any other statutes or ordinances that provide the basis of legal authority for the agreement].

In consideration of the mutual promises contained in this Agreement, the parties agree as follows:

1. Within 30 days following the execution of this Agreement, the [personnel offices] of each party shall designate the procedures to be followed to implement this Agreement. The procedures shall include development of a standard form agreement documenting the type and length of assignment, job duties, fiscal obligations, including, as agreed, the direct and indirect costs of furnishing the personnel, and arrangements for travel and moving expenses of an assigned employee.

2. The head of any agency of one party may request, in writing, that an agency of the second party temporarily assign personnel to the requesting agency. Such request shall be transmitted through [the respective personnel offices of the parties or, if either or both parties have no central personnel office, through the personnel office of the agency by whom or of whom the request is made].

3. An employee assigned under this Agreement shall be subject to the direction and control of the party to whom such employee is assigned and shall observe the work hours and rules and regulations of employment set by that party.

4. The terms of salary payment of any personnel temporarily assigned under this Agreement shall be worked out between [the personnel offices] of the parties. Any personnel temporarily assigned by a party under the terms of this Agreement shall continue to be covered by any pension, retirement benefits, life insurance, and health benefits plans of such party. The costs of such benefits shall be paid by the party obtaining the personnel to [the agency of the party providing such personnel].

5. Each party may adopt its own internal rules and procedures governing maximum and minimum length of assignment of its employees, eligibility of personnel for such assignments, and conditions of accepting such assignments, such as a requirement that any personnel supplied under this Agreement must serve with the party of original employment for a period equal to the length of the assignment.

6. This Agreement shall take effect upon execution by the parties and shall continue in effect from the date of execution. Either party may terminate this Agreement upon written notice to the other party of not less than [one year] prior to the date of termination.

IN WITNESS WHEREOF, the parties to this Agreement have caused their names to be affixed hereto by their proper officers this _____ day of _____, 19_____.

[Jurisdiction A]

Attest: _____

By: _____

[Jurisdiction B]

Attest: _____

By: _____

Editorial Note: The following model agreement is based on Section 10-205(4)(c) (Supply of Personnel, Information, and Technical Services, State Technical Services) of the Model Procurement Code, which authorizes the Chief Procurement Officer to provide the use of product testing and inspection facilities to other jurisdictions. In the form of a Memorandum of Understanding between two jurisdictions, the agreement provides for cooperative use of the testing and inspection facilities of both jurisdictions. Testing or inspection would be performed for the procuring jurisdiction by the jurisdiction which has superior testing or inspection capability for the supply, service, or construction item being procured. The jurisdiction performing the testing or inspection will be reimbursed by the jurisdiction for which such services have been performed.

**MEMORANDUM OF UNDERSTANDING TO USE
PRODUCT TESTING AND INSPECTION FACILITIES**

This Agreement is entered into this _____ day of _____, 19_____, by [the State of Jurisdiction A], [Jurisdiction A, a political subdivision of the State of _____], and [the State of Jurisdiction B] [Jurisdiction B, a political subdivision of the State of _____], hereinafter called "the parties," for the purpose of strengthening the product testing and inspection capability of each by

maximizing the use of the expertise of each party, pursuant to [Sections 10-205(4) and (5) of the State Procurement Code] and [cite any other statutes or ordinances that provide the basis of legal authority for the agreement].

In consideration of the mutual promises contained in this Agreement, the parties agree as follows:

1. Each party agrees to perform for the other, to the maximum practical extent and consistent with its capabilities, all necessary testing and inspection of designated supplies, services, and construction procured or used by the other party subject to the general terms and conditions hereinafter set forth.

2. The [Chief Procurement Officer] of each party shall, within 90 days after the execution of this Agreement, and periodically thereafter, list the product testing and inspection capability which such officer believes that jurisdiction is uniquely or especially qualified to undertake; thereafter, the lists shall be exchanged. If one of the parties plans to procure a supply, service, or construction item for which the other party has superior testing or inspection capability, then the procuring party shall notify the [Chief Procurement Officer] of the other party of the supply, service, or construction item to be procured or used that will require testing or inspection, and, to the extent appropriate, the required test or inspection procedure. Such notification should be prior to the issuance of an Invitation for Bids or Request for Proposals and indicate when inspection or testing should be performed or is required.

3. For the purpose of performing the testing or inspection specified under this Agreement, the party performing the testing or inspection (hereinafter the "Testing/Inspecting Jurisdiction") shall furnish all the necessary labor, supervision, equipment, and supplies other than the items to be tested or inspected. Both parties agree that the Testing/Inspecting jurisdiction shall have full authority and necessary control of the inspection or testing. Any controversy arising between a bidder, offeror, or contractor and the party conducting the procurement (hereinafter the "Procuring Jurisdiction") in regard to the inspection or testing of any supply or bid sample furnished, or supply or service delivered, by any bidder, offeror, or contractor, shall be resolved between such person and the Procuring Jurisdiction in accordance with [Article 9 of the State Procurement Code]. The Testing/Inspecting Jurisdiction shall not be liable to the Procuring Jurisdiction for any loss or damage in connection with the services performed under this Agreement unless such loss or injury results from the failure of the Testing/Inspecting Jurisdiction to exercise ordinary care and diligence. The Testing/Inspecting Jurisdiction agrees to provide, to the extent it is capable, expert testimony to support its testing or inspection results.

4. The Procuring Jurisdiction shall pay to the Testing/Inspecting Jurisdiction the entire cost of performing inspection and testing, including salaries and wages of employees engaged in or supervising such work, travel expenses, pro-rated overhead,

including the cost of clerical work, office supplies, and depreciation on equipment, and all other costs and expenses incidental to the performance of such work. For the purpose of fixing the compensation to be paid to the Testing/Inspecting Jurisdiction, it is hereby agreed that there shall be included in each billing, to cover overhead costs, an amount equal to ____% of the total cost of labor to the Testing/Inspecting Jurisdiction for performing testing and inspection services.

5. The [Chief Procurement Officer] of the Testing/Inspecting Jurisdiction shall keep reasonably itemized and detailed records covering the cost of all inspection and testing performed, including all categories of items listed in Paragraph 4 of this Agreement, and shall render to the Procuring Jurisdiction at the close of each calendar month an itemized statement covering all such categories of items. The Procuring Jurisdiction shall pay the Testing/Inspecting Jurisdiction for such services within 30 days after receipt of such statement.

6. This Agreement shall be in full force and effect upon execution by the parties, and, unless sooner terminated as provided for herein, shall run for a period ending _____, 19____. This Agreement may be renewed for successive periods not to exceed [5] years each.

7. Notwithstanding any other provisions of this Agreement either party may terminate this Agreement upon written notice to the other party of not less than [180] days prior to the date of such termination.

IN WITNESS WHEREOF, the parties to this Agreement have caused their names to be affixed hereto by their proper officers this _____ day of _____, 19_____.

[Jurisdiction A]

Attest: _____
By: _____

[Jurisdiction B]

Attest: _____
By: _____

*Appendix 10-301-Agreement Designating [State Procurement Appeals Board]
to Hear and Resolve Controversies*

Editorial Note: Section 10-301(2)(a) (Contract Controversies, Local Public Procurement Unit Not Subject to Article 9 (Legal and Contractual Remedies)) of the Model Procurement Code authorizes a local jurisdiction not subject to Article 9 of the Code to enter into an agreement with the State

Procurement Appeals Board (or other State disputes resolving agency) to use such board to resolve controversies between the local jurisdiction and bidders, offerors, and contractors. Similarly, Section 10-301 (2)(b) authorizes the same jurisdiction to enter into an agreement with another local jurisdiction, or a jurisdiction not located in the State, to establish procedures or use the latter's existing procedures to resolve procurement controversies. These types of arrangements may be advantageous to small, local jurisdictions that do not have elaborate administrative organizations.

The following model agreement between a State Procurement Appeals Board and a local jurisdiction illustrates how Section 10-301 (2)(a) may be implemented.

**AGREEMENT DESIGNATING
[THE STATE PROCUREMENT APPEALS BOARD]
TO HEAR AND RESOLVE CONTROVERSIES**

This Agreement entered into this _____ day of _____,
19_____,

between the [Procurement Appeals Board] of the State of A, hereinafter called ["State Procurement Appeals Board"], and [Jurisdiction B], a political subdivision of the State of A, hereinafter called ["Jurisdiction B"], is for the purpose of designating the [State Procurement Appeals Board] to hear and determine controversies between [Jurisdiction B] and bidders, offerors, or contractors pursuant to the authority contained in [Section 10-301(2)(a) of the State Procurement Code] and [cite any other statutes or ordinances that provide the basis of legal authority for the agreement].

In consideration of the mutual promises contained in this Agreement, the parties agree as follows:

1. As of the date of execution of this Agreement, the [State Procurement Appeals Board] shall hear, consider, and decide as fully and finally as might the [insert title of the official of Jurisdiction B, if any, authorized to hear and decide such controversies], the following types of controversies:

- (a) a protest of a solicitation or award of a contract by an aggrieved actual or prospective bidder or offeror, or contractor;
- (b) an appeal of a decision by [the appropriate official of Jurisdiction B] concerning a protest of a solicitation or award of a contract;
- (c) an appeal of a decision by [the appropriate official of Jurisdiction B] to debar or suspend a person from consideration for award of contracts; and

(d) an appeal of a decision by [the appropriate official of Jurisdiction B] concerning

controversies arising under a contract between [Jurisdiction B] and a contractor, including those based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.

2. The [State Procurement Appeals Board] will follow such rules and procedures as it follows for the determination of State procurement controversies.

3. The [City/Corporation/County Counsel] will be responsible for the representation of the interests of [Jurisdiction B] in proceedings before the [State Procurement Appeals Board].

4. All officers and employees of [Jurisdiction B] shall cooperate with the [State Procurement Appeals Board] and the [City/Corporation/County Counsel] in the processing of protests and appeals so as to assure their speedy and just determination.

5. [Jurisdiction B] shall pay to the [State Procurement Appeals Board] the costs of hearing, considering, and deciding protests and appeals pursuant to this Agreement.

6. All hearings held by the [State Procurement Appeals Board] pursuant to this Agreement shall be transcribed, and [Jurisdiction B] shall reimburse the [Board] for the cost of such transcriptions, provided, however, that only the cost of the initial transcription shall be reimbursed and any copies shall be paid for by the person requesting a copy.

7. This Agreement shall apply to all protests and appeals not finally determined by the [appropriate official of Jurisdiction B] as of its date of execution and which may thereafter arise between [Jurisdiction B] and any bidder, offeror, or contractor.

8. This Agreement shall take effect upon execution by the parties and shall continue in effect therefrom. Either party may terminate this Agreement upon written notice to the other party of not less than [one year] prior to the date of termination.

IN WITNESS WHEREOF, the parties to this Agreement have caused their names to be affixed hereto by their proper officers this _____ day of _____, 19_____.

[Jurisdiction A]

Attest: _____

By: _____
[Jurisdiction B]

Attest: _____

By: _____