

## Chapter 3

### Source Selection and Contract Formation

#### 3.101 Purchasing Procedures

##### 3.101.01 Definition of Terms Used in this Section

- (1) Established Catalog Price – the price included in a catalog, 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 price at which sales are currently or were last made to a significant number of any categories of buyers or buyers constituting the general buying public for the supplies or services involved.
- (2) Invitation for Bids – all documents, whether attached or incorporated by reference, utilized for soliciting bids.
- (3) Purchase Description – the words used in a solicitation to describe the commodities, equipment, or construction to be purchased and includes specifications attached to, or made a part of, the solicitation.
- (4) Request for Proposals – all documents, whether attached or incorporated by reference, utilized for soliciting proposals.
- (5) Responsible Bidder or Offerer – 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.
- (6) Responsive Bidder – a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.
- (7) Reverse Auction – an electronic auction where suppliers bid online against each other for contracts against a published specification.
- (8) Electronic Bids – allows for the online submission of bids. It is a fast, secure and fully audited environment in which suppliers can upload bid files to buyers.
- (9) Online Auctions – an auction where items are sold over the internet.

##### 3.101.02 Exemptions Not Requiring Approval

Unless otherwise ordered by regulation of the Public Procurement Review Board (PPRB), the following listed items are exempt from the competitive bid process and do not require approval of the Office of Purchasing, Travel and Fleet Management except as may be required when submitting an Inventory Deletion Form.

- (1) Transactions listed in [Section 31-7-13\(m\), Mississippi Code of 1972, Annotated](#)
- (2) Transfer, sale, or exchange of personal property between state agencies or between state agencies and governing authorities - (For transfer, sale or exchange of vehicles, see State Fleet Manual.)
- (3) Service contracts provided by businesses or persons which do not include the acquisition of a commodity or equipment
- (4) Transportation of items (freight charges) - This exemption shall not apply to the travel contracts established by the Office of Purchasing, Travel and Fleet Management.
- (5) Postage
- (6) Workers Compensation Insurance and Personnel Bond required by law
- (7) Utilities
- (8) Commodities purchased for resale
- (9) Highway right-of-way and highway construction contracts governed by specific laws dealing with such contracts
- (10) Food and lodging reimbursable on a travel voucher
- (11) Maintenance contracts except those under the purview of the Department of Information Technology Services
- (12) Live animals
- (13) Textbooks
- (14) Library books and other reference materials purchased by or for libraries
- (15) Purchases of original artwork and artifacts by museums for public display
- (16) Purchases of original artwork (paintings, statues, sculptures, etc.) for public display
- (17) Subscriptions
- (18) Purchases made from state operated industries such as Mississippi Industries for the Blind.

### **3.101.03 Exemptions Requiring Approval**

Unless otherwise ordered by regulation of the Public Procurement Review Board (PPRB), the following listed items are exempt from the competitive bid process provided they follow 3.109.02; however, these purchases do require P-1 approval of the Office of Purchasing, Travel and Fleet Management.

- (1) Non-competitive items that are available from only one source;
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- (2) Items purchased for research that are available from only one source

### **3.102 General Provisions**

#### **3.102.01 Extension of Time for Bid or Proposal Acceptance**

After opening bids or proposals, the Agency Procurement Officer may request bidders or offerers to extend the time during which the State entity 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.

#### **3.102.02 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(s) do not cause the contract to exceed 60 months and that there shall be no increase in price, unless originally allowed by the bid specifications, and the Chief Procurement Officer or Agency Procurement Officer determines that it is not practical to award another contract at the time of such extension.

#### **3.102.03 Only One Bid or Proposal Received, No Bid Received**

##### **3.102.03.1 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 Agency Procurement Officer finds that the price submitted is fair and reasonable, and that either;

- (1) The other prospective bidders had reasonable opportunity to respond, or
- (2) There is not adequate time for re-solicitation.

Otherwise, the bid may be rejected pursuant to the provisions of Subsection 3.112.04, Cancellation of Solicitation; Rejection of all Bids or Proposals and:

- (1) The bid may be re-advertised and new bids or offers may be solicited; or
- (2) The proposed procurement may be canceled.

##### **3.102.03.2 One Proposal Received**

If only one proposal is received in response to a Request for Proposals, the Agency Procurement Officer may either make an award in accordance with the procedures set forth in Section 3.107, Competitive Sealed Proposals, of these regulations or, if time permits, re-solicit for the purpose of obtaining competitive sealed proposals.

##### **3.102.03.3 No Bid or Proposal Received**

If no bid or proposal is received in response to an Invitation,

- (1) The bid may be re-advertised and new bids or offers may be solicited;

- (2) The proposed procurement may be canceled; or
- (3) An emergency procurement may be made in compliance with Section 3.110, Emergency Procurements.

#### **3.102.04 Alternate Bids or Proposals**

If alternate bids or proposals are allowed, the solicitation shall state that such bids or proposals shall be accepted, and the solicitation shall specify their treatment. The solicitation shall state that such bids or proposals shall be accepted.

#### **3.102.05 Procuring Commodities and Services Produced or Offered by State Agencies**

Agency requirements may be fulfilled by procuring supplies produced or services performed incident to the State's own programs, such as Mississippi Industries for the Blind. The Chief Procurement Officer or the head of the 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. When such procurements are made from other state agencies, the private sector need **not** be solicited to compete against other agencies.

#### **3.102.06 Bid and Performance Bonds for Commodity 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 or the Agency Procurement Officer 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 offerer responsibility. [Section 31-5-51, Mississippi Code of 1972, Annotated](#), sets forth bonding requirements applicable to construction contracts and may be considered when establishing any such requirements for supply contracts or service contracts.

#### **3.102.07 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 Mississippi contract shall be deemed non-responsive and not acceptable.

#### **3.103 Unsolicited Offers**

##### **3.103.01 Defined**

An unsolicited offer is any offer other than one submitted in response to a solicitation.

##### **3.103.02 Processing of Unsolicited Offers**

The Chief Procurement Officer or the Agency Procurement Officer 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 Agency Procurement Officer 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.

**3.103.03 Conditions for Consideration**

To be considered for evaluation, an unsolicited offer:

- (1) Must be in writing;
- (2) Must be sufficiently detailed to allow a judgment to be made concerning the potential utility of the offer to the State;
- (3) Must be unique or innovative to State use;
- (4) Must demonstrate that the proprietary character of the offering warrants consideration of the use of sole-source procurement;
- (5) May be subject to testing under terms and conditions specified by Mississippi; and
- (6) Must be a commodity that is not included on any state contract.

**3.103.04 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.

**3.103.05 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 subject to Mississippi Public Records Act of 1983, [Section 25-6-1, Mississippi Code of 1972, Annotated](#).

**3.104 Novation or Change of Name (Assignment)****3.104.01 No Assignment**

No Mississippi contract is transferable or otherwise assignable without the written consent of the Chief Procurement Officer; provided, however, that a contractor may assign monies receivable under a contract after due notice to the State, the contracting entity, and with approval of the Chief Procurement Officer.

**3.104.02 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:

- (1) The transferee assumes all of the transferor's obligations;
  - (2) The transferor waives all rights under the contract as against the State; and
  - (3) Unless the transferor guarantees performance of the contract by the transferee, the transferee shall, if required, furnish a satisfactory performance bond.
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**3.104.03 Change of Name**

When a contractor requests to change the name in which it holds a contract with the State, the Chief 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.

**3.104.04 Reports**

All change of name or novation agreements effected hereunder other than by the Chief Procurement Officer shall be reported to the Chief Procurement Officer within 30 days of the date that the agreement becomes effective.

**3.104.05 Actions Affecting More Than One Purchasing Agency**

Notwithstanding the provisions of Subsection 3.104.01, No Assignment, Subsection 3.104.02, Recognition of a Successor in Interest; Novation, Subsection 3.104.03, Change of Name, and Subsection 3.104.04, No Assignment, Recognition of a Successor in Interest; Novation, Change of Name, Reports, when a contractor holds contracts with more than one purchasing agency of the State, the novation or change of name agreements herein authorized shall be processed only through the office of the Chief Procurement Officer.

**3.105 Method of Source Selection**

Unless otherwise authorized by law, all contracts for commodities, equipment and printing shall be negotiated contracts by the OPTFM as set forth in Subsection 2.103.04, Commodities, Equipment and Printing, or shall be awarded by competitive sealed bidding pursuant to Section 3.106, Competitive Sealed Bids, except as provided in:

- (1) Section 3.107, Competitive Sealed Proposals;
- (2) Section 3.108, Purchases less than \$50,000.01;
- (3) Section 3.109, Sole-Source Procurement;
- (4) Section 3.110, Emergency Procurements; and
- (5) Section 3.111, Competitive Selection Procedures for Services.

**3.106 Competitive Sealed Bids**

- (1) Conditions for Use

Contracts shall be awarded by competitive sealed bidding except as otherwise provided in Section 3.105, Method of Source Selection.

- (2) Invitation for Bids

An Invitation for Bids shall be issued and shall include a purchase description and all

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contractual terms and conditions applicable to the procurement.

(3) Public Notice

Public notice of Invitation for Bids when anticipated expenditure is more than, \$50,000, shall be made in compliance with [Section 31-7-13\(c\), Mississippi Code of 1972, Annotated.](#)

(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 name of each bidder shall be recorded. The amount of each bid and such other relevant information as may be specified by regulation may be recorded; the record and each bid shall be open to public inspection as provided in Section 1.108, Public Access to Procurement Information.

(5) Bid Acceptance and Bid Evaluation

Bids shall be unconditionally accepted without alteration or correction, except as authorized in these regulations. 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. The Invitation for Bids shall set forth the evaluation criteria to be used. **No criteria may be used in evaluation that are not set forth in the Invitation for Bids.**

(6) Correction or Withdrawal of Bids; Cancellation of Awards

Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such bid mistakes shall be permitted in accordance with regulations promulgated by the Office of Purchasing, Travel and Fleet Management. 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 with the approval of the Chief Procurement Officer.

(7) Award

The contract shall be awarded with reasonable promptness by written notice to the lowest responsible bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids.

(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

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offers have been qualified under the criteria set forth in the first solicitation.

**3.106.01 Application**

The provisions of this regulation apply to every procurement made by competitive sealed bidding, including multi-step sealed bidding.

**3.106.02 Use of Competitive Sealed Bidding**

Competitive sealed bidding is the preferred method for the procurement of commodities, services, or construction.

**3.106.03 Invitation for Bids**

**3.106.03.1 Use**

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

**3.106.03.2 Content**

Invitation for Bids shall include the following:

- (1) Instructions and information to bidders concerning the bid submission requirements, including the time and date set for receipt of bids, the address of the office to which bids are to be delivered, the maximum time for bid acceptance by the State, and any other special information.
- (2) The purchase description, evaluation factors, delivery or performance schedule, and such inspection and acceptance requirements as are not included in the purchase description.
- (3) The contract terms and conditions, including warranty and bonding or other security requirements, as applicable.

**3.106.03.3 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.

**3.106.03.4 Invitation for Bids Packet**

Normally the Invitation for Bids Packet will be divided into the following sections:

- (1) General Conditions

This section is sometimes referred to as the “boilerplate”. This section includes instructions and information which should be considered by the bidders. This information is standard for all bids and may include how to complete and submit the bid forms, how errors will be handled, how to obtain clarification of the specifications, etc.

(2) Instructions and Special Conditions

This section includes instructions and information which is pertinent and unique to the particular Invitation for Bids. This may include special delivery requirements, bonding, installation, etc. This section should include information concerning the method used to evaluate and award the contract (i.e., all or none, line item, life-cycle-cost, etc.)

(3) Specifications

This section should clearly describe the minimum requirements and any testing requirements.

(4) Bid Form

A bid form should be provided so that all bidders are submitting pricing in a similar format. Instructions on the proper completion of the bid form should be included if needed.

(5) Execution Page

The packet should include a page for the bidder to complete showing bidder information such as name, contract administrator, address, phone, e-mail, fax, etc. This should also include a space for the bidder to provide a signature indicating the bidder's acceptance of the terms and conditions and commitment to honoring the prices bid.

### **3.106.04 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.

#### **3.106.04.1 Bid Form**

The Invitation for Bids should provide a bid 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.

#### **3.106.04.2 Bid Sample and Descriptive Literature**

- (1) "Descriptive literature" means information available in the ordinary course of business which shows the characteristics, construction, or operation of an item which enables the purchasing entity to consider whether the item meets its needs.
  - (2) "Bid sample" means a sample to be furnished by a bidder to show the characteristics of the item offered in the bid.
  - (3) Bid samples or descriptive literature may be required when it is necessary to evaluate required characteristics of the items bid.
  - (4) The Invitation for Bids may 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
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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. Further, any sample submitted will be returned only at bidder's expense. It should also be known that when samples are requested, it may be necessary that the sample be damaged or destroyed in the process of evaluation in which case neither the State nor the purchasing agency shall be responsible for reimbursement to the bidder.

### **3.106.05 Public Notice**

#### **3.106.05.1 Publication**

Every procurement in excess of \$50,000 must be publicized: [Section 31-7-13, Mississippi Code of 1972, Annotated](#).

- (1) In a newspaper published in the county or municipality in which the agency is located or a newspaper of statewide general circulation;
- (2) By submitting notice to be published to Mississippi Procurement Technical Assistance Program on the same day that the notice is submitted to the newspaper;

#### **3.106.05.2 Content of Advertisement**

When composing the advertisement to appear in the legal notice section of the newspaper, the intent is to include information that will promote competition.

#### **Commentary**

The following is a suggested guide for a legal advertisement:

The (name of the entity) will accept sealed bids until (time of bid opening), (day of the week), (month), (date), (year) for the purpose of purchasing the following:

- Name of commodity/service you wish to procure,
- Bid file number
- Detailed specifications may be obtained by contacting (name of contact person) at (telephone number), at (physical mailing address) or at (email address).

#### **3.106.05.3 Mississippi Procurement Technical Assistance Program**

[Section 31-7-13\(c\)\(i\), Mississippi Code of 1972, Annotated](#), clearly states, "On the same date that the notice is submitted to the newspaper for publication, the agency or governing authority involved shall mail written notice to, or provide electronic notification to the main office of the Mississippi Procurement Technical Assistance Program that contains the same information as that in the published notice."

**3.106.05.4 Advertising Time**

Advertising time is the period of time between the date of publication of the advertisement and the time and date set for receipt of bids. This time is set by [Section 31-7-13\(c\), Mississippi Code of 1972, Annotated](#). This section shall be interpreted to mean the advertisement for bids must be published once each week for two consecutive weeks with the second notice being published on or after the 7th calendar day after the first notice was published. The date set for the bid opening for commodities, equipment or printing must not be less than seven (7) working days after the last notice appears in the newspaper. Therefore, the bid opening must not be sooner than the 8th working day. The bid opening for construction projects with total cost in excess of \$50,000 must not be less than 15 working days after the last notice appears in the newspaper. Therefore, the bid opening must not be sooner than the 16th working day. Working days are defined as days that your entity is officially open for business.

**3.106.05.5 Public Availability**

The Invitation for Bids must be made available for any interested party at the location specified in the published notice.

**3.106.06 Bidders Lists****3.106.06.1 Purpose**

Bidder's lists should be compiled to provide the purchasing entity with the names of businesses that may be interested in competing for various types of Mississippi 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 Mississippi contract.

**3.106.06.2 Deletion of Bidders**

Businesses that fail to respond to four consecutive bid invitations on any item within a class may be removed from the applicable bidders list after notice to the bidder for that particular class/item. Prospective bidders currently meeting the criteria for inclusion on the list may be reinstated on such lists at their request.

**3.106.06.3 Public Availability**

Names and addresses on bidder's lists may be available for public inspection provided these lists must not be used for private promotional, commercial, or marketing purposes.

**3.106.07 Pre-Bid Conferences**

Pre-bid conferences may be conducted to explain the procurement requirements. They must be announced to all prospective bidders known to have received an Invitation for Bids. The conference should be held long enough after the Invitation for Bids has been issued to allow bidders to become familiar with it but sufficiently before bid opening to allow bidders to make any adjustments based on clarifications made during the conference. Nothing stated at the pre-bid conference shall change the Invitation for Bids unless a change is made by written amendment as provided in Subsection 3.106.08, Amendments to Invitations for Bids. In no case shall it be mandatory for any prospective bidder to attend any such pre-bid conference.

**3.106.08 Amendments to Invitations for Bids****3.106.08.1 Form**

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

**3.106.08.2 Distribution**

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

**3.106.08.3 Timelines**

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. As per [Section 31-7-13\(c\)\(ii\), Mississippi Code of 1972, Annotated](#), no addendum to bid specifications may be issued within two (2) working days of the time established for the receipt of bids unless such addendum also amends the bid opening to a date not less than five (5) working days after the date of the addendum.

**Commentary**

Amendments should be used to:

- (1) Make any changes in the Invitation for Bids such as changes in quantity, purchase descriptions, delivery schedules, and opening dates;
- (2) Correct defects or ambiguities; or
- (3) 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. Any such information when not given to all bidders shall be cause for rejecting all bids.

**3.106.09 Pre-Opening Modification or Withdrawal of Bids****3.106.09.1 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.

**3.106.09.2 Records**

All documents relating to the modification or withdrawal of bids shall be made a part of the

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appropriate procurement file.

### **3.106.10 Late Bids, Late Withdrawals, and Late Modifications**

#### **3.106.10.1 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.

#### **3.106.10.2 Treatment**

No late bid, late modification, or late withdrawal will be considered unless receipt would have been timely but for the action or inaction of state personnel directly serving the procurement activity.

#### **3.106.10.3 Notice**

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

#### **3.106.10.4 Records**

Records equivalent to those required in Subsection 3.106.09.2, Pre-Opening Modification or Withdrawal of Bids, Records, shall be made and kept for each late bid, late modification, or late withdrawal.

### **3.106.11 Receipt, Opening, and Recording of Bids**

#### **3.106.11.1 Receipt**

Upon its receipt, each bid and modification shall be date-stamped or time/date-stamped but not opened and shall be stored in a secure place until the time and date set for bid opening. Electronic bids received will be stored in an electronic lockbox until the time designated for the bid opening.

#### **3.106.11.2 Opening and Recording**

Bids and modifications shall be opened publicly, in the presence of two or more individuals, 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 Agency Procurement Officer, shall be read aloud or otherwise made available. Such information also may be recorded at the time of bid opening; that is, the bids may be tabulated or a bid abstract made. The names of required witnesses shall also be recorded at the opening. The opened bids shall be available for inspection by participants except to the extent the bidder designates trade secrets or other proprietary data to be confidential as set forth in Subsection 3.106.11.3, Confidential Data. Material so designated shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid. Prices and makes and models or catalog numbers 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. Bids shall be available for inspection at any time subsequent to the awarding of the contract affected

by those bids. Inspection shall be in compliance with Section 1.108, Public Access to Procurement Information.

### **3.106.11.3 Confidential Data**

The Agency 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 Agency Procurement Officer shall inform the bidders in writing what portions of the bids will be disclosed and that, unless the bidder protests under Chapter 6, Legal and Contractual Remedies, the bids will be so disclosed. The bids shall be open to inspection as set forth in Section 1.108, Public Access to Procurement Information, subject to any continuing prohibition on the disclosure of confidential data.

#### **Commentary**

It may be appropriate to establish bid receipt times for commodity 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.

### **3.106.12 Mistakes in Bids**

#### **3.106.12.1 General**

Correction or withdrawal of a bid because of an inadvertent, nonjudgmental 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.

#### **3.106.12.2 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 Subsection 3.106.09, Pre-Opening Modification or Withdrawal of Bids.

#### **3.106.12.3 Confirmation of Bid**

When the Agency 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 Subsection 3.106.12.4, Mistakes Discovered After Opening but Before Award, Subsection 3.106.12.5, Mistakes Discovered After Award, and 3.106.12.6, Determinations Required, are met.

**3.106.12.4 Mistakes Discovered After Opening but Before Award**

This subsection sets forth procedures to be applied in three situations described in Subsection 3.106.12.4 (1), Minor Informalities, Subsection 3.106.12.4 (2), Mistakes Where Intended Correct Bid Is Evident, and Subsection 3.202.13.4 (3), Mistakes Where Intended Correct Bid is Not Evident, in which mistakes in bids are discovered after the time and date set for bid opening but before award.

**(1) Minor Informalities**

Minor informalities are matters of form rather than substance evident from the bid document, or insignificant mistakes that can be waived or corrected without prejudice to other bidders; that is, the effect on price, quantity, quality, delivery, or contractual conditions is negligible. The Agency 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:

- (a) Return the number of signed bids required by the Invitation for Bids;
- (b) Sign the bid, but only if the unsigned bid is accompanied by other material indicating the bidder's intent to be bound;
- (c) Failure to submit literature or samples with bid provided that such literature or samples shall be received prior to any award being made; or
- (d) Acknowledge receipt of an amendment to the Invitation for Bids, but only if:
  - (i) It is clear from the bid that the bidder received the amendment and intended to be bound by its terms; or
  - (ii) The amendment involved had a negligible effect on price, quantity, quality, or delivery.

**(2) Mistakes Where Intended Correct Bid Is Evident**

If the mistake and the intended correct bid are clearly evident on the bid document, the bid shall be corrected on the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the bid document are typographical errors, errors in extending unit prices, and mathematical errors.

**(3) Mistakes Where Intended Correct Bid is Not Evident**

A bidder may be permitted to withdraw a low bid if:

- (a) A mistake is clearly evident on the bid document, but the intended correct bid is not similarly evident; or
  - (b) The bidder submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made.
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**3.106.12.5 Mistakes Discovered After Award**

Mistakes shall not be corrected after award of the contract except where the Chief Procurement Officer or the Agency Procurement Officer makes a written determination that it would be unconscionable not to allow the mistake to be corrected.

**3.106.12.6 Determinations Required**

When a bid is corrected or withdrawn, or correction or withdrawal is denied, under Subsections 3.106.12.4, Mistakes Discovered After Opening but Before Award, or 3.106.12.5, Mistakes Discovered After Award, the Chief Procurement Officer or the Agency Procurement Officer shall prepare a written determination showing that the relief was granted or denied in accordance with these regulations, except that the Agency Procurement Officer shall approve the determination required under Subsection 3.106.12.4 (1), Minor Informalities.

**3.106.13 Bid Evaluation and Award****3.106.13.1 General**

The contract is to be awarded to the lowest and best responsible/responsive bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids. See Subsection 3.106.14.2, Award. The Invitation for Bids shall set forth the requirements and criteria which will be used to determine the lowest and best responsible/ responsive bidder. No bid shall be evaluated for any requirement or criterion that is not disclosed in the Invitation for Bids.

**3.106.13.2 Responsibility and Responsiveness**

Responsibility of prospective contractors is covered by Section 3.113, Responsibility of Bidders and Offerers. Responsiveness of bids is covered by Subsection 3.101.01 (6), Responsive Bidder, which defines responsive bidder as "a person who has submitted a bid which conforms in all material respects to the Invitation for Bids."

**3.106.13.3 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:

- (1) Inspection or testing of a product prior to award for such characteristics as quality or workmanship.
- (2) Examination of such elements as appearance, finish, taste, or feel.
- (3) 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 non-responsive.

### 3.106.13.4 Determination of Lowest and Best Bidder

Following determination of product acceptability as set forth in Subsection 3.106.13.3, Product Acceptability, 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 Subsection 3.106.03, Invitation for Bids. Only objectively measurable criteria which are set forth in Subsection 3.106.13.4, Determination of Lowest and Best Bidder, shall be applied in determining the lowest and best bidder. Examples of such criteria include, but are not limited to, guaranteed buy back and ownership or life-cycle cost formulas. Evaluation factors need not be precise predictors of actual future costs, but to the extent possible such evaluation factors shall:

- (1) Be reasonable estimates based upon information the State has available concerning future use; and
- (2) Treat all bids equitably.

### 3.106.13.5 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 3.106.13.4, Determination of Lowest and Best Bidder. Further, this section does not permit negotiations with any bidder.

#### Commentary

The following is an example of a life cycle cost evaluation procedure for purchasing window air conditioners.

#### Life Cycle Cost Evaluation

All proposals meeting the requirements of this specification will be evaluated on the basis of Life Cycle Cost (LCC). The LCC is the initial purchase price, plus the operating costs over an anticipated life expectancy. The LCC evaluation formula is as follows:

$$EC = CO \div EER + P$$

Where: EC = Total evaluated cost (\$) over the 5-year compressor warranty period.

P = Bid Price (\$)

CO = Anticipated operating cost factor of the unit over the 5-year warranty period.

EER = The certified Energy Efficiency Ratio.

The EER is the quotient obtained by dividing the BTU/hr. output by the electrical watts input during cooling.

This value represents the relative electrical efficiency of room air conditioners. (Use higher EER where there is a dual voltage.)

$$CO = (R) (H) (K)$$

Where: R = Rated minimum capacity from the bid form.

H = Total operating hours over 5-year period in each area. (5000 hours)\*

K = Cost of electricity within each area in \$/watt hour

K = \$0.07 per kilowatt-hour = \$0.00007 per watt-hour

Vendor A bid \$375 for a 12,000 btu unit with an EER of 10.0

Vendor B bid \$345 for a 12,000 btu unit with an EER of 9.2

Looking only at price the contract would be awarded to Vendor B.

Using the calculations:

$$\text{Vendor A, EC} = (12,000 \times 5000 \times .00007) / 10 + \$375 = \$795.00$$

$$\text{Vendor B, EC} = (12,000 \times 5000 \times .00007) / 9.2 + \$345 = \$801.52$$

As can be seen by this example, the higher priced air conditioner with the higher energy efficiency ratio is the better purchase because of the lower total cost over the life of ownership. The contract would be awarded to Vendor A.

### 3.106.14 Low Tie Bids

#### 3.106.14.1 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.

#### 3.106.14.2 Award

The prime criterion for making an award where tie bids are involved shall be in compliance with [Section 31-7-15\(1\), Mississippi Code 1972, Annotated](#); i.e., that resident vendors shall be given preference over non-resident vendors. Award shall not be made by a coin toss, except as set forth below, or by dividing business among identical bidders. In the discretion of the Chief Procurement Officer or the Agency Procurement Officer, award shall be made in any permissible manner that will discourage tie bids. If no permissible method will be effective in discouraging tie bids, and a written determination is made so stating, award may be made by a coin toss. In such case, those bidders involved shall be invited to attend the procedure, and two agency employees shall act as witnesses.

**3.106.14.3 Record**

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

- (1) The identification number of the Invitation for Bids.
- (2) The supply, service, or construction item.
- (3) A listing of all the bidders and the prices submitted.

**3.106.15 Documentation of Award**

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

**3.106.16 Publicizing Awards**

Written notice of award shall be sent to the successful bidder. Notice of award shall be made available to the public.

**3.106.17 Multi-Step Sealed Bidding****3.106.17.1 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 the awarding 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.

**3.106.17.2 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. No multi-step sealed bidding method of purchasing will be permitted unless approved by the Chief Procurement Officer or his/her designee. Multi-step sealed bidding may, thus, be used when it is considered desirable:

- (1) To invite and evaluate technical offers to determine their acceptability to fulfill the purchase description requirements;
  - (2) To conduct discussions for the purposes of facilitating understanding of the technical offer and purchase description requirements and, where appropriate, obtain supplemental information, permit amendments of technical offers, or amend the purchase description;
  - (3) To accomplish Subsections 3.106.17.2 (1) and (2), Multi-Step Sealed Bidding,
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Conditions for Use, prior to soliciting priced bids; and

- (4) To award the contract to the lowest responsive and responsible bidder in accordance with the competitive sealed bidding procedures.

### **3.106.18 Pre-Bid Conferences in Multi-Step Sealed Bidding**

Prior to the submission of unpriced technical offers, a pre-bid conference as contemplated by Subsection 3.106.07, Pre-Bid Conferences, may be conducted by the Agency Procurement Officer. The Agency Procurement Officer may also hold a conference of all potential bidders in accordance with Subsection 3.106.07, Pre-Bid Conferences, at any time during the evaluation of the unpriced technical offers.

### **3.106.19 Procedure for Phase One of Multi-Step Sealed Bidding**

#### **3.106.19.1 Form**

Multi-step sealed bidding shall be initiated by the issuance of an Invitation for Bids in the form required by Subsection 3.106.03, The Invitation for Bids, except as hereinafter provided. In addition to the requirements set forth in Subsection 3.106.03, The Invitation for Bids, shall state:

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

#### **3.106.19.2 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 Agency Procurement Officer, a contemplated amendment will significantly change the nature of the procurement, the Invitation for Bids shall be canceled in accordance with Subsection 3.112.04, Cancellation of Solicitation; Rejection of All Bids or Proposals, and a new Invitation for Bids issued.

**3.106.19.3 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.

**3.106.19.4 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:

- (1) Acceptable;
- (2) Potentially acceptable; that is, reasonably susceptible of being made acceptable; or
- (3) Unacceptable. The Agency Procurement Officer shall record in writing the basis for finding an offer unacceptable and make it part of the procurement file.

The Agency Procurement Officer may initiate Phase Two of the procedure if, in the Agency 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 Agency Procurement Officer finds that such is not the case, the Agency Procurement Officer shall issue an amendment to the Invitation for Bids or engage in technical discussions as set forth in Subsection 3.106.19.5, Discussion of Unpriced Technical Offers.

**3.106.19.5 Discussion of Unpriced Technical Offers**

The Agency Procurement Officer may conduct discussions with any bidder who submits an acceptable or potentially acceptable technical offer. During the course of such discussions, the Agency 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 Agency Procurement Officer. Such submission may be made at the request of the Agency Procurement Officer or upon the bidder's own initiative.

**Commentary**

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

**3.106.19.6 Notice of Unacceptable Unpriced Technical Offer**

When the Agency Procurement Officer determines a bidder's unpriced technical offer to be unacceptable, such offerer shall not be afforded an additional opportunity to supplement its technical offer.

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**3.106.20 Mistakes During Multi-Step Sealed Bidding**

Mistakes may be corrected or bids may be withdrawn during Phase One at any time. During Phase Two, mistakes may be corrected or withdrawal permitted in accordance with Subsection 3.106.12, Mistakes in Bids.

**3.106.21 Procedure for Phase Two****3.106.21.1 Initiation**

Upon the completion of Phase One, the Agency Procurement Officer shall either:

- (1) Open priced bids submitted in Phase One (if priced bids were required to be submitted) from bidders whose unpriced technical offers were found to be acceptable;

or

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

**3.106.21.2 Conduct**

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

- (1) No public notice need be given of this invitation to submit priced bids because such notice was previously given;
- (2) After award the unpriced technical offer of the successful bidder shall be disclosed as follows. The Agency 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 Agency 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 Chapter 6, Legal and Contractual Remedies, 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
- (2) 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 3.106.21.2, Procedure for Phase Two, Conduct, 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.

**3.107 Competitive Sealed Proposals****(1) Conditions for Use**

When, under regulations approved by the Public Procurement Review Board (PPRB), the Chief Procurement Officer, the head of a purchasing agency, or a designee of either officer above the level of the Agency Procurement Officer determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State, a contract may be entered into by competitive sealed proposals. The Public Procurement Review Board (PPRB) may provide by regulation that it is either not practicable or not advantageous to the State to procure specified types of supplies or services by competitive sealed bidding.

**(2) Request for Proposals**

Proposals shall be solicited through a Request for Proposal.

**(3) Public Notice**

Adequate public notice of the Request for Proposals shall be given in the same manner as provided in Subsection 3.106.05, Competitive Sealed Bidding, Public Notice.

**(4) Receipt of Proposals**

Proposals shall be opened so as to avoid disclosure of contents to competing offerers during the process of negotiation. A Register of Proposals shall be prepared and shall be open for public inspection after contract award. The Register of Proposals shall indicate the name of all vendors submitting proposals.

**(5) Evaluation Factors**

The Request for Proposals shall state the relative importance of price and other evaluation factors.

**(6) Discussion with Responsible Offerers and Revisions to Proposals**

As provided in the Request for Proposals and as set forth in these regulations, discussions may be conducted with responsible offerers 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. Offerers 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 offerers.

**(7) Award**

Award shall be made to the responsible offerer whose proposal 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.

### **3.107.01 Application**

The provisions of this chapter apply to every procurement of commodities, supplies, and equipment made by competitive sealed proposals. Provisions of this chapter may be used as a guideline when making other procurements by competitive sealed proposals.

### **3.107.02 Conditions for Use of Competitive Sealed Proposals**

#### **3.107.02.1 “Practicable” Distinguished from “Advantageous.”**

As used in Subsection 3.107.02, Conditions for Use of Competitive Sealed Proposals, the words “practicable” and “advantageous” are to be given ordinary dictionary meanings. The term “practicable” denotes what may be accomplished or put into practical application. “Advantageous” denotes a judgmental assessment of what is in the State’s best interest. Competitive sealed bidding may be practicable; that is, reasonably possible but not necessarily advantageous; that is, in the State’s best interest.

#### **3.107.02.2 General Discussion**

Competitive sealed bidding is the preferred method of procurement; however, if it is not practicable and/or advantageous, competitive sealed proposals should be used. If competitive sealed bidding is determined not to be advantageous, competitive sealed proposals may be used when authorized as provided in Subsection 3.107.02.5, Competitive Sealed Proposals, Determinations.

The key element in determining advantageousness is the need for flexibility. The competitive sealed-proposals method differs from competitive sealed bidding in two important ways:

- (1) It permits discussions with competing offerers and changes in their proposals including price.
- (2) It allows comparative judgmental evaluations to be made when selecting among acceptable proposals for award of the contract.

An important difference between competitive sealed proposals and competitive sealed bidding is the finality of initial offers. Under competitive sealed proposals, alterations in the nature of a proposal and in prices may be made after proposals are opened. Such changes are not allowed, however, under competitive sealed bidding. Therefore, unless it is anticipated that a contract can be awarded solely on the basis of information submitted by bidders at the time of opening, competitive sealed bidding is not practicable or advantageous.

Another consideration concerns the type of evaluations needed after offers are received. Where evaluation factors involve the relative abilities of offerers to perform, including degrees of technical or professional experience or expertise, use of competitive sealed proposals is the appropriate procurement method. Similarly, such method is appropriate where the type of need to be satisfied involves weighing artistic and aesthetic values to the extent that price is a secondary consideration. Further, where the types of supplies, services, or construction may require the use of comparative judgmental evaluations to evaluate them adequately, use of competitive sealed proposals is the appropriate method.

**3.107.02.3 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:

- (1) Whether the contract needs to be other than a fixed-price type;
- (2) Whether oral or written discussions may need to be conducted with offerers concerning technical and price aspects of their proposals;
- (3) Whether offerers may need to be afforded the opportunity to revise their proposals, including price;
- (4) 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
- (5) Whether the primary consideration in determining award may not be price.

**3.107.02.4 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:

- (1) If prior procurements indicate that competitive sealed proposals may result in more beneficial contracts for the State; and
- (2) Whether the factors listed in Subsections 3.107.02.3 (2), Competitive Sealed Proposals, When Competitive Sealed Bidding is Not Practicable, through 3.107.02.3 (5) Determinations, 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 as "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's 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 offerers as the discussions proceeded.

#### 3.107.02.5 Determinations

- (1) Before a contract may be entered into by competitive sealed proposals, the Chief Procurement Officer or his/her designee shall determine in writing that competitive sealed bidding is either not practicable or not advantageous to the State.
- (2) The Chief Procurement Officer or his/her designee may make determinations by category of commodities that it is either not practicable or not advantageous to the State to procure specified types of commodities by competitive sealed bidding. Procurements of the specified types of commodities 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.

#### 3.107.02.6 Competitive Sealed Proposal vs. Competitive Sealed Bid

This section of the procurement regulations has defined and compared the competitive sealed proposal and the competitive sealed bid. Both methods are valid procurement procedures.

However, let us caution you that though the sealed proposal process is available, there are few occasions that would dictate its being used. No competitive sealed proposal method of purchasing will be permitted unless approved by the Chief Procurement Officer or his/her designee. The request to purchase by this method must provide justification that would be acceptable under the conditions set forth in Subsection 3.107.02, Conditions for Use of Competitive Sealed Proposals.

### **3.107.03 Content of the Request for Proposals**

The Request for Proposals shall be prepared in accordance with Subsection 3.106.03, The Invitation for Bids, provided that it shall also include:

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

### **3.107.04 Proposal Preparation Time**

Proposal preparation time shall be set to provide offerers a reasonable time to prepare their proposals. A minimum of 30 days shall be provided unless a shorter time is deemed necessary for a particular procurement as determined in writing by the Agency Procurement Officer.

#### **Commentary**

The minimum proposal preparation time should be longer than the minimum bidding time to be specified in Subsection 3.106.04, Bidding Time.

### **3.107.05 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.

### **3.107.06 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 Subsection 3.106.05, Public Notice.

### **3.107.07 Use of Bidders Lists**

Bidder's lists compiled and maintained in accordance with Subsection 3.106.06, Bidders Lists, may serve as a basis for soliciting competitive sealed proposals.

### **3.107.08 Pre-Proposal Conferences**

Pre-proposal conferences may be conducted in accordance with Subsection 3.106.07, Pre-Bid

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Conferences. Any such conference should be held prior to submission of initial proposals.

### **3.107.09 Amendments to Requests for Proposals**

Amendments to Requests for Proposals may be made in accordance with Subsection 3.106.08, Amendments to Invitations for Bids, prior to submission of proposals. After submission of proposals, amendments may be made in accordance with Subsection 3.106.19, Procedure for Phase One of Multi-Step Sealed Bidding, Amendments to the Invitation for Bids.

### **3.107.10 Modification or Withdrawal of Proposals**

Proposals may be modified or withdrawn prior to the established due date in accordance with Subsection 3.106.09, Pre-Opening Modification or Withdrawal of Bids. For the purposes of this section and Subsection 3.107.11, 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 offerers who submitted proposals by the time announced for receipt of proposals may submit best and final offers.

### **3.107.11 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 Subsection 3.107.10, Modification or Withdrawal of Proposals, for the definition of "established due date." They may only be considered in accordance with Subsection 3.107.11, Late Bids, Late Withdrawals, and Late Modifications.

### **3.107.12 Receipt and Registration of Proposals**

Proposals shall not be opened publicly but shall be opened in the presence of two or more agency procurement officials. Proposals and modifications shall be date-stamped or time/date-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 offerer, the number of modifications received, if any, and a description sufficient to identify the supply and/or 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 personnel having a legitimate interest in them. Electronic proposals received will be stored in an electronic lockbox until the time designated for the opening of the proposal.

### **3.107.13 Evaluation of Proposals**

#### **3.107.13.1 Evaluation Factors in the Request for Proposals**

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

#### **3.107.13.2 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.

**3.107.13.3 Classifying Proposals**

For the purpose of conducting discussions under Subsection 3.107.14, Proposal Discussions with Individual Offerers, proposals shall be initially classified as:

- (1) Acceptable
- (2) Potentially acceptable; that is, reasonably susceptible of being made acceptable; or
- (3) Unacceptable

Offerers whose proposals are unacceptable shall be so notified promptly.

**3.107.14 Proposal Discussions with Individual Offerers****3.107.14.1 "Offerers" Defined**

For the purposes of Subsection 3.107.14, Proposal Discussions with Individual Offerers of the Mississippi Procurement Manual and this section, the term "offerers" includes only those businesses submitting proposals that are acceptable or potentially acceptable. The term shall not include businesses who submitted unacceptable proposals.

**3.107.14.2 Purpose of Discussions**

Discussions are held to:

- (1) Promote understanding of the State's requirements and the offerer's proposals; and
- (2) 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.

**3.107.14.3 Conduct of Discussions**

Offerers shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. The Agency 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 offerer's price to another) and/or disclosure of any information derived from competing proposals are prohibited. Any substantial oral clarification of a proposal shall be reduced to writing by the offerer.

**Commentary**

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

**3.107.14.4 Best and Final Offers**

The Agency 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 Agency Procurement Officer 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. Offerers 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 constructed as their best and final offer.

**3.107.15 Mistakes in Proposals****3.107.15.1 Modification or Withdrawal of Proposals**

Proposals may be modified or withdrawn as provided in Subsection 3.107.15.1, Modification or Withdrawal of Proposals.

**3.107.15.2 Confirmation of Proposal**

When the Agency Procurement Officer knows or has reason to conclude before award that a mistake has been made, such officer should request the offerer to confirm the proposal. If the offerer alleges mistake, the proposal may be corrected or withdrawn during any discussions that are held or if the conditions set forth in Subsections 3.107.15.3 through 3.107.15.5 are met.

**3.107.15.3 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.

**(1) During Discussions; Prior to Best and Final Offers**

Once discussions are commenced with any offerer or after best and final offers are requested, any offerer may freely correct any mistake by modifying or withdrawing the proposal until the time and date set for receipt of best and final offers.

**(2) Minor Informalities**

Minor informalities, unless otherwise corrected by an offerer as provided in this section, shall be treated as they are under competitive sealed bidding. See Subsection 3.106.12.4, Mistakes Discovered After Opening but Before Award.

**(3) Correction of Mistakes**

If discussions are not held or if the best and final offers upon which award will be made have been received, mistakes may be corrected and the intended correct offer considered only if:

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

- (b) The mistake is not clearly evident on the face of the proposal, but the offerer 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 offerers.

(4) **Withdrawal of Proposals**

If discussions are not held or if the best and final offers upon which award will be made have been received, the offerer may be permitted to withdraw the proposal if:

- (a) The mistake is clearly evident on the face of the proposal and the intended correct offer is not;
- (b) The offerer submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made but does not demonstrate the intended correct offer; or
- (c) The offerer 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 offerers.

**3.107.15.4 Mistakes Discovered After Award**

Mistakes shall not be corrected after award of the contract except where the Chief Procurement Officer or the Agency Procurement Officer agency finds it would be unconscionable not to allow the mistake to be corrected.

**3.107.15.5 Determinations Required**

When a proposal is corrected or withdrawn, or correction or withdrawal is denied under Subsection 3.106.09, Pre-opening Modification or Withdrawal of Bids, or Subsection 3.107.11, Late Proposals, Late Withdrawals, and Late Modifications, a written determination shall be prepared showing that relief was granted or denied in accordance with these regulations. The Chief Procurement Officer or the Agency Procurement Officer shall prepare the determination, except under Subsection 3.107.15.3, Mistakes Discovered After Receipt of Proposals but Before Award, the determination may be prepared by the Agency Procurement Officer.

**3.107.16 Award**

The Agency Procurement Officer shall make a written determination showing the basis on which the award was found to be most advantageous to the State based on the factors set forth in the Request for Proposals.

**3.107.17 Publicizing Awards**

Written notice of award shall be sent to the successful bidder. Notice of award shall be made available to the public.

**3.107.18 Debriefings**

The Agency Procurement Officer is authorized to provide debriefings that furnish the basis of the

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source selection decision and contract award. For regulations governing vendor debriefings, please see Chapter 6, Section 6.210 of the Manual.

### **3.108 Purchases less than \$50,000.01**

Any procurement not exceeding the amount established by [Section 31-7-13\(b\), Mississippi Code of 1972, Annotated](#), shall be made in accordance with the provision of [Section 31-7-13\(b\), Mississippi Code of 1972, Annotated](#); provided, however, that procurement requirements shall not be artificially divided so as to constitute a purchase under this section. This is not to be interpreted to apply to those purchases which in total do not exceed \$5,000. Purchases which do not total more than \$5,000 may be purchased under regulations promulgated by the Agency Procurement Officer.

#### **3.108.01 Application**

In accordance with Section 3.108, Purchases less than \$50,000.01, this regulation is established for procurements of not more than \$50,000 for commodities, equipment or printing.

#### **Commentary**

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

#### **3.108.02 Authority to Make Small Purchases**

##### **3.108.02.1 Amount**

The Office of the Chief Procurement Officer or a purchasing agency may use this regulation if the procurement is to be less than \$50,000.01 for commodities, equipment or printing. If these methods are not used, the other methods of source selection provided in Section 3.105, Method of Source Selection, shall apply.

##### **3.108.02.2 Existing State Contracts**

Commodities, equipment or printing which may be obtained under current state contracts shall be procured under such agreements in accordance with the terms of such contracts, unless authority to do otherwise is granted by the Department of Finance and Administration acting through the Chief Procurement Officer or his designee.

##### **3.108.02.3 Available from One Source Only**

If the commodity, equipment or printing is available from only one source, the sole-source procurement method set forth in Section 3.109, Sole-Source Procurement, of these regulations and [Section 31-7-13\(m\), Mississippi Code of 1972, Annotated](#), shall be used even if the procurement is a small purchase as specified in Subsection 3.108.04, Purchases less than \$5,000.01.

**3.108.03 Competitive Written Bid Between \$5,000.01 and \$50,000****3.108.03.1 Procedure**

As provided by Statute for small purchases of commodities, equipment or printing costing more than \$5,000 but not more than, \$50,000, no less than two businesses shall be solicited to submit written bids that are recorded and placed in the procurement file. Written bids are defined in [Section 31-7-13\(b\), Mississippi Code of 1972, Annotated](#), and the definition is as follows:

Competitive written bid shall mean a bid submitted on a bid form furnished by the buying agency or governing authority and signed by authorized personnel representing the vendor, or a bid submitted on a vendor's letterhead or identifiable bid form and signed by authorized personnel representing the vendor. Bids may be submitted by facsimile, electronic mail or other generally accepted method of information distribution. Bids submitted by electronic transmission shall not require the signature of the vendor's representative unless required by agencies or governing authorities.

Award shall be made to the business offering the lowest responsive quotation provided at least two competitive written bids have been obtained.

**3.108.03.2 Records**

The written bids shall be recorded and maintained as a public record.

**3.108.04 Purchases less than \$5,000.01**

The Chief Procurement Officer or his designee, or Agency Procurement Officer shall adopt operational procedures for making small purchases of not more than \$5,000. 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.

**3.109 Sole-Source Procurement**

A contract may be awarded for commodities without competition when the Chief Procurement Officer, the head of a purchasing agency, or a designee of either officer determines in writing that there is only one source for the required commodity. Such purchases shall be in compliance with [Section 31-7-13, Mississippi Code of 1972, Annotated](#). State agencies must obtain approval for sole-source purchases from the Office of Purchasing, Travel and Fleet Management. Proper procedures for submitting a Request for Authority to Purchase, P-1, are covered in Subsection 3.124.01, Request for Authority to Purchase, P-1.

**3.109.01 Application**

The provisions of this regulation apply to all sole-source procurements unless emergency conditions exist as defined in Section 3.110, Emergency Procurements.

**3.109.02 Conditions for Use of Sole-Source / Research Procurement(s)**

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 sole-source procurement if there is more than one potential bidder or offerer for that item. The following are examples of

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circumstances which could necessitate sole-source procurement:

- (1) Where the compatibility of equipment, accessories, or replacement parts is the paramount consideration (and manufacturer is sole supplier).
- (2) Where a sole supplier's item is needed for trial use or testing.
- (3) Where a sole supplier's item is to be required when no other item will serve the need of the user entity.

Any agency seeking sole source procurement authority for commodities shall advertise in the same manner provided in [Section 31-7-13\(c\), Mississippi Code of 1972, Annotated](#). Such advertisement shall direct vendors to the procurement portal website established by [Sections 25-53-151 and 27-104-165](#), where the agency shall publish for a minimum of fourteen (14) days the terms of the proposed sole source procurement. The portal publication shall include, but is not limited to, the following information:

1. A description of the commodity that the agency is seeking to procure;
2. An explanation of why the commodity is the only one that can meet the needs of the agency;
3. An explanation of why the source is the only person or entity that can provide the required commodity;
4. An explanation of why the amount to be expended for the commodity is reasonable;
5. The efforts that the agency went through to obtain the best possible price for the commodity; and
6. Procedures for any person or entity that objects and proposes that the commodity published on the procurement portal is not sole source and can be provided by another person or entity. These procedures shall direct the objecting person or entity to notify the agency that published the proposed sole source procurement request with a detailed explanation of why the commodity is not a sole source procurement. If such an objection has been raised, the agency shall follow the following steps:
  - (a) If the agency determines after review that the commodity in the proposed sole source request can be provided by another person or entity, then the agency must withdraw the sole source request publication from the procurement portal website and submit the procurement of the commodity to an advertised competitive bid or selection process.
  - (b) If the agency determines after review that there is only one (1) source for the required commodity, then the agency may appeal to the Public Procurement Review Board. The agency has the burden of proving that the commodity is only provided by one (1) source.
  - (c) If the Public Procurement Review Board has any reasonable doubt as to whether the commodity can only be provided by one (1) source, then the agency must submit the procurement of the commodity to an advertised competitive bid or

selection process.

Once the procedures listed above have been followed, and an item has been certified as a single source item, the item may be purchased without complying with provisions for competitive bidding. Authority must be granted by the Office of Purchasing, Travel and Fleet Management prior to acquisition of the item by using the electronic P-1 process. A letter must be accompanied as an attachment to the P1 request outlining the results of the procedures that have been detailed above.

Following the approved purchase, per [Section 31-7-13 \(m\)\(viii\), Mississippi Code of 1972, Annotated](#), the executive head of the state agency, or his designees, shall file with the Department of Finance and Administration, documentation of the purchase, including a description of the commodity purchased, the purchase price thereof and the source from whom it was purchased when submitting the applicable payment request as more particularly prescribed in the DFA MAAPP Manual. In the case of Institutions of Higher Learning, this can be done by adding an attachment to the university's previously approved P1 request.

### **3.109.03 Negotiation in Sole-Source Procurement**

Once an item has been certified as sole source, the head of the purchasing agency or his/her designee shall conduct negotiations, as appropriate, as to price, delivery, and terms.

### **3.109.04 Sole-Source for Governing Authorities**

In connection with the purchase by governing authorities of non-competitive items only available from one (1) source, a certification of the conditions and circumstances requiring the purchase shall be filed by the governing authority with the board of the governing authority.

### **3.110 Emergency Procurements**

Notwithstanding any other provisions of this regulation, 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 under emergency conditions as defined in [Section 31-7-1\(f\), Mississippi Code of 1972, Annotated](#); 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. Such purchases shall be made in compliance with [Section 31-7-13\(j\), Mississippi Code of 1972, Annotated](#). Agencies shall notify or seek approval from, where required, the Office of Purchasing, Travel and Fleet Management by using the electronic P-1 process.

(1) **Emergencies threatening health and safety or property**

If such emergency threatens the health or safety of any person, or the preservation or protection of property, then the provisions of competitive bidding shall not apply and any officer or agent of the agency having general or specific authority for making the purchase or repair contract shall approve the bill presented for payment and provide justification and certification in writing detailing from whom the purchase was made or with whom the repair contract was made to the Office of Purchasing, Travel and Fleet Management using the electronic P-1 process.

The justification should be written in sufficient detail so that a person not familiar with the situation could be expected to understand the need to forego the normal purchasing procedure. As per [Section 31-7-13\(j\), Mississippi Code of 1972, Annotated](#), the certification for an emergency purchase must be submitted on letterhead and signed by the executive head or his/her designee(s) of the requesting agency. Agencies shall address the following when preparing the justification:

- (a) Does it fall under the definition of an emergency set forth in [Sections 31-7-1\(f\), Mississippi Code of 1972, Annotated](#)?
- (b) What happened to cause the emergency?
- (c) What would be the negative consequences of following normal purchasing procedures?
- (d) Does it threaten the health or safety of any person, or the preservation or protection of property?
- (e) The total purchases made shall only be for the purpose of meeting the needs created by the emergency situation.

Following the emergency purchase, documentation of the purchase, including a description of the commodity purchased, the purchase price thereof and the nature of the emergency shall be filed with the Department of Finance and Administration when submitting the applicable payment request as more particularly prescribed in the DFA MAAPP Manual. In the case of Institutions of Higher Learning, this can be done by adding an attachment to the university's P1 request.

## (2) Emergencies Requiring Approval Prior to Purchase

If the governing board or the executive head, or his designees, of any agency of the state shall determine that an emergency exists in regard to the purchase of any commodities or repair contracts, so that the delay incident to giving opportunity for competitive bidding would be detrimental to the interests of the state, then the head of such agency, or his designees, shall seek approval of the Office of Purchasing, Travel and Fleet Management using the electronic P-1 process.

The justification should be written in sufficient detail so that a person not familiar with the situation could be expected to understand the need to forego the normal purchasing procedure. As per [Section 31-7-13\(j\), Mississippi Code of 1972, Annotated](#), the certification for an emergency purchase must be submitted on letterhead and signed by the executive head or his/her designee(s) of the requesting agency. Agencies shall address the following when preparing the justification:

- (a) Does it fall under the definition of an emergency set forth in [Sections 31-7-1\(f\), Mississippi Code of 1972, Annotated](#)?
  - (b) What happened to cause the emergency?
  - (c) What would be the negative consequences of following normal purchasing procedures?
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- (d) The total purchases made shall only be for the purpose of meeting the needs created by the emergency situation.

Upon receipt of the justification and any applicable board certification, the State Fiscal Officer or his designees, may authorize the purchase or repair without having to comply with competitive bidding requirements.

Following the emergency purchase, documentation of the purchase, including a description of the commodity purchased, the purchase price thereof and the nature of the emergency shall be filed with the Department of Finance and Administration when submitting the applicable payment request as more particularly prescribed in the DFA MAAPP Manual. In the case of Institutions of Higher Learning, this can be done by adding an attachment to the university's P1 request.

### **3.110.01 Application**

The provisions of this regulation apply to every procurement made under emergency conditions that will not permit other source selection methods to be used.

### **3.110.02 Definition of Emergency Conditions**

The term "emergency" shall mean any circumstances caused by fire, flood, explosion, storm, earthquake, epidemic, riot, insurrection, or caused by any inherent defect due to defective construction, or when the immediate preservation of order or public health is necessary by reason of unforeseen emergency, or when the restoration of a condition of usefulness of any public building, equipment, road or bridge appears advisable, or in the case of a public utility when there is a failure of any machine or other thing used and useful in the generation, production or distribution of electricity, water or natural gas or in the transportation or treatment of sewage; or when the delay incident to obtaining competitive bids could cause adverse impact upon the governing authorities or agency, its employees or its citizens. [See Section 31-7-1\(f\), Mississippi Code of 1972, Annotated.](#)

### **3.110.03 Scope of Emergency Procurement**

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

### **3.110.04 Authority to Make Emergency Procurements**

Any state agency may make emergency procurements when an emergency condition arises and the need cannot be met through normal procurement methods, provided approval by the executive head of the agency shall be obtained prior to the procurement and provided 3.110 is followed. Governing authorities shall comply with [Section 31-7-13\(k\), Mississippi Code of 1972, Annotated.](#)

### **3.110.05 Source Selection Methods**

#### **3.110.05.1 General**

The procedure used shall be selected to assure that the required commodities are procured in time to meet the emergency. Given this constraint, such competition as is practicable shall be

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obtained.

### **3.110.05.2 After Unsuccessful Competitive Sealed Bidding**

Competitive, sealed bidding is unsuccessful when bids received pursuant to an Invitation for Bids are unreasonable, non-competitive, or the low bid exceeds available funds as certified by the appropriate fiscal officer, and time or other circumstances will not permit the delay required to re-solicit competitive sealed bids. If emergency conditions exist after an unsuccessful attempt to use competitive sealed bidding, an emergency procurement may be made.

### **3.110.06 Emergency Purchase for Governing Authorities**

The procedures required for a governing authority to make an emergency purchase are set forth in [Section 31-7-13\(k\), Mississippi Code of 1972, Annotated](#), governing authorities are not required to obtain approval from the Office of Purchasing, Travel and Fleet Management.

### **3.111 Competitive Selection Procedures for Services**

See Personal Services Contract Review Board Manual.

### **3.112 Cancellation of Invitations for Bids or Requests for Proposals**

An Invitation for Bids, a Request for Proposals, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, when it is in the best interest of the State. The reasons, therefore, shall be made part of the contract file.

#### **3.112.01 Scope of this Regulation**

The provisions of this regulation shall govern the cancellation of any solicitations whether issued by the State under competitive sealed bidding, competitive sealed proposals, small purchases, or any other source selection method, and rejection of bids or proposals in whole or in part.

#### **3.112.02 Policy**

Solicitations should only be issued when there is a valid procurement need unless the solicitation states that it is for informational purposes only.

Preparing and distributing a solicitation requires the expenditure of time and funds. Businesses likewise incur expense in examining and responding to solicitations. Therefore, although issuance of a solicitation does not compel award of a contract, a solicitation is to be canceled only when there are compelling reasons to believe that the cancellation of the solicitation is in the State's best interest.

#### **3.112.03 Cancellation of Solicitation Notice**

Each solicitation issued may state that the solicitation may be canceled as provided in this regulation.

**3.112.04 Cancellation of Solicitation; Rejection of All Bids or Proposals****3.112.04.1 Prior to Opening**

- (1) 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 proposal in competitive sealed proposals.
- (2) Prior to opening, a solicitation may be canceled 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 for reasons including but not limited to:
  - (a) The buying agency no longer requires the supplies, services, or construction;
  - (b) The buying agency no longer can reasonably expect to fund the procurement; or,
  - (c) Proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable.
- (3) When a solicitation is canceled prior to opening, notice of cancellation shall be sent to all businesses solicited.
- (4) The notice of cancellation shall:
  - (a) Identify the solicitation;
  - (b) Briefly explain the reason for cancellation; and
  - (c) Where appropriate, explain that an opportunity will be given to compete on any re-solicitation or any future procurements of similar supplies, services, or construction.

**3.112.04.2 After Opening**

- (1) 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 for reasons including but not limited to:
  - (a) The supplies, services, or construction being procured are no longer required;
  - (b) Ambiguous or otherwise inadequate specifications were part of the solicitation;
  - (c) The solicitation did not provide for consideration of all factors of significance to the buying entity;
  - (d) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
  - (e) All otherwise acceptable bids or proposals received are at clearly unreasonable prices; or

- (f) There is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith.
- (2) A notice of rejection should be sent to all businesses that submitted bids or proposals, and it shall conform to Subsection 3.112.04.1, Prior to Opening.

### **3.112.04.3 Documentation**

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

## **3.112.05 Rejection of Individual Bids or Proposals**

### **3.112.05.1 General**

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

### **3.112.05.2 Notice in Solicitation**

Each solicitation issued may 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.

### **3.112.05.3 Reasons for Rejection**

#### **(1) Bids**

As used in this section, "bid" means any offer providing pricing submitted in competitive sealed bidding or in the second phase of multi-step sealed bidding and includes submissions under Section 3.108, Purchases less than \$50,000.01, if no changes in offers are allowed after submission. Reasons for rejecting a bid include but are not limited to:

- (a) The business that submitted the bid is non-responsible as determined under Subsection 3.113.05, Written Determination of Non-responsibility Required;
- (b) The bid is not responsive; that is, it does not conform in all material respects to the Invitation for Bids, see Subsection 3.106.13.2, Responsibility and Responsiveness; or
- (c) The supply or service 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 Subsection 3.106.13.3, Product Acceptability.

#### **(2) Proposals**

As used in this section, "proposal" means any offer submitted in response to any solicitation for a proposal, except a bid as defined in Subsection 3.112.05.3, Reasons for Rejection. Unless the solicitation states otherwise, proposals need not be

unconditionally accepted without alteration or correction, and the 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:

- (a) The business that submitted the proposal is non-responsible as determined under Section 3.113, Responsibility of Bidders and Offerers.
- (b) 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
- (c) The proposed price is clearly unreasonable.

#### **3.112.05.4 Notice of Rejection**

Vendors that have submitted bids or proposals which are rejected shall be notified of the rejection and the reasons therefore.

#### **3.112.06 "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 non-responsive. If the bid or proposal is properly so limited, the buying entity shall not reject part of such bid or proposal and award on the remainder. "All or none" bids shall not be requested unless it is determined that a multiple number of bidders can provide pricing on all items requested. If the "all or none" requirement limits the bidding to the point that only a single responsive bid is received, the Office of Purchasing, Travel and Fleet Management will not approve the request unless ample justification is presented.

#### **3.112.07 Disposition of Bids or Proposals**

When bids or proposals are rejected, or a solicitation canceled 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 offerers.

#### **3.113 Responsibility of Bidders and Offerers**

##### **(1) Determination of Non-responsibility**

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

##### **(2) Right of Nondisclosure**

Information furnished by a bidder or offerer pursuant to this section shall not be disclosed outside of the office of the Chief Procurement Officer or the purchasing agency if so requested by the bidder or offerer.

**3.113.01 Application**

A determination of responsibility or non-responsibility shall be governed by this regulation.

**3.113.02 Standards of Responsibility****3.113.02.1 Standards**

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

- (1) Available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
- (2) A satisfactory record of performance;
- (3) A satisfactory record of integrity;
- (4) Qualified legally to contract with the State; and
- (5) Supplied all necessary information in connection with the inquiry concerning responsibility.

**3.113.02.2 Information Pertaining to Responsibility**

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

**3.113.03 Ability to Meet Standards**

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

- (1) Evidence that such contractor possesses such necessary items;
- (2) Acceptable plans to subcontract for such necessary items; or
- (3) A documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items.

**3.113.04 Duty Concerning Responsibility**

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

**3.113.05 Written Determination of Non-responsibility Required**

If a bidder or offerer who otherwise would have been awarded a contract is found non-responsible, a written determination of non-responsibility setting forth the basis of the finding shall be prepared by the Chief Procurement Officer or the head of a purchasing agency. A copy of the determination shall be sent promptly to the non-responsible bidder or offerer. The final determination shall be made part of the procurement file.

**3.114 Prequalification of Suppliers**

Prospective suppliers may be pre-qualified for particular types of supplies, services, and construction. Solicitation mailing lists of potential contractors shall include but shall not be limited to such pre-qualified suppliers.

**3.114.01 Prequalification****3.114.01.1 General**

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

**3.114.01.2 Qualified Products Lists**

This section is not applicable to qualified products lists which are treated in Subsection 4.103.01.2, Authority to Contract for Preparation of Specifications.

**3.115 Cost or Pricing Data****(1) Contractor Certification**

A contractor shall when requested by the buying entity except as provided in Subsection 3.115 (3), Cost or Pricing Data Not Required, submit cost or pricing data and shall certify that, to the best of its knowledge and belief, the cost or pricing data submitted was accurate, complete, and current as of a mutually determined specified date.

**(2) Price Adjustment**

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

**(3) Cost or Pricing Data Not Required**

The requirements of this section need not be applied to contracts:

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

- (b) Where the contract price is based on established catalog prices or market prices;
  - (c) Where contract prices are set by law or regulations; or
  - (d) Where it is determined in writing that the requirements of this section may be waived, and the reasons for such waiver are stated in writing.
- (4) When it is determined that offerer or bidder should provide cost or pricing data to justify a bid or proposal, this regulation may be used as a guideline for such negotiation.

### **3.115.01 Scope of Regulation**

This regulation sets forth the pricing policies which are applicable to contracts of any type and any price adjustments thereunder when cost or pricing data are required to be submitted. The provisions of this regulation requiring submission of cost or pricing data do not apply to a contract let by competitive sealed bidding (including multi-step bidding) or small purchases except as may be provided herein.

### **3.115.02 Requirement for Cost or Pricing Data**

#### **3.115.02.1 Submission of Cost or Pricing Data**

Cost or pricing data may be required in support of a proposal when:

- (1) Any contract expected to exceed the limit set in the PSCRB Manual is to be awarded by competitive sealed proposals or by sole-source procurement;
- (2) An emergency procurement is made in excess of the limit set in the PSCRB Manual, but such data may be submitted after contract award; or
- (3) The Agency Procurement Officer makes a written determination that the circumstances warrant required submission of cost or pricing data; provided, however, cost or pricing data shall not be required where the contract award is made pursuant to competitive sealed bidding.

### **3.115.03 Meaning of Terms "Adequate Price Competition," "Established Catalog Prices" or "Market Prices," and "Prices Set by Law or Regulation"**

#### **3.115.03.1 Application**

The terms "adequate price competition," "established catalog prices or market prices," and "prices set by law or regulations" shall be construed in accordance with the following definitions.

#### **3.115.03.2 Adequate Price Competition**

Price competition exists if competitive sealed proposals are solicited and at least two responsible offerers independently compete for a contract to be awarded to the responsible offerer 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 Agency Procurement Officer

determines in writing that such competition is not adequate.

### **3.115.03.3 Established Catalog Prices or Market Prices**

- (1) "Established Catalog Price" means the price included in a catalog, price list, schedule, or other form that:
  - (a) Is regularly maintained by a manufacturer or 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 categories of buyers or buyers constituting the general buying public for the supplies or services involved.
- (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.
- (3) If, despite the existence of an established catalog price or market price, and after consultation with the prospective contractors, the Agency Procurement Officer considers that such price is not reasonable, cost or pricing data may be requested. Where the reasonableness of the price can be assured by a request for cost or pricing data limited to data pertaining to the differences in the item or services being procured and those listed in the catalog or market, requests should be so limited.

### **3.115.03.4 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 offerer or contractor may charge the State and other customers.

### **3.115.04 Submission of Cost or Pricing Data and Certification**

#### **3.115.04.1 Time and Manner**

When cost or pricing data are required, they shall be submitted to the Agency Procurement Officer prior to beginning price negotiations at any reasonable time and in any reasonable manner prescribed by the Agency Procurement Officer. When the Agency Procurement Officer requires the offerer or contractor to submit cost or pricing data in support of any proposal, such data shall either be actually submitted or specifically identified in writing.

#### **3.115.04.2 Obligation to Keep Data Current**

The offerer or contractor is required to keep such submission current until the negotiations are concluded or, if applicable, until the contract is expired.

#### **3.115.04.3 Time for Certification**

The offerer or contractor shall certify as soon as practicable after agreement is reached on price that the cost or pricing data submitted are accurate, complete, and current as of a mutually

determined date prior to reaching agreement.

#### **3.115.04.4 Refusal to Submit Data**

A refusal by the offerer to supply the required data shall be referred to the Chief Procurement Officer or the head of a purchasing agency, whose duty shall be to determine in writing whether to disqualify the non-complying offerer, to defer award pending further investigation, or to enter into the contract. A refusal by a contractor to submit the required data to support a price adjustment shall be referred to the Chief Procurement Officer or the head of a purchasing agency who shall determine in writing whether to further investigate the price adjustment, not to allow any price adjustment, or to set the amount of the price adjustment, subject to the contractor's rights under Chapter 6, Legal and Contractual Remedies.

#### **3.115.05 Price Analysis Techniques**

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

- (1) Price submission of prospective bidders or offers in the current procurement;
- (2) Prior price quotations and contract prices charged by the bidder, offerer, or contractor;
- (3) Prices published in catalogs or price lists;
- (4) Prices available on the open market; and
- (4) In-house estimates of cost.
  - (a) In making such analysis, consideration must be given to any differing terms and conditions.

#### **3.115.06 Cost Analysis Techniques**

Cost analysis includes the appropriate verification of cost or pricing data, and the use of this data to evaluate:

- (1) Specific elements of costs;
  - (2) The necessity for certain costs;
  - (3) The reasonableness of amounts estimated for the necessary costs;
  - (4) The reasonableness of allowances for contingencies;
  - (5) The basis used for allocation of indirect costs;
  - (6) The appropriateness of allocations of particular indirect costs to the proposed contract; and
  - (7) The reasonableness of the total cost or price.
-

**3.115.07 Evaluations of Cost or Pricing Data**

Evaluations of cost or pricing data should include comparisons of costs and prices of an offerer's cost estimates with those of other offerers and any independent Mississippi price and cost estimates. They shall also include consideration of whether such costs are reasonable and allowable.

**3.116 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. A cost reimbursement contract may be used only when a determination is made in writing that such contract is 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.

**3.116.01 Scope of Regulation**

This regulation contains descriptions of types of contracts and limitations as to when they should be utilized by the State in its procurements.

**3.116.02 Cost-Plus-a-Percentage-of-Cost Contracting**

Except for a cost-plus-a-percentage-of-cost contract which agencies are urged to avoid, the use of any type of contract is permissible.

**Commentary**

A cost-plus-a-percentage-of-cost contract is one in which, prior to beginning 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.

**3.116.03 Policy Regarding Selection of Contract Types****3.116.03.1 General**

The selection of an appropriate contract type depends on factors such as the nature of the commodities or equipment 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.

The objective when selecting a contract type is to obtain the best value in needed commodities or equipment in the time required and at the lowest cost or price to the State. In order to achieve this objective, the Agency Procurement Officer, before choosing a contract type, should review those elements of the procurement which directly affect the cost, time, risk, and profit incentives bearing on the performance.

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

- (1) The type and complexity of the commodities or equipment item being procured;
- (2) The difficulty of estimating performance costs such as the inability of the State to develop definitive specifications, to identify the risks to the contractor inherent in the nature of the work to be performed, or otherwise to establish clearly the requirements of the contract;
- (3) The administrative costs to both parties;
- (4) The degree to which the State must provide technical coordination during the performance of the contract;
- (5) The effect of the choice of the type of contract on the amount of competition to be expected;
- (6) The stability of material or commodity market prices or wage levels;
- (7) The urgency of the requirement; and
- (8) 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.

### **3.116.03.2 Use of Contract Types not Herein Described**

The provisions of Section 3.116, Types of Contracts, describe and define the principal contract types. Any other type of contract may be used provided the Chief Procurement Officer or the head of a purchasing agency determines that such use is in the State's best interest.

### **3.116.04 Types of Fixed-Price Contracts**

#### **3.116.04.1 General**

A fixed-price contract places responsibility on the contractor for the delivery of the commodity or equipment in accordance with the contract terms at a price that may be firm or may be subject to contractually specified adjustments. The fixed-price contract is appropriate for use when the extent and type of work necessary to meet requirements can be reasonably specified and the cost can be reasonably estimated, as is generally the case for construction or standard commercial products. A fixed-price type of contract is the only type of contract that can be used in competitive sealed bidding.

### Commentary

Fixed-price contracts are preferred for use in procurements and should be used whenever possible. However, when risks are unknown or not readily measurable in terms of cost, the use of such contracts can result in inflated prices and inadequate competition; poor performance, disputes, and claims when performance proves difficult; or excessive profits when anticipated contingencies do not occur.

#### 3.116.04.2 Firm Fixed-Price Contract

A firm fixed-price contract provides a price that is not subject to adjustment because of variations in the contractor's cost of performing the work specified in the contract. It should be used whenever prices which are fair and reasonable to the State can be established at the outset. Bases upon which firm fixed prices may be established include:

- (1) Adequate price competition for the contract;
- (2) Comparison of prices in similar prior procurements in which prices were fair and reasonable;
- (3) Establishment of realistic costs of performance by utilizing available cost or pricing data and identifying uncertainties in contract performance; or
- (4) Use of other adequate means to establish a firm price.

#### 3.116.04.3 Fixed-Price Contract with Price Adjustment

- (1) A fixed-price contract with price adjustment provides for variation in the contract price under special conditions defined in the contract. Bid proposals and contracts may include price adjustment clauses with relation to the cost to the contractor based upon a nationally published industry-wide or nationally published and recognized cost index. The bid proposal and contract documents utilizing a price adjustment clause shall contain the basis and method of adjusting unit prices for the change in the cost of such commodities, equipment and public construction. State agencies shall submit proposed specifications containing price adjustment clauses to the Office of Purchasing, Travel and Fleet Management for review and approval prior to soliciting bids. An adjustment would be implied in the authority for change orders as would be applicable to construction contracts.
- (2) If the contract permits unilateral action by the contractor to bring about the condition under which a price increase may occur, the contract shall reserve to the State the right to reject the price increase and terminate without cost the future performance of the contract. The contract shall also require that notice of any such price increase shall be given within such time prior to its effective date as is specified in the contract.

**3.116.05 Definite Quantity and Indefinite Quantity Contracts****3.116.05.1 Definite Quantity**

A definite quantity contract is a fixed-price contract that provides for delivery of a specified quantity of supplies or services either at specified times or when ordered.

**3.116.05.2 Indefinite Quantity**

An indefinite quantity contract is a contract for an indefinite amount of supplies or services to be furnished at specified times, or as ordered, that establishes unit prices of a fixed-price type. Generally an approximate quantity or the best information available as to quantity is stated in the solicitation. The contract may provide a minimum quantity the State is obligated to order and may also provide for a maximum quantity provision that limits the State's obligation to order.

**3.116.05.3 Requirements Contracts**

A requirements contract is an indefinite quantity contract for supplies or services that obligates the State to order all the actual requirements of designated using agencies during a specified period of time. The obligation to order the State's actual requirements is limited only by the provisions of [Section 31-7-12\(1\), Mississippi Code of 1972, Annotated](#). For the protection of the State and the contractor, requirements contracts shall include the following:

- (1) A provision which requires the State and any other users named in the solicitation to order their actual requirements of the supplies or services covered. However, the State may reserve in the solicitation and in the resulting contract the right to take bids separately if a particular quantity requirement arises which exceeds the State's normal requirements or an amount specified in the contract.
- (2) Three exemptions from ordering under the contract occur when:
  - (a) 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 non-recurring, special need of the buying entity;
  - (b) Commodities are produced or services are performed incidental to the State's own programs, such as Mississippi Industries for the Blind, that can satisfy the need; or
  - (c) The Chief Procurement Officer approves a finding that prices obtained in compliance with paragraph [\(a\), \(b\), or \(c\) of Section 31-7-13, Mississippi Code of 1972, Annotated](#), provide a cost effective alternative to the established state contract.

**3.117 Lease Contracts****3.117.01 Description**

A lease is a contract for the use of equipment or other commodities under which title will not pass to the State at any time. Subsection 3.117.03, Option Provisions, applies to a lease with purchase option where title may pass to the State.

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**3.117.02 Use**

A lease may be entered into provided:

- (1) It is in the best interest of the State;
- (2) All conditions for renewal and costs of termination are set forth in the lease; and
- (3) The lease is not used to circumvent normal procurement procedures.

**3.117.03 Option Provisions****3.117.03.1 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.

**3.117.03.2 Exercise of Option**

Before exercising any option for renewal, extension, or purchase, the Agency 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.

**3.117.03.3 Lease with Purchase Option**

Because a purchase option changes the nature of the procurement, it has been determined that agencies shall not enter into lease contracts which contain a purchase option.

**Commentary**

The justification for prohibiting the lease with an option to purchase has several issues. If an agency were to solicit bids and enter into a contract based upon the lowest lease cost, and then, at the end of the contract period, determine that they desire to take advantage of a purchase option, it is possible that the change from a lease to a purchase would have caused a different bidder to actually be the lowest bidder. In addition, during a lease, funds generally come from a contractual service fund while in a purchase, funds come from the "equipment" budget. If an agency were to lease an item for a period of time and then take advantage of the purchase option, they would have used "contractual service" funds to purchase equipment. Finally, since all lease/purchase by state agencies shall fall under the Master Lease Purchase Program, the implementation of the purchase option would create a situation where the agency has lease/purchased the item without using the Master Lease Purchase Program.

**3.117.04 Lease-Purchase Contracts****3.117.04.1 General**

Lease-purchase contracts are authorized under [Sections 31-7-10 and 31-7-13\(m\), Mississippi Code of 1972, Annotated](#). These are extended term contracts requiring payment over a specified period of time up to the useful life of the equipment as determined by the Asset Depreciation Range (ADR) established by the Federal Internal Revenue Service. Such contracts almost certainly will transcend a fiscal year. Therefore, it is required that any such contract shall include a non-appropriation clause. This clause provides that should the contract be canceled for nonavailability of funds the equipment shall be returned to the lessor with no further obligations on the part of the lessee except that all payments due up to the end of the fiscal year in which funding was available shall be paid. No agency shall enter into any lease-purchase contract without approval of the Department of Finance and Administration. Any lease-purchase contract is considered to be a purchase transaction; therefore, payments made pursuant to such contracts shall be made from the funding category of capital outlay equipment. The universities should preview the Institutions of Higher Learning's policies concerning lease-purchase contracts.

**3.117.05 Multi-year or Short-term Rental Lease Agreements****3.117.05.1 General**

Multi-year or short-term rental lease agreements may be used when:

- (1) It would promote economy in procurement by obtaining the benefits of reduced monthly rental cost due to extended term rental and sufficient funds are not available for purchase;
- (2) The equipment requested is for a special project that would not warrant a purchase as the project is of short duration and with the termination of that project there would be no further need for the equipment; and
- (3) Such reason as may be prescribed by law for certain entities.

**3.117.05.2 Procedures**

Subsection 2.103.03, Rental, Lease, Lease-Purchase of Equipment and Furniture, sets forth the procedures for state agencies to follow when entering into a rental agreement.

**Commentary**

Careful evaluation of the economics of leasing versus buying is required prior to making the 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.

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.

Any contract that by the terms of such contract obligates the lessee to make payments for any period past the last day of the fiscal year in which the contract was entered into shall include a non-appropriation clause.

### **3.117.05.3 Automatic Renewal Clause**

Agencies shall not enter into contracts which contain an automatic renewal clause without first obtaining the written approval of the Office of Purchasing, Travel and Fleet Management.

### **3.117.05.4 Rental Agreement for use by Mississippi Departments and Vendors**

All rentals under the terms of a state contract must utilize the Rental Agreement. In addition, agencies are urged to use the Rental Agreement for all other rentals.

### **3.117.06 Lease Termination**

Multi-year agreements frequently offer lower monthly rental charges as they carry a certain assurance that the equipment will be in service for the specified time, thereby providing a greater return to the owner on the original investment. Early cancellation of leases may result in termination removal charges. Therefore, only two reasons are considered justifications for requesting cancellation:

- (1) Equipment is inoperative or inefficient and the lessor either cannot or will not correct the situation.
- (2) Funding for the succeeding fiscal year is not available and the provisions of the funding-out clause must be exercised.

In the case of inoperative or inefficient equipment, no termination or removal charges will be paid by state agencies.

When exercising provisions of the funding-out clause, the removal charges as presented in the original contract shall be due and payable; however, no payment of termination charges will be allowed.

### **3.118 Multi-Term Contracts**

- (1) Specified Period

Unless otherwise provided by law, a contract for commodities may be entered into for a period of time not to exceed 60 months 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 thereof.

(2) Determination Prior to Use

Prior to the utilization of a multi-term contract, the following must be determined:

- (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.

**3.118.01 Multi-Term Contracts - General**

**3.118.01.1 General**

A multi-term contract is appropriate when it is in the best interest of the State to obtain uninterrupted services or firm pricing for commodities extending over more than one fiscal period, where the performance of such services involves high start-up costs or where a changeover of service contractors involves high phase-in/phase-out costs during a transition period. The multi-term method of contracting is also appropriate when special production of definite quantities of supplies for more than one fiscal period is necessary to best meet the State's needs, but funds are available only for the initial fiscal period. Special production refers to production for contract performance which requires alteration of the contractor's facilities or operations involving high start-up costs. The contractual obligation of both parties in each fiscal period succeeding the first is subject to the appropriation and availability of funds thereof. The contract must provide that in the event that funds are not available for any succeeding fiscal period, the remainder of such contract shall be canceled.

**3.118.01.2 Multi-Term Contract Regulation Inapplicable**

Section 3.118, Multi-Term Contracts, applies only to contracts for commodities or services described in Subsection 3.118.01.1, General, and does not apply to any other contract including, but not limited to, contracts for construction and leases.

**3.118.02 Conditions for Use of Multi-Term Contracts**

A multi-term contract may be used when it is determined by the Agency Procurement Officer that:

- (1) Special production of definite quantities or the furnishing of long-term services are required to meet needs of the State; and
- (2) A multi-term contract will serve the best interests of the State by encouraging effective competition or otherwise promoting economies in State procurement.

**3.118.03 Multi-Term Contract Procedure**

**3.118.03.1 Solicitation**

The solicitation must state:

- (1) The amount of supplies or services required for the proposed contract period.
-

- (2) That a unit price must be given for each supply or service, and that such unit prices must be the same throughout the contract.
- (3) That the multi-term contract will be canceled 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.
- (4) That the Agency 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.
- (5) That a multi-term contract may be awarded and how award will be determined including the fact that prices must be firm for the full term of the contract or, that a price adjustment is allowed, provided that the basis and method of adjusting unit prices must be included in the solicitation.

### **3.118.03.2 Award**

Award must be made as stated in the solicitation and permitted under the source selection method utilized.

### **3.118.03.3 Cancellation**

- (1) "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 canceled. Cancellation results when the Agency Procurement Officer:
  - (a) Notifies the contractor of nonavailability of funds for contract performance for any fiscal period subsequent to the first; or
  - (b) Exercises cancellation provision of the original contract.
- (2) 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 canceled as provided in this subsection. If a contract is canceled for lack of funding, all obligations due the contractor for the period during which funding was available shall be paid. Cancellation for reasons of nonavailability of funding relieves the purchaser of all contractual obligations for any contract period subsequent to the date of cancellation. No contract shall be canceled for lack of funds during a fiscal year period when funds were allocated for such contract.

#### **Commentary**

Multi-term contracts as set forth in this section should be interpreted to mean a contract having effective dates that would span two fiscal years or two appropriation periods and would obligate the purchasing entity to purchase a specified quantity of supplies over that period. It does not refer to a term contract that only establishes a price for which an

unspecified quantity of supplies may be purchased.

### **3.119 Multiple Source Contracting**

#### **3.119.01 Incremental Award**

##### **3.119.01.1 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 offerer for different amounts of the same item are necessary to obtain the total quantity for the required delivery.

##### **3.119.01.2 Intent to Use**

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

##### **3.119.01.3 Determination Required**

The Agency 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.

#### **3.119.02 Multiple Award**

##### **3.119.02.1 General**

A multiple award is an award of an indefinite quantity contract for one or more commodities or services to more than one bidder or offerer 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), Section 75-2-306, [Mississippi Code of 1972, Annotated](#).

##### **3.119.02.2 Limitations on Use**

A multiple award may be made when award to two or more bidders or offerers for similar products is necessary for adequate delivery, service, or product compatibility. Any multiple award shall be made in accordance with the provisions of Section 3.106, Competitive Sealed Bids, Section 3.107, Competitive Sealed Proposals, Section 3.108, Purchases less than \$50,000.01, and Section 3.110, 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. Awards shall not be made for the purpose of dividing the business, making available product or supplier selection to allow for user preference unrelated to utility or economy, or avoiding the resolution of tie bids. Any such awards shall be limited to the least number of suppliers necessary to meet the valid requirements of using agencies.

**3.119.02.3 Contract and Solicitation Provisions**

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

- (1) The State shall reserve the right to take bids separately if a particular quantity requirement arises which exceeds its normal requirement or an amount specified in the contract;
- (2) The State shall reserve the right to take bids separately if the Chief Procurement Officer approves a finding that the supply or service available under the contract will not meet a non-recurring special need of the agency; and
- (3) The contract may allow the State to procure commodities produced, or services performed, incidental to the State's own programs, such as, Mississippi Industries for the Blind, when such supplies or services satisfy the need.

**3.119.02.4 Intent of 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 must be stated in the solicitation.

**3.119.02.5 Determination Required**

The Agency Procurement Officer shall make a written determination setting forth the reasons for a multiple award, which must 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. 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 Section 3.106, Competitive Sealed Bids, Section 3.107, Competitive Sealed Proposals, Section 3.108, Purchases less than \$50,000.01, and Section 3.110, Emergency Procurements, respectively.

**3.120 Right to Inspect Plant**

The State may, at reasonable times during normal posted business hours, 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.

**3.120.01 Inspection of Plant or Site**

Circumstances under which the State may perform inspections include, but are not limited to,

inspections of the contractor's plant or site in order to determine:

- (1) Whether the standards set forth in Subsection 3.113.02, Standards of Responsibility, have been met or are capable of being met; and
- (2) If the contract is being performed in accordance with its terms.

### **3.120.02 Access to Plant or Place of Business**

The State may enter a contractor's or subcontractor's plant or place of business to:

- (1) Inspect supplies or services for acceptance by the State pursuant to the terms of a contract; and
- (2) Investigate in connection with an action to debar or suspend a person from consideration for award of contracts pursuant to Section 6.102, Authority to Debar or Suspend.

### **3.120.03 Inspection and Testing of Supplies and Services**

#### **3.120.03.1 Solicitation and Contractual Provisions**

Mississippi contracts may provide that the State may inspect supplies and services at the contractor's or subcontractor's facility and perform tests to determine whether they conform to solicitation requirements or, after award, to contract requirements and are, therefore, acceptable. Such inspections and tests shall be conducted in accordance with the terms of the solicitation and contract.

#### **3.120.03.2 Procedures for Trial Use and Testing**

The Chief Procurement Officer may establish operational procedures governing the testing and trial use of equipment, materials, and other supplies by any state agency and the application of resulting information and data to specifications or procurements.

### **3.120.04 Conduct of Inspections**

#### **3.120.04.1 Inspectors**

Inspections or tests shall be performed so as not to unduly delay the work of the contractor or subcontractor. No inspector other than the Agency Procurement Officer may change any provision of the specifications or the contract without written authorization of the Agency Procurement Officer. The presence or absence of an inspector shall not relieve the contractor or subcontractor from any requirements of the contract.

#### **3.120.04.2 Location**

When an inspection is made in the plant or place of business of a contractor or subcontractor, such contractor or subcontractor must provide without charge all reasonable facilities and assistance for the safety and convenience of the person performing the inspection or testing.

**3.120.04.3 Time**

Inspection or testing of supplies and services performed at the plant or place of business of any contractor or subcontractor must be performed at reasonable times during normal posted business hours.

**3.120.05 On-site Inspection**

On-site inspection of the construction of the equipment must be performed in accordance with the terms of the contract.

**3.121 Finality of Determinations**

The determinations required by Subsection 3.106.09, Pre-Opening Modification or Withdrawal of Bids, Subsection 3.106 (6), Competitive Sealed Bids, Cancellation of Awards, Subsection 3.107 (1), Competitive Sealed Proposals, Conditions for Use, Subsection 3.107. (4), Competitive Sealed Proposals, Award, Section 3.109, Sole-Source Procurement, Section 3.110, Emergency Procurements, Section 3.111, Competitive Selection Procedures for Services, Subsection 3.113 (2), Responsibility of Bidders and Offerers, Determination of Non-responsibility, Subsection 3.115 (3), Cost or Pricing Data, Cost or Pricing Data Not Required, Section 3.116, Types of Contracts, and Subsection 3.118 (2), Multi-Term Contracts, Determination Prior to Use, are final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.

**3.122 Reporting of Anticompetitive Practices**

When for any reason collusion or other anticompetitive practices are suspected among any bidders or offerers, a notice of the relevant facts shall be transmitted to the Attorney General.

**3.122.01 Anticompetitive Practices**

For the purposes of this regulation, an anticompetitive practice is a practice among bidders or offerers which reduces or eliminates competition or restrains trade. An anticompetitive practice can result from an agreement or understanding among competitors to restrain trade such as submitting collusive bids or proposals, or result from illicit business actions which have the effect of restraining trade, such as controlling the resale price of products or an improper collective refusal to bid. Indications of suspected anticompetitive practices include, but are not limited to, identical bids or proposals, rotated low bids or proposals, sharing of the business, "tie-in" sales, resale price maintenance, and group boycotts. See Subsection 3.122.05, Other Anticompetitive Practices.

**Commentary**

Bidders and offerers are prohibited by federal and some states' law from collectively responding to a solicitation in a manner that controls directly or indirectly the price of a supply, service, or construction item sought. This prohibition may extend generally to such actions as establishing any of the following: minimum or maximum prices, uniform list prices, uniform credit terms, uniform discounts, uniform costs and mark-ups, uniform trade-in allowances, specified price differentials between varying grades of the same product, price ranges, price scales or price calculation formulas, and minimum fee schedules.

**3.122.02 Independent Price Determination**

Every solicitation may provide that by submitting a bid or offer, the bidder or offerer certifies that the price submitted was independently arrived at without collusion.

Editorial Note: Some agencies may want to require the signing of a separate form which certifies that the price in the bid or offer was arrived at independently.

**3.122.03 Detection of Anticompetitive Practices**

In order to assist in ascertaining whether or not an anticompetitive practice may have occurred or may be occurring, the Agency Procurement Officer should be alert and sensitive to conditions of the market place and will often find it necessary to study past procurements including, as appropriate, the following:

- (1) A study of the bidding history of a commodity or service item over a period of time sufficient to determine any significant bidding patterns or changes.
- (2) A review of similar Mississippi contract awards over a period of time.
- (3) Consultation with outside sources of information, such as bidders or offerers who have competed for similar Mississippi business in the past but who are no longer competing for such business.

**Commentary**

Guidance on the detection of collusive bidding may be found in Government Purchasing and the Antitrust Laws at pages 21-24 (National Association of Attorneys General and National Association of State Purchasing Officials, May 1977).

**3.122.04 Identical Bidding and Price Fixing**

The term "identical bidding" means the submission by bidders or offerers of the same total price or the same price on a particular line item. The submission of identical bids may or may not signify the existence of collusion. In some instances, price controls imposed by state or federal governments result in the submission of identical bids. Identical bids for supplies are more likely to occur in the absence of collusion if:

- (1) The supply is a commodity with a well-established market price or a brand name with a "suggested retail price;"
- (2) The quantity being purchased is small in relation to the supplier's total sales;
- (3) Early delivery is required; or
- (4) Transportation expenses are low relative to total costs.

In seeking to determine whether collusion has taken place, the Agency Procurement Officer

should view the identical bids against present and past pricing policies of the bidders or offerers, the structure of the industry involved including comparisons of prices f.o.b. shipping point and f.o.b. destination, and the nature of the supply, service, or construction involved, such as whether it is a basic chemical or metal. Identical bids may also result from resale price maintenance agreements which are described in Subsection 3.122.05.3, Resale Price Maintenance. Any other attempt by bidders or offerers to fix prices should also be reported.

#### **Commentary**

Executive Order No. 10,936, 26 Fed. Reg. 3555 (1961) directs the U.S. Attorney General to invite state and local governments to report tie bids.

### **3.122.05 Other Anticompetitive Practices**

#### **3.122.05.1 General**

The practices which are described in Subsection 3.122.05.2, Rotated Low Bids or Proposals, through 3.122.05.6, Group Boycott, and which the Agency Procurement Officer suspects might be anticompetitive shall be reported in accordance with Subsection 3.122.06, Reporting Suspected Anticompetitive Practices.

#### **3.122.05.2 Rotated Low Bids or Proposals**

Rotated low bids or proposals result where all bidders or offerers participating in the collusive scheme submit bids and by agreement alternate being the lowest bidder or offerer. To aid in determining whether rotation may be occurring, the agency Procurement Office must review past similar procurements in which the same bidders or offerers have participated.

#### **3.122.05.3 Resale Price Maintenance**

The practice of resale price maintenance consists of an agreement between a manufacturer and a distributor or a dealer to fix the resale price of a supply. An Agency Procurement Officer should consider the possibility that such an agreement exists where prices offered adhere to an established pattern, such as a published price schedule and when identical bidding occurs.

#### **3.122.05.4 Sharing of the Business**

Sharing of the business occurs where potential bidders or offerers allocate business among themselves based on the customers or the territory involved. Thus, an Agency Procurement Officer might discover that a potential bidder or offerer is not participating in a Mississippi procurement because a particular Mississippi agency, or a particular territory, has not been allocated to such bidder or offerer by the producer or manufacturer.

#### **3.122.05.5 "Tie-in" Sales**

"Tie-in" sales are those in which a bidder or offerer attempts to sell one supply or service only upon the condition that the Agency Procurement Officer purchase another particular supply or

service.

### **3.122.05.6 Group Boycott**

A group boycott results from an agreement between competitors not to deal with another competitor or not to participate in, for instance, a Mississippi procurement until the boycotting competitors' conditions are met by the boycotted competitor or the State. The boycott of a competitor by other competitors may have an effect on the market structure or price of a supply, service, or construction item needed by the State.

### **3.122.06 Reporting Suspected Anticompetitive Practices**

The Chief Procurement Officer, in consultation with the Attorney General, shall develop procedures, including forms, for reporting suspected anticompetitive practices. An Agency Procurement Officer who suspects that an anticompetitive practice has occurred or may be occurring shall follow these procedures.

#### **Commentary**

Protecting the principles of competition in public procurement is a difficult and often complex task. A program of communication and cooperation between procurement and legal offices, institutionalized to the extent feasible, is essential in combating anticompetitive practices.

### **3.123 Retention of Procurement Records**

All procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules by the Department of Archives and History.

### **3.124 Purchasing and Disposal – and Their Application**

#### **3.124.01 Request for Authority to Purchase, P-1**

The P-1 process should now be accomplished by using an electronic method. The paper process has been phased out; however, there are still some instances where the electronic process cannot be used. Instructions for entering an electronic P-1 are shown on the Office of Purchasing, Travel and Fleet Management website. The P-1 is used when requesting authority to purchase commodities under the following conditions:

- (1) Emergency Purchases when total amount of purchase exceeds \$5,000.
- (2) Single Source Purchase when total amount of purchase exceeds \$5,000.
- (3) Purchases or rentals in excess of \$50,000 for commodities not covered by a state or agency contract.
- (4) Acquisition of equipment by lease-purchase. (The universities are exempt from this requirement but must follow the Institutions of Higher Learning's procedures for all lease-

purchase transactions.)

- (5) Purchase or rental of items covered on competitive bid state contracts from other than the contract vendor. Exception: similar items under \$1,000, see Subsection 2.103.01.1, Competitive Bid Contracts.
- (6) Any agency construction contract which exceeds \$50,000.

The P-1 originates at the agency level. The agency submits the request and applicable attachments electronically. If approval is granted, the agency is notified electronically and may then issue the appropriate purchase order. All electronic documents are archived electronically for future reference.

P-1's for a lease-purchase are processed using paper P-1's. Rather than returning the two (2) copies to the agency, only one (1) copy is returned to the agency. One (1) copy is forwarded to the Bureau of Financial Control where it is kept on file for the duration of the agreement. The agency must then reference the P-1 number on each purchase order pertaining to the agreement. Agencies should refer to the online P-1 document for proper instructions.

### **3.124.02 Request for Authority to Dispose of Personal Property**

An Inventory Deletion Form must be completed on any inventory item. The completed document is first sent to the Office of Purchasing, Travel and Fleet Management along with all applicable documents. If approved by the Office of Purchasing, Travel and Fleet Management, all three (3) copies are then forwarded to the Division of Property Control of the Office of the State Auditor for approval. If the Property Control Officer grants approval, one (1) copy is retained on file with the Division of Property Control, and the two (2) remaining copies are returned to the Office of Purchasing, Travel and Fleet Management. One (1) copy is retained on file with the Office of Purchasing, Travel and Fleet Management, and one (1) copy returned to the originating agency. An approved Inventory Deletion Form must be in the possession of the agency disposing of the property before said property can be released to the successful bidder, except as provided for in Section 8.101.01.3, Personal property may be transferred from one state agency to another state agency, including transfers to the Office of Surplus Property.

Approval from the Office of Purchasing, Travel and Fleet Management is not required for sale or transfer of property, excluding vehicles, between state agencies. The agencies must still submit the completed Inventory Deletion Form to the Division of Property Control and must obtain their approval prior to disposing of the property.