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State of Mississippi

Mississippi Procurement Manual

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Foreword

During the 1962 Regular Session of the Mississippi Legislature, legislation was introduced and passed to establish a division of state government to supervise the procurement activities of all state agencies, departments and institutions. This authority was granted to the Commission of Budget and Accounting in Sections 31-7-3 through 31-7-7, Mississippi Code of 1972, Annotated, and the Division of Purchase Supervision was established under the Commission to carry out the provisions of the Act.

Governmental reorganization, brought about by the enactment of Senate Bill 3050 in the 1984 Regular Session, abolishing the Commission of Budget and Accounting and placing purchasing under the authority of the State Fiscal Management Board. The State Fiscal Management Board assumed all duties and responsibilities and had all authorities originally granted to the Commission of Budget and Accounting as applicable to purchasing. The reorganization also brought about a name change. The Division of Purchase Supervision was redesignated the Purchasing Division of the State Fiscal Management Board.

The 1985 Legislature passed Senate Bill 2510 which moved the purchasing function from the authority of the State Fiscal Management Board and made it a separate bureau within the Office of General Services. Effective July 1, 1985, the Purchasing Division was designated as the Bureau of Purchasing. All duties and authority over purchasing originally given to the Commission of Budget and Accounting and subsequently to the State Fiscal Management Board was then placed with the Office of General Services.

State Government Reorganization enacted during the Regular Legislative Session of 1989 established the Department of Finance and Administration. The Bureau of Purchasing was placed under the jurisdiction of the Division of Financial Management and designated the Office of Purchasing. On July 1, 1990, the Travel Division of the Department of Finance and Administration was integrated into the Office of Purchasing, which changed the name to the Office of Purchasing and Travel.

The Bureau of Fleet Management (the “BFM” or “Bureau”) was established within the Office of Purchasing and Travel, within the Department of Finance and Administration (“DFA”), pursuant to Senate Bill 2398, Regular Legislative Session, Laws of 2006, which amended Section 25-1-77, Mississippi Code of 1972, Annotated, as amended (the “Code”). This created what is now known as the Office of Purchasing, Travel and Fleet Management (“OPTFM”).

This Manual and the regulations contained herein have been written specifically with the intent that the application be directed to state agencies as opposed to governing authorities. For that reason, there are some requirements and authorizations contained in the Manual that would not apply to governing authorities. It should always be remembered that no presentation in this Manual shall be interpreted to take precedent over law. If a procedure set forth in this Manual is contrary to any statute applicable to governing authorities, the statute shall prevail and the procedure shall **not** be followed.

Any reference to a need for approval by the Office of Purchasing, Travel and Fleet Management of the Request for Authorization to Purchase, P-1, does **not** apply to governing authorities. However, Governing Authorities are required to request exemption from utilizing reverse auctions for competitive sealed bidding. Exemption may only be granted by the Public Procurement Review Board (PPRB) after requests are received and reviewed by the Office of Purchasing, Travel and Fleet Management.

Throughout this Manual the use of the term "the Office" shall mean the Office of Purchasing, Travel and Fleet Management.

Chapter 1

General Provisions

1.101 Purpose of the Mississippi Procurement Manual

The purpose of the Mississippi Procurement Manual is to set forth all laws and regulations, along with any other pertinent information, that shall be in effect with the implementation of Title 31, Chapter 7, Mississippi Code of 1972, Annotated. The policies and procedures set forth herein apply to the procurement of commodities and equipment either bought, leased or rented with any funds, regardless of source, by those agencies which are required by the statute to be under the authority of the Department of Finance and Administration Public Procurement Review Board (PPRB). This Manual is intended to be a thorough representation of procedures relative to purchasing by all state entities. Further, it shall serve as a source of information for vendors instructing them as to the proper procedures that must be followed in doing business with the State. For the purpose of this document, all definitions found in Section 31-7-1, Mississippi Code of 1972, Annotated, shall apply.

1.101.01 Interpretation, Purposes and Policies

(1) Interpretation

These regulations shall be construed and applied to promote their underlying purposes and polices.

(2) Purposes and Policies

The underlying purposes and polices of these regulations are:

(a) To simplify, clarify, and modernize the regulations governing procurement by agencies of the State of Mississippi;

(b) To permit the continued development of procurement policies and practices;

(c) To provide for increased public confidence in the procedures followed in public procurement;

(d) To ensure the fair and equitable treatment of all persons who deal with the procurement system of this State;

(e) To provide increased economy in the State of Mississippi procurement activities and to maximize to the fullest extent practicable the purchasing value of public funds of the State;

(f) To foster effective broad-based competition with the free enterprise system; and

(g) To provide safeguards for the maintenance of a procurement system of quality and integrity

1.101.02 Purpose and Implementation of these Regulations

These regulations, issued by the Mississippi Public Procurement Review Board (PPRB), hereafter referred to as the Board, establishing policies, procedures, and guidelines related to the procurement, management, control, and disposal of commodities and equipment, as applicable, under the authority of these regulations. These regulations are designed to achieve maximum practicable uniformity throughout the State. Therefore, implementation by and within Mississippi agencies shall be consistent with these regulations.

1.102 Purchasing Laws and Regulations

Laws relative to the Office of Purchasing, Travel and Fleet Management and the procurement process in general may be found in Title 31, Chapter 7, Mississippi Code of 1972, Annotated, beginning with Section 31-7-1. These laws and regulations cover the entire procurement process and contain definitions and provisions that both the buying agency and the vendor will find useful in understanding the State's purchasing system.

1.102.01 Supplementary General Principles of Law Applicable

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

1.103 Requirement of Good Faith

These regulations require all parties involved in the negotiation, performance or administration of Mississippi contracts to act in good faith.

1.104 Application of the Regulations

(1) General Application

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

(2) Application to Mississippi Procurement

These regulations shall apply to every expenditure of public funds irrespective of their source, when such expenditures are made in compliance with or are designated by Section 31-7-1, et seq. Mississippi Code of 1972, Annotated. However, in the event of a conflict, the guidelines of the grant, gift, or self-generated funds shall prevail; and in any case, violation of these regulations shall carry such penalties as may be applicable under state laws.

(3) Application to Service and Construction Contracts

Agencies which are under the authority of the Office of Personal Service Contract Review (OPSCR) shall follow the guidelines set forth in the State of Mississippi Personal Service Contract Rules and Regulations adopted by the PPRB.

The regulations herein shall apply to contracts for construction unless they conflict with

regulations and procedures established by the Bureau of Buildings, Grounds and Real Property Management. When such conflict arises, the provisions set forth by the Bureau of Building, Grounds, and Real Property Management shall take precedent.

1.105 Severability

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

1.106 Duration

These regulations, when approved by the Public Procurement Review Board (PPRB) as authorized by Section 31-7-9, Mississippi Code of 1972, Annotated, shall be in effect as written until amended or repealed by the Board.

1.107 Definitions

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

(1) The context in which they are used clearly requires a different meaning; or

(2) A different definition is prescribed for a particular chapter or provision.

(a) Agency – as defined in Section 31-7-1, Mississippi Code of 1972, Annotated.

(b) Agency Procurement Officer – any person duly authorized to enter into and administer contracts and make written determinations with respect thereto. The term also includes an authorized representative acting within the limits of authority.

(c) Board – the Public Procurement Review Board (PPRB).

(d) Business – any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity.

(e) Certified Purchasing Office – any purchasing office in which 50% or more of the purchasing agents hold a certification from the Universal Public Purchasing Certification Council or other nationally recognized purchasing certification, and in which, in the case of a state agency purchasing office, in addition to the national certification, one hundred percent (100%) of the purchasing officials hold a certification from the State of Mississippi's Basic or Advanced Purchasing Certification Program.

(f) Change Order – a written order signed by the Agency Procurement Officer directing the contractor to make changes. The changes clause of the contract authorizes the Agency Procurement Officer to order change without the consent of the contractor.

(g) Chief Procurement Officer – the person holding the position as the Director of the Office of Purchasing, Travel and Fleet Management.

(h) Construction – the process of building, altering, improving, renovating or demolishing a public structure, public building, or other public real property. It does not include routine operation, routine repair or regularly scheduled maintenance of existing public structures, public buildings, or other public real property.

(i) Contract – all types of Mississippi agreements, regardless of what they may be called, for the procurement or disposal of commodities, equipment, services, or construction.

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

(k) Contractor – any person having a contract with a governmental body.

(l) Data – recorded information, regardless of form or characteristic.

(m) Designee – a duly authorized representative of a person holding a superior position.

(n) Employee – an individual drawing a salary from a governmental body, whether elected or not, and any non-compensated individual performing personal services for any governmental body.

(o) Governing Authority – as defined in Section 31-7-1, Mississippi Code of 1972, Annotated.

(p) May – denotes the permissive.

(q) Must – to be required or compelled to

(r) Person – any business, individual, union, committee, club, other organization, or group of individuals.

(s) Procurement – buying, purchasing, renting, leasing, or otherwise acquiring any commodities, equipment, services, or construction. It also includes all functions that pertain to the obtaining of any commodities, equipment, services, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract and all phases of contract administration.

(t) Purchase – buying, renting, leasing or otherwise acquiring.

(u) Purchasing Agency – any governmental body other than the Office of Purchasing, Travel and Fleet Management which is authorized by regulations, or by way of delegation from the Chief Procurement Officer, to enter into contracts.

(v) Purchasing Agent – any administrator, superintendent, purchase clerk or other chief officer so designated having general or special authority to negotiate for and make private contract for or purchase for any governing authority or agency, including issue purchase orders, invitations for bid, requests for proposals, and receive and accept bids.

(w) Regulation – a governmental body's statement, having general or particular applicability and future effect, designed to implement, interpret, or prescribe law or policy, or describing organization, procedure, or practice requirements, which has been promulgated in accordance with Section 31-7-9, Mississippi Code of 1972, Annotated.

(x) Reverse Auction – an online auction in which sellers bid against each other to win a buyer's business. Typically used to purchase commodities from multiple pre-qualified providers. Also referred to as eAuction.

(y) Services – the furnishing of labor, time, or effort by a vendor or supplier, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. This term shall not include employment agreements or collective bargaining agreements.

(z) Shall – denotes the imperative.

1.108 Public Access to Procurement Information

Procurement information shall be public record to the extent provided in Section 25-61-1, Mississippi Code of 1972, Annotated, in accordance with each state entity's policies and procedures.

Chapter 2

Procurement Organization

2.101 Organization

The Public Procurement Review Board (PPRB) as provided for under Section 27-104-7, Mississippi Code of 1972, Annotated shall approve any purchasing regulation established as provided for in Section 31-7-9, Mississippi Code of 1972, Annotated, and shall act upon those purchasing transactions as may be, from time to time, designated by the Board as requiring Board approval. The Board shall also act on other such transactions as would be required by the procedures set forth in the regulations presented herein.

The membership of the Board shall be governed by Section 27-104-7 and consists of three (3) individuals appointed by the Governor with the advice and consent of the Senate; two (2) individuals appointed by the Lieutenant Governor with the advice and consent of the Senate; and the Executive Director of the Department of Finance and Administration, serving as an ex officio and nonvoting member.

2.102 The Office of Purchasing, Travel and Fleet Management

It shall be the responsibility of the Office of Purchasing, Travel and Fleet Management to supervise the purchases, lease-purchases, leases, and rentals of any commodities or equipment made or entered into by the agencies of the State and the Office shall have approval authority over all sales or transfers of personal property owned by agencies of the State; provided, however, that this shall not be intended to include items under the jurisdiction of the Department of Information Technology Services.

Each agency of the State shall be responsible for the procurement of commodities, equipment, and construction needed by that agency in compliance with Section 31-7-13, Mississippi Code of 1972, Annotated, and with the policies and procedures established herein.

2.102.01 Procurement Regulations

(1) Regulations shall be promulgated by the Office of Purchasing, Travel and Fleet Management, with approval of the Public Procurement Review Board (PPRB), in accordance with authority granted under Section 31-7-9, Mississippi Code of 1972, Annotated.

(2) Regulations shall not change existing contract rights.

2.102.02 Deviation from these Regulations

The Public Procurement Review Board (PPRB) may approve deviations to these regulations and may delegate the authority to approve such deviations to the Chief Procurement Officer. Any such deviation shall be based on a determination by the Board or the Chief Procurement Officer that it is to the best interest of the State.

2.102.03 Agency Procurement Officials

State agencies must designate purchasing agents as defined in Section 1.107 herein for reporting to OPTFM.

On or before January 1 of each year, and every time a purchasing agent is hired, each state agency shall provide to OPTFM the name of each purchasing agent and information identifying the state agency's central purchasing office, including location and director, if applicable.

2.102.04 Amendment to these Regulations

These regulations may be amended by the Office of Purchasing, Travel and Fleet Management, with the approval of the Public Procurement Review Board (PPRB), as authorized in Section 31-7-9, Mississippi Code of 1972, Annotated.

2.102.05 Public Procurement Review Board (PPRB) Approval

The requesting agencies are required to submit a Request for Authority to Purchase, P-1, to the Office of Purchasing, Travel, and Fleet Management (OPTFM) for certain purchases. In certain situations, as outlined below, the OPTFM will be required to obtain Public Procurement Review Board (PPRB) approval prior to processing the requests. Agencies are advised that they shall not award any purchase or construction contract prior to approval by the Public Procurement Review Board (PPRB) if the purchase or construction contract is one which requires PPRB approval. When approval requests are received, the OPTFM will assign the request to a DFA Contract Analyst who will evaluate the request and provide a recommendation to the Board. The Public Procurement Review Board (PPRB) has regularly scheduled meetings on the first Wednesday of every month. Requests should be submitted to the OPTFM not later than the deadline posted on PPRB's website. Requests received after this time shall be delayed until the next regular meeting of the Board. The Public Procurement Review Board (PPRB) requires that the following items be brought before the Board for approval:

(1) Any request for any purchase authority (to include multiple purchases or a "not to exceed" amount), award, or awards (when such awards are the result of one competitive procurement) which exceeds ~~s~~ $500,000 of commodities, goods, merchandise, furniture, equipment, automotive equipment of every kind, and other personal property purchased by the agencies of the state, but not commodities purchased for resale or raw materials converted into products for resale as provided by Section 31-7-1(e), Mississippi Code of 1972, Annotated;

(2) Regulations governing the approval of contracts let for the construction and maintenance of state buildings and other facilities;

(3) Proposed equipment acquisition schedules for Master Lease Purchase Program (Section 31-7-10, Mississippi Code of 1972, Annotated);

(4) Cancellation of Mississippi Department of Corrections contracts on minutes (Section 47-5-107, Mississippi Code of 1972, Annotated);

(5) Policies and procedures which relate to the purchasing of commodities, goods, merchandise, furniture, equipment, automotive equipment of every kind, and other personal property purchased by the agencies of the state, but not commodities purchased for resale or raw materials converted into products for resale as provided by

Sections 31-7-1(e), and 31-7-9, Mississippi Code of 1972, Annotated;

(6) Rules and regulations regarding the sale or disposal of property (Section 29-9-9, Mississippi Code of 1972, Annotated);

(7) Regulations governing any leases or rental agreements for space outside the buildings under the jurisdiction of the Department of Finance and Administration (as defined in the DFA Bureau of Building, Grounds and Real Property Management Leasing Manual);

(8) Regulations governing contracts for engineering or architectural services related to construction and maintenance of state buildings and other state facilities; and

(9) Requests for exemptions from utilizing reverse auctions submitted by state agencies and governing authorities.

2.103 Responsibility of the Office of Purchasing, Travel and Fleet Management

The Public Procurement Review Board (PPRB) acting through the Office of Purchasing, Travel and Fleet Management (OPTFM) shall have approval authority over the types of purchases listed in this chapter and in accordance with the procedures set forth. The OPTFM has the responsibility to serve the State objectively, economically and efficiently; to provide effective service to the state agencies; and to follow fair and ethical practices with all suppliers. However, this authority does not extend to governing authorities. Any mention of the requirements for P-1 approval applies **only** to agencies. Governing authorities are **not** required to obtain approval of the Office of Purchasing, Travel and Fleet Management except as otherwise provided in Section 3.106.22 Reverse Auctions.

2.103.01 Contracts

The Office of Purchasing, Travel and Fleet Management (OPTFM) shall have the authority to establish contracts on any commodity being purchased by the agencies. The contracts may be established by competitive bidding or by negotiation. The OPTFM also maintains agency and cooperative contracts. The OPTFM shall have the authority to require that agencies purchase from these contracts and shall have the authority to grant exemption from that requirement if it is determined to be in the best interest of the agency and would be an economically feasible transaction.

The OPTFM shall have the authority to set standards for commodities being purchased, and such standards shall be based on a practical and economically efficient application of that commodity.

It shall be at the discretion of the OPTFM as to the items of equipment and the commodities on which contracts will be established. The OPTFM shall have the authority to establish standards for the acquisition of equipment by agencies.

2.103.01.1 Competitive Bid Contracts

The competitive bid contracts are established on the basis of written specifications and sealed competitive bids with a contract or contracts being awarded to the vendor or vendors that have submitted the lowest and best bid which meets the specifications. All state agencies are required to purchase from the awarded contract vendor unless written approval is obtained from the OPTFM prior to obtaining quotes or soliciting bids regardless of the cost. There are times when an agency needs a product which is similar to items covered on state contract but has

determined that the item on contract will not meet the needs of the using agency. Agencies are allowed to purchase similar items up to $1,000 without obtaining P-1 approval. The agency should note on the PO how the item is different from the items on state contract and should note in their files why the items on contract would not meet the specific needs of the agency. Requests for purchases of similar items in excess of $1,000 must be submitted to the Office of Purchasing, Travel and Fleet Management on a P-1 with justification.

2.103.01.2 Negotiated Contracts

The negotiated contracts are established on the basis of proposals from many vendors. These proposals are evaluated with contracts being awarded to all vendors whose prices are "comparable." These contracts may be used by any agency. These negotiated contracts are "convenience" contracts and shall serve to establish a maximum price that can be paid for any item covered by the contract and does not preclude further downward negotiations by the buying agency and/or the Office of Purchasing, Travel and Fleet Management if volume so dictates. Agencies may purchase items covered by a negotiated contract from other than the contract vendor provided they follow the applicable procedures set forth in Section 31-7-13(a), Mississippi Code of 1972, Annotated; (a) purchases under $5,000 may be made without any quotes or bids; (b) if the purchase exceeds $5,000 but is not over $50,000 two quotes are required; or (c) purchases over $50,000 may be made from the lowest and best bidder after properly advertising. In addition, agencies purchasing items covered by a negotiated contract from other than the contract vendor and following the procedures set forth in Section 31-7-13(c), Mississippi Code of 1972, Annotated, purchases over $50,000, shall submit a Request for Authority to Purchase, P-1, to the Office of Purchasing, Travel and Fleet Management for approval prior to making the purchase.

2.103.01.3 Cooperative Contracts

Statewide Cooperative Contracts are established on the basis of reviewing and selecting solicited contracts from written specifications and sealed competitive bids or by those on a multiple award scheduled by consortiums which show a demonstrative cost savings. These contracts are usually awarded to the vendor that has submitted the lowest bid that meets specifications. All state agencies are allowed to purchase from cooperative contracts approved by the Office of Purchasing, Travel, and Fleet Management. Governing authorities may purchase from other than the awarded vendor provided they purchase an identical item at or below contract price.

Municipalities – Section 31-7-59, Mississippi Code of 1972, Annotated; State Agencies – Section 31-7-13, Mississippi Code of 1972, Annotated.

2.103.01.4 Statewide Agency Contracts

The statewide agency contracts are established on the basis of competitive bids by a specific state agency. The statewide agency contract must be approved by the OPTFM prior to any purchases being made. The availability of statewide agency contracts to various agencies is dependent upon the terms of the agreement and a determination by the OPTFM that the prices should be available to other agencies. See Section 10.106, Procedures for Establishing an Agency Contract.

2.103.02 Open-Market Purchases

Commodities that are not covered by any state contract may be purchased on the open market provided the agency follows the requirements set forth in Section 31-7-13, Mississippi Code of 1972, Annotated. Purchases of items that are not covered by any state contract in excess of

$50,000 must be approved by the OPTFM prior to issuance of a purchase order. The OPTFM will supervise the procurement of all commodities by state agencies and shall, upon receipt of the Request for Authority to Purchase, P-1, ascertain that all aspects of the purchase are in compliance with state statutes. The OPTFM will also have the authority to reject requests which are determined not to be in the best interest of the State. The OPTFM shall have the authority to grant exemption from the requirement for P-1 approval if it is determined to be in the best interest of the agency and would be an economically feasible transaction. 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.

2.103.03 Rental, Lease, Lease-Purchase of Equipment and Furniture

Commodities that are not covered by any state contract may be rented or leased on the open market provided the agency follows the requirements set forth in Section 31-7-13, Mississippi Code of 1972, Annotated. Rental of items that are not covered by any state contract in excess of $50,000 must be approved by the OPTFM prior to issuance of a purchase order. The Office of Purchasing, Travel and Fleet Management will supervise the rental of all commodities by state agencies and shall, upon receipt of the Request for Authority to Purchase, P-1, ascertain that all aspects of the rental are in compliance with state statutes. The OPTFM will also have the authority to reject requests which are determined not to be in the best interest of the State. The OPTFM shall have the authority to grant exemption from the requirement for P-1 approval if it is determined to be in the best interest of the agency and would be an economically feasible transaction. 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. Agencies should also refer to Section 3.117, Lease Contracts, for further discussion of lease contracts.

To determine if advertising is required, the agency should multiply the rental payment by the number of payments to determine a total cost for the term of the rental. For example: A 36-month contract at $1400/month would be $1400 x 36 = $50,400 and would require advertising. A 3-year contract at $800/quarter would be $800 x 12 = $9,600 and would require at least two written quotes. No agency personnel shall enter into any lease-purchase contract except as is provided for in Sections 31-7-10 and/or 31-7-13(e), Mississippi Code of 1972, Annotated.

It shall be unlawful for any agency to enter into any single lease-purchase transaction for any items having an acquisition cost of less than $10,000.

The OPTFM shall have the right to disapprove any lease-purchase agreement regardless of authority if it is determined to create excessive cost and not be in the best interest of the State.

2.103.04 Commodities, Equipment, and Printing

The Office of Purchasing, Travel and Fleet Management shall supervise the procurement of all commodities, equipment, and printing by state agencies and shall, upon receipt of Request for Authority to Purchase, P-1, ascertain that all aspects of the purchase are in compliance with state statutes. The OPTFM shall have the authority to solicit additional quotes if, upon reviewing the P-1, there is reason to believe that the bids received by the requesting agency are not competitive.

2.103.05 Information Distribution

The OPTFM will make the information available through electronic methods of information distribution.

2.104 Certified Purchasing Office

As per Section 31-7-1(i), Mississippi Code of 1972, Annotated, Certified Purchasing Office shall be defined as any purchasing office in which 50% or more of the purchasing agents hold a certification from the Universal Public Purchasing Certification Council or other nationally recognized purchasing certification, and in which, in the case of a state agency purchasing office, in addition to the national certification, one hundred percent (100%) of the purchasing officials hold a certification from the State of Mississippi's Basic or Advanced Purchasing Certification Program. For the purposes of this policy, purchasing agent shall be defined using the general meaning set forth in Section 31-7-1(c), Mississippi Code of 1972, Annotated. "Purchasing agent" means any administrator, superintendent, purchase clerk or other chief officer so designated having general or special authority to negotiate for and make private contract for or purchase for any governing authority or agency.

Commentary

If a person has the authority to issue purchase orders, issue invitations to bid, receive and accept bids, negotiate contract clauses, etc., they should be considered a purchasing agent for the purposes of this policy.

An entity may apply to become a Certified Purchasing Office by completing an application found on the OPTFM website and submitting with appropriate documentation to the Office of Purchasing, Travel and Fleet Management. The application will require the name of the agency, address, phone number and e-mail address of person submitting the application. In addition, the application will require that all purchasing agents for the entity be listed with phone numbers, email addresses and certifications mentioned above. Proof of certification must show the name of the certification holder, the entity issuing the certification, the issue date and the expiration date of the certification. A copy of the certificate will be accepted provided that the required information is included.

Upon receipt of the application, the Office of Purchasing, Travel and Fleet Management will verify that 50% or more of the purchasing agents are certified by a qualified entity (UPPCC or other nationally recognized certification) and in the case of a state agency, that 100% hold a certification from the State of Mississippi's Basic or Advanced Purchasing Program. After review and verification of the submitted documentation, the Office of Purchasing, Travel and Fleet

Management will issue a certificate to the entity which shall be valid for a twelve (12) month period. If a purchasing agent's national certification expires prior to the twelve (12) month period, and if this change would reduce the number of qualified purchasing agents below the minimum requirements, the Office of Purchasing, Travel and Fleet Management may issue a Certified Purchasing Office certificate for a period of less than twelve (12) months. Certified Purchasing Offices are eligible to purchase from Cooperative Purchasing Agreements that qualify under Section 31-7-13(m)(xxix) as follows:

> (xxviii) Purchases made pursuant to qualified cooperative purchasing agreements.
>
> Purchases made by Certified Purchasing Offices of state agencies or governing authorities under cooperative purchasing agreements previously approved by The Office of Purchasing, Travel and Fleet Management and established by or for any city, county, parish, or state government or the Federal Government, provided, however, that the notification to potential contractors included a clause which set forth the availability of the

contract to other governmental entities. Such purchases shall only be made if the use of such contract is determined to be in the best interest of the government entity.

State Agencies should note that this authority does not allow them to purchase outside the terms of the statewide competitive bid contracts unless the contract document specifically says that state agencies may use the contract or choose to purchase from a qualified cooperative purchasing agreement. The current state contracts provide the assurance that all state agencies will purchase from the contract and it would be unfair to those vendors to remove that volume without proper notification. Future contract invitations may include a clause which notifies vendors of the availability of cooperative agreements and at that time agencies would have the option.

A qualified cooperative contract is one that has been submitted to and approved by the Office of Purchasing, Travel and Fleet Management after careful consideration of the process used to establish the contract, the products covered and the available prices. Vendors will not be allowed to submit contracts to OPTFM for approval. The OPTFM will only consider contracts submitted by Certified Purchasing Offices. In practical terms this means that a vendor may approach the Certified Purchasing Office of any city, county, or state agencies. If the Certified Purchasing Office feels that the products/prices available under the cooperative agreement would be advantageous, they would then submit a request to the Office of Purchasing, Travel and Fleet Management, advising the OPTFM of the name of the contract, the vendor, copies of applicable web sites/price lists, etc. The OPTFM will review the documents and may contact the originating purchasing entity for additional information prior to making a decision concerning the acceptability of the contract. Upon approval or disapproval the OPTFM will notify the Certified Purchasing Offices and will maintain a list of all approved contracts. Once approved, all Certified Purchasing Offices may purchase off of the approved cooperative contract.

State agencies with certified purchasing offices would, in most cases, be exempt from bidding requirements when they purchase from a qualified cooperative contract. The exception would be that if a commodity is covered by a competitively bid contract, the state agencies will be required to purchase from that contract unless the contract specifically allows purchases made from cooperative contracts.

Cities and counties (governing authorities) with certified purchasing offices will be exempt from bidding requirements when purchasing from a qualified cooperative contract.

Governing Authorities with Certified Purchasing Offices may also use the following procedures: Purchases may be made from the bidder offering the best value. In determining the best value bid, freight and shipping charges shall be included. Life-cycle costing, total cost bids, warranties, guaranteed buy-back provisions, documented previous experience, training costs and other relevant provisions including but not limited to, a bidder having a local office and inventory located within the jurisdiction at the governing authority, may be included in the best value calculation.

Renewal – it will be the responsibility of the Certified Purchasing Office to be aware of the expiration date of their certification and to submit a new application not more than four (4) months and not less than one (1) month prior to the expiration date. The Office of Purchasing, Travel and Fleet Management will not be responsible for notifying the Certified Purchasing Office.

2.105 Training and Certification

In accordance with Section 31-7-9 (3), Mississippi Code of 1972, Annotated and to ensure state purchasing and contract management personnel are trained and knowledgeable in accordance

with state law, the Office of Purchasing, Travel and Fleet Management offers the Mississippi Purchasing Certification Program. This program shall be required for all purchasing officials at state agencies. The goal of the Mississippi Purchasing Certification Program is to offer public purchasing courses and certification testing specifically designed for Mississippi procurement.

"Certified Mississippi Purchasing Agent" means a state agency purchasing official who holds a certification from the Mississippi Basic Purchasing Certification Program as established by the Office of Purchasing, Travel and Fleet Management.

2.105.01 Eligibility Requirements and Maintaining Certification

The minimum procurement experience and training requirements are as follows:

(1) Certified Mississippi Purchasing Agent (CMPA) requirements:

(a) New employees should register for first available class;

(b) Successfully complete Mississippi Basic Purchasing Certification Program coursework; and

(c) Pass the CMPA exam with a score of 70% or higher.

(d) Recertify every five (5) years by following the same process as listed above.

2.105.02 Further Information

Information on registration, training opportunities, continuing education and resources are available on the Office of Purchasing, Travel and Fleet Management website.

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 and which are under the purview of the Office of Personal Service Contract Review

(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 under the purview of the Department of Information Technology Services or the Office of Personal Service Contract Review

(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;

(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.

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 only after exemption from reverse auction is approved per Section 3.106.22 and 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

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

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

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."

Agencies which utilize the MAGIC system to publicize the Invitation for Bids shall be deemed in

compliance with this provision by ensuring that the start date of the RFx corresponds with the first date of advertisement in the newspaper.

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 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.

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 ÷ 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:

Vendor A, EC = (12,000 x 5000 x .00007) / 10 + $375 = $795.00

Vendor B, EC = (12,000 x 5000 x .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, 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.

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.

3.106.22 Reverse Auctions

Reverse auctions shall be the primary method for receiving bids during the bidding process. Generally speaking, reverse auctions are not recommended for highly customized specifications where only a small number of suppliers will be able to respond. Commodities that are clearly defined by industry standards (e.g., “off the shelf” items), with very many suppliers, where the supplier relationship is transactional and costs to switch among suppliers are negligible are good candidates for reverse auctions. By comparison, a procurement for a patented or highly technical and complex good that has a single or few suppliers may not be a good candidate for reverse auctions.

3.106.22.1 Initiation

In general, purchasing entities should follow the procedures set forth in Section 3.106 regarding Invitations for Bids and Public Notice, modifying the Advertisement and Invitation for Bids to reflect the use of reverse auction.

3.106.22.2 Invitation for Bids Packet

In addition to the content prescribed in Section 3.106.03, the Invitation for Bids must contain sections detailing:

(1) The Timing of the Auction

The Invitation for Bids shall be advertised in accordance with Section 3.106.05.4 herein, and the deadline to receive initial responses by suppliers shall be not less than seven (7) working days after the last notice appears in the newspaper. After such deadline has passed, the submissions shall be taken under advisement for prequalification. The reverse auction should occur only after the purchasing agent has had sufficient time to prequalify the suppliers. Such anticipated time shall be included in the Invitation for Bids Packet; however, the purchasing agent should reserve the right to extend the auction date if necessary to complete prequalification.

(2) The Prequalification Process

The initial response to the Invitation for Bids shall include a proposed product, including specifications and/or samples, for the purchasing entity to evaluate and determine responsiveness to requirements. Once a supplier’s product is determined to be responsive, the supplier may participate in the reverse auction.

(3) Quotes

Responding suppliers must provide a quote with the initial response. Quotes are utilized by the purchasing agent to determine market pricing and set the auction parameters (e.g., Start Price).

(4) Instructions on Accessing the Auction

Suppliers should be given detailed instructions on how to access the reverse auction event, including how to gain access to the system utilized and what technical requirements may be involved. However, no supplier may be prohibited from participating in person by paper through surrogate bidding.

(5) The Award Process

Suppliers should be advised that no award will automatically result from a reverse auction, and that the purchasing entity will review the results of the auction and make a determination in a timely manner.

3.106.22.3 State Agencies

State agencies shall utilize the State's ERP system, MAGIC, to perform reverse auctions. Detailed instructions for both agency buyers and suppliers may be accessed on OPTFM's website.

3.106.22.4 Governing Authorities

Governing authorities may utilize any responsible reverse auction company to provide the auction services, however OPTFM recommends that governing authorities utilize the state contracts established for such services by the Mississippi Department of Information Technology Services.

3.106.22.5 Alternative Processes

If a purchasing entity determines that a reverse auction is not in the best interest of the state, then that determination must be approved by the Public Procurement Review Board. The purchasing entity shall submit a detailed explanation of why a reverse auction would not be in the best interest of the state and present the alternative process to be approved by the Public Procurement Review Board. If the Public Procurement Review Board authorizes the purchasing entity to solicit bids with a method other than reverse auction, then the purchasing entity may designate the other methods by which the bids will be received, including, but not limited to, bids sealed in an envelope, bids received electronically in a secure system, or bids received by any other method that promotes open competition and has been approved by OPTFM.

State agencies may request approval to use an alternative process through MAGIC. Governing authorities may request approval to use an alternative process through use of the Exemption Form provided on OPTFM's website.

The Public Procurement Review Board must approve any contract entered into by alternative processes.

3.106.22.6 Exemptions

Reverse auction shall not be required for:

(1) Any public contract for design or construction of public facilities, including buildings, roads and bridges; or

(2) Procurements made by the individual state institutions of higher learning via competitive sealed bidding.

3.106.23 Electronic Bidding

3.106.23.1 Application

When utilizing the Competitive Sealed Bidding method provided herein agencies and governing authorities shall provide a secure electronic interactive system for the submittal of such bids as an additional bidding option for those bidders who choose to submit their bids electronically. No bidder shall be required to submit bids electronically. When construction bids are submitted electronically, the requirement for including a certificate of responsibility, or a statement that the bid enclosed does not exceed Fifty Thousand Dollars ($50,000.00), on the exterior of the bid envelope as indicated in Section 31-3-21(1) and (2) shall be deemed in compliance with by including same as an attachment with the electronic bid submittal.

3.106.23.2 State Agencies

State agencies shall utilize MAGIC for the receipt of bids electronically and shall include in the Invitation for Bids packet instructions for supplier access to MAGIC.

3.106.23.3 Governing Authorities

Governing authorities may utilize any responsible electronic bidding company to provide the electronic bidding services, however OPTFM recommends that governing authorities utilize the state contracts established for such services by the Mississippi Department of Information Technology Services.

3.106.23.4 Exemptions

The electronic bidding option does not have to be provided by:

(1) Any governing authority without available high speed Internet access,

(2) any county having a population of less than twenty thousand (20,000), or

(3) any municipality having a population of less than ten thousand (10,000).

3.107 Competitive Sealed Proposals

3.107.01 Application

Except as otherwise provided by law, the provisions of Section 3.107 shall apply to every procurement of commodities, supplies, equipment, construction, technology, personal and

professional services other than those in Section 27-104-7(2)(f) and (8), state agency employee benefits, supplemental insurance and cafeteria plans, that are solicited by any state agency by a request for proposals or request for qualifications. The following provisions are intended to ensure that the best practices for soliciting requests for proposals or requests for qualifications are implemented.

3.107.02 Conditions for Use

(1) Competitive sealed bidding is the preferred method of procurement; however, if it is not practicable and advantageous, a request for proposals or request for qualifications may be used. The terms "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.

(2) The following factors shall be considered when determining advantageousness:

(a) The need for flexibility;

(b) The type of evaluations that will be needed after offers are received;

(c) Whether the evaluation factors involve the relative abilities of offerers to perform, including degrees of technical or professional experience or expertise;

(d) Whether the type of need to be satisfied involves weighing artistic and aesthetic values to the extent that price is a secondary consideration;

(e) Whether the types of supplies, services or construction may require the use of comparative judgmental evaluations to evaluate them adequately; and

(f) Whether prior procurements indicate that a request for proposals may result in more beneficial contracts for the state.

(3) The following factors shall be considered when determining practicability:

(a) Whether the contract needs to be a contract other than a fixed-price type contract;

(b) Whether oral or written discussions may need to be conducted with offerers concerning technical and price aspects of their proposals;

(c) Whether offerers may need to be afforded the opportunity to revise their proposals, including price;

(d) Whether the award may need to be based upon a comparative evaluation of differing price and contractual factors as well as quality factors that include technical and performance capability and the content of the technical proposal; and

(e) Whether the primary consideration in determining award may not be price.

(4) If the head purchasing agent at an agency or his or her designee determines, in writing, that the use of competitive sealed bidding is either not practicable or not advantageous to the state, he or she shall submit a detailed explanation of the reasons for that determination to the Public Procurement Review Board by submitting same in writing on agency letterhead to OPTFM. If the Public Procurement Review Board determines that competitive sealed bidding is either not practicable or not advantageous to the state, then a contract may be entered into for the procurement of commodities, supplies, equipment, construction, technology, personal and professional services, state agency purchased employee benefits or state agency supplemental

insurance and cafeteria plans, by a request for proposals or request for qualifications. However, these procurements contracted for through a request for proposals or request for qualifications may not be combined or included in a contract with other procurements that are required to be procured through competitive sealed bidding so as to avoid the statutory obligation for procurement through competitive sealed bidding. The board may modify or revoke its determination at any time, and the determination should be reviewed for current applicability from time to time.

(5) In addition to determining whether a request for proposals or request for qualifications would be practicable and advantageous to the state, when making the decision to use a request for proposals or request for qualifications, the head purchasing agent shall consider the following factors:

(a) Whether quality, availability or capability is overriding in relation to price in procurements for research and development, technical supplies or services;

(b) Whether the initial installation needs to be evaluated together with later maintenance and service capabilities and what priority should be given to these requirements in the best interests of the state; and

(c) Whether the marketplace will respond better to a solicitation permitting not only a range of alternative proposals but evaluation and discussion of them before making the award.

3.107.03 Content of the Request for Proposals or Request for Qualifications

(1) The request for proposals or request for qualifications shall include the following:

(a) Instructions and information to offerers concerning the request for proposals or request for qualifications submission requirements, including the time and date set for receipt of proposals or qualifications, the address of the office to which proposals or qualifications are to be delivered, the maximum time for proposal or qualification acceptance by the state, the manner in which proposals or qualifications are to be submitted, including any forms for that purpose and any other special information;

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

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

(d) A statement that discussions may be conducted with offerers who submit proposals or qualifications determined to be reasonably susceptible of being selected for the award, but that proposals or qualifications may be accepted without such discussions; and

(e) A statement of when and how price should be submitted.

(2) The request for proposals or request for qualifications may incorporate documents by reference provided that the request for proposals or request for qualifications specifies where those documents can be obtained.

(3) Proposal or qualification preparation time shall be set to provide offerers a reasonable time to prepare their proposals or qualifications. A minimum of thirty (30) days shall be provided unless a shorter time is deemed necessary for a particular procurement as determined in writing by the head purchasing agent of the requesting agency.

3.107.04 Public Notice

(1) In addition to any method of public notice regarding the solicitation of requests for proposals or requests for qualifications currently being used by state agencies, the head purchasing agent shall also have posted on the Mississippi procurement portal and on the soliciting agency's website, public notification of a pending procurement through request for proposals or request for qualifications. The notice shall include the following:

(a) The due date for responses;

(b) The name and phone number of the officer conducting the procurement; and

(c) The means of obtaining the solicitation.

(2) The notice shall be posted at least thirty (30) days before the date that proposals or qualifications are to be submitted to the head purchasing agent, unless a shorter time is deemed necessary for a particular procurement as determined in writing by the head purchasing agent of the requesting agency.

(3) Each head purchasing agent may determine that other methods of public notification are best for that particular agency or that particular request for proposals or request for qualifications. If such a determination is made, the head purchasing agent may provide notice in an alternative manner about the request for proposals or request for qualifications in addition to the methods provided for in Section 3.107.

(4) OPTFM shall monitor agency websites and the Mississippi procurement portal to ensure that the agencies are posting the required notice. OPTFM shall audit agencies and report its findings to the Chairs of the House of Representatives and Senate Accountability, Efficiency and Transparency Committees and House of Representatives and Senate Appropriations Committees by December 31 of each year.

3.107.05 Pre-Proposal Conferences

(1) Pre-proposal conferences may be conducted to explain the procurement requirements. If a head purchasing agent plans to hold such a conference, he or she shall prominently place the notification in the request for proposals or request for qualifications solicitation. The notification shall include the date, time and location of the conference. If the head purchasing agent decides to hold a pre-proposal conference after the request for proposals or request for qualifications has been sent out, then he or she shall notify all prospective offerers known to have received a request for proposals or request for qualifications.

(2) If a pre-proposal conference is held, it shall be at least fourteen (14) days after the request for proposals or request for qualifications has been issued. In setting the time for the conference,

the head purchasing agent shall consider the complexity of the procurement and the potential modifications that may need to be made after the conference and any amendments to the solicitation that the head purchasing agent may need to make after the conference.

(3) The head purchasing agent issuing the request for proposals or request for qualifications shall serve as chair of the conference. Offerers attending the conference shall be required to sign an attendance sheet provided by the soliciting agency. The chair shall announce at the beginning of the conference how the conference is to be handled. The conference shall be recorded. The head purchasing agent may mandate attendance at a conference if he or she feels it is critical to understanding the solicitation. Once the conference is over, the head purchasing agent shall put the recordings from the conference and the questions and answers from the conference in writing and send them to the offerers who received the request for proposals or request for qualifications and post them on the Mississippi procurement portal and the soliciting agency's website.

3.107.06 Drafting the Request for Proposals or Request for Qualifications

(1) In addition to the items listed in Section 3.107, the contents of a request for proposals or request for qualifications shall also include the following:

(a) A statement that discussions may be conducted with offerers who submit proposals or qualifications determined to be reasonably susceptible of being selected for the award, but that proposals or qualifications may also be accepted without those discussions; and

(b) A statement of when and how price should be submitted.

(2) The request for proposals or request for qualifications shall indicate, either by the order listed, weights or some other manner, the order of importance of the evaluation criteria.

(3) The request for proposals or request for qualifications, its amendments, the offerer's proposals or qualifications and the best and final offer shall constitute the contract.

3.107.07 Evaluation Factors in the Request for Proposals or Request for Qualifications

(1) When the head purchasing agent submits the determination that the use of competitive sealed bidding is either not practicable or not advantageous to the state to the Public Procurement Review Board for its approval, he or she shall include in that submission the evaluation factors that will be used in reviewing the submitted proposals or qualifications. The evaluation factors shall be approved by the Public Procurement Review Board in the same way that the decision to solicit procurements through a request for proposals or request for qualifications must be approved.

(2)

(a) The request for proposals or request for qualifications shall state all of the approved evaluation factors, including price, and their relative importance. When the head purchasing agent is determining the weights and importance of each evaluation factor, price as an evaluation factor shall be given the highest criteria weighting and at least thirty-five percent (35%) out of the one hundred percent (100%) total weight of all the other evaluation factors. The evaluation shall be based on the evaluation factors set forth in the request for proposals or request for qualifications. The evaluation factors used and the weights given to each shall be decided and agreed to by the evaluation committee before

the opening of any proposal or qualification. Numerical rating systems shall be used when determining the weight and importance of each evaluation factor. Factors not specified in the request for proposals or request for qualifications shall not be considered. Upon completion of the evaluation, the evaluation score sheets used to review the submitted proposals or qualifications shall be made part of the report required under Section 3.107.12(1) herein.

(b) The following, as appropriate to individual circumstances, shall be used as criteria for evaluating requests for proposals or requests for qualifications under the request for proposals or request for qualifications process described in Section 3.107 herein. These factors are not intended to be limiting or all-inclusive, and they may be adapted or supplemented in order to meet a soliciting agency's individual needs as the competitive procurement process requires.

(i) Technical factors (Proposed methodology):

1. Does the offerer's proposal or qualification demonstrate a clear understanding of the scope of work and related objectives?

2. Is the offerer's proposal or qualification complete and responsive to the specific request for proposals or request for qualifications requirements?

3. Has the past performance of the offerer's proposed methodology been documented?

4. Does the offerer's proposal or qualification use innovative technology and techniques?

(ii) Management factors (Factors that will require the identity of the offerer to be revealed must be submitted separately from other factors):

1. Project management:

a. How well does the proposed scheduling timeline meet the needs of the soliciting agency?

b. Is there a project management plan?

2. History and experience in performing the work:

a. Does the offerer document a record of reliability of timely delivery and on-time and on-budget implementation?

b. Does the offerer demonstrate a track record of service as evidenced by on-time, on-budget, and contract compliance performance?

c. Does the offerer document industry or program experience?

d. Does the offerer have a record of poor business ethics?

3. Availability of personnel, facilities, equipment and other resources:

a. To what extent does the offerer rely on in-house resources vs. contracted resources?

b. Are the availability of in-house and contract resources documented?

4. Qualification and experience of personnel:

a. Documentation of experience in performing similar work by employees and when appropriate, sub-contractors?

b. Does the offerer demonstrate cultural sensitivity in hiring and training staff?

(iii) Cost factors (Factors must be submitted separately from other factors unless specifically approved by the Public Procurement Review Board):

1. Cost of goods to be provided or services to be performed:

a. Relative cost: How does the cost compare to other similarly scored proposals or qualifications?

b. Full explanation: Is the price and its component charges, fees, etc. adequately explained or documented?

2. Assurances of performance:

a. If required, are suitable bonds, warranties or guarantees provided?

b. Does the proposal or qualification include quality control and assurance programs?

3. Offerer's financial stability and strength: Does the offerer have sufficient financial resources to meet its obligations?

3.107.08 Evaluation Committee

(1) Evaluation committees shall be used to evaluate request for proposals or request for qualifications and award contracts. Persons appointed to an evaluation committee shall have

the relevant experience necessary to evaluate the proposal or qualification. The members of the evaluation committee shall have no personal, financial or familial interest in any of the contract offerers, or principals thereof, to be evaluated.

(2) The names of the members of the evaluation committee shall not be publicly disclosed until their evaluation report as required under Section 3.107.12(1) herein. The members' names and job titles shall be made available to the public. Where evaluation committee members are not public employees, those members' names, educational and professional qualifications, and practical experience, that were the basis for the appointment, shall be made available to the public.

(3) Before evaluating proposals or qualifications, each individual participating in the evaluation of a proposal or qualification shall execute a statement in accordance with subsection (1) of this section certifying that he or she does not have a conflict of interest. The statement shall be filed with the head purchasing agent of the soliciting agency, before beginning the evaluation process. The certification shall be as follows:

"I hereby certify that I have reviewed the conflict of interest standards prescribed herein, and that I do not have a conflict of interest with respect to the evaluation of this proposal or qualification. I further certify that I am not engaged in any negotiations or arrangements for prospective employment or association with any of the offerers submitting proposals or qualifications or their parent or subsidiary organization."

(4) Committee members may conduct their work separately or together.

(5) The committee may use advisors, as it deems necessary to give opinions on evaluating proposals or qualifications, except that such advisors shall be subject to the provisions of subsection (3) of this section. The names of the advisors shall be made public at the same time as members of the evaluation committee as provided in subsection (2) of this section. For the purposes of this section, the term "advisors" shall mean those individuals who provide such significant input to a member or members of the evaluation committee that the advisor's opinions are fundamental in shaping the committee member's evaluation of the submitted proposals or qualifications.

(6) The process of establishing weighting criteria and evaluating proposals or qualifications shall result in a finding that a specific proposal or qualification is the most practical and advantageous, price and other factors considered, or that all proposals or qualifications should be rejected.

3.107.09 Receipt and Registration of Proposals or Qualifications

(1) Submitted proposals or qualifications shall be opened at the time designated for opening in the request for proposals or request for qualifications. Proposals or qualifications and modifications shall be date-stamped or time and date-stamped upon receipt and held in a secure place until the established due date. Electronic proposals or qualifications received will be stored in an electronic lockbox until the time designated for the opening of the proposal or qualification.

(2) As each proposal or qualification is submitted but before those proposals or qualifications are opened, the head purchasing agent shall designate a person to prepare a register of proposals

or qualifications, which shall include the number of modifications received, if any, and a description sufficient to identify the supply, service, commodity or other item offered. The designated person shall assign each submitted proposal or qualification an identifying letter, number, or combination thereof, without revealing the name of the offerer who submitted each proposal or qualification to the head purchasing agent or any person named to the evaluation committee for that proposal or qualification. The designated person shall keep the names of the offerers and their identifying numbers or letters, or combination thereof, in a sealed envelope or other secure location until factors not requiring knowledge of the name of the offerer have been evaluated and scored. If the designated person reveals the names of the offerers and the corresponding identifying information before such time, the procurement process shall be terminated and the proposal or qualifications resolicited. The register of proposals or qualifications shall be made part of the report required under Section 3.107.12(1) herein.

3.107.10 Evaluating Submitted Proposals or Qualifications

(1) The evaluation committee shall evaluate proposals or qualifications only in accordance with the methodology and weighting criteria described in the request for proposals or request for qualifications. Proposals or qualifications shall be initially classified as: (a) acceptable; (b) potentially acceptable, which means reasonably susceptible of being made acceptable; or (c) unacceptable. Offerers whose proposals or qualifications are unacceptable shall be so notified promptly.

(2) Discussions may be held with offerers to:

(a) Promote understanding of the state's requirements and the offerer's proposals or qualifications; and

(b) Facilitate arriving at a contract that will be the most practicable and advantageous to the state taking into consideration price and the other evaluation factors set forth in the request for proposals or request for qualifications.

(c) Offerers shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals or qualifications. Any discussions that take place under the provisions of this section shall be recorded and the recordings shall be made public upon award of the contract. The head purchasing agent shall 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 or request for qualifications, the request shall be amended to incorporate the clarification or change. Auction techniques, revealing one offerer's price to another, and disclosure of any information derived from competing proposals is prohibited. Any substantial oral clarification of a proposal or qualification shall be reduced to writing by the offerer.

3.107.11 Best and Final Offers

The head purchasing agent shall establish a common date and time for the submission of best and final offers. Best and final offers shall be submitted only once; however, the head purchasing agent 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 before the 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 construed as their best and final offer.

3.107.12 Awarding the Contract

(1) After proposals or qualifications have been evaluated, the evaluation committee shall prepare a report evaluating and recommending the award of a contract or contracts. The report shall list the names of all potential offerers who submitted a proposal or qualification and shall summarize the proposals or qualifications of each offerer. The report shall rank offerers in order of evaluation, shall recommend the selection of an offerer or offerers, as appropriate, for a contract, shall be clear in the reasons why the offerer or offerers have been selected among others considered, and shall detail the terms, conditions, scope of services, fees and other matters to be incorporated into the contract. The report shall be available to the public at least forty-eight (48) hours before the awarding of the contract.

(2) The head purchasing agent shall publish a notice on the agency's website and the Mississippi procurement portal summarizing the award of the contract, which shall include but not be limited to, the nature, duration and amount of the contract, the name of the offerer and a statement that the contract is on file and available for public inspection in the office of the head purchasing agent.

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 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?

(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 in scope to those supplies, services, or construction items necessary to meet the emergency and limited in term to the time necessary to meet the emergency; however in no event shall any emergency contract exceed a term of one (1) year.

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 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 Office of Personal Services Contract Review Rules and Regulations.

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.

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.

3.125 Protective Orders

Any party seeking a protective order for a procurement contract awarded by state agencies shall give notice to and provide the reasons for the protective order to the party requesting the information in accordance with the Mississippi Rules of Civil Procedure. The notice and reasons for the protective order must be posted on the Mississippi procurement portal for a minimum of seven (7) days before filing the petition seeking the protective order in chancery court. Any party seeking a protective order in violation of this subsection may be barred by a state agency from submitting bids, proposals or qualifications for procurement for a period not to exceed five (5) years.

Agencies may access detailed instructions on entering this information into MAGIC on OPTFM's website.

Chapter 4

Specifications

4.101 Definition of Terms Used in this Chapter

4.101.01 Definitions

(1) Brand Name Specification – a specification limited to one or more items by manufacturers' names or catalog numbers.

(2) Brand Name or Equal Specification – a specification which uses two or more manufacturer's names or catalog numbers to describe the standard of quality, performance, and other characteristics needed to meet Mississippi requirements and which provides for the submission of equivalent products. The use of Brand Name or Equal Specifications that contain less than two manufacturer's names or catalog numbers may be cause for rejection of the purchase request by the Office of Purchasing, Travel and Fleet Management.

(3) Qualified Products List – an approved list of supplies, services, or construction items described by model or catalog numbers, which, prior to competitive solicitation, the State has determined will meet the applicable specification requirements.

(4) Specification – any description of the physical, functional, or performance characteristics or of the nature of a supply, service, or construction item. A specification includes, as appropriate, requirements for inspecting, testing, or preparing a supply, service, or construction item for delivery.

(5) Specification for a Common or General Use Item – a specification which has been developed and approved for repeated use in procurements in accordance with the provisions of Subsection 4.104.01, Procedures for the Development of Specifications.

4.102 Duties of the Office of Purchasing, Travel and Fleet Management

The Office of Purchasing, Travel and Fleet Management shall promulgate regulations with approval of the Public Procurement Review Board (PPRB) governing the preparation, maintenance, and content of specifications for commodities and equipment required by the State.

4.102.01 General Purpose and Policies

4.102.01.1 Purpose

The purpose of a specification is to serve as a basis for obtaining a supply, service, or construction item adequate and suitable for the State's needs in a cost-effective manner, taking into account, to the extent practicable, the costs of ownership and operation as well as initial acquisition costs. It is the policy of the State that specifications permit maximum practicable competition consistent with this purpose. Specifications shall be drafted with the objective of clearly describing the State's requirements.

4.102.01.2 Use of Functional or Performance Descriptions

Specifications shall, to the extent practicable, emphasize functional or performance criteria while limiting design or other detailed physical descriptions to those necessary to meet the needs of the State. To facilitate the use of such criteria, using agencies shall endeavor to include as a part of their purchase requisitions the principal functional or performance needs to be met. It is recognized, however, that the preference for use of functional or performance specifications is primarily applicable to the procurement of supplies and services. Such preference is often not practicable in construction, apart from the procurement of supply-type items for a construction project.

4.102.01.3 Preference for Commercially Available Products

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

4.102.02 Availability of Documents

Except as provided in Subsection 4.104.01, Procedures for the Development of Specifications, regarding testing and confidential data, specifications, and any written determination or other document generated or used in the development of a specification shall be available for public inspection pursuant to Section 1.108, Public Access to Procurement Information.

4.103 Duties of the Chief Procurement Officer

The Chief Procurement Officer or their designee shall prepare, issue, revise, maintain, and monitor the use of specifications for commodities and equipment required by the State.

4.103.01 Authority to Prepare Specifications

4.103.01.1 Authority of the Chief Procurement Officer and State Agencies

The Chief Procurement Officer is authorized to prepare specifications. The Chief Procurement Officer may delegate the authority to prepare and utilize specifications to purchasing agencies and using agencies for any type of commodities and equipment provided such delegations may be revoked by the Chief Procurement Officer.

4.103.01.2 Authority to Contract for Preparation of Specifications

When a determination is made by the Chief Procurement Officer or the head of a purchasing agency authorized to prepare such specifications that there will be no substantial conflict of interest involved and it is otherwise in the best interest of the State, a contract to prepare specifications for State use in procurement of commodities or equipment may be entered into provided such officer has the authority to approve the specifications.

4.103.01.3 Small Purchase and Emergency Authority

If a specification for general or common use or a qualified products list exists for an item to be procured under Section 3.108, Purchases less than $50,000.01, it may be used except as otherwise provided by the Chief Procurement Officer or the head of a purchasing agency. If no such specification exists, purchasing and using agencies are hereby granted the authority to prepare specifications for use in such purchases. In an emergency under Section 3.110,

Emergency Procurements, any necessary specifications may be utilized by the purchasing or using agency without regard to the provisions of this chapter.

4.104 Procedures for the Development of Specifications

4.104.01.1 Provisions of General Application

(1) Application of Section

This section applies to all persons who may prepare a specification for State use, including the Chief Procurement Officer, the head of a purchasing agency, the head of a using agency, and the designees of such officers.

(2) Specification of Alternates

A specification may provide alternate descriptions of supplies, services, or construction items where two or more design, functional, or performance criteria will adequately meet the State's requirements.

(3) Use of Existing Specifications

If a specification for a common or general use item has been developed in accordance with Subsection 4.104.01, Procedures for the Development of Specifications, or a qualified products list has been developed in accordance with Subsection 4.104.01.2 (4), Qualified Products List, for a particular commodity or equipment item, it may be used unless the Chief Procurement Officer or the head of a purchasing agency makes a written determination that its use is not in the State's best interest and that another specification shall be used.

Commentary

The Chief Procurement Officer may provide for the periodic review of certain specifications to determine whether any existing specification needs revision or a new specification is needed to reflect changes in:

(1) The state-of-the-art;

(2) The characteristics of the available supplies, services, or construction items; or

(3) Needs of the using agency.

4.104.01.2 Special Additional Procedures

(1) Specifications for Common or General Use Items

(a) Preparation and Utilization

A specification for common or general use items shall, to the extent practicable, be prepared to be utilized when:

(i) A commodity or equipment item is used in common by several using agencies or used repeatedly by one using agency, and the characteristics of the commodity or equipment item, as commercially produced or provided, remain relatively stable while the frequency or volume of procurements is significant;

(ii) The State's recurring needs require uniquely designed or specially produced items; or

(iii) The Chief Procurement Officer, or the head of a purchasing or using agency authorized to prepare such specifications finds it to be in the State's best interest.

In the event a using agency requests the preparation of a specification for a common or general use item, the Chief Procurement Officer may prepare such a specification if such officer determines the conditions in Subsections 4.104.01.2 (1)(a)(i), (ii), or (iii), Preparation and Utilization, have been met.

(b) Comments on the Draft

The Chief Procurement Officer or the head of a purchasing or using agency preparing a specification for a common or general use item may provide the using agencies, and a reasonable number of manufacturers and suppliers as such officer deems appropriate, an opportunity to comment on the draft specification.

(c) Final Approval

Final approval of a proposed specification for a common or general use item shall be given only by the Chief Procurement Officer or by the head of a purchasing or using agency authorized to give such approval.

(d) Revisions

Revisions to specifications for common or general use items which do not change the technical elements of the specifications but which are necessary for clarification may be made upon approval of the Chief Procurement Officer or the head of a purchasing or using agency authorized to approve such specifications. Interim revisions for a particular procurement which change the technical elements of the specification may be made by the Chief Procurement Officer or the head of a purchasing or using agency authorized to approve such specifications. All other revisions shall be made in accordance with 4.104.01.2 (1)(b), Comments on the Draft, and Subsection 4.104.02.2 (1)(c), Final Approval.

(e) Cancellation

A specification for a common or general use item may be canceled by the Chief Procurement Officer, or by the head of a purchasing or using agency authorized to give final approval to such specifications.

(2) Brand Name or Equal Specification

(a) Applicability of this Subsection

Subsection, 4.104.01.2(2), Brand Name or Equal Specification, shall apply whenever brand names are used in specifications except as provided in Subsection 4.104.01.2(3), Brand Name Specification.

(b) Use

Brand name or equal specifications may be prepared to be used when the Chief Procurement Officer or the head of a purchasing agency determines that:

(i) No specification for a common or general use item or qualified products list is available;

(ii) Time does not permit the preparation of another form of specification, not including a brand name specification;

(iii) The nature of the product or the nature of the State's requirements makes use of a brand name or equal specification suitable for the procurement; or

(iv) Use of a brand name or equal specification is in the State's best interest.

(c) Designation of Several Brand Names

Brand name or equal specifications shall seek to designate as many different brands as are practicable as "or equal" references and shall further state that substantially equivalent products to those designated will be considered for award.

(d) Required Characteristics

Unless the Chief Procurement Officer or the head of a purchasing or using agency authorized to approve specifications determines that the essential characteristics of the brand names included in the specifications are commonly known in the industry or trade, brand name or equal specifications shall include a description of the particular design, functional, or performance characteristics which are required.

(e) Non-restrictive Use of Brand Name or Equal Specifications

Where a brand name or equal specification is used in a solicitation, the solicitation shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance, and characteristics desired and is not intended to limit or restrict competition.

(3) Brand Name Specification

(a) Use

Since use of a brand name specification is restrictive, it may be used only when the Chief Procurement Officer makes a determination that only the identified brand name item or items will satisfy the State's needs.

(b) Competition

The Agency Procurement Officer shall seek to identify sources from which the designated brand name item or items can be obtained and shall solicit such sources to achieve whatever degree of competition is practicable. If only one source can supply the requirement, the procurement shall be made under Section 3.109, Sole-Source Procurement.

(4) Qualified Products List

(a) Use

A qualified products list may be developed with the approval of the Chief Procurement Officer, or the head of a purchasing or using agency authorized to develop qualified products lists, when testing or examination of the commodities prior to issuance of the solicitation is desirable or necessary in order to best satisfy the requirements.

(b) Comments, Final Approval, Revisions, and Cancellation

Comments on final approval of and revisions to the proposed criteria and methodology for establishing and maintaining a qualified products list, and the cancellation thereof, shall follow the procedures of Subsections 4.104.01.2 (1) (b), Comments on the Draft, through 4.104.01.2 (1) (e), Cancellation, applicable to specifications for common or general use items.

(c) Solicitation

When developing a qualified products list, a representative group of potential suppliers shall be solicited in writing to submit products for testing and examination to determine acceptability for inclusion on a qualified products list. Any potential supplier, even though not solicited, may offer its products for consideration.

(d) Testing and Confidential Data

Inclusion on a qualified products list shall be based on results of tests or examinations conducted in accordance with prior published requirements. Except as otherwise provided by law, trade secrets, test data, and similar information provided by the supplier will be kept confidential when requested in writing by the supplier. However, qualified products lists test results shall be made public but in a manner so as to protect the confidentiality of the identity of the competitors by, for example, using numerical designations.

Commentary

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

4.105 Relationship with Using Agencies

The Chief Procurement Officer may obtain expert advice and assistance from personnel of using agencies in the development of specifications and may delegate in writing to a using agency the authority to prepare and utilize its own specifications.

4.106 Formulation and Restriction

Specifications written to invite bidding for term contracts when issued for the first time will be sent to selected competitive vendors for their review and comment prior to the request for formal bid. A standard form will be furnished with these specifications with questions that should be answered by all those surveyed and a request for comments if appropriate.

It will not be the intent of the Office of Purchasing, Travel and Fleet Management to either write or approve any specifications that are restrictive and preclude competitive bidding. Neither will it be the intent or policy of the Office of Purchasing, Travel and Fleet Management to write or allow to be written specifications that are so open and nonspecific as to invite participation by vendors offering less than quality products.

In the formulation of specifications, we would both welcome and invite vendor participation, but we would have it clearly understood that we will not tolerate vendor dictations.

In some cases, it will be absolutely necessary that the specifications be written in a manner that would invite bids on a single product or service or major repair part so as to conform to and be compatible with items of equipment or furnishings presently in use. When such cases arise, no consideration will be given to an alternate bid.

4.107 Maximum Practicable Competition

All specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the State's needs, and shall not be unduly restrictive. Specifications shall not be written so as to exclude equipment of domestic manufacture as provided for in Section 31-7-13(c), Mississippi Code of 1972, Annotated.

4.107.01 Non-restrictiveness Requirement

All specifications shall be written in such a manner as to describe the requirements to be met, without having the effect of exclusively requiring a proprietary commodity or equipment item, or procurement from a sole source, unless no other manner of description will suffice. In that event, a written determination shall be made that it is not practicable to use a less restrictive specification.

4.108 Specifications Prepared by Architects and Engineers

The requirements of this chapter regarding the purposes and non-restrictiveness of specifications shall apply to all specifications, including, but not limited to, those prepared by architects, engineers, designers, and draftsmen for public contracts.

4.108.01 Specifications Prepared by Other Than State Personnel

The requirements of this chapter shall apply to all specifications prepared by other than State

personnel including, but not limited to, those prepared by consultants, architects, engineers, designers, and other draftsmen of specifications for public contracts. Contracts for the preparation of specifications by other than State personnel shall require the specification writer to adhere to such requirements. When persons other than State personnel prepare specifications, the State shall not be relieved from the comment and review requirements of this chapter.

Chapter 5

Modification and Termination of Contracts for Commodities

5.101 Introduction

The following contract clauses are available for use in commodity contracts at the discretion of the Chief Procurement Officer, the head of a purchasing agency, or the designee of either officer. Alternative clauses are provided in some instances to permit accommodation of differing contract situations.

5.101.01 Variations in Estimated Quantities Clause

5.101.01.1 Definite Quantity Contracts

The following clause is authorized for use in definite quantity commodity contracts:

Variation in Quantity

"Upon the agreement of the parties, the quantity of commodities specified in this contract may be increased by a maximum of ten percent (10%) provided:

(1) The unit prices will remain the same (except for any price adjustments otherwise applicable); and

(2) The Agency Procurement Officer makes a written determination that such an increase will either be more economical than awarding another contract or that it would not be practical to award another contract."

5.101.01.2 Indefinite Quantity Contracts

No clause is provided here because in indefinite quantity contracts the flexibility as to the State's obligation to order and the contractor's obligation to deliver should be designed to meet using agency needs while making the contract as attractive as possible to potential contractors, thereby attempting to obtain maximum practicable competition in order to assure the best economy for the State of Mississippi. However, in each case, the contract should state:

(1) The minimum quantity, if any, the State is obligated to order and the contractor to provide;

(2) Whether there is a quantity the State expects to order and how this quantity relates to any minimum and maximum quantities that may be ordered under the contract;

(3) Any maximum quantity the State may order and the contractor must provide; and

(4) Whether the State is obligated to order its actual requirements under the contract, or in the case of a multiple award as defined in Section 3.119, Multiple Source Contracting, that the State will order its actual requirements from the contractors under the multiple award subject to any minimum or maximum quantity stated.

5.101.02 Termination for Default Clause

Termination for Default

(1) Default

If the contractor refuses or fails to perform any of the provisions of this contract with such diligence as will ensure its completion within the time specified in this contract, or any extension thereof otherwise fails to timely satisfy the contract provisions, or commits any other substantial breach of this contract, the Agency Procurement Officer may notify the contractor in writing of the delay or non-performance and if not cured in ten (10) days or any longer time specified in writing by the Agency Procurement Officer, such officer may terminate the contractor's right to proceed with the contract or such part of the contract as to which there has been delay or a failure to properly perform. In the event of termination in whole or in part, the Agency Procurement Officer may procure similar supplies or services in a manner and upon terms deemed appropriate by the Agency Procurement Officer. The contractor shall continue performance of the contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services.

(2) Contractor's Duties

Notwithstanding termination of the contract and subject to any directions from the Agency Procurement Officer, the contractor shall take timely, reasonable, and necessary action to protect and preserve property in the possession of the contractor in which the State has an interest.

(3) Compensation

Payment for completed supplies delivered and accepted by the State shall be at the contract price. The State may withhold from amounts due the contractor such sums as the Agency Procurement Officer deems to be necessary to protect the State against loss because of outstanding liens or claims of former lien holders and to reimburse the State for the excess costs incurred in procuring similar goods and services.

(4) Excuse for Non-performance or Delayed Performance

Except with respect to defaults of subcontractors, the contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms (including any failure by the contractor to make progress in the prosecution of the work hereunder which endangers such performance) if the contractor has notified the Agency Procurement Officer within 15 days after the cause of the delay and the failure arises out of causes such as: acts of God; acts of the public enemy; acts of the State and any other governmental entity in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather. If the failure to perform is caused by the failure of a subcontractor to perform or to make progress, and if such failure arises out of causes similar to those set forth above, the contractor shall not be deemed to be in default, unless the supplies or services to be furnished by the subcontractor were reasonably obtainable from other sources in sufficient time to permit the contractor to meet the contract requirements.

Upon request of the contractor, the Agency Procurement Officer shall ascertain the facts and extent of such failure, and, if such officer determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, the contractor's progress and performance would have met the terms of the

contract, the delivery schedule shall be revised accordingly, subject to the rights of the State under the clause entitled (in fixed-price contracts, “Termination for Convenience,” in cost-reimbursement contracts, “Termination”). (As used in this paragraph of this clause, the term “subcontractor” means subcontractor at any tier).

(5) Erroneous Termination for Default

If, after notice of termination of the contractor’s right to proceed under the provisions of this clause, it is determined for any reason that the contract was not in default under the provisions of this clause, or that the delay was excusable under the provisions of Subsection 5.101.02 (4), Excuse for Non-performance or Delayed Performance, of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the State, be the same as if the notice of termination had been issued pursuant to such clause. If, in the foregoing circumstances, this contract does not contain a clause providing for termination for convenience of the State, the contract shall be adjusted to compensate for such termination and the contract modified accordingly subject to the contractor’s rights under Chapter 6, Legal and Contractual Remedies.

(6) Additional Rights and Remedies

The rights and remedies provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

5.101.03 Liquidated Damages Clause

5.101.03.1 With Termination for Default Clause

The following clause is authorized for use in commodity contracts when it is difficult to determine with reasonable accuracy the amount of damage to the State due to delays caused by late contractor performance or non-performance and the contract contains the termination for default clause set forth in Subsection 5.101.02, Termination for Default Clause.

Liquidated Damages

"When the contractor is given notice of delay or non-performance as specified in Subsection 5.101.02 (1), Termination for Default Clause, of this contract and fails to cure in the time specified, the contractor shall be liable for damages for delay in the amount of $_____ per calendar day from date set for cure until either the State reasonably obtains similar commodities if the contractor is terminated for default, or until the contractor provides the supplies or services if the contractor is not terminated for default. To the extent that the contractor's delay or non-performance is excused under Subsection 5.101.02 (4), Excuse for Non-performance or Delayed Performance of the Termination for Default Clause of this contract, liquidated damages shall not be due the State. The contractor remains liable for damages caused other than by delay."

5.101.03.2 In Other Situations

If the contract will not have a Termination for Default Clause or the liquidated damages are to be assessed for reasons other than delay, the Chief Procurement Officer or the head of a purchasing agency may approve the use of any appropriate liquidated damages clause.

5.101.04 Termination for Convenience Clause

Termination for Convenience

(1) Termination

The Agency Procurement Officer may, when the interests of the State so require, terminate this contract in whole or in part, for the convenience of the State. The Agency Procurement Officer shall give written notice of the termination to the contractor specifying the part of the contract terminated and when termination becomes effective.

(2) Vendor’s Obligations

The vendor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination the contractor will stop work to the extent specified. The contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The Agency Procurement Officer may direct the contractor to assign the contractor's right, title, and interest under terminated orders or subcontracts to the State. The contractor must still complete the work not terminated by the notice of termination and may incur obligations as are necessary to do so.

Chapter 6

Legal and Contractual Remedies

6.101 Authority to Resolve Protested Solicitations and Awards

(1) Right to Protest

Any actual or prospective bidder, offerer, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the Head of the Purchasing Agency and copy the Chief Procurement officer. The protest shall be submitted in writing within 7 days after such aggrieved person knows or should have known of the facts giving rise thereto.

(2) Authority to Resolve Protests

The Chief Procurement Officer, the head of a purchasing agency, or a designee of either officer shall have the authority to settle and resolve a protest of an aggrieved bidder, offerer, or contractor, actual or prospective, concerning the solicitation or award of a contract.

(3) Decision

If the protest is not resolved by mutual agreement, the Chief Procurement Officer, the head of a purchasing agency, or a designee of either officer shall promptly issue a decision in writing. The decision shall:

(a) state the reasons for the action taken; and

(b) inform the protestant of its right to administrative review as provided in this Chapter.

(4) Notice of Decision

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

(5) Finality of Decision

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

(a) Any person adversely affected by the decision appeals administratively to the Procurement Review Board in accordance with Section 6.204, Protest of Solicitations or Awards.

(5) Stay of Procurements During Protests

In the event of a timely protest under Subsection (1) of this section, the State shall not proceed further with the solicitation or with the award of the contract until the Chief Procurement Officer, after consultation with the head of the using agency or the head of a purchasing agency, makes a written determination that the award of the contract

without delay is necessary to protect substantial interests of the State.

6.101.01 Definitions

6.101.01.1 **Interested Party** means an actual or prospective bidder, offerer, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest.

6.101.01.2 **Protestor** means any actual or prospective bidder, offerer, or contractor who is aggrieved in connection with the solicitation or the award of a contract and who files a protest.

6.101.01.3 **Attorney General** shall mean the individual assigned by the Attorney General to provide legal assistance to the Department of Finance and Administration.

6.101.02 Complaint to Procurement Officer

Complainants should seek resolution of their complaints initially with the Procurement Officer or the office that issued the solicitation. Such complaints may be made verbally or in writing.

6.101.03 Filing of Protest

6.101.03.1 When Filed

Protests shall be made in writing to the head of the purchasing agency and copied to the Chief Procurement Officer, and shall be filed in duplicate within seven (7) days after the protestor knows or should have known of the facts giving rise thereto. A protest is considered filed when received by the Chief Procurement Officer or the head of a purchasing agency. Protests filed after the seven (7) day period shall not be considered.

6.101.03.2 Subject of Protest

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

6.101.03.3 Form

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

(a) the name and address of the protestor;

(b) appropriate identification of the procurement and if a contract has been awarded, its number;

(c) a statement of reasons for the protest; and

(d) supporting exhibits, evidence, or documents to substantiate any claims unless not available within the filing time in which case the expected availability date shall be indicated.

6.101.03.4 Notification of the Attorney General

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

6.101.04 Requested Information; Time for Filing

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

6.101.05 Stay of Procurements During Protest

When a protest has been filed within 7 days and before an award has been made, the Chief Procurement Officer or the head of a purchasing agency shall make no award of the contract until the protest has been settled unless the Chief Procurement Officer makes a written determination, after consulting with the head of the using agency or the head of the purchasing agency, that the award of the contract without delay is necessary to protect substantial interests of the State.

6.101.06 Making Information on Protests Available

The Chief Procurement Officer or the head of a purchasing agency shall upon written request make available to any interested party information submitted that bears on the substance of the protest except where information is proprietary, confidential, or otherwise permitted or required to be withheld by law or regulation. Persons who wish to keep such information submitted by them confidential should so request by specifically identifying such information within documents submitted, and indicating on the front page of each document that it contains such information. The availability of such information shall be in compliance with 1.301, Public Access to Procurement Information.

6.101.07 Decision by the Chief Procurement Officer or the Head of a Purchasing Agency

6.101.07.1 Time for Decisions

A decision on a protest shall be made by the Chief Procurement Officer or the head of a purchasing agency as expeditiously as possible after receiving all relevant, requested information. If a protest is sustained, the available remedies include, but are not limited to, those set forth in Section 6.201.01, Determination that Solicitation or Award Violates Law, and Regulation 6.202, Remedies Prior to an Award.

6.101.08 Request for Reconsideration

6.101.08.1 Request

Reconsideration of a decision of the Chief Procurement Officer or the head of a purchasing agency may be requested by the protestor, appellant, any interested party who submitted comments during consideration of the protest, or any agency involved in the protest. The request for reconsideration shall contain a detailed statement of the factual and legal grounds

upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

6.101.08.2 Time for Filing

Requests for reconsideration of a decision of the Chief Procurement Officer or the head of a purchasing agency shall be filed not later than 7 days after receipt of such decision.

6.101.08.3 Time for Acting

A request for reconsideration shall be acted upon as expeditiously as possible. The Chief Procurement Officer or the head of a purchasing agency may uphold the previous decision or reopen the case as such officer deems appropriate.

6.101.09 Effect of Judicial or Administrative Proceedings

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

6.102 Authority to Debar or Suspend

(1) Authority

After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Chief Procurement Officer or the head of a purchasing agency, after consultation with the using agency and the Attorney General, shall have authority to debar a person for cause from consideration for award of contracts. The debarment shall be for a period of two years. The same officer, after consultation with the using agency and the Attorney General, shall have authority to suspend a person from consideration for award of contracts if there is probable cause for debarment. The suspension shall not be for a period exceeding three months.

(2) Causes for Debarment or Suspension

The causes for debarment or suspension include the following:

(a) conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;

(b) conviction under State or Federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a Mississippi contractor;

(c) conviction under State or Federal antitrust statutes arising out of the submission of bids or proposals;

(d) violation of contract provisions, as set forth below, of a character which is regarded by the Chief Procurement Officer or the head of a purchasing agency to be so serious as to justify debarment action:

(i) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or

(ii) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;

(e) any other cause the Chief Procurement Officer or the head of a purchasing agency determines to be so serious and compelling as to affect responsibility as a Mississippi contractor, including debarment by another governmental entity for any cause listed herein; and

(f) for violation of the ethical standards set forth in Chapter 9 (Ethics in Public Contracting).

(3) Decision

The Chief Procurement Officer or the head of a purchasing agency shall issue a written decision to debar or suspend. The decision shall:

(a) state the reasons for the action taken; and

(b) inform the debarred or suspended person involved of its rights to administrative review as provided in this Chapter.

(4) Notice of Decision

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

(5) Finality of Decision

A decision shall be final and conclusive, unless fraudulent, or:

(a) the debarred or suspended person commences an action in court; or

(b) the debarred or suspended person appeals administratively to the Procurement Review Board in accordance with Section 6.205, Suspension or Debarment Procedures.

6.102.01 Application

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

6.102.02 Suspension

6.102.02.1 Initiation

After consultation with the affected using agency, the Attorney General, and, where practicable, the contractor or prospective contractor who is to be suspended, and upon written determination by the Chief Procurement Officer or the head of a purchasing agency that probable cause exists for debarment as set forth in Section 6.102, Authority to Debar or Suspend, a contractor or prospective contractor shall be suspended. A notice of suspension, including a copy of such determination, shall be sent to the suspended contractor or prospective contractor. Such notice shall state that:

(a) the suspension is for the period it takes to complete an investigation into possible debarment including any appeals of a debarment decision but not for a period in excess of three months;

(b) bids or proposals will not be solicited from the suspended person, and, if they are received, they will not be considered during the period of suspension; and

(c) if a hearing has not been held, the suspended person may request a hearing in accordance with Section 6.102.04, Request for Hearing.

6.102.02.2 Effect of Decision

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

6.102.03 Initiation of Debarment Action

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

(a) state that debarment is being considered;

(b) set forth the reasons for the action;

(c) state that if the contractor or prospective contractor so requests, a hearing will be held, provided such request is received by the Chief Procurement Officer or the head of a purchasing agency within seven days after the contractor or prospective contractor receives notice of the proposed action.

Such notice shall also be sent to the Attorney General and the affected using agency. The affected using agency is that agency that has used the commodities or equipment supplied by the contractor. If more than one affected using agency is involved, the Chief Procurement Officer or the head of a purchasing agency may designate one or more representatives to be consulted in respect to this action.

6.102.04 Request for Hearing

A contractor or prospective contractor that has been notified of a proposed debarment action may request in writing that a hearing be held. Such request must be received by the official proposing the action within 7 days of receipt of notice of the proposed action under Section 6.102.03, Initiation of Debarment Action. If no request is received within the seven-day period, a final determination may be made as set forth in Section 6.102.08, Determination of Hearing Officer; Final Decision, after consulting with the Attorney General and the affected using agency.

6.102.05 Notice of Hearing

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

6.102.06 Authority of Hearing Officer

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

(a) hold informal conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding either by consent of the parties or upon such officer's own motion;

(b) require parties to state their positions with respect to the various issues in the proceeding;

(c) require parties to produce for examination those relevant witnesses and documents under their control;

(d) rule on motions, and other procedural items on matters pending before such officer;

(e) regulate the course of the hearing and conduct of participants therein;

(f) receive, rule on, exclude, or limit evidence, and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;

(g) fix time limits for submission of written documents in matters before such officer;

(h) impose appropriate sanctions against any party or person failing to obey an order under these procedures, which sanctions may include:

(i) refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(ii) excluding all testimony of an unresponsive or evasive witness; and

(iii) expelling any party or person from further participation in the hearing;

(i) take official notice of any material fact not appearing in evidence in the record, if such

fact is among the traditional matters of judicial notice.

6.102.07 Hearings Procedures

(1) Hearings shall be as informal as may be reasonable and appropriate under the circumstances and in accordance with applicable due process requirements. The weight to be attached to evidence presented in any particular form will be within the discretion of the hearing officer. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness was present. The hearing officer may require evidence in addition to that offered by the parties.

(2) A hearing may be recorded but need not be transcribed except at the request and expense of the contractor or prospective contractor. A record of those present, identification of any written evidence presented, and copies of all written statements and a summary of the hearing shall be sufficient record.

(3) Opening statements may be made unless a party waives this right.

(4) Witnesses shall testify under oath or affirmation. All witnesses may be cross-examined.

6.102.08 Determination of Hearing Officer; Final Decision

The hearing officer shall prepare a written determination recommending a course of action. Such determination shall be given to the Chief Procurement Officer or the head of a purchasing agency. Copies shall also be sent to the contractor or prospective contractor, the Attorney General, and the affected using agency. The contractor or prospective contractor shall have seven days to file comments upon the hearing officer's determination. The Chief Procurement Officer or the head of a purchasing agency may request oral argument. After consultation with the affected using agency and the Attorney General, the Chief Procurement Officer or the head of a purchasing agency shall issue a final decision. Both the hearing officer's determination and the final decision shall recite the evidence relied upon. When debarment is recommended or ordered, the reasons for such action, and to what extent affiliates are affected, shall be set forth. In addition, the final determination shall inform the debarred person of its rights to administrative review.

6.102.09 Effect of Debarment Decision

A debarment decision will take effect upon issuance and receipt by the contractor or prospective contractor. After the debarment decision takes effect, the contractor shall remain debarred until the debarment period specified in the decision expires.

6.102.10 Maintenance of List of Debarred and Suspended Persons

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

6.103 Authority to Resolve Contract and Breach of Contract Controversies

(1) Applicability

This section applies to controversies between the State and a contractor and which arise under, or by virtue of, a contract between them. This includes without limitation controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.

(2) Authority

The Chief Procurement Officer, the head of a purchasing agency, or a designee of either officer is authorized to settle and resolve a controversy described in Subsection (1) of this section.

(3) Decision

If such a controversy is not resolved by mutual agreement, the Chief Procurement Officer, the head of a purchasing agency, or the designee of either officer shall promptly issue a decision in writing. The decision shall:

(a) state the reasons for the action taken; and

(b) inform the contractor of its right to administrative review as provided in this Chapter.

(4) Notice of Decision

A copy of the decision under Subsection (3) of this section shall be mailed or otherwise furnished immediately to the contractor.

(5) Finality of Decision

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

(a) the contractor appeals administratively to the Procurement Review Board in accordance with Section 6.206, Contract and Breach of Contract Controversies.

(6) Failure to Render Timely Decision

If the Chief Procurement Officer, the head of a purchasing agency, or the designee of either officer does not issue the written decision required under Subsection (3) of this section within 60 days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

6.103.01 General

The Mississippi Procurement Code establishes procedures and remedies to resolve contract and breach of contract controversies between the State and a contractor. It is the State's policy, consistent with the Code, to try to resolve all controversies by mutual agreement. In appropriate circumstances, informal discussions between the parties can aid in the resolution of differences

by mutual agreement and are encouraged. If such informal discussions do not resolve the controversy, individuals who have not participated substantially in the matter in controversy may be brought in to conduct discussions if this is feasible. Independent committees and panels which review controversies expeditiously and informally with a view to fair settlement possibilities also are encouraged at this stage.

6.103.02 Scope of Regulations

Section 6.103, Authority to Resolve Contract and Breach of Contract Controversies, is applicable to controversies between the State and a contractor which arise under, or by virtue of, a contract between them. This includes without limitation controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification, reformation, or rescission. The word "controversy" is meant to be broad and all-encompassing. It includes the full spectrum of disagreements from pricing of routine contract changes to claims of breach of contract.

6.103.03 Delegation of Authority to Procurement Officer

6.103.03.1 Procurement Officer Authority

Subject to Subsection 6.103.03.2 of this section, unless a provision of the contract specifies that the authority to settle and resolve controversies and to issue decisions is reserved to the Chief Procurement Officer or the head of a purchasing agency, such authority is hereby delegated to the Procurement Officer. Within this Regulation, therefore, "Procurement Officer" denotes the person with such authority whether that is the Procurement Officer, the Chief Procurement Officer, the head of a purchasing agency, or a designee of such officer.

6.103.03.2 Prior Approval of Large Settlements

The settlement or resolution of controversies involving claims in excess of $15,000 is subject to the prior written approval of the Chief Procurement Officer or the head of a purchasing agency. In such cases, the Procurement Officer shall prepare a recommended decision for the Chief Procurement Officer or the head of a purchasing agency.

6.103.04 Procurement Officer's Decision

6.103.04.1 Procedures Prior to Issuing Decision

When a controversy cannot be resolved by mutual agreement, the Procurement Officer shall, after written request by the contractor for a final decision, promptly issue a written decision. Before issuing a final decision, the Procurement Officer shall:

(a) review the facts pertinent to the controversy; and

(b) secure any necessary assistance from legal, fiscal, and other advisors.

6.103.04.2 Final Decision

The Procurement Officer shall immediately furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt, and include in the decision:

(a) a description of the controversy;

(b) a reference to pertinent contract provisions;

(c) a statement of the factual areas of agreement or disagreement;

(d) a statement of the Procurement Officer's decision, with supporting rationale;

(e) a paragraph substantially as follows:

"This is the final decision of the Procurement Officer. This decision may be appealed to the Procurement Review Board. If you decide to make such an appeal, you must mail or otherwise furnish written notice of appeal to the Procurement Review Board within 7 days from the date you receive this decision. A copy of the notice of appeal shall be furnished to the Procurement Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference the decision from which the appeal is being taken, and identify the contract involved."

6.103.04.3 Failure to Timely Issue Final Decision

If the Procurement Officer does not issue a written decision within 60 days after written request by the contractor for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision has been received.

6.103.04.4 Payments of Amounts Found Due

The amount determined payable pursuant to the decision, less any portion already paid, normally should be paid without awaiting contractor action concerning appeal. Such payment shall be without prejudice to the rights of either party and where such payments are required to be returned by a subsequent decision, interest on such payments shall be paid at the statutory rate from the date of payment; provided, however, that any payment made shall be in compliance with State law.

6.103.05 Controversies Involving Mississippi Claims Against the Contractor

All controversies involving claims asserted by the State against a contractor which cannot be resolved by mutual agreement shall be the subject of a decision by the Procurement Officer, the Chief Procurement Officer, or the head of a purchasing agency, as applicable.

6.103.06 Interest

6.103.06.1 Payable on Claims

Interest on amounts ultimately determined to be due to a contractor or the State shall be payable at the statutory rate applicable to judgments from the date the claim arose through the date of decision or judgment, whichever is later. Reference Section 31-7-301 through 31-7-317 Mississippi Code.

6.103.06.2 Contract Clause

Each contract between the State and a contractor may contain a paragraph substantially similar to Subsection 6.103.06.1 of this section.

6.103.07 Disputes Clause

Language substantially similar to the following clause may be inserted in all Mississippi contracts:

"Disputes

(1) All controversies between the State and the contractor which arise under, or are by virtue of, this contract and which are not resolved by mutual agreement, shall be decided by the Chief Procurement Officer in writing, within 60 days after a written request by the contractor for a final decision concerning the controversy; provided, however, that if the Chief Procurement Officer does not issue a written decision within 60 days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

(2) The Chief Procurement Officer shall immediately furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt.

(3) Any such decision shall be final and conclusive, unless fraudulent, or:

(a) within the 7 days from the date of receipt of the decision, the contractor mails or otherwise furnishes written notice of appeal to the Procurement Review Board.

(4) The contractor shall comply with any decision of the Procurement Officer and proceed diligently with performance of this contract pending final resolution by the Procurement Review Board of any controversy arising under, or by virtue of, this contract, except where there has been a material breach of the contract by the State; provided, however, that in any event the contractor shall proceed diligently with the performance of the contract where the Chief Procurement Officer has made a written determination that continuation of work under the contract is essential to the public health and safety."

6.201 Applicability of this Part

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

6.201.01 Determination that Solicitation or Award Violates Law

6.201.01.1 Determination

A solicitation or award may be in violation of the law due to actions of state employees, bidders, offerers, contractors, or other persons. After consultation with the Attorney General, the Chief Procurement Officer or the head of a purchasing agency may determine that a solicitation or contract award is in violation of the provisions of the Mississippi Procurement Code or Regulations. After consultation with the Attorney General, the Ethics Commission may determine that a solicitation or award violates Ethics in Public Contracting of the Mississippi Procurement Regulation or the regulations promulgated thereunder. Any such determination shall be made in writing after an opportunity to be heard is given, and such determination is subject to appropriate appeal. [The Procurement Review Board may determine that a solicitation or contract award is in violation of the provisions of the Mississippi Procurement Regulations.]

6.201.01.2 Finding of Bad Faith or Fraud

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

6.202 Remedies Prior to an Award

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

(a) canceled; or

(b) revised to comply with the law.

6.202.01 Cancelling or Revising Solicitation or Proposed Award to Comply with Law

A finding by the Chief Procurement Officer, after consultation with the Attorney General, that the solicitation or proposed award is in violation of law will constitute a compelling reason to cancel or revise a solicitation or proposed award. Such cancellation shall be made in accordance with Regulation 3.112 (Cancellation of Invitations for Bids or Requests for Proposals).

6.203 Remedies After an Award

If after an award, it is determined that the solicitation or award is in violation of the law then the contract will be canceled in accordance with Section 3.112, Cancellation of Invitations for Bids or Requests for Proposals.

6.203.01 Termination

Contracts based on awards or solicitations that were in violation of law shall be terminated at no cost to the State, except as may be approved by the Public Procurement Review Board (PPRB) in compliance with State law.

6.203.02 Effect of Declaring a Contract Null and Void

In all cases where a contract is voided, the State shall endeavor to return those supplies delivered under the contract that have not been used or distributed. No further payments shall be made under the contract and the State is entitled to recover the greater of:

(a) the difference between payments made under the contract and the contractor's actual costs up until the contract was voided; or

(b) the difference between payments under the contract and the value to the State of the supplies, services, or construction if obtained under the contract.

The State may in addition claim damages under any applicable legal theory.

6.204 Protest of Solicitations or Awards

(1) Scope

This section applies to:

(a) a protest of a solicitation or award of a contract addressed to the Procurement Review Board by an aggrieved actual or prospective bidder or offeror, or a contractor; and

(b) an appeal addressed to the Board of a decision under Section 6.101.03.

(2) Time Limitations on Filing a Protest or an Appeal

(a) For a protest under Subsection (1)(a) of this section, the aggrieved person shall file a protest with the Board within 7 days after the aggrieved person knew or should have known of the facts and circumstances upon which the protest is based.

(b) For an appeal under Subsection (1) (b) of this section, the aggrieved person shall file an appeal within seven days of receipt of a decision under Section 6.101(3).

(3) Decision

On any direct protest under Subsection (1)(a) of this section or appeal under Subsection (1)(b) of this section, the Board shall promptly decide whether the solicitation or award was in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation. The proceeding shall be de novo. Any prior determinations by administrative officials shall not be final or conclusive.

(4) Standard of Review for Factual Issues

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

6.205 Suspension or Debarment Procedures

(1) Scope

This section applies to a review by the Procurement Review Board of a decision under Section 6.102, Authority to Debar or Suspend.

(2) Time Limitations on Filing an Appeal

The aggrieved person shall file its appeal with the Board within 7 days of the receipt of a decision under Section 6.102(3), Authority to Debar or Suspend, Decision.

(3) Decision

The Board shall promptly decide whether, or the extent to which, the debarment or suspension was in accordance with the Constitution, statutes, regulations, and the best interests of the State, and was fair. The proceeding shall be de novo. Any prior

determinations by administrative officials shall not be final or conclusive.

(4) Standard of Review for Factual Issues

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

6.206 Contract and Breach of Contract Controversies

(1) Scope

This section applies to a review by the Procurement Review Board of a decision under Section 6.103, Authority to Resolve Contract and Breach of Contract Controversies.

(2) Time Limitations on Filing an Appeal

The aggrieved contractor shall file its appeal with the Board within 7 days of the receipt of a decision under Section 6.103(3), Authority to Resolve Contract and Breach of Contract Controversies, Decision.

(3) Decision

The Board shall promptly decide the contract or breach of contract controversy. The proceeding shall be de novo. Any prior determinations by administrative officials shall not be final or conclusive.

(4) Standard of Review for Factual Issues

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

6.207 No Finality to a Decision on an Issue of Law

No determination by the Procurement Review Board on an issue of law shall be final or conclusive.

6.208 Appeal and Review of Procurement Appeals Board Decisions

(1) Appeal

Any person receiving an adverse decision, the State, or both may appeal from a decision by the Procurement Review Board to the designated court or courts of the State.

(2) Authorization of Appeal by the State

No such appeal shall be made by the State unless recommended by the Chief Procurement Officer or the head of the purchasing agency involved and approved by the Attorney General.

6.209 Discontinuance of Contractor's Appeal

After notice of an appeal to the Procurement Review Board has been filed with the Chief Procurement Officer or the head of a purchasing agency, a contractor may not discontinue such appeal without prejudice, except as authorized by the Board.

6.210 Debriefings

In accordance with Chapter 3, Section 3.107.18 of the Manual, the Agency Procurement Officer is authorized to provide debriefings that furnish the basis of the source selection decision and contract award. Debriefings may only be conducted when utilizing the competitive sealed proposal process as authorized in Chapter 3, Section 3.107.

(1) At the written request of any offeror who has submitted a proposal, debriefings may be given orally, in writing, or by any other method acceptable to the Agency Procurement Officer. Such debriefings may be given at any time on or after the eighth (8th) day after the agency has awarded the contract. In no case may an offeror request a debriefing more than thirty (30) days after the agency has awarded the contract.

(2) An offeror's written request for a debriefing should include a list of any questions an offeror may have in order to assist the Agency Procurement Officer or agency staff in preparing for the debriefing.

(3) A post-award debriefing may include:

(a) The agency's evaluation of significant weaknesses or deficiencies in the proposal, if applicable;

(b) The overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror;

(c) The overall ranking of all proposals, when any such ranking was developed during the source selection;

(d) A summary of the rationale for award;

(e) Reasonable responses to relevant questions about whether source selection procedures contained in the Request for Proposals and applicable law were followed.

(4) Post-award debriefings should not include point-by-point comparisons of the debriefed proposal with those of other offerors.

(5) Any debriefing should not reveal any information prohibited from disclosure by law, or exempt from release under the Mississippi Public Records Act of 1983, including trade secrets, or privileged or confidential commercial or manufacturing information. Agencies should consult their Public Information Officer or agency legal representative for guidance in complying with the Act prior to conducting debriefings.

(6) Debriefings are non-adversarial business meetings. Accordingly, offerors may bring legal representation to any oral debriefing, although it is not necessary. If, however, any offeror has legal representation present during an oral debriefing, the agency must also

have its legal representative in attendance. Questioning of agency staff by offerors' legal representative(s) is not permitted.

(7) A summary of any debriefing should be included in the contract file.

Chapter 7

Intergovernmental Relations

7.101 Definitions of Terms Used in this Chapter

(1) Cooperative Purchasing – procurement conducted by, or on behalf of, more than one Public Procurement Unit, or by a Public Procurement Unit with an External Procurement Activity.

(2) External Procurement Activity – any buying organization not located in this State which, if located in this State, would qualify as a Public Procurement Unit. An agency of the United States is an External Procurement Activity.

(3) Governing Authority – defined in Section 31-7-1, Mississippi Code of 1972, Annotated.

(4) Public Procurement Unit – either a procurement entity of a governing authority or of a state agency.

(5) Agency – defined in Section 31-7-1, Mississippi Code of 1972, Annotated.

7.102 Purchasing by Governing Authorities

7.102.01 Options Available to Purchase Commodities and Equipment

When purchasing commodities and/or equipment, the governing authority may follow the procedures set forth as follows:

(1) Follow statutory purchasing procedures set forth in Section 31-7-13, Mississippi Code of 1972, Annotated.

(2) Make purchases from contracts executed by the Office of Purchasing, Travel and Fleet Management. These contracts may include competitively bid contracts, negotiated contracts, cooperative contracts, and agency contracts which are deemed to be available to all entities by the Office of Purchasing, Travel and Fleet Management. Purchases made under the terms of this section shall be excepted from the normal bid requirements as per Section 31-7-13(m)(i), Mississippi Code of 1972, Annotated.

(3) Purchase the identical commodity or equipment offered on a contract established by the Office of Purchasing, Travel and Fleet Management from a vendor other than the one listed on the contract at a price not exceeding the state contract price. Identical shall mean that the product is the same make, model, item number, product code, manufacturer and description as the item on the state contract.

7.102.02 Purchasing Vehicles Having a Gross Weight Rating of Less Than 26,000 Pounds

When purchasing vehicles having a gross weight rating of less than 26,000 pounds, the governing authority may follow the procedures set forth as follows:

(1) Follow statutory purchasing procedures as set forth in Section 31-7-13, Mississippi Code

of 1972, Annotated, and award to the low responsive bidder regardless of dealer's location within the State. All vehicle sales firms doing business in Mississippi must have a Mississippi Motor Vehicle License Number as authorized in Section 63-17-73, Mississippi Code of 1972, Annotated.

(2) Follow statutory purchasing procedures as set forth in Section 31-7-13, Mississippi Code of 1972, Annotated, and award to the low responsive bidder domiciled within the county in which the governing authority is located, provided that the bid from the local dealer does not exceed the invoice cost of the vehicle by more than three percent (3%), Section 31-7-18, Mississippi Code of 1972, Annotated.

(3) Make purchases from contracts established by the Office of Purchasing, Travel and Fleet Management. These contracts may include competitively bid contracts, negotiated contracts, agency contracts, and cooperative contracts which are deemed to be available to all entities by the Office of Purchasing, Travel and Fleet Management. Purchases made under the terms of this section shall be excepted from the normal bid requirements as per Section 31-7-13(m)(i), Mississippi Code of 1972, Annotated.

(4) Purchase the identical commodity or equipment offered on a contract established by the Office of Purchasing, Travel and Fleet Management from a vendor other than the one listed on the contract at a price not exceeding the state contract price. Identical shall mean that the product is the same make, model, item number, product code, manufacturer and description as the item on the state contract.

7.103 In-State Cooperative Purchasing

7.103.01 Cooperative Purchasing Agreement Between a State Agency and a Local Governing Authority

Any agreement between the State and a local public procurement unit which provides that certain open-ended procurement contracts (requirement contracts) shall be available to the local public procurement unit shall also provide the following:

(1) The State shall conduct the procurements in compliance with the Mississippi Procurement Manual and applicable statutes.

(2) When the governing authority elects to procure any commodity under the state contract, all of its purchases for such commodities shall be obtained by placing purchase orders against the appropriate state contract in accordance with the terms and conditions of such contract.

(3) Payment for supplies or services ordered by the local public procurement unit under state contracts shall be the exclusive obligation of such jurisdiction.

(4) Inspection and acceptance of supplies or services ordered by the local public procurement unit under state contracts shall be the exclusive obligation of such jurisdiction.

(5) The State may terminate the cooperative agreement for failure of the local public procurement unit to comply with the terms of the contract or pay a contractor to whom the State has awarded a contract.

(6) The exercise of any warranty rights attaching to commodities received by the local public

procurement unit under state contracts shall be the exclusive obligation of such jurisdiction.

(7) Failure of a local public procurement unit which is procuring commodities under a state contract to secure performance from the contractor in accordance with the terms and conditions of its purchase order will not necessarily require the State or any other local public procurement unit to consider the default or to discontinue procuring under the contract.

(8) Any transactions shall be in compliance with applicable section of Section 31-7, Mississippi Code of 1972, Annotated,

7.104 Sale, Acquisition, or Use of Commodities by a Public Procurement Unit

Any public procurement unit may sell to, acquire from, or use any commodities belonging to another public procurement unit or external procurement activity as authorized by Sections 31-7-7 and 31-7-13, Mississippi Code 1972, Annotated.

7.105 Multi-State Cooperative Contracts

The Office of Purchasing, Travel and Fleet Management may enter into multi-state contracts which allow state agencies and governing authorities to purchase commodities and equipment, at prices established by the contract.

Chapter 8

Disposal of Personal Property

8.101 Procedures for Selling, Transferring, or Trading Personal Property are promulgated in accordance with Section 29-9-9.

8.101.01 Methods

Personal property which becomes surplus to the needs of a state agency may be disposed of in any of the following ways:

(1) Sold

(2) Traded

(3) Transferred

State agencies that fall under the purview of the Bureau of Fleet Management should reference the State Fleet Manual for instructions on disposal of vehicles.

8.101.01.1 Disposal of Personal Property

Items with an estimated value of not more than $1,000 may be salvaged, sold, traded, or transferred to other governmental entities.

Items with an estimated value of greater than $1,000 and not more than $5,000 can be traded, transferred or sold. When trading or selling items with a value of greater than $1,000 and not more than $5,000 a minimum of two written quotes must be obtained.

Items with an estimated value greater than $5,000 can be transferred, traded or sold. An item or group of items of personal property with a total estimated value of greater than $5000 may only be sold or traded after complying with the requirements set forth below for sealed bids as set forth in Subsection 8.101.01.2 or by auction as set forth in Subsection 8.101.03, Auction.

8.101.01.2 Personal property which becomes surplus to the needs of an agency or becomes obsolete or inoperable and still has a residual value may be traded as a part of the transaction to acquire new equipment.

This method of disposal may not be used when acquiring any vehicle covered by a state contract. The request for pricing based on a trade-in must be made a part of the specification for the equipment being purchased. The specification shall contain all pertinent information about the item being traded (i.e., make, model, year model, mileage or hours, where it may be seen, etc.). Surplus property may also be traded as a part of an acquisition of items covered by a state contract. All trades must be submitted on an Inventory Deletion Form and approved prior to releasing any equipment. The Inventory Deletion Form may not serve as a purchase request. The Inventory Deletion Form is to be considered as an inventory deletion form only. If an item is to be disposed of by trade-in, the Inventory Deletion Form shall be completed to include all information applicable to the trade-in. However, the agency must at the same time submit electronically the P-1 for approval to purchase the item to which the trade-in applies. Approval of

both documents must be obtained prior to the issuance of a purchase order.

Commentary

It should be noted that, when trading in a commodity and applying the revenue towards a reduction in the purchase price the agency must evaluate the value of the commodity being traded as well as the value of the item being procured to determine the proper methods of soliciting bids. If the estimated value of the item or items being traded is greater than $1000 but not more than $5000, two written quotes are required. If the estimated value of the "trade-in" commodity exceeds $5000, then the transaction shall be advertised.

If the estimated value of the commodity to be purchased exceeds, $50,000, then the transaction shall be advertised. See Section 31-7-13, Mississippi Code of 1972, Annotated. If the estimated value of the commodity to be purchased exceeds, $5,000, then the transaction shall be entered into after obtaining at least two competitive bids. See Section 31-7-13, Mississippi Code of 1972, Annotated. An example of what is not proper and not allowed would be: an agency wishes to trade in commodities having a value, more than $50,000; in return they would purchase commodities with a value of $51,000 for a total cost of $1,000. The agency would indicate that since the cost is only $1,000, they should not be required to obtain bids. This is not a correct interpretation. The agency is using $50,000 of state resources and acquiring an item with a value of $51,000, therefore, this transaction would require advertising and sealed bids.

Another example would be:

If the estimated value of the commodity to be purchased is less than $50,000, but the trade in value is over $5,000 then the transaction shall be advertised. An example of what is not proper and not allowed would be: an agency wishes to trade in commodities having a value of more than $5,000; in return they would purchase commodities with a value of $40,000 for a total cost of $45,000. The agency would indicate that since the cost is only $45,000, they should not be required to obtain bids. This is not a correct interpretation. The agency has a trade in valued over $5,000 so therefore, this transaction would require advertising and sealed bids.

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).

Property may also be transferred from a state agency to a governing authority. Transfers, or sale of property from one state agency to another, do not require approval of the Office of Purchasing, Travel and Fleet Management. The agencies must still submit the completed Inventory Deletion Form to the Division of Property Control, Office of the State Auditor and must obtain approval prior to disposing of the property.

8.101.01.4 An item or group of items of personal property may be sold to another state agency or governing authority by private treaty sale as set forth in Subsection 8.101.04.1, Private treaty sale is generally intended to refer to a sale based on the buyer's acceptance of a price set by the seller.

An item or group of items of personal property with a total estimated value of not more than

$1,000 may be sold by private treaty negotiated sale to any private entity as set forth in Subsection 8.101.04.1, Private treaty sale is generally intended to refer to a sale based on the buyer's acceptance of a price set by the seller. An item or group of items of personal property with a total estimated value of not more than $5000 may be sold to the highest bidder after first obtaining at least two written quotes. An item or group of items of personal property with a total estimated value of greater than $5000 may only be sold after complying with the requirements set forth below for sealed bids or auction as set forth in Subsection 8.101.02.1, Sealed Bid, or Subsection 8.101.03, Auction.

8.101.02 Sale of Personal Property may be accomplished by public auction, sealed bid, or private treaty negotiated sale.

8.101.02.1 Sealed Bid

Agencies when disposing of personal property by sealed bid will be required to advertise the sale in the same manner as set forth in Section 31-7-13(c), Mississippi Code of 1972, Annotated (with the exception of providing notice of the advertisement to the Mississippi Procurement Technical Assistance Program (MPTAP) under the Mississippi Development Authority). Such advertisement shall be made one time each week for two consecutive weeks and shall be made in a newspaper published in the county or municipality in which the agency is located or in a newspaper of state circulation. Such advertisement should indicate where, when, and for how long Invitation for Bids may be obtained; generally describe the items being sold; when and where the items may be seen; and contain other pertinent information but is not required to include detailed specifications. Bids received for such sale shall be handled in compliance with Subsection 3.106.11, Receipt, Opening, and Recording of Bids. No equipment sold by sealed bid shall be released to the successful bidder until the Inventory Deletion Form has been approved by the Office of Purchasing, Travel and Fleet Management and Property Control, Office of the State Auditor. The opening of sealed bids for the sale of state owned property shall be in compliance with Subsection 3.106.11, Receipt, Opening and Recording of Bids.

8.101.02.2 Property Disposal Specifications

The specifications or instructions to prospective buyers should provide a listing of all items being offered and such listing shall provide, but is not limited to, the following:

(1) Classification; (i.e., chair, typewriter, automobile, etc.).

(2) Make – Model

(3) Year of manufacture.

(4) Mileage or hours used

(5) Location – (Where the item may be seen.).

(6) Date and time when item may be inspected.

(7) Address of location to which the bids shall be delivered.

(8) Time and date set for the bid opening.

(9) Name of person (include telephone number) to be contacted if additional information is necessary.

Commentary

This listing, appropriately, should also serve as the Bid Form in which case each item should be numbered in a manner that would be easily recognized by any prospective buyer. The number shown on the item shall be the same as the number shown on the listing applicable to that item.

8.101.02.3 Bid Rejection

The selling agency shall have the authority to reject any or all bids or any part of any or all bids if it is determined by the head of the selling agency, the Chief Procurement Officer, or a designee of either that:

(1) The item should remain in service with the using agency or that it would be to the best interest of the State to transfer, etc., or sell the item to another agency or governing authority;

(2) The best price offered was determined to be too low; or

(3) The information provided on the listing of items was erroneous or misleading in such a manner as to be detrimental to the buyer or the State.

8.101.03 Auction

8.101.03.1 Public auctions have long been an acceptable, as well as preferred method of disposing of surplus property that is advantageous to the State.

Auctions allow buyers to offer more than a single price for any particular item. This is not the case with the sealed bid procedure. Because of this, items sold at auction have historically brought more money than those sold by sealed bid.

8.101.03.2 Selection Process

Auctioneers or auction companies and the selection of them provides for three (3) options which are:

(1) Auctions that are held on agency property;
(2) Auctions held at auction company location; and

(3) Online auctions

8.101.03.3 Auctions Held on Agency Property

When conducting an auction at the agency location, a decision must be made as to the extent of the involvement by the auction company. The two options available are:

(1) Will the auction company only be required to sell each item with no involvement in any other aspect; i.e., advertisement, item numbering, paper work, collection, etc; or

(2) Will the auction company provide a "lock and key" job? In which case the auction

company will be responsible for all aspects of the auction up to the depositing of receipts.

8.101.03.4 If the auction company is responsible only for selling each item, the selling agency may negotiate with a company provided the fee does not exceed an amount equal to ten percent (10%) per item but not to exceed $50 per item.

Example: The fee would be ten percent (10%) on any item selling for not more than $500. Items selling for more than $500 will generate a flat fee of $50 per item to the auction company.

Buyers fee may be allowed. Such contracts may be made without advertising; however, the Chief Procurement Officer or his/her designee must review contract prior to execution.

8.101.03.5 If the auction company fee is in excess of that set forth in 8.101.03.4, the auction company may only be selected through the competitive bid process.

Specifications shall be written which shall set forth all requirements imposed on the auction companies offering bids. No buyer fee is allowed if auction is held on agency property. The intent to contract shall be advertised in compliance with Section 31-7-13(c), Mississippi Code of 1972, Annotated, and approval of specifications must be granted by the Chief Procurement Officer or his/her designee.

8.101.03.6 Dealer Auctions

Vehicles - see State Fleet Manual.

Other equipment - If the dealer auction company is responsible only for selling each item, the selling agency may negotiate with a company, provided the fee does not exceed an amount equal to ten percent (10%) per item but not to exceed $50 per item. Buyers fee may be allowed for this type of disposal (vehicle).

Example: The fee would be ten percent (10%) on any item selling for not more than $500. Items selling for more than $500 will generate a flat fee of $50 per item to the dealer auction company.

8.101.03.7 Any time equipment owned by state agencies is sold at public auction, the Office of Purchasing, Travel and Fleet Management shall be notified in writing not less than 15 days prior to the auction.

This notification shall include:

(1) A detailed list of the items being sold,

(2) The time, date, and place where the auction will be held,

(3) A copy of the auctioneer's contract,

(4) Copies of specifications and bids for auctioneer's services (if applicable),

(5) A list of potential buyers who are being sent a notification of the auction; and

(6) A copy of, or a draft of, a legal advertisement to notify potential bidders of the day, time, and place of auction. The advertisement should run in a newspaper of general circulation in the county in which the auction will be held and should appear in the paper not less than twice. The second appearance of the advertisement shall be not less than seven (7)

working days prior to the auction. If a copy of an advertisement is submitted, it should include the days in which it appeared in the newspaper. If a draft of an advertisement is submitted, the agency should indicate the days it will appear in the newspaper.

Included with this information should be a request for authority to proceed with the auction. If approved, the agency shall have authority to release the property to the successful bidders at the time of the auction. Buyers fees are allowed if the agency agrees to the percentage of fee charged. Agencies will still be required to submit the appropriate Authorization to Dispose of Personal Property, Inventory Deletion Form, after the auction. The Office of Purchasing, Travel and Fleet Management reserves the right to attend any auction and to reject any bid which is determined to not be in the best interest of the State.

8.101.04 Private Treaty

8.101.04.1 Private treaty sale is generally intended to refer to a sale based on the buyer's acceptance of a price set by the seller.

Private treaty sale is generally intended to refer to a sale based on the buyer's acceptance of a price set by the seller. An item or group of items of personal property may be sold to another state agency or governing authority by private treaty sale. Such a method of sale applicable to state-owned property can only be used if the buyer is another state agency or is a governing authority (both entities must meet the requirements as set forth in the definitions of each in Section 31-7-1, Mississippi Code of 1972, Annotated); or if the agency determines the value of the state-owned property is less than, $1,000, a private treaty sale may be negotiated with a private entity. Agencies interested in entering into private treaty sales with governing authorities or private entities shall submit an Inventory Deletion Form to the Office of Purchasing, Travel and Fleet Management for review.

8.101.04.2 When using the private treaty method, it should be the consideration of the selling agency that the price not be set too high, such as book retail price.

This could and, in many cases, will create a situation that because no agency or governing authority would pay the price being asked, the equipment was sold at public auction to a private entity buyer at a price less than that which was asked of the government entities. Keep in mind that if another agency or a governing authority has use for equipment that becomes surplus to the selling agency then the selling agency should give every consideration to "cutting a deal" for any other government entity having a need for the item; however, if the selling entity has statutory authority to rebudget the proceeds from the sale of surplus property, they should employ a method which involves competition (auction or sealed bid). In doing so, the seller would realize the best price available at that time and the buyer, should it be another government entity, may get the equipment at a price less than that which had been asked.

Commentary

If your agency has no statutory authority to rebudget proceeds from the sale of the equipment, you may wish to simply transfer the item to another agency or governing authority. Agencies should keep in mind that theOffice of Surplus Property is in the business of redistributing surplus property to those entities that have a need for the items. Interested agencies should contact the Office of Surplus Property to ascertain the available options.

8.101.05 Electronic Recyclers

Agencies seeking to dispose of state-owned personal property that meets the definition of "electronics" found in Section 49-2-101, Mississippi Code of 1972, Annotated may dispose of the property through the use of a certified electronic recycler, after a determination is made that the item(s) have no value and the property will not be sold, traded, or transferred by the agency. Agencies shall only use certified recyclers who appear on the directory maintained by the Mississippi Department of Environmental Quality for the disposal of agency electronics, in accordance with Section 49-2-103, Mississippi Code of 1972, Annotated.

Chapter 9

Ethics in Public Contracting

Introduction

This chapter is provided for guidance and information only and shall not be considered as superseding any laws or regulations administered and enforced by the State Ethics Commission. Please refer to Sections 25-4-101 through 25-4-119, Mississippi Code of 1972, Annotated.

9.101 Definitions of Terms Used in this Chapter

(1) Confidential Information – any information which is available to an employee only because of the employee's status as an employee of Mississippi and is not a matter of public knowledge or available to the public on request.

(2) Conspicuously – written in such special or distinctive format, print, or manner that a reasonable person against whom it is to operate ought to have noticed it.

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

(4) Financial Interest –

(a) Ownership of any interest or involvement in any relationship from which, or as a result of which, a person within the past year has received, or is presently or in the future entitled to receive, monetary compensation or material gratuity;

(b) Ownership of such interest in any property or any business as may be specified by the Ethics Commission; or

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

(5) Gratuity – a payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received.

(6) Immediate Family – a spouse, children, parents, brothers and sisters, and such other relatives as may be designated by the Ethics Commission.

(7) Official Responsibility – direct administrative or operating authority, whether intermediate or final, either exercisable alone or with others, either personally or through subordinates, to approve, disapprove, or otherwise direct Mississippi action.

(8) Purchase Request – that document whereby a using agency requests that a contract be entered into for a specified need, and may include, but is not limited to, the technical description of the requested item, delivery schedule, transportation, criteria for

evaluation, suggested sources of supply, and information supplied for the making of any written determination required by this Code.

9.101.01 Definitions

(1) Bona Fide Employee – a person employed by a prospective contractor and subject to the prospective contractor's supervision and control as to the time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain Mississippi contracts. In determining whether a bona fide employment relationship exists, the following factors should be considered:

(a) Whether the employment is continuous.

(b) Whether the person is subject to the supervision and control of the prospective contractor.

(c) Whether the size of any contingent fee is reasonable in relation to the service performed.

(d) Whether the method of payment of the contingent fee is customary in the trade.

(e) Whether the person is employed solely by the prospective contractor.

(2) Bona Fide Established Commercial Selling Agency – a business that neither exerts nor proposes to exert improper influence to solicit or obtain public contracts. In determining whether a business is a bona fide established commercial selling business, the following factors should be considered:

(a) Whether the business is one which has either been active for a considerable period of time or is presently an on-going concern and is likely to continue as such.

(b) Whether the business uses its own name and is characterized by the customary indicia of the conduct of a regular business.

(c) The degree to which the business' activities are directed toward the solicitation of contracts of the State.

(d) Whether the size of any contingent fee is reasonable in relation to the services performed.

(e) Whether the method of payment of the contingent fee is customary in the trade.

(3) Business Employee – a person, whether compensated or not, who performs personal services for a business.

(4) Employee – as defined in Subsection 1.107(2)(n), Definitions, Employee, is hereinafter referred to as "Mississippi Employee." As used throughout this section, the term "Mississippi Employee" shall include:

(a) A person elected to a Mississippi office;

(b) A non-elected person, whether appointed or selected through a personnel

selection procedure, receiving a salary, wages, or other compensation from the State; and

(c) A non-compensated or minimally compensated person who is performing personal services for the State.

The term "Mississippi Employee" does not include a person who, as an independent contractor, performs professional, scientific, technical, or advisory service for a state agency and who receives a fee, honorarium, or similar consideration for the services performed.

9.102 Statement of Policy

Public employment is a public trust. It is the policy of the State of Mississippi to promote and balance the objective of protecting government integrity and the objective of facilitating the recruitment and retention of personnel needed by the State. Such policy is implemented by prescribing essential standards of ethical conduct without creating unnecessary obstacles to entering public service.

Public employees must discharge their duties impartially so as to assure fair competitive access to governmental procurement by responsible contractors. Moreover, they should conduct themselves in such a manner as to foster public confidence in the integrity of the State procurement organization.

To achieve the purpose of this chapter, it is essential that those doing business with the State of Mississippi also observe the ethical standards prescribed herein.

9.103 General Standards of Ethical Conduct

(1) General Ethical Standards for Employees

Any attempt to realize personal gain through public employment by conduct inconsistent with the proper discharge of the employee's duties is a breach of a public trust. In order to fulfill this general prescribed standard, employees must also meet the specific standards set forth in: Section 9.104, Employee Conflict of Interest; Section 9.105, Gratuities; Section 9.106, Prohibition Against Contingent Fees; and Section 9.107, Restrictions on Employment of Present Employees.

(2) General Ethical Standards for Non-employees

Any effort to influence any public employee to breach the standards of ethical conduct set forth in this section and Section 9.104, Employee Conflict of Interest; Section 9.105, Gratuities; Section 9.106, Prohibition Against Contingent Fees; Section 9.107, Restrictions on Employment of Present Employees; and Section 9.108, Restriction on Employees Purchasing Under Terms of a State Contract is also a breach of ethical standards.

Commentary

The head of each governmental body or such official's designee is encouraged to explain and to discuss at least annually with such official's employees the provisions of these regulations.

9.104 Employee Conflict of Interest

(1) Conflict of Interest

It shall be a breach of ethical standards for any employee to participate directly or indirectly in a procurement when the employee knows that:

(a) The employee or any member of the employee's immediate family has a financial interest pertaining to the procurement;

(b) A business or organization in which the employee, or any member of the employee's immediate family, has a financial interest pertaining to the procurement; or

(c) Any other person, business, or organization with whom the employee or any member of the employee's immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement.

(2) Discovery of Actual or Potential Conflict of Interest, Disqualification, and Waiver

Upon discovery of an actual or potential conflict of interest, an employee shall promptly file a written statement of disqualification and shall withdraw from further participation in the transaction involved. The employee may, at the same time, apply to the Ethics Commission for an advisory opinion as to what further participation, if any, the employee may have in the transaction.

(3) Notice

Notice of this prohibition shall be provided in accordance with regulations promulgated by the Ethics Commission.

Commentary

Section 9.104, Employee Conflict of Interest, covers instances in which a state employee involved in procurement is actively negotiating for employment with a contractor or prospective contractor. Such an employee must recuse himself or herself from participation in a procurement involving such contractor or prospective contractor and apply to request an advisory opinion from the Ethics Commission for a waiver of the conflict of interest prohibition regarding any further participation in that procurement. Offers of employment under certain circumstances may also be gratuities which are prohibited by Section 9.105, Gratuities.

9.105 Gratuities

It shall be a breach of this regulation for any person to offer, give, or agree to give any employee or former employee, or for any employee or former employee to solicit, demand, accept, or agree to accept from another person, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, preparation of any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other

particular matter, pertaining to any program requirement or proposal thereof.

9.105.01 Gratuities Prohibition

9.105.01.1 Relationship of Gratuity

In addition, the gratuity or offer of employment must be made in relation to any proceeding or application, request for a ruling, determination, claim or controversy, or other particular matter, to constitute a breach, and in connection with any:

(1) Decision;

(2) Approval;

(3) Disapproval;

(4) Recommendation;

(5) Preparation of any part of a program requirement or a purchase request;

(6) Action to influence the content of any specification or procurement standard;

(7) Rendering of advice;

(8) Investigation;

(9) Auditing; or

(10) Other advisory capacity.

9.105.01.2 Family

This prohibition extends to the giving of gratuities to anyone on the state employee's or former state employee's behalf such as a member of that employee's immediate family.

9.105.02 When Prohibition Against Gratuities Not Applicable

Section 9.105, Gratuities, does not prohibit:

(1) The solicitation or acceptance of anything of monetary value from a friend, parent, spouse, child, or other close relative when the circumstances make it clear that the motivation for the transaction is unrelated to any procurement or program requirement with the State and is based upon a personal or family relationship;

(2) The participation in the activities of, or the acceptance of an award for, a meritorious public contribution or achievement from a charitable, religious, professional, social, or fraternal organization, or from a non-profit educational, recreational, public service, or civic organization;

(3) Acceptance only on current customary terms of finance of a loan from a bank or other financial institution for proper and usual activities of state employees, such as home mortgage loans; or

(4) Acceptance of unsolicited advertising products or promotional material, such as pens, pencils, note pads, calendars, and other such items.

9.106 Prohibition Against Contingent Fees

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

9.106.01 Influence Peddling

The prohibition in Section 9.106, Prohibition Against Contingent Fees, covers influence peddling and particularly that which might occur when a former state official is hired on a contingent basis by a business seeking state contracts.

9.106.02 Improper Influence

A business employee or a commercial selling business should be conclusively presumed not to be bona fide if the Ethics Commission determines that improper influence has been or is being used to secure a state contract.

9.107 Restrictions on Employment of Present Employees

Except as may be permitted by advisory opinions regulations or rulings of the Ethics Commission, it shall be a breach of ethical standards for any employee who is participating directly or indirectly in the procurement process to become or be, while such an employee, the employee of any person contracting with the governmental body by whom the employee is employed. Notice of this provision shall be provided in accordance with opinions promulgated by the Ethics Commission.

9.108 Restriction on Employees Purchasing Under Terms of a State Contract

Section 25-4-105(1), Mississippi Code of 1972, Annotated, states, "No public servant shall use his official position to obtain pecuniary benefit for himself other than that compensation provided for by law, or to obtain or attempt to obtain pecuniary benefit for any relative or any business with which he is associated."

In layman's terms, this means that anyone purchasing a product is free to negotiate the best price possible with the seller but any attempt to tie the sale to a state contract based upon employment with a governmental entity could be considered to be a violation of the ethics law.

9.109 Restriction on Employees Buying Surplus Property

Section 25-4-105(3)(b), Mississippi Code of 1972, Annotated, states, "No public servant shall be a purchaser, direct or indirect, at any sale made by him in his official capacity or by the governmental entity of which he is an officer or employee, except in respect of the sale of goods and services when provided as public utilities or offered to the general public on a uniform price schedule." In the case of a sale by a state agency, no state employee, regardless of the agency affiliation of the selling party or the purchaser, may participate in the sale as a purchaser.

9.110 Contractor/Consultant Conflict of Interest

It is the policy of the State of Mississippi to identify, avoid or mitigate conflicts of interest in contracting with independent contractors and consultants for services related to the subsequent competitive acquisition of commodities as defined in Section 31-7-1(e), Mississippi Code of 1972, Annotated.

The underlying principles of this policy are:

(1) Preventing the existence of conflicting roles that may bias a contractor's or consultant's judgment in its work for the State; and

(2) Preventing unfair competitive advantage.

An independent contractor or consultant hired by any state agency for the purpose of preparing or furnishing complete or essentially complete specifications which are to be used in competitive acquisition for the furnishing of the same services or equipment shall not:

(1) Be awarded a contract in the subsequent competitive acquisition of commodities; or

(2) Be a subcontractor or consultant to a bidder participating in the competitive acquisition of the same.

The Chief Procurement Officer may waive this policy by determining that its application in a particular situation would not be in the best interest of the State of Mississippi. Any request for a waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the Chief Procurement Officer.

Chapter 10

Special Procedures

10.101 Special Procedures

This section sets forth unique policies and procedures to be used when purchasing certain items or when using specialized techniques as follows:

(1) Section 10.102, Purchasing Petroleum Products

(2) Section 10.103, Purchasing Hi–Tech and Surveillance Equipment

(3) Section 10.104, Acquiring Copiers

(4) Section 10.105, Purchasing Commodities Produced from Recovered Materials

(5) Section 10.106, Procedures for Establishing an Agency Contract

(6) Section 10.107, Procedures for Issuance of Open Purchase Orders

(7) Section 10.108, Procedures for Applying Preference to Resident Contractors

(8) Section 10.109, Information Applicable to Construction

(9) Section 10.110, Information Applicable to Taxes

(10) Section 10.111, Information Applicable to Services

(11) Subsection 10.111.03, Small Purchase Procurement Card

10.102 Purchasing Petroleum Products

Section 31-7-13(h), Mississippi Code of 1972, Annotated, provides that when any agency or governing authority shall have a need for gas, diesel fuel, oils and/or other petroleum products in excess of, $5,000 the agency or governing authority may purchase the commodity after having solicited and obtained at least two competitive written bids as defined in Section 31-7-13(b), Mississippi Code of 1972, Annotated. If two competitive written bids are not obtained, the entity shall comply with the formal bidding procedures set forth in Section 31-7-13(c), Mississippi Code of 1972, Annotated. After having advertised for bids for the purchase of gas, diesel fuel, oils and other petroleum products and no acceptable bids can be obtained, the agency or governing authority may negotiate in such a manner as to secure the best price available. Therefore, when purchasing these products, the following procedures should be followed:

(1) If the total purchase does not exceed, $5,000 the purchase may be made without any quotes or bids. We recommend that the purchasing entity contact at least two sources to assure that the price paid is not excessive.

(2) If the total purchase exceeds, $5,000 you may obtain two written, signed quotes and purchase from the vendor who has offered the lowest and best bid. State agencies will not be required to submit a P-1 for gasoline purchases.

(3) If the entity is unable to obtain two written quotes, the entity must advertise as set forth in Section 31-7-13(c), Mississippi Code of 1972, Annotated. We suggest that the advertisement be for a contract to purchase gasoline for a term of 12 months. Upon receipt of bids if the low bid is acceptable, then you may award the contract and make all purchases for the period from the awarded vendor. If no bids are acceptable, then the entity should reject all bids and may negotiate to meet their needs. Please note that a bid with an escalation clause may be an acceptable bid provided that the invitation to bid included a price adjustment clause and the basis and method of adjusting unit prices. After having advertised and received no acceptable bids, we suggest that the entity obtain telephone quotes each time gasoline is needed. After obtaining an adequate number of telephone quotes, the entity should purchase from the vendor offering the lowest and best bid. It will be absolutely imperative that a file be maintained which should include:

(a) The firm name,

(b) Individual contacted,

(c) Vendor phone number,

(d) Price for each vendor contacted,

(e) Copy of the original advertisement for bids, and

(f) A letter of explanation as to why all bids were rejected.

10.102.01 Fuel Management Services

Any governing authority or agency of the State shall, before contracting for the services and products of a fuel management or fuel access system, enter into negotiations with not fewer than two (2) sellers of fuel management or fuel access systems for competitive written bids to provide the services and products for the systems. In the event that the governing authority or agency cannot locate two (2) sellers of such systems or cannot obtain bids from two (2) sellers of such systems, it shall show proof that it made a diligent, good-faith effort to locate and negotiate with two (2) sellers of such systems. Such proof shall include but not be limited to publications of a request for proposals and letters soliciting negotiations and bids. For purposes of this paragraph, a fuel management or fuel access system is an automated system of acquiring fuel for vehicles as well as management reports detailing fuel use by vehicles and drivers.

10.102.02 Contract for Fuel Access Card Services

The Bureau of Fleet Management maintains a contract for Fuel Access Card Services which is available for use by all state agencies and governing authorities. Proper use of this contract would exempt the using department from bid procedures for purchases made pursuant to this contract.

Commentary

When it comes to purchasing gas with a credit card or a fuel access card, it is very important to understand exactly what the card does and for what you are being charged. It is improper for an entity to pay interest on debt unless they have specific authority to do so. Therefore, the use of a credit card which charges a service charge or interest should not be allowed. On the other hand, the use of a fuel access card or gas identification card is considered acceptable as long as there are no service charges or interest charges. If these purchases are individual purchases less than $5,000.01 and the purchases are not being artificially broken up so as to circumvent the law, there would not be any reason to require quotes or formal advertisement.

10.103 Purchasing Hi –Tech and Surveillance Equipment

The Mississippi Bureau of Narcotics and any other such department of state or local government involved in any type of undercover operations relating to drug enforcement will be required to comply with this regulation when making any purchase as permitted in Section 31-7-13(m)(xix), Mississippi Code of 1972, Annotated.

10.103.01 Objective

The objective of this regulation is to provide a procedure that would allow for the acquisition of surveillance equipment or any other hi-tech equipment used by law enforcement agents in undercover operations in the most cost-effective manner without requiring public notification of the intent to purchase the equipment.

10.103.02 Definitions

The following definitions will apply when used throughout this regulation.

(1) Surveillance Equipment – any equipment or device used to monitor, track, or observe persons or things related to any type of investigation or evidence gathering process wherein the need for the highest degree of security is mandatory so as not to compromise the operation in general or personnel in particular.

(2) Hi-Tech Equipment – any equipment considered by the industry and law enforcement personnel to be specialized, sophisticated and secretive in nature that to publicize its acquisition could or would jeopardize the success of the mission or the safety of those persons involved in that mission.

(3) Quote – any price solicitation as described in Section 31-7-13(b), Mississippi Code of 1972, Annotated.

10.103.03 Conditions for Soliciting Competition

Section 31-7-13(m)(xix), Mississippi Code of 1972, Annotated, exempts the purchase of surveillance and other hi-tech equipment used by law enforcement agents in undercover operation from competitive bid requirements. This should be interpreted to mean that no notification of the intent to purchase need be published as required by Section 31-7-13(c), Mississippi Code of 1972, Annotated. It should not be interpreted to mean that competition be ignored.

10.103.04 Procedures

10.103.04.1 State Agency Procedures

When acquiring the equipment referenced herein, state agencies will solicit multiple quotes unless it is determined that the item being purchased is available from only a single supplier. If the purchase is in excess of $50,000 the Request for Authority to Purchase, P-1, must be submitted to the Office of Purchasing, Travel and Fleet Management. In completing the P-1, the item description section need only reflect the term “surveillance” or “hi-tech” equipment. No specific description need be presented. In listing the quotes when multiple suppliers are available, the suppliers’ name may be listed by name and address, or they may simply be designated as supplier 1, supplier 2, etc. The agency shall maintain a file for each such purchase which shall contain, but is not limited to:

(1) Description of the equipment being purchased;

(2) Specifications (if used);

(3) List of vendors receiving solicitation;

(4) Copies of quotes;

(5) Justification for single-source purchase (if single-source provision is exercised);

(6) Justification for accepting other than the low bid (if other than the low bid is receiving the award); and

(7) Any other documentation relative to the purchase.

10.103.04.2 Governing Authority Procedures

Law enforcement units which are entities of governing authorities are not required to obtain approval of the Office of Purchasing, Travel and Fleet Management when making purchases as set forth in this regulation. The Board of the governing authority having jurisdiction over the law enforcement unit making the purchase shall set the guidelines to be followed in making those purchases. However, where competition is available, the purchases shall be made on the basis of competitive quotes. These entities shall also maintain a bid file on each purchase made under the provisions of Section 31-7-13(m)(xix), Mississippi Code of 1972, Annotated, and the file will contain the same information as set forth in the above requirements applicable to state agencies.

10.104 Acquiring Copiers

10.104.01 Methods

The following is an explanation of the methods available to state agencies and governing authorities to acquire copiers:

10.104.01.1 Purchase

There are a number of copiers on contract with a net cost of $50,000 and below. State agencies may purchase from any of the vendors listed in these contracts Copiers with a net cost which exceeds $50,000 and copiers not covered by state contracts may be purchased in compliance

with statutory bidding requirements set forth in Section 31-7-13, Mississippi Code of 1972, Annotated. Governing authorities may purchase from any vendor offering the contract item at or below the contract price.

10.104.01.2 Rental

There are a number of copiers available on contract for one and/or multiple-year rental programs. Agencies may rent from any of the vendors listed in these contracts. Governing authorities may rent from any vendor offering the contract items at or below the contract prices. When renting a copier, state agencies must use the Vendor Rental Agreement for use by Mississippi departments and vendors.

10.104.01.3 Rental, Not on Contract

Rental, by state agencies, of copiers not covered by the contracts and/or longer term rentals may be considered on the basis of competitive bids. The correct procedure for this type of acquisition will be as follows:

(1) The agency should determine their needs in the area of copies per minute, copies per month, duplexing, finishing, collating, reduction/enlargement, electrical capabilities, space allocation, length of commitment, etc. The agency should then contact at least two vendors and ask them to submit a bid which will meet the agency's needs. If the base commitment (monthly rental x number of months) exceeds, $50,000 the agency must advertise as per Section 31-7-13(c) of the Mississippi Code of 1972, Annotated.

(2) The bids should be in writing so that all vendors are submitting an offer based on the same requirements. The agencies must assure that all costs are included and that all vendors are making uniform bids.

(3) Upon receipt of the, bids, the agency should evaluate the bids to determine which is in the best interest of the agency. Upon completion of the evaluation, the agency should submit a P-1 to the Office of Purchasing, Travel and Fleet Management with copies of all bids and a letter of justification explaining the agency's preference. If the agency is not accepting the lowest bid, they will be expected to submit a justification explaining why the low bid is not acceptable.

10.104.02 Trade-In of Office Equipment for Credit

The Office of Purchasing, Travel and Fleet Management will permit trade-in of equipment for credit when state agencies enter into a rental contract. However, all applicable credit must be extinguished prior to any payments being made by the agency. Contracts wherein that credit is spread out over the term of the contract will not be allowed.

10.104.03 Assignment of Contracts

This is a reminder that no contract for commodities, supplies or equipment, with a state agency, may be assigned without the express written consent of the Office of Purchasing, Travel and Fleet Management.

10.105 Purchasing Commodities Produced from Recovered Materials

10.105.01 Objective

The objective of this regulation is to establish procedures to be followed when state agencies purchase products that can be produced from recovered materials.

10.105.02 Specifications

When preparing specifications for products that can be produced from recovered materials, the agency should include a clause indicating the desire for recycled products. The agency should also define, for the purposes of the specific purchase, the minimum percentage of recovered material which will be required to be considered for the ten percent (10%) preference. In addition, the agency should describe the award process so that all vendors know how the evaluation and award is to be made.

Specification Clause for Products Made from Recovered Materials

It is suggested that all agencies consider using the following clause when issuing specifications for products made from recovered materials. This applies to printing, paper, corrugated boxes, paper bags, toilet tissue, etc.

Mississippi law requires that specifications be written so as to promote the use of products made from recovered materials. Therefore, bidders are asked to consider bidding on a product made from recovered materials; provided, however, that any product bid must be equal in quality, weight, texture, and color to the product required by these specifications. For the purposes of these specifications, a commodity made from recovered materials must be at least 20% post-consumer waste as defined by EPA and ASTM.

Products made from recovered materials will be given a preference in the award procedure as follows:

(1) The low bid which meets specifications will be determined.

(2) If the low bid meeting specifications is made from recovered materials, then the award will be made to the vendor offering the low bid.

(3) If the low bid is not made from recovered materials, then the award will be made to the low bid meeting specifications which is made from recovered materials; provided, however, that the price paid may not be more than ten percent (10%) higher than the lowest bid received.

(4) If there are no bids for recycled products within ten percent (10%) of the lowest bid, then the award will be made to the vendor offering the lowest bid.

10.106 Procedures for Establishing an Agency Contract

10.106.01 Objective

The objective of this regulation is to establish the procedures for agencies and institutions of the State of Mississippi to enter into Agency Contracts for the purchase of commodities, supplies, and equipment.

10.106.02 Definition

Agency Contract is defined as an agreement between an agency and a vendor, wherein the agency purchases specific products from the vendor for a specific period of time and, in most cases, at firm prices.

10.106.03 Procedures for Items Where Multiple Bids can be Obtained

(1) When multiple bids can be obtained, the agency should develop specifications, advertise, and solicit bids as per Section 31-7-13(c), Mississippi Code of 1972, Annotated. If the agency intends to award on an "all or none" basis, they must indicate estimated usage for each item on the bid form.

(2) After receipt of bids and evaluation, the agency should prepare an electronic Request for Authority to Purchase, P-1.

(3) The agency should also submit:

(a) Two (2) copies of the proposed prices, (not required if using electronic process;

(b) A copy of the advertisement;

(c) A bid tabulation sheet; and

(d) Copies of the bids.

If preparing copies of the bids appears to be too cumbersome, agencies may request approval to send only the tabulation sheet. The Office of Purchasing, Travel and Fleet Management will reserve the right to require copies of any and all bids at any time.

(4) The agency should also submit any letters of justification or information which relate to the proposed contract(s).

(5) If there are multiple vendors being awarded items, a separate P-1 shall be done for each awarded vendor.

(6) The Office of Purchasing, Travel and Fleet Management will approve the contract at which time the agency will receive an e-mail notification of the approval and may then begin issuing purchase orders against the contract.

(7) All purchase orders issued by the agency during the term of the contract for the commodities covered shall indicate the P-1 number in the space provided.

10.106.04 Procedures for Single-Source Items, Firm Price

(1) For items wherein the agency cannot obtain competitive bids but can obtain firm prices for a fixed period of time, the agency should submit an electronic Request for Authority to Purchase, P-1.

(2) The agency should submit a copy of the proposed prices

(3) The agency should also submit any letters of justification or information which relate to the proposed contract(s). This should include an explanation why the need fulfilled by

the commodity cannot be met by any other available product.

(4) The Office of Purchasing, Travel and Fleet Management will approve the contract at which time the agency will receive an e-mail notification of approval and may then begin issuing purchase orders against the contract.

(5) All purchase orders issued by the agency, during the term of the contract, for the commodities covered, shall indicate the P-1 number in the space provided.

10.106.05 Procedures for Single-Source Items, Firm Price Not Available

(1) For items wherein the agency cannot obtain competitive bids and cannot obtain firm prices for a fixed period of time, the agency should prepare and submit a Request for Authority to Purchase, P-1.

(2) The agency should also submit any letters of justification or information which relate to the proposed contract(s). This should include an explanation why the need fulfilled by the commodity cannot be met by any other available product, as well as an explanation as to why firm pricing is not available.

(3) The Office of Purchasing, Travel and Fleet Management will approve the contract at which time the agency will receive an e-mail notification of approval and may then begin issuing purchase orders against the contract.

(4) All purchase orders issued by the agency, during the term of the contract for the commodities covered shall indicate the P-1 number in the space provided.

10.107 Procedures for Issuance of Open Purchase Orders

10.107.01 Objective

The objective of this regulation is to establish procedures for open purchase orders which may be used for multiple purchases from a single vendor for a period of not more than an allotment period. The purchase order may be issued on or after the first day of the allotment period. Partial payments may be made as valid invoices are received and verified. This procedure is established in accordance with Section 31-7-9, Mississippi Code of 1972, Annotated.

10.107.02 State Agency Procedures for Open Purchase Orders in Excess of $5,000

All open purchase orders in excess of $5,000 must have an approved electronic Request for Authority to Purchase, P-1, attached to the purchase order. P-1 approval is not required for open purchase orders for service contracts. To receive P-1 approval, the P-1 must have the following included on the P-1 or attached:

(1) A brief justification of the need for an open purchase order in lieu of normal P.O. procedures. This should include, but not be limited to, an estimate of the quantity of purchase orders that would be required if the Open Purchase Order Procedures are not used.

(2) A general description of the commodities/services and the maximum amount per invoice.

(3) The following certification:

"This is to certify that only the commodities/services shown will be purchased and that no items currently covered by any state contract will be purchased under the terms of this purchase order without proper approval from the Office of Purchasing, Travel and Fleet Management. This procedure will not be used to separate purchases so as to circumvent any laws, regulations or policies of the State of Mississippi."

10.107.03 State Agency Procedures for Open Purchase Orders for $5,000 or Less

All open purchase orders for $5,000 or less must have the following either included on the P.O. or attached:

(1) A brief justification of the need for an open purchase order in lieu of normal P.O. procedures.

(2) In the case of a rental which requires P-1 approval, the P.O. must include the appropriate P-1 approval number.

(3) A general description of the commodities/services and the maximum amount per invoice.

(4) The following certification:

"This is to certify that only the commodities/services shown will be purchased and that no items currently covered by any state contract will be purchased under the terms of this purchase order without proper approval from the Office of Purchasing, Travel and Fleet Management. This procedure will not be used to separate purchases so as to circumvent any laws, regulations or policies of the State of Mississippi."

10.107.04 Procedures to be Established by State Agencies

The agencies who issue open purchase orders should establish a procedure whereby the person picking up goods or services has a signed or approved purchase requisition form in order to maintain control of the open purchase order balances. The items purchased from all open purchase orders must agree with the proper object of expenditure code recorded for that particular P.O. All responsibility that the proper type of items are being purchased and that all purchasing laws concerning bid or contract items are being followed will fall upon the agency officials.

10.107.05 Institutions of Higher Learning Procedures for Open Purchase Orders

The Institutions of Higher Learning may issue open purchase orders which are in compliance with policies and procedures which have been submitted to and approved by the Department of Finance and Administration.

10.108 Procedures for Applying Preference to Resident Contractors

Sections 31-7-47 and 31-3-21, Mississippi Code of 1972, Annotated, state that, "In the letting of public contracts, preference shall be given to resident contractors, and a non-resident bidder domiciled in a state, city, county, parish, province, nation or political subdivision having laws granting preference to local contractors shall be awarded Mississippi public contracts only on the same basis as the non-resident bidder's state, city, county, parish, province, nation or

political subdivision awards contracts to Mississippi contractors bidding under similar circumstances. Resident contractors actually domiciled in Mississippi, be they corporate, individuals or partnerships, are to be granted preference over non-residents in awarding of contracts in the same manner and to the same extent as provided by the laws of the state, city, county, parish, province, nation or political subdivision of domicile of the non-resident.

Commentary

In layman's terms, this means that we must penalize out-of-state vendors by the same amount as their state laws would penalize our vendors. If State A has a five percent (5%) in-state preference and a vendor from State A is bidding in Mississippi, then you must give a Mississippi vendor a five percent (5%) preference in the evaluation and award of the contract. Agencies are advised to review the applicable statutes and discuss this matter with their attorney.

10.109 Information Applicable to Construction

Agencies considering construction projects should become familiar with the applicable sections of the Mississippi Code of 1972, Annotated, and the Planning and Construction Manual developed by the Bureau of Building, Grounds and Real Property Management. The following definitions and commentary are set forth as an introduction and should not be considered to be a complete discussion of construction contracting.

10.109.01 Construction Defined

The Office of Purchasing, Travel and Fleet Management, in cooperation with the Office of the State Auditor, has developed the following guidelines to assist agencies and governing authorities in the interpretation of the purchasing requirements.

As per Section 31-7-1, Mississippi Code of 1972, Annotated, “construction” shall mean the process of building, altering, improving, renovating or demolishing a public structure, public building, or other public real property. It does not include routine operation, routine repair or regularly scheduled maintenance of existing public structures, public buildings or other public real property. As per Section 31-7-13, Mississippi Code of 1972, Annotated, “construction” falls under the public bid laws. The question is, where does “routine repair” end and “construction” begin? In general, it is considered construction if it would add to, restore, or reduce the value of a property.

“Add to” would indicate an addition to or an improvement to the property. This would include such projects as the construction of a new building or road, the construction of an additional office to an existing building, or the installation of a new air conditioning system into an existing building. “Restore” would indicate a situation where a building or road had depreciated significantly, and the project was intended to bring the property back to its original value. “Reduce” would indicate demolition of the property.

In addition, there are other “projects” which would fall under the term “construction” which would not necessarily follow the definition shown above. Routine maintenance to retain value and/or function would not be considered construction, and, therefore, would not require compliance with the public purchasing laws. However, non-routine maintenance to restore value as opposed to retain value would be considered “construction” and would fall under the public bid laws. Therefore, it is important to establish and maintain maintenance schedules on all property in an

effort to retain the value and not allow property to depreciate.

Please remember that repairs made to a building, road, or bridge in an emergency are exempt from the bidding requirements. Part of the definition of an emergency is "...when the immediate restoration of a condition of usefulness of any public building, equipment, road or bridge appears advisable...." Since "emergency" repairs are exempt from the bidding requirements, this would indicate that repairs which are not an emergency would not be considered exempt.

Another "rule of thumb" is that if the funding source is from a budget line "Capital Outlay" then the project is considered construction. Please do not construe this statement to imply that purchases made from other funds would be exempt from the bidding requirements.

Please note that the lack of a requirement to obtain competitive bids should not preclude the purchasing agent from attempting to obtain the best possible price for the entity. If in doubt, follow the statutory bid laws set forth in Section 31-7-13, Mississippi Code of 1972, Annotated. A few examples will help to give some guidelines to follow in determining if bids are required.

(1) Pouring of concrete to add a parking area would be considered construction since value is being added to the property. Resealing of an existing parking area, on a routine basis, would not necessarily be considered construction since this would be considered routine maintenance, and the value of the property is being retained at its original value and not increased.

(2) Adding new pipe to an existing structure so as to provide water to a new part of the building would be considered construction. Replacing existing pipe would not be considered routine maintenance and would be considered construction.

(3) Painting of a building on a routine basis would not necessarily be considered construction since you would be retaining the value of the building. This may be considered a contractual service and would not necessarily require bidding. If, however, you purchased paint and hired a painter, you would need to follow the statutory procedures for purchasing of the paint. If there was not a maintenance schedule, this project would appear to be an effort to restore the value and should be considered as a construction project and compliance with the bid laws would be required.

(4) Demolition of existing walls and replacement with new walls would not be considered routine maintenance. The "renovations" would have an impact upon the value of the building; this would be considered construction. Since it is not routine maintenance, it must be construction. In this case, it may be better to be safe than sorry; put it out for bids.

10.109.02 Public Projects

When preparing Instructions and Specifications for a public project, it may be wise to include the specific requirements for information to be shown on the outside of the envelope, except where bidders are submitting electronically in MAGIC, in which case the certificate of responsibility may be submitted with the electronic bid. As per Section 31-3-21(2), Mississippi Code of 1972, Annotated, all paper bids submitted for public projects where said bid is in excess of $50,000 shall contain on the outside of the envelope the contractors current certificate of responsibility number. Also, please remember that no bids for a public project shall be opened unless such certificate number appears on the envelope or unless there appears a statement on the outside of the envelope to the effect that the bid enclosed therewith did not exceed $50,000.

For informational purposes, a public project is defined as, “Any project for erection, building, construction, reconstruction, repair, maintenance or related work which is funded in whole or in part with public funds.”

Commentary

In layman’s terms, this means that you need to remind the bidders that if they plan to bid on a public project, they better put the certificate number on the envelope or a statement that the bid is not over $50,000. Without one or the other, you cannot open the bid. Interested parties may want to review Section 31-3-21, Mississippi Code of 1972, Annotated.

10.109.03 Architectural or Engineering Service Contracts

Section 31-11-3, Mississippi Code of 1972, Annotated, requires that the Department of Finance and Administration shall review and preapprove all architectural or engineering service contracts entered into by any state agency, institution, commission, board or authority other than architectural or engineering contracts paid for by self-generated funds of any of the state institutions of higher learning or community college projects that are funded form local funds.

Also, this requirement does not apply to any construction or design projects of the State Military Department that are funded from federal funds or other non-state sources, nor shall they apply to any project of the State Department of Transportation. Prior to entering into any such contract or agreement, agencies should contact the Bureau of Building, Grounds, and Real Property Management.

10.110 Information Applicable to Taxes

In general, state agencies have limited authority to pay taxes. Therefore, any reference to taxes owed in contracts should be reviewed with legal counsel. Agencies should may want to consider deleting sections pertaining to the payment of taxes during negotiations with the vendor advise vendors that the state is exempt from taxes on the sale of property, labor, services and products sold directly to the state or its departments or institutions.

10.111 Information Applicable to Services

Agencies under the authority of Office of Personal Service Contract Review shall follow the guidelines set forth in the Personal Service Contract Rules and Regulations.

10.111.01 Services Requiring Competition

The services shown below require competition as indicated.

(1) Fuel management services, see Subsection 10.102.01, Fuel Management Services.

(2) Garbage collection or disposal, solid waste collection or disposal, sewage collection or disposal. Contracts in excess of $50,000 for these services may be entered into after following a formal request for proposal procedure and advertising in accordance with

Subsection 3.106.05, Public Notice.

Any request for proposals when issued shall contain terms and conditions relating to price, financial responsibility, technology, legal responsibilities and other relevant factors as are determined by the governing authority or agency to be appropriate for inclusion; all factors determined relevant by the governing authority or agency or required by this paragraph shall be duly included in the advertisement to elicit proposals. After responses to the request for proposals have been duly received, the governing authority or agency shall select the most qualified proposal or proposals on the basis of price, technology and other relevant factors and from such proposals, but not limited to the terms thereof, negotiate and enter contracts with one or more of the persons or firms submitting proposals. If the governing authority or agency deems none of the proposals to be qualified or otherwise acceptable, the request for proposals process may be reinitiated.

10.111.02 Small Purchase Procurement Card Services

In accordance with Section 7-7-23, Mississippi Code of 1972, Annotated, the State Fiscal Officer established a general rule to allow state agencies to make certain purchases without first issuing a purchase order. The various state agencies may make purchases under the Small Purchase Procurement Card Program established by the Office of Purchasing, Travel and Fleet Management provided, however, that all such purchases shall be made in compliance with the minimum policies and procedures established by the Office of Purchasing, Travel and Fleet Management. The Chief Procurement Officer or his/her designee of Office of Purchasing, Travel and Fleet Management shall have the authority to limit the ability of any agency to use the Small Purchase Procurement Card Program if it is determined that the agency is not in compliance with the policies and procedures. Policies, procedures, and guidelines on the Procurement Card Program can be found in the State Procurement Card Guidelines.

10.111.03 State of Mississippi Procurement Card Program

The Office of Purchasing, Travel and Fleet Management maintains a contract for a Procurement Card Program. The intent of this Procurement Card Program is to allow government entities to make small purchases of commodities, repairs, or services easier and more economical. This card is accepted by a wide variety of businesses offering goods and services. Government entities may use the Procurement Card to make purchases which are bona fide needs of the entity.

The maximum amount of a single purchase transaction shall be $5,000 (entities may establish stricter guidelines.) Municipalities need to follow requirements by law for issuing purchase orders. The procedures for the program can be found in the State Procurement Card Guidelines.

10.111.04 Procurement Card Program Exception

If an agency establishes the fact that the State Procurement Card program cannot or will not meet the needs of the agency, the agency may submit a request for approval from the Office of Purchasing, Travel and Fleet Management to establish their own procurement card program.

When the approval from the Office of Purchasing, Travel and Fleet Management has been received, the procedures established in Section 3.107, Competitive Sealed Proposals, must be followed. Prior to any award, justification must be submitted to the Office of Purchasing, Travel and Fleet Management indicating how their program better meets the needs of the agency and indicate the differences from that of the State Procurement Card Program.

If a governing authority establishes the fact that the Small Purchase Procurement Card cannot or will not meet the needs of the governing authority, the governing authority may submit a request for approval from their governing board to establish their own Procurement Card program by following the procedures established in Section 3.107, Competitive Sealed Proposals. Approval of such action shall be placed on the minutes of the board of the governing authority and a copy of the approval sent to the Office of Purchasing, Travel and Fleet Management.

10.112 Credit Cards and Club Membership Cards

In accordance with Section 31-7-1(1)(b), Mississippi Code of 1972, Annotated the Office of Purchasing, Travel and Fleet Management has established these purchasing regulations governing the use of credit cards and purchasing club membership cards to be used by state agencies and governing authorities. Use of the cards shall be in strict compliance with these regulations.

10.112.01 Balances On Accounts

Balances on credit cards shall be paid at the receipt of the monthly statement, once the statement has been reconciled for accuracy. Balances on credit cards shall not be carried over to the next month except on disputed claims and only for the disputed amount. Any amounts due on credit cards shall incur interest charges as set forth in Section 31-7-305, Mississippi Code of 1972, Annotated, which only allows for an interest rate of 1 ½% per month to be applied to any unpaid balance not paid within 45 days.

10.112.02 Limitations of Use

The Chief Procurement Officer or his/her designee shall have the authority to limit the ability of any government entity to use procurement cards, credit cards and club membership cards if it is determined that the entity is not in compliance with the minimum policies and procedures established by this office.

10.112.03 Merchant-Specific Credit Cards

The use of the Small Purchase Procurement card should prevent the need for merchant specific credit cards (i.e. Walmart, Home Depot, Texaco, etc.) and should be utilized if the need for a credit card is established. Exceptions may be approved if circumstances arise which require the need for a merchant specific credit card. State agencies desiring to obtain a merchant specific credit card shall submit to the Office of Purchasing, Travel and Fleet Management for approval, written justification for the need of a merchant-specific credit card.

Governing authorities desiring to obtain a merchant specific credit card shall submit to their governing board for approval, written justification for the need of a merchant specific credit card. Approval of such action shall be placed on the minutes of the board of the governing authority.

10.112.04 Merchant Specific Credit Card Minimum Requirements

The following are the minimum requirements for use of credit cards. Individual entities may decide to implement stricter or additional requirements. Each entity should develop written policies and procedures to present to cardholders prior to receipt of any credit card. The minimum requirements are as follows:

(1) Assure any purchases made using a credit card adheres to all applicable purchasing procedures, as set forth in Section 31-7-1, Mississippi Code of 1972, Annotated.

(2) Assure that the items purchased are required for bona fide government purposes.

(3) Assure that the prices paid are fair and reasonable.

(4) Notify the merchant that the purchase is being made in the name of a government entity which is exempt from state and local taxes.

(5) Assure that a list of the items purchased (either in the form of a detailed sales receipt or an order description) is reviewed and confirmed in writing by the cardholder. This list should have the cardholder's printed name and signature.

(6) Assure that all items are received (no back orders allowed).

(7) Assure that state contract items are purchased only from the state contract vendor at or below the state contract price.

(8) Assure that purchases are within the limits set by the individual entity and available budget authority.

(9) State Agencies shall assure that no purchases are made for travel purposes; In general, Governing Authorities shall not use a credit card for travel purposes except where allowed by statue, such as Section 19-24-13, Mississippi Code of 1972, Annotated, which allows a sheriff and his deputies to use an approved credit card to pay expenses incurred when traveling in or out of state in the performance of their official duties.

(10) Assure that no cash advances are made with the card.

(11) Upon receipt of the monthly statement, the cardholder shall review all charges to assure accuracy, complete applicable dispute documents, reconcile the statement with copies of receipts and order logs, and approve and sign the statement.

(12) Forward the statement, copies of receipts, logs, and dispute documents to the appropriate official within the agency according to agency policy. This should be done within one day after receipt of the statement. The documents may be mailed, but it is recommended that these items be sent via facsimile.

(13) Appropriate official within the agency should review statements and applicable documents to assure that only proper purchases have been made and that the statement accurately reflects the charges indicated on the receipts, logs, and dispute documents. If correct, the appropriate official shall approve the statements for payment and process to the agency accounting office. The agency accounting office shall verify all statements and submit for payment.

(14) The appropriate agency official shall maintain a file with the statements and all applicable receipts and dispute documents.

(15) Prior to receiving a credit card, the cardholder shall sign a statement verifying that he/she has read these minimum requirements, and any additional policies established by the agency, and that it is understood he/she will be personally liable for any purchase that is made which is not in compliance with these procedures; and in addition to being responsible for any such charges, the cardholder may lose the privilege of using the credit card.

(16) Prior to any credit cards being issued, the appropriate agency official shall sign a statement verifying that he/she has read these minimum requirements and that it is understood he/she may be held jointly liable for any purchase that he/she approved which is not in compliance with these procedures; and in addition to being responsible for any such charges, the agency may lose the privilege of using the credit cards.

10.112.05 Membership Club Cards

Membership club card fee's, such as Sam's club cards, are allowed but should be justified by the agency or governing authority to show that the anticipated savings from using the card would exceed the cost of the card fee. This justification should be maintained on file with the government entity. Each subsequent year, the government entity shall document actual savings for the previous year which substantiate the cost of the card. This would not mean documenting savings on each and every purchase but enough documentation to substantiate adequate savings to justify the expense of the card.

State agencies desiring to obtain a membership club card shall submit to the Office of Purchasing, Travel and Fleet Management for approval with written justification for the need of a membership club card.

Appendix A

Summary of Laws

The following is a summary of various laws which pertain to public purchasing. It is not intended to be a complete summary, nor is it guaranteed to be 100% accurate. It is a good general reference guide.

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