

# **Charleston County School District**

## **CONSOLIDATED**

## **PROCUREMENT**

## **CODE**

**Version 1.5**

**EFFECTIVE July 21, 2008**  
**Revision January 7, 2011**

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**APPENDIX A: Definitions**

**APPENDIX B: Exemptions**

Guidance& Best Practices for Permissible Communications in a Competitive Sealed Proposal After Opening but Prior to Award

Pre-Qualification handbook for Construction Bidding (2011)

Indefinite Delivery Contracts, appearing as Chapter 9 of the South Carolina Manual for Planning and Execution of State Permanent Improvements Part II (2009)



**ARTICLE I**  
**GENERAL PROVISIONS**

**10. GENERALLY. (SC Code §§ 11-35-10, -70; SC Reg. § 19-445-2000)**

10.1 **Adoption.** Effective February 28, 2011 this document is adopted pursuant to the mandate of § 11-35-70 of the South Carolina Code of Laws, is intended to have the force and effect of law, and shall be known and may be cited as the "Charleston County School District Procurement Code" (hereafter the "Code"). (SC Code § 11-35-70)

10.2 **Prior Codes Superseded.** This Code supersedes all other prior codes, regulations, ordinances, policies, procedures or other rules of this District regarding procurement. To the extent of any conflict, this Code takes precedence over any other codes, regulations, ordinances, policies, procedures, or other rules of this District.

10.3 **Approval of Code.** By letter dated January 7, 2011 the District received a written opinion from the Materials Management Office ("MMO") of the South Carolina Budget and Control Board to the effect that this Code is substantially similar to the provisions of the South Carolina Consolidated Procurement Code and the regulations promulgated there under, as required by § 11-35-70. Citing the following authority, the written opinion declines to address whether or not the exemptions granted by the Board are substantially similar as required by Section 11-35-710: *Glasscock Company, Inc. v. Sumter County*, 361 S.C. 483, 604 S.E. 2d 718 (Ct. App. 2004) (rejecting argument that 11-35-50 prevents local government from exercising the flexibility provided to the state by section 11-35-710). (SC Code § 11-35-70; SC Reg. § 19-445-2005)

10.4 **Updating of Code.** The Board of Trustees of the District intends that this Code be updated in conjunction with changes to the South Carolina Consolidated Procurement Code and the regulations promulgated there under; accordingly, whenever the South Carolina Consolidated Procurement Code or the regulations promulgated there under are updated, the Superintendent shall submit conforming updates for approval to both MMO and the Board of Trustees of the District. (SC Code § 11-35-70; SC Reg. § 19-445.2005).

10.5 **Non-Waiver of Rights.** Nothing contained in this Code shall be construed to waive any rights, remedies or defenses the District might have under any of the laws of the State of South Carolina or any other State, or under any of the laws or treaties of the United States. (SC Reg. § 19-445.2005(A))

**20. PURPOSE AND POLICIES. (SC Code §§ 11-35-20, -70; SC Reg. § 19-445-2000)**

20.1 **Purpose and Policies.** The underlying purposes and policies of this Code are:

20.1.1 To provide increased economy in District procurement activities and to maximize to the fullest extent practicable the purchasing values of funds while ensuring that procurements are the most advantageous to the District and in compliance with the provisions of the Ethics Government Accountability and Campaign Reform Act; (SC Code § 11-35-20(a))

20.1.2 To foster effective broad-based competition for public procurement within the free enterprise system; (SC Code § 11-35-20(b))

20.1.3 To develop procurement capability responsive to appropriate user needs; (SC Code § 11-35-20(c))

20.1.4 To ensure the fair and equitable treatment of all persons who deal with the procurement system of the District, which will promote increased public confidence in the procedures followed in public procurement; (SC Code § 11-35-20(f))

- 20.1.5 To provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process; (SC Code § 11-35-20(g))
- 20.1.6 To develop an efficient and effective means of delegating roles and responsibilities; (SC Code § 11-35-20(h))
- 20.1.7 Developing a training system to train District procurement officials in the techniques and methods of public procurement; (SC Reg. § 19-445.200(B)(2)(a))
- 20.1.8 To mandate the existence of a structured system of auditing and monitoring in order to assure adherence to the provisions of this Code;
- 20.1.9 To establish policies and procedures relating to the procurement, management, control, and disposal of supplies, services, equipment, information technology, and construction, as applicable, under the authority of the South Carolina Consolidated Procurement Code, as amended, Title 59 of the South Carolina Code of Laws, and regulations of the State Board of Education. (SC Reg. § 19-445.2000(A))
25. **CODE SUPERSEDES CONFLICTING LAW. (SC Code § 11-35-25)**
- 25.1 If this code applies to a procurement, the provisions of this code supersede all laws or parts of laws in conflict with it to the extent of the conflict including, but not limited to, the principles of law and equity, the common law, and the Uniform Commercial Code of this State.
30. **OBLIGATION OF GOOD FAITH. (SC Code § 11-35-30)**
- 30.1 Every contract or duty within this Code imposes an obligation of good faith in its negotiation, performance or enforcement. "Good faith" means honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.
35. **DISTRICT MAY NOT DESIGNATE SURETY COMPANY. (SC Code § 11-35-35)**
- 35.1 The District shall comply with Section 11-35-35 of the South Carolina Code of Law, as amended. On the date of this code's adoption, Section 11-35-35 provided as follows: If the State, or county, city, public service district, or other political subdivision of the State, or agency, department, institution, or other public entity of the State, enters into a procurement contract and requires the bidder to provide a surety bond to secure the bid or the performance or payment of the contract, the state political subdivision of the State, or public entity of the State may not exact that the surety bond be furnished by a particular surety company or through a particular agent or broker.
40. **APPLICATION OF THIS CODE. (SC Code §§ 11-35-40)**
- 40.1 **General Application.** This Code applies only to contracts solicited or entered into after the effective date of this Code unless the parties agree to its application to a contract entered into prior to its effective date. (SC Code § 11-35-40(1))
- 40.2 **Application to District Procurement.** This Code applies to every procurement or expenditure of funds by the District under contract as herein defined irrespective of the source of the funds, including federal assistance monies, except as specified in § 40.3 (Compliance with Federal Requirements), § 710 (Exemptions), and except

that this code does not apply to gifts, to the issuance of grants, or to contracts between public procurement units, except as provided in Article 19 (Cooperative Purchasing). It shall also apply to the disposal of District supplies as provided in Article 15 (Supply Management). (SC Code § 11-35-40(2))

40.3 **Compliance with Federal Requirements.** Where procurement involves the expenditure of federal assistance or contract funds, the District shall also comply with such federal law and authorized regulations as are mandatorily applicable and which are not presently reflected in the Code. Notwithstanding, where federal assistance or contract funds are used in a procurement by the District, requirements that are more restrictive than federal requirements shall be followed (SC Code § 11-35-40(3))

40.4 **Use of Public Funds.** The acquisition of a facility or capital improvement by a foundation or eleemosynary organization on behalf of or for the use of the District which involves the use of public funds in the acquisition, financing, construction, or current or subsequent leasing of the facility or capital improvement is subject to the provisions of this Code in the same manner as the District. The definition and application of the terms “acquisition”, “financing”, “construction”, and “leasing” are governed by generally accepted accounting principles. (SC Code § 11-35-40(4))

45. **PAYMENT FOR GOODS AND SERVICES RECEIVED. (SC Code § 11-35-45)**

45.1 **Time for Payment.** The District is responsible for the payment of all supplies, services or information technology within thirty (30) work days after the acceptance of the goods or services and proper invoice, whichever is received later, and shall pay an amount established in the late payment charge regulations issued by the South Carolina Comptroller General, not to exceed fifteen percent per annum on any unpaid balance which exceeds the thirty (30) work day period, if the vendor specifies on the statement or the invoice submitted to the District that a large penalty is applicable if not paid within thirty (30) work days after the acceptance of goods or services..

45.2 **Onset of Thirty-Day Period.** The thirty (30) work-day period does not begin until the District certifies its satisfaction with the received goods or services and proper invoice. (SC Code § 11-35-45(D))

55. **PURCHASES FROM ENTITY EMPLOYING PRISON INMATES OF ANOTHER STATE. (SC Code § 11-35-55)**

The District shall comply with Section 11-35-55 of the South Carolina Code of Law, as amended. On the date of this code’s adoption, Section 11-35-55 provided as follows: “A governmental body procuring goods or services under the Consolidated Procurement Code, and any agency or department of a political subdivision of this State procuring goods or services under the Consolidated Procurement Code or its own procurement code, may not accept any proposals from or procure any goods or services from an entity which employs or uses inmates of a correctional system of another state who are not paid at least the required federal minimum wage for work performed in the manufacturing, processing, or supplying of those goods or services.”

70. **Mandatory Audits.** A procurement audit must be performed every three years by an audit firm approved by the Office of General Services. Costs associated with the internal review and audits are the responsibility of the school district and will be paid to the entity performing the audit. (11-35-70)

**210. DETERMINATIONS. (SC Code § 11-35-210)**

- 210.1 Written determinations expressly required by the Code must be retained in an official contract file by the District. These determinations must be documented in sufficient detail to satisfy the requirements of an audit performed pursuant to SC Code § 11-35-70.

**SECTION 310. Definitions. (S.C. Code 11-35-310)**

Unless the context clearly indicates otherwise:

- “Information Technology (IT)” means data processing, telecommunications, and office systems technologies and services:
- (a) “data processing” means the automated collection, storage, manipulation, and retrieval of data including: central processing units for micro, mini, and mainframe computers; related peripheral equipment such as terminals, document scanners, word processors, intelligent copiers, off-line memory storage, printing systems, and data transmission equipment; and related software such as operating systems, library and maintenance routines, and applications programs.
  - (b) “telecommunications” means voice, data, message, and video transmissions, and includes the transmission and switching facilities of public telecommunications systems, as well as operating and network software.
  - (c) “office systems technology” means office equipment such as typewriters, duplicating and photocopy machines, paper forms, and records; microfilm and microfiche equipment and printing equipment and services.
  - (d) “services” means the providing of consultant assistance for any aspect of information technology, systems, and networks.
- “Board” means the Board of Trustees of the School District of Charleston County.
- “Business” means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other legal entity.
- “Change order” means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual agreement of the parties to the contract.
- “Chief Business Officer” means a District employee, above the level of procurement officer and reporting directly to the superintendent, designated in writing by the Superintendent as having primary management responsibility for District business operations and finance. Unless otherwise provided by the Superintendent, the “Chief Business Officer” shall also serve as the “Chief Procurement Officer.” The name and official District title of the person currently serving as the District's chief business officer must be published in the internal operating procedures issued pursuant to Section 540.

[Model Comment: (1) In order to accommodate districts with limited staff, the person appointed as the CBO also serves as the CPO, by default. The preference is to separate these functions by having the Superintendent appoint different people to each. The intent is to elevate the role of the CBO to a person at least one step removed from the purchasing office, hopefully more. (2) Unlike the CPO, the CBO is not authorized to delegate authority to others. If the same person serves both functions, responsibilities assigned to the CBO may not be delegated. Those assigned to the CPO may be delegated. (3) The wording of this definition is critical and should not be modified. It

is carefully tied to numerous decisions regarding how best to adapt the Consolidated Procurement Code to the school district context.]

“Chief procurement officer” means a District employee, above the level of procurement officer, designated in writing by the Superintendent as having primary management responsibility for supervising procurement or disposal by the District. The Superintendent may provide for the division or sharing of duties and powers assigned by this Code to the Chief Procurement Officer to more than one person. Unless otherwise designated in writing by the Superintendent, the Chief Business Officer serves as the Chief Procurement Officer. The name and official District title of the person currently serving as the District's chief procurement officer must be published in the internal operating procedures issued pursuant to Section 540.

[Model Comment: (1) This CPO must be a person above the level of procurement officer and below the level of superintendent. Preferably someone outside the procurement office. By default, the person serving as the CPO is also the CBO. While this approach may be necessary for smaller districts, it tends to undermine the level of independence the Code envisions for a CPO. (2) The district should identify the district's position title for the person serving as the chief procurement officer in its published internal operating procedures. See § 540(2). (3) Subject to the organizational relationship outlined in Comment No. 1 above, a district may elect to have more than one chief procurement officer. For example, a district may have one chief procurement officer for supplies and services, one for construction related services, and another for disposal of surplus property.]

“Construction” means the process of building, altering, repairing, remodeling, improving, or demolishing a public infrastructure facility, including any public structure, public building, or other public improvements of any kind to real property. It does not include the routine operation, routine repair, or routine maintenance of an existing public infrastructure facility, including structures, buildings, or real property.

[Model Comment: For a thorough discussion of "routine operation, routine repair, or routine maintenance" and how to determine whether an acquisition is one for construction, you may wish to consult with the OSE Manual.]

“Contract” means all types of agreements, regardless of what they may be called, for the procurement or disposal of supplies, services, information technology, or construction.

“Contract modification” means a written order signed by the procurement officer, directing the contractor to make changes which the changes clause of the contract authorizes the procurement officer to order without the consent of the contractor.

“Contractor” means any person having a contract with the District.

“Cost effectiveness” means the ability of a particular product or service to efficiently provide goods or services to the District. In determining the cost effectiveness of a particular product or service, the procurement officer shall list the relevant factors in the bid notice or solicitation and use only those listed relevant factors in determining the award.

“Data” means recorded information, regardless of form or characteristics.

- “Days” means calendar days. In computing any period of time prescribed by this code or the regulations, or by any order of the Procurement Review Panel, the day of the event from which the designated period of time begins to run is not included. If the final day of the designated period falls on a Saturday, Sunday, or a legal holiday for the District or federal government, then the period shall run to the end of the next business day.
- “Debarment” means the disqualification of a person to receive invitations for bids, or requests for proposals, or the award of a contract by the District, for a specified period of time commensurate with the seriousness of the offense or the failure or inadequacy of performance.
- “Designee” means a duly authorized representative of a person with formal responsibilities under the code.
- “District” means Charleston County School District.
- “Employee” means an individual drawing a salary from the District, whether elected or not, and any non-salaried individual performing personal services for the District.
- “Grant” means the furnishing by the District, State or the United States government of assistance, whether financial or otherwise, to a person to support a program authorized by law. It does not include an award, the primary purpose of which is to procure specified end products, whether in the form of supplies, services, information technology, or construction. A contract resulting from such an award must not be considered a grant but a procurement contract.
- “Invitation for bids” means a written or published solicitation issued by an authorized procurement officer for bids to contract for the procurement or disposal of District supplies, services, information technology, or construction, which will ordinarily result in the award of the contract to the responsible bidder making the lowest responsive bid.
- “Procurement” means buying, purchasing, renting, leasing, or otherwise acquiring any supplies, services, information technology, or construction. It also includes all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection, and solicitation of sources, preparation and award of contracts, and all phases of contract administration.
- “Procurement officer” means any person duly authorized by the District in accordance with procedures prescribed by regulation, to enter into and administer contracts and make written determinations and findings with respect thereto. The term also includes an authorized representative of the governmental body within the scope of his authority.
- “Real property” means any land, all things growing on or attached thereto, and all improvements made thereto including buildings and structures located thereon.
- “Request for proposals (RFP)” means a written or published solicitation issued by an authorized procurement officer for proposals to provide supplies, services, information technology, or construction which ordinarily result in the award of the contract to the responsible bidder making the proposal determined to be most advantageous to the District. The award of the contract must be made on the basis of evaluation factors that must be stated in the RFP.
- “Services” means the furnishing of labor, time, or effort by a contractor not required to deliver a specific end product, other than reports which are merely incidental to required performance. This term includes consultant services other than architectural, engineering, land surveying, construction management, and related services. This term does not include employment agreements or services as defined in the definition of information technology.
- “Subcontractor” means any person having a contract to perform work or render service to a prime contractor as a part of the prime contractor’s agreement with the District.

“Supplies” means all personal property including, but not limited to, equipment, materials, printing, and insurance.

“State Engineer” means the person holding the position as head of the state engineer’s office.

“Superintendent” means the District’s chief executive official, usually known as the Superintendent.

“Suspension” means the disqualification of a person to receive invitations for bids, requests for proposals, or the award of a contract by the District, for a temporary period pending the completion of an investigation and any legal proceedings that may ensue because a person is suspected upon probable cause of engaging in criminal, fraudulent, or seriously improper conduct or failure or inadequacy of performance which may lead to debarment.

**410. PUBLIC ACCESS TO PROCUREMENT INFORMATION. (SC Code § 11-35-410)**

410.1 **Public Record.** Procurement information must be a public record to the extent required by Chapter 4 of Title 30 (The Freedom of Information Act) with the exception that commercial or financial information obtained in response to a Request for Proposals or any type of bid solicitation that is privileged and confidential, need not be disclosed (SC Code § 11-35-410(A))

410.2 **Privileged and Confidential Information.** Privileged and confidential information is information in specific detail not customarily released to the general public, the release of which might cause harm to the competitive position of the party supplying the information. Examples of this type of information include:

410.2.1 Customer lists.

410.2.2 Design recommendations and identification of prospective problem areas under an RFP.

410.2.3 Design concepts, including methods and procedures.

410.2.4 Biographical data on key employees of the bidder. (SC Code § 11-35-410(B))

410.3 **Nondisclosure if No Award Made.** For all documents submitted in response or with regard to a solicitation or other request, the documents need not be disclosed if an award is not made. (SC Code § 11-35-410(C))

410.4 **Evaluative Pre-Decisional Documents.** Evaluative documents pre-decisional in nature such as inter-District or intra-District memoranda containing technical evaluations and recommendations are exempted so long as the contract award does not expressly adopt or incorporate the inter-District or intra-District memoranda reflecting the pre-decisional deliberations. (SC Code § 11-35-410(D))

410.5 **Identification of Confidential Information.** For all documents submitted in response or with regard to any solicitation or other request, the person submitting the documents shall comply with instructions provided in the solicitation for marking information exempt from public disclosure. Information not marked as required by the applicable instructions may be disclosed to the public. (SC Code § 11-35-410(E))

**ARTICLE 3**

**PROCUREMENT ORGANIZATION**

**510. DELEGATION OF AUTHORITY TO SUPERINTENDENT. (SC Code § 11-35-510)**

510.1 Except as otherwise provided herein, all rights, powers, duties and authority relating to the procurement of supplies, construction, information technology and services for the District and to the management, control, warehousing, sale and disposal of supplies, construction, information technology, and services for the District, are hereby delegated to the Superintendent by the Board.

- 540. OPERATIONAL PROCEDURES; OVERSIGHT BY THE BOARD OF TRUSTEES (SC Code §§ 11-35-540; 59-19-130 et. seq.; S.C. Regs. §§ 19-445.2005, .2015)**
- 540.1 **Operational Procedures.** The Superintendent shall be authorized to develop internal operating protocols, procedures, and forms consistent with this Code. (§ 11-35-540(3))
- 540.2 **Oversight by the Board of Trustees; Policy.** The Board shall consider and decide matters of policy within provisions of this Code, including those referred to it by the Superintendent. The Board shall have the power to audit and monitor the implementation of its policies and the requirements of this Code. (§ 11-35-540(4))
- 710. EXEMPTIONS. (SC Code §§ 11-35-710, 59-19-270)**
- 710.1 The Board may exempt specific supplies, services, information technology, or construction from the purchasing procedures required in this Code or withdraw exemptions provided for in this section (Appendix B). Exemptions granted by the Board shall appear in any internal operation protocols or procedures adopted pursuant to Section 540.1(SC Code § 11-35-710).
- 840. DELEGATION OF AUTHORITY. (SC Code §§ 11-35-840; SC Reg. § 19-445.2000(B))**
- 840.1 **Organizational Structure.** The Superintendent shall be responsible for developing such organizational structure as necessary to implement the provisions of the Procurement Code (SC Reg. § 19-445.2000(B) (1))
- 840.2 **Delegation by Superintendent.** (SC Code § 11-35-840) Subject to this code, the Superintendent may delegate his/her authority to any designee and the Chief Procurement Officer may delegate his/her authority to any designee.
- 840.3 **Delegations in Writing.** A delegation of authority by either the Superintendent or the Chief Procurement Officer must be in writing and available upon request to the public by the Chief Procurement Officer (SC Code § 11-35-1560(B))
- 1240. RATIFICATION OF UNAUTHORIZED PROCUREMENT. (SC Reg. § 19-445-2015)**
- 1240.1 **Unauthorized Procurements.** The ratification of an act obligating the District to a contract by any person without the requisite authority to do so by an appointment or delegation under the Code rests with the Board. It is prohibited for a Procurement Officer to ratify such acts. The Board may delegate authority, in such amounts as the Board may determine, to ratify such acts to a person above the level of the Procurement Officer. (SC Reg. § 19-445.2015(A))
- 1240.2 **Corrective Action.** When ratification is necessary, the Superintendent or a designee as authorized in writing above the level of Procurement Officer shall also prepare a written determination as to the facts and circumstances surrounding the act, corrective action taken to prevent reoccurrence, action taken against the individual committing the act, and documentation that the price paid is fair and reasonable. (SC Reg. § 19-445.2015(A) (3))
- 1250. CONTRACTING FOR AUDITING OR ACCOUNTING SERVICES (SC Code § 11-35-1250)**



1250.1 No contract for auditing or accounting services shall be awarded without the approval of the Board or the Superintendent.

1260. **CONTRACTING FOR LEGAL SERVICES** (SC Code § 11-35-1260)

1260.1 No contract for the services of attorneys shall be awarded without the approval of the Board or the Superintendent

## **ARTICLE 5**

### **SOURCE SELECTION AND CONTRACT FORMATION**

**SECTION 1410.** Definitions of terms used in this article. (S.C. Code 11-35-1410)

Unless the context clearly indicates otherwise:

- (1) "Cost reimbursement contract" means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the cost principles as provided in Article 13 of this code and a fee, if any.
- (2) "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 vendor of an item;
  - (b) is either published or otherwise available for inspection by customers;
  - (c) states prices at which sales are currently or were last made to a significant number of buyers constituting the general buying public for the supplies, services, or information technology involved.
- (3) "Invitation for bids" means all documents, whether attached or incorporated by reference, utilized for soliciting bids in accordance with the procedures set forth in Section 1520.
- (4) "Purchase description" means specifications or other document describing the supplies, services, information technology, or construction to be procured.
- (5) "Request for proposals" means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.
- (6) "Responsible bidder or Offeror" means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance.
- (7) "Responsive bidder or Offeror" means a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals.

**SECTION 1510.** Methods of source selection.

Unless otherwise provided by law, all District contracts must be awarded by competitive sealed bidding, pursuant to Section 1520, except as provided in:

- (1) Section 1250 (Authority to Contract for Auditing Services);
- (2) Section 1260 (Authority to Contract for Legal Services);
- (3) Section 1525 (Fixed Priced Bidding);
- (4) Section 1528 (Competitive Best Value Bidding);
- (5) Section 1529 (Competitive Online Bidding);

- (6) Section 1530 (Competitive Sealed Proposals);
- (7) Section 1540 (Negotiations After Unsuccessful Competitive Sealed Bidding);
- (8) Section 1550 (Small Purchases);
- (9) Section 1560 (Sole Source Procurements);
- (10) Section 1570 (Emergency Procurements);
- (11) Section 1575 (Participation in Auction or Bankruptcy Sale);
- (12) (Reserved)
- (13) Section 3015 (Source Selection Methods Assigned to Project Delivery Methods);
- (14) Section 3220 (Architect Engineer, Construction Management and Land Surveying Services Procurement Procedures);  
and
- (15) Section 3230 (Exception for Small Architect-Engineer and Land Surveying Services Contracts).

**1520. COMPETITIVE SEALED BIDDING. (SC Code § 11-35-1520; SC Reg. § 19-445.2030-.2090)**

- 1520.1 **Condition for Use.** Contracts greater than fifty thousand dollars (\$50,000) must be awarded by competitive sealed bidding except as otherwise provided in § 1510 (Methods of Source Selection). (SC Code § 11-35-1520(1))
- 1520.2 **Invitation for Bids.** An invitation for bids must be issued in an efficient and economical manner and must include specifications and all contractual terms and conditions applicable to the procurement. (SC Code § 11-35-1520(2))
- 1520.2.1 Bidding time will be set to provide bidders a reasonable time to prepare their bids. A minimum of seven (7) days shall be provided unless a shorter time is deemed necessary for a particular procurement as determined in writing by the Chief Procurement Officer or designee.
- 1520.2.2 The invitation for bids shall be the document used to initiate competitive sealed bid procurement and shall include the following as applicable: (SC Reg. § 19-445.2030(4))
- 1520.2.2.1 **Bid Instructions.** Instructions and information to bidders concerning the bid submission requirements, including the time and date set for receipt of bids, the individual to whom the bid is to be submitted, the address of the office to which bids are to be delivered, the maximum time for bid acceptance by the District, and any other special information; (SC Reg. § 19-445.2030(1))
- 1520.2.2.2 **Specifications.** The purchase description, evaluation factors, specifications, delivery and performance schedule, and such inspection and acceptance requirements as are not included in the purchase descriptions; (SC Reg. § 19-445.2030(2))
- 1520.2.2.3 **Terms and Conditions.** The contract terms and conditions, including warranty and bonding or other security requirements as applicable; and (SC Reg. § 19-445.2030(3))
- 1520.2.2.4 **Confidentiality Instruction.** Instructions to bidders to visibly mark as “confidential” each part of their bid, which they considered to be proprietary information. (SC Reg. § 19-445.2030(4))
- 1520.3 **Notice.** Adequate notice of the invitation for bids must be given at a reasonable time before the date set forth in it for the opening of bids. Notice should include publication in *South Carolina Business Opportunities* but must include, at least, publication in a newspaper of general circulation in the

District. The District may give additional or wider public notice in any other media. See 1520.3.1 (SC Code § 11-35-1520(3))

- 1520.3.1 **Methods.** Methods of notice, which must be consistent with this Code, will be set forth in the District operational procedures created under § 540.1 (Operational Procedures).
- 1520.3.2 **Advertising of Notice.** Notice of a solicitation must include publication in "South Carolina Business Opportunities" and/or a newspaper of general statewide circulation and/or a means of central electronic advertising as approved by the board. For procurements with a total potential value in excess of two-hundred and fifty thousand dollars (\$250,000), notice of the solicitation must be published in SCBO. (SC Code § 11-35.1520(3))
- 1520.3.3 **Costs:** The District may charge vendors the cost incurred for copying and mailing bid or proposal documents requested in response to procurement. (SC Code § 11-35.1520(3))
- 1520.4 **Receipt and Safeguarding of Bids.**
- 1520.4.1 **Receipt and Safeguarding of Bids.** All bids, including modifications, received before the time of opening must be kept secure and unopened except as provided in § 1520.4.2 (Unidentified Bids). (SC Code § 11-35-1520(4)); R. 19-445.2045(A)) If an invitation for bids is cancelled, bids shall be returned to the bidders. Necessary precautions shall be taken to insure the security of the bid. Prior to bid opening, information concerning the identity and number of bids received shall be made available only to District employees, and then only on a "need to know" basis. When bid samples are submitted, they shall be handled with sufficient care to prevent disclosure of characteristics before bid opening. (SC Reg. § 19-445.2045(A))
- 1520.4.2 **Unidentified Bids.** Unidentified bids may be opened solely for the purpose of identification and then only by a Procurement Officer specifically designated for this purpose by the Chief Procurement Officer, or a designee. If a sealed bid is opened by mistake, the person who opens the bid must immediately write his/her signature and position on the envelope and deliver it to the Procurement Officer, who must immediately write on the envelope an explanation of the opening, the date and time opened, the invitation for bids' number, and his/her signature, and then shall immediately reseal the envelope. (SC Reg. § 19-445.2045(B))
- 1520.5 **Bid Opening.**
- 1520.5.1 **Postponement.** If it becomes necessary to postpone a bid opening, the Procurement Officer shall issue the appropriate amendments to the solicitation postponing or rescheduling the bid opening. When the District is closed due to force Majeure, bid opening will be postponed to the same time on the next official business day. (SC Reg. § 19-445.2050(B))
- 1520.5.2 **Public Opening.** Bids must be opened publicly in the presence of one (1) or more witnesses at the time and place designated in the invitation for bids and in the following manner; (SC Code § 11-35-1520(5)) The Procurement Officer or a designee shall decide when the time set for bid opening has arrived, and shall so declare to those present. The Procurement Officer or designee must then personally and publicly open all bids received before that time and read aloud so much thereof as is practicable, including prices, to those persons present and have the bids recorded. The amount of

each bid and such other relevant information, together with the name of each bidder, must be tabulated. (SC Reg. § 19-445.2050(A))

1520.5.3 **Tabulation.** The amount of each bid together with the name of each bidder must be tabulated. The tabulation shall be open to public inspection at that time (SC Code § 11-35-1520(5)). Only the information disclosed by the Procurement Officer or designee at the bid opening is considered to be public information under the Freedom of Information Act, Chapter 4 of Title 30 until the notice of intent to award is issued. (SC Reg. § 19-445.2050(C))

1520.6 **Bid Acceptance and Bid Evaluation; Telegraphic Bids.**

1520.6.1 **Unconditional Acceptance; Evaluation Factors.** Bids must be accepted unconditionally without alteration or correction, except as otherwise authorized in this Code. The invitation for bids must set forth the evaluation criteria to be used. Criteria must not be used in bid evaluations that are not set forth in the invitation for bids. Bids must be evaluated based on the requirements in the invitation for bids and this Code. (SC Code § 11-35-1520(6))

1520.6.2 **Bid Acceptability Criteria.** When necessary, for the best interest of the District, bid criteria to determine acceptability may include 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 must be measurable costs to include, but not be limited to, discounts, transportation costs, and total or life-cycle costs. (SC Reg. § 19-445.2055)

1520.6.3 **Telegraphic Bids.** As a general rule, telegraphic bids will not be authorized. When, in the judgment of the Procurement Officer, the date for the opening of bids will not allow bidders sufficient time to prepare and submit bids on the prescribed forms or when prices are subject to frequent changes, sealed telegraphic bids may be authorized. (SC Reg. § 19-445.2060)

1520.6.4 **Rejection of Bids; Cancellation of Bids.**

1520.6.4.1 **Application.** Unless there is a compelling reason to reject one or more bids, award will be made to the lowest responsible and responsive bidder. Every effort must be made to anticipate changes in a requirement prior to the date of opening and to notify all prospective bidders of any resulting modification or cancellation, thereby permitting bidders to change their bids and preventing the unnecessary exposure of bid prices. As a general rule after opening, an invitation for bids should not be canceled and re-advertised due solely to increased quantities of the items being procured; award should be made on the initial invitation for bids and the additional quantity required should be treated as a new procurement. (SC Reg. § 19-445.2065(A))

1520.6.4.2 **Cancellation of Bids Prior to Award.** When it is determined prior to an award, but after opening, that the requirements relating to the availability and identification of specifications have not been met, the invitation for bids shall be cancelled. Invitations for bids may be cancelled after opening, but prior to award, when such action is consistent with § 1520.6.4.1 (Application) above and the Procurement Officer determines in writing that: (SC Reg. § 19-445.2065(B))

- 1520.6.4.2.1 Inadequate or ambiguous specifications were cited in the invitation: (SC Reg. § 19-445.2065(B) (1))
- 1520.6.4.2.2 Specifications have been revised; (SC Reg. § 19-445.2065(B) (2))
- 1520.6.4.2.3 The supplies or services being procured are no longer required; (SC Reg. § 19-445.2065(B) (3))
- 1520.6.4.2.4 The invitation did not provide for consideration of all factors of cost to the District, such as cost of transporting District furnished property to bidders' plants; (SC Reg. § 19-445.2065(B)(4))
- 1520.6.4.2.5 Bids received indicate the needs of the District can be satisfied by a less expensive article differing from that on which the bids were invited; (SC Reg. § 19-445.2065(B) (5))
- 1520.6.4.2.6 All otherwise acceptable bids received are at unreasonable prices; (SC Reg. § 19-445.2065(B) (6))
- 1520.6.4.2.7 The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith; or (SC Reg. § 19-445.2065(B) (7))
- 1520.6.4.2.8 For other reasons, cancellation is in the best interest of the District. Determinations to cancel invitations for bids shall state the reasons therefore. (SC Reg. § 19-445.2065(B) (8))
- 1520.6.4.3 **Extension of Bid Acceptance Period.** Should administrative difficulties be encountered after the bid opening, which may delay award beyond bidders' acceptance periods, the several lowest bidders should be requested, before expiration of their bids, to extend the bid acceptance period (with consent of sureties, if any) in order to avoid the need for re-advertisement. (SC Reg. § 19-445.2065(C))
- 1520.6.5 **Rejection of Individual Bids.**
- 1520.6.5.1 **General Application.** Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected. . (SC Reg. § 19-445.2070(A))
- 1520.6.5.2 **Alternate Bids.** Any bid which does not conform to the specifications contained or referenced in the invitation for bids may be rejected unless the invitation authorized the submission of alternate bids and the supplies and/or services offered as alternates meet the requirements specified in the invitation. (SC Reg. § 19-445.2070(B))
- 1520.6.5.3 **Delivery Schedule, Non-responsive Bids.** Any bid which fails to conform to the delivery schedule or permissible alternates thereto stated in the invitation for bids, or to other material requirements of the solicitation may be rejected as non-responsive. (SC Reg. § 19-445.2070(C))

- 1520.6.5.4 **Modification of Requirements by Bidder.** . (SC Reg. § 19-445.2070(D)) Ordinarily a bid should be rejected when the bidder attempts to impose conditions which would modify requirements of the invitation for bids or limit his/her liability to the District, since to allow the bidder to impose such conditions would be prejudicial to other bidders. For example, bids should be rejected in which the bidder:
- 1520.6.5.4.1 Attempts to protect himself against future changes in conditions, such as increased costs, if total possible cost to the District cannot be determined;
  - 1520.6.5.4.2 Fails to state a price and in lieu thereof states that price must be "price in effect at time of delivery;"
  - 1520.6.5.4.3 States a price but qualified such price as being subject to "price in effect at time of delivery;"
  - 1520.6.5.4.4 When not authorized by the invitation, conditions or qualifies his/her bid by stipulating that his/her bid is to be considered only if, prior to date of award, the bidder receives (or does not receive) award under a separate procurement;
  - 1520.6.5.4.5 Requires the District to determine that the bidder's product meets specifications; or
  - 1520.6.5.4.6 Limits the rights of the District under any contract clause.
  - 1520.6.5.4.7 The bidders may be requested to delete objectionable conditions from bids provided that these conditions do not go to the substance, as distinguished from the form, of the bid or work an injustice on other bidders.
- 1520.6.5.5 **Price Unreasonableness.** Any bid may be rejected if the Procurement Officer determines in writing that it is unreasonable as to price. (SC Reg. § 19-445.2070(E))
- 1520.6.5.6 **Bid Guarantee Requirement.** When a bid guarantee is required and a bidder fails to furnish it in accordance with the requirements of the invitation for bids, the bid shall be rejected. (SC Reg. § 19-445.2070(F))
- 1520.6.5.7 **Unsigned Bids.** See § 1520.13.3.
- 1520.6.5.8 **Exceptions to Rejection Procedures.** Any bid received after the Procurement Officer or designee has declared that the time set for bid opening has arrived, shall be rejected unless the bid had been delivered to the District office indicated in the solicitation prior to bid opening. (SC Reg. § 19-445.2070(H)),
- 1520.6.5.9 **All or None Qualifications.** Unless the invitation for bids so provides, a bid is not rendered non-responsive by the fact that the bidder specifies that the award will be accepted only on all, or a specified group, of the items included in the invitation for bids. However, bidders shall not be permitted to withdraw or modify "all or none" qualifications after bid opening since such qualifications are substantive and affects the rights of the other bidders. (SC Reg. § 19-445.2075).

**1520.7 Correction or Withdrawal of Bids; Cancellation of Awards.**

**1520.7.1 Correction, Cancellation, Withdrawal of Bids.** Correction or withdrawal of inadvertently erroneous bids before bid opening, withdrawal of inadvertently erroneous bids after award, or cancellation and re-award of awards or contracts, after award but before performance, may be permitted in accordance with this Code. After bid opening changes in bid prices or other provisions of bids prejudicial to the interest of the District or fair competition must not be permitted. After opening, bids must not be corrected or withdrawn except in accordance with the provisions of this Code. Except as otherwise provided, all decisions to permit the correction or withdrawal of bids, or to cancel awards, or contracts, after award but before performance, must be supported by a written determination of appropriateness made by the Chief Financial and Operations Officer, Chief Procurement Officer or Superintendent. (SC Code § 11-35-1520(7))

**1520.7.2 General Procedures.** A bidder or Offeror must submit in writing a request to either correct or withdraw a bid to the Procurement Officer. Each written request must document the fact that the bidder or Offeror's mistake is clearly an error that will cause him substantial loss. (SC Reg. § 19-445.2085(A))

**1520.7.3 Correction Creates Low Bid.** To maintain the integrity of the competitive sealed bidding system, a bidder shall not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid unless the mistake, in the judgment of the Procurement Officer, is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition. . (SC Reg. § 19-445.2085(B))

**1520.7.4 Cancellation of Award Prior to Performance.** (SC Reg. § 19-445.2085(C)) When it is determined after an award or a notice of award has been issued but before performance has begun that the District's requirements for the goods or services have changed or have not been met, the award or contract may be cancelled and either re-awarded or a new solicitation issued, if the Superintendent, Chief Financial and Operations Officer, Chief Procurement Officer determines in writing that:

1520.7.4.1 Inadequate or ambiguous specifications were cited in the invitation;

1520.7.4.2 Specifications have been revised;

1520.7.4.3 The supplies or services being procured are no longer required;

1520.7.4.4 The invitation did not provide for consideration of all factors of cost to the District, such as cost of transporting District furnished property to bidders' plants;

1520.7.4.5 Bids received indicate that the need of the District can be satisfied by a less expensive article differing from that on which the bids were invited;

1520.7.4.6 The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith;

1520.7.4.7 Administrative error of the District discovered prior to performance; or

1520.7.4.8 For other reasons, cancellation is clearly in the best interest of the District.

**1520.8 Discussion with Bidders.** As provided in the invitation for bids, discussions may be conducted with apparent responsive bidders for the purpose of clarification to assure full understanding of the requirements of the invitation for bids. All bids, in the District's sole judgment, needing clarification must be accorded that opportunity. Clarification of a bidder's bid must be documented in writing by the Procurement Officer and must be included with the bid. Documentation concerning the clarification must be subject to disclosure upon request as required by § 410 (Public Access to Procurement Information). (SC Code § 11-35-1520(8))

- 1520.9 **Tie Bids.** (SC Code § 11-35-1520(9)) In the event two (2) or more bidders are tied in price while otherwise meeting all of the required conditions, awards are determined in the following order of priority:
- 1520.9.1 **In-State vs. Out-of-State Firms.** Should there be a South Carolina firm tied with an out-of-state firm, the award shall be made automatically to the South Carolina firm.
- 1520.9.2 **In-State vs. Out-of-State Products.** Tie bids involving South Carolina produced or manufactured products, when known, and items produced or manufactured out of the state shall be resolved in favor of the South Carolina commodity.
- 1520.9.3 **MBE Firms.** Tie bids involving a business certified by the South Carolina Office of Small and Minority Business Assistance as a Minority Business Enterprise must be resolved in favor of the Minority Business Enterprise.
- 1520.9.4 **In-State vs. In-District Firm.** Tie bids involving South Carolina firms shall be resolved in favor of the firm located in the District.
- 1520.9.5 **All Other Ties.** In all other situations in which bids are tied, the award must be made to the tied bidder offering the quickest delivery time, or if the tied bidders have offered the same delivery time, the tie must be resolved by the flip of a coin witnessed by the Procurement Officer. All responding vendors must be invited to attend.
- 1520.10 **Award.**
- 1520.10.1 **Posting and Sending Notice.** Unless there is a compelling reason to reject bids as prescribed by this Code, notice of an award or an intended award of a contract to the lowest responsive and responsible bidder(s) whose bid meets the requirements set forth in the invitation for bids must be given by posting such notice at a location specified in the invitation for bids. For contracts with a total or potential value in excess of fifty thousand dollars (\$50,000) but less than one hundred thousand dollars (\$100,000), notice of the award of a contract must be given by posting and must be sent to all bidders responding to the solicitation on the same day that the notice is posted in accordance with this section. For contracts with a total or potential value of one hundred thousand dollars (\$100,000) or greater, notice of intended award of a contract must be given by posting the notice for ten days before entering into a contract and must be sent to all bidders responding to the solicitation on the same day that the notice is posted in accordance with this section. The posting date shall appear on the face of all these notices. Before the posting of the award, the District may negotiate with the lowest responsive and responsible bidder to lower his bid within the scope of the invitation for bids. The invitation for bids and a notice of award or notice of intent to award must contain a statement of a bidder's right to protest pursuant to § 4210 (Protests). When only one response is received, the notice of intent to award and the delay of award may be waived. (SC Code § 11-35-1520(10))
- 1520.10.2 **Application.** Except as otherwise provided herein, the contract shall be awarded to the lowest responsive and responsible bidder(s) whose bid meets the requirements and criteria set forth in the invitation for bids. (SC Reg. § 19-445.2090(A))
- 1520.10.3 **Time of Award.** The District shall issue the notice of intent to award or award on the date specified in the solicitation, unless the Procurement Officer determines, and gives notice, that a longer review



time is necessary. The Procurement Officer shall give notice of a time extension to each bidder by posting it at the location identified in the solicitation. (SC Reg. § 19-445.2090(B))

1520.11 **Requests for Qualifications (RFQ)** Before soliciting bids, the District may issue a request for qualifications from prospective bidders. The request must contain, at a minimum, a description of the scope of work to be solicited by the invitation for bids, the deadline for submission of information, and how prospective bidders may apply for consideration. The request must require information concerning the prospective bidders' product specifications, qualifications, experience, and ability to perform the requirements of the contract. Adequate public notice of the request for qualifications must be given in the manner provided in § 1520.3 (Notice). After receipt of the responses to the request for qualifications from prospective bidders, the rank of the prospective bidders must be determined in writing from most qualified to least qualified on the basis of the information provided. Bids then must be solicited from at least the top two prospective bidders by means of an invitation for bids. The determination regarding how many bids to solicit is not subject to review under Article 17. (SC Code § 11-35-1520(11))

1520.12 (Reserved)

1520.13 **Minor Informalities and Irregularities in Bids.** (SC Code § 11-35-1520(13)) A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders. The Chief Procurement Officer must either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the District. Such communication or determination shall be in writing. Examples of minor informalities or irregularities include, but are not limited to:

1520.13.1 Failure of a bidder to return the number of copies of signed bids required by the solicitation;

1520.13.2 Failure of a bidder to furnish the required information concerning the number of the bidder's employees or failure to make a representation concerning its size;

1520.13.3 Failure of a bidder to sign its bid, but only if the firm submitting the bid has formally adopted or authorized the execution of documents by typewritten, printed, or rubber stamped signature and submits evidence of such authorization, and the bid carries that signature or the unsigned bid is accompanied by other material indicating the bidder's intention to be bound by the unsigned document, such as the submission of a bid guarantee with the bid or a letter signed by the bidder with the bid referring to and identifying the bid itself;

1520.13.4 Failure of a bidder to acknowledge receipt of an amendment to a solicitation, but only if: (i) the bid received indicates in some way that the bidder received the amendment, such as where the amendment added another item to the solicitation and the bidder submitted a bid on it, provided that the bidder states under oath that it received the amendment before bidding and that the bidder will stand by its bid price or, (ii) the amendment has no effect on price or quantity or merely a trivial or negligible effect on quality, or delivery, and is not prejudicial to bidders, such as an amendment correcting a typographical mistake in the name of the District;

1520.13.5 Failure of a bidder to furnish an affidavit concerning affiliates;

- 1520.13.6 Failure of a bidder to execute the certifications with respect to Equal Opportunity and Affirmative Action Programs;
- 1520.13.7 Failure of a bidder to furnish cut sheets or product literature;
- 1520.13.8 Failure of a bidder to furnish certificates of insurance;
- 1520.13.9 Failure of a bidder to furnish financial statements;
- 1520.13.10 Failure of a bidder to furnish references;
- 1520.13.11 Failure of a bidder to furnish its bidder number; and
- 1520.13.12 Notwithstanding Title 40, the failure of a bidder to indicate his/her contractor's license number or other evidence of licensure, provided that a contract must not be awarded to the bidder unless and until the bidder is properly licensed under the laws of South Carolina.

**1525. COMPETITIVE FIXED PRICE BIDDING. (SC Code § 11-35-1525)**

- 1525.1 **Conditions for Use.** When the District determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the District, a contract may be entered into by competitive fixed price bidding subject to the provisions of Section 1520 (Competitive Sealed Bidding), unless otherwise provided for in this § 1525 (Competitive Fixed Price Bidding). (SC Code § 11-35-1525(1))
- 1525.2. **Fixed Price Bidding.** The purpose of fixed price bidding is to provide multiple sources of supply for specific services, supplies, or information technology based on a pre-set maximum price which the District will pay for the services, supplies, or information technology desired. (SC Code § 11-35-1525(2))
- 1525.3 **Public Notice.** Adequate public notice of the solicitation shall be given in the manner as provided in § 1520.3 (Notice). (SC Code § 11-35-1525(3))
- 1525.4 **Pricing.** The District shall establish, before issuance of the fixed price bid, a maximum amount the District will pay for the services, supplies, or information technology desired. (SC Code § 11-35-1525(4))
- 1525.5 **Evaluation.** Vendors' responses to the fixed price bid will be reviewed to determine if they are responsive and responsible. (SC Code § 11-35-1525(5))
- 1525.6 **Discussion with Responsive Bidders.** Discussions may be conducted with apparent responsive bidders to assure understanding of the requirements of the fixed priced bid. All bidders whose bids, in the Procurement Officer's sole judgment, need clarification shall be accorded such an opportunity. (SC Code § 11-35-1525(6))
- 1525.7 **Award.** Award must be made to all responsive and responsible bidders to the District's request for competitive fixed price bidding. The contract file shall contain the basis on which the award is made and must be sufficient to satisfy external audit. (SC Code § 11-35-1525(7))
- 1525.8 **Bids Received after Award.** Bidders not responding to the initial fixed price bid may be added to the awarded vendors list provided the bidder furnishes evidence of responsibility and responsiveness to the District's original fixed price bid as authorized by the solicitation. (SC Code § 11-35-1525(8))
- 1525.9 **Remedies.** The failure of a specific Offeror to receive business, once it has been added to the awarded vendors list, shall not be grounds for a contract controversy under § 4230 (Authority to Resolve Contracts and Breach of Contract Controversies). (SC Code § 11-35-1525(9))

**1528. COMPETITIVE BEST VALUE BIDDING. (SC Code § 11-35-1528)**

- 1528.1 **Conditions for Use.** When the District determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the District, a contract may be entered into by competitive best value bidding subject to the provisions of § 1520, unless otherwise provided in this section. (SC Code § 11-35-1528(1))
- 1528.2 **Best Value Bidding.** The purpose of best value bidding is to allow factors other than price to be considered in the determination of award for specific supplies, services or information technology based on pre-determined criteria identified by the District. (SC Code § 11-35-1528(2))
- 1528.3 **Public Notice.** Adequate public notice of the solicitation must be given in the same manner as provided in § 1520.3 (Notice). (SC Code § 11-35-1528(3))
- 1528.4. **Bid Opening.** At Bid opening, the only information that will be released is the names of the participating bidders. Cost information will be provided after the ranking of bidders and the issuance of award. (SC Code § 11-35-1528(4))
- 1528.5 **Evaluation Factors.** (SC Code § 11-35-1528(5)) The best value bid must state the factors to be used in determination of award and the numerical weighting for each factor. Cost must be a factor in determination of award and cannot be weighted at less than sixty percent (60%). Best value bid evaluation factors may be defined to include, but are not limited to, any of the following as determined by the Procurement Officer in his sole discretion and not subject to protest:
- 1528.5.1 Operational costs that the District would incur if the bid is accepted;
  - 1528.5.2 Quality of the product or service, or its technical competency;
  - 1528.5.3 Reliability of delivery and implementation schedules;
  - 1525.5.4 Maximum facilitation of data exchange and systems integration;
  - 1525.5.5 Warranties, guarantees, and return policy;
  - 1525.5.6 Vendor financial stability;
  - 1525.5.7 Consistency of the proposed solution with the District's planning documents and announced strategic program direction;
  - 1525.5.8 Quality and effectiveness of business solution and approach;
  - 1525.5.9 Industry and program experience;
  - 1525.5.10 Prior record of vendor performance;
  - 1525.5.11 Vendor expertise with engagement of similar scope and complexity;
  - 1525.5.12 Extent and quality of the proposed participation and acceptance by all user groups;
  - 1525.5.13 Proven development methodologies and tools; and
  - 1525.5.14 Innovative use of current technologies and quality results
- 1528.6 **Discussion with Responsive Bidders.** Discussions may be conducted with apparent responsive bidders to assure understanding of the best value bid. All bidders, whose bids, in the District's sole judgment, need clarification, shall be accorded such an opportunity. (SC Code § 11-35-1528(6))
- 1528.7 **Selection and Ranking.** Bids shall be evaluated by using only the criteria stated in the best value bid and by adhering to the weighting as assigned. All evaluation factors, other than cost, will be considered prior to determining the effect of cost on the score for each participating bidder. Once the evaluation is complete, all responsive bidders shall be ranked from most advantageous to least advantageous to the District, considering only the evaluation factors stated in the best value bid (SC Code § 11-35-1528(7)).

1528.8 **Award.** Award must be made to the responsive and responsible bidder whose bid is determined, in writing, to be most advantageous to the District, taking into consideration all evaluation factors set forth in the best value bid. The contract file shall contain the basis on which the award is made and must be sufficient to satisfy external audit. (SC Code § 11-35-1528(8))

**1529. COMPETITIVE ON-LINE BIDDING. (SC Code § 11-35-1529)**

1529.1 **Conditions for Use.** When the District determines that on-line bidding is more advantageous than other procurement methods provided by this Code, a contract may be entered into by competitive on-line bidding, subject to the provisions of § 1520 (Competitive Sealed Bidding), unless otherwise provided in this § 1529 (Competitive On-line Bidding). (SC Code § 11-35-1529(1))

1529.2 **Bidding Process.** The solicitation must designate both an Opening Date and time and a Closing Date and time. The Closing Date and Time need not be a fixed point in time, but may remain dependent on a variable specified in the solicitation. At the Opening Date and Time, the District must begin accepting real-time electronic bids. The solicitation must remain open until the Closing Date and Time. The District may require bidders to register before the Opening Date and Time and, as a part of that registration, to agree to any terms, conditions, or other requirements of the solicitation. Following receipt of the first bid after the Opening Date and Time, the lowest bid price must be posted electronically to the Internet and updated on a real-time basis. At any time before the Closing Date and Time, a bidder may lower the price of its bid, except that after Opening Date and Time, a bidder may not lower its price unless that price is below the then lowest bid. Bid prices may not be increased after Opening Date and Time. Except for bid prices, bids may be modified only as otherwise allowed by this Code. A bid may be withdrawn only in compliance with § 1520 (Competitive Sealed Bidding). If a bid is withdrawn, a later bid submitted by the same bidder may not be for a higher price. If the lowest responsive bid is withdrawn after the Closing Date and Time, the District may cancel the solicitation in accordance with this Code or reopen electronic bidding to all pre-existing bidders by giving notice to all pre-existing bidders of both the new Opening Date and Time and the new Closing Date and Time. Notice that electronic bidding will be reopened must be given as specified in the solicitation. (SC Code § 11-35-1529(2))

1529.3 **Receipt and Safeguarding of Bids.** Other than price, any information provided to the District by a bidder must be safeguarded as required by § 1520.4 (Receipt and Safeguarding of Bids) in this Code. (SC Code § 11-35-1529(3))

1529.4 **Provisions Not to Apply.** Section 1520.5 (Bid Opening) does not apply to solicitations issued pursuant to this section. (SC Code § 11-35-1529(4))

**SECTION 1530. Competitive sealed proposals.**

(1) Conditions for Use. If a District determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the District, a contract may be entered into by competitive sealed proposals subject to the provisions of Section 1520 and the regulations, unless otherwise provided in this section. The regulations may provide that it is either not practicable or not advantageous to the District to procure specified types of supplies, services, information technology, or construction by competitive sealed bidding. Contracts for

the design-build, design-build-operate-maintain, or design-build-finance-operate-maintain project delivery methods specified in Article 9 of this code must be entered into by competitive sealed proposals, except as otherwise provided in Sections 1550 (Small purchases), 1560 (Sole source procurements), and 1570 (Emergency procurements).

- (2) Public Notice. Adequate public notice of the request for proposals must be given in the same manner as provided in Section 1520(3).
- (3) Receipt of Proposals. Proposals must be opened publicly in accordance with regulations. A tabulation of proposals must be prepared in accordance with regulations promulgated by the board and must be open for public inspection after contract award.
- (4) Request for Qualifications.
  - (a) Before soliciting proposals, the procurement officer may issue a request for qualifications from prospective offerors. The request must contain at a minimum a description of the scope of the work to be solicited by the request for proposals and must state the deadline for submission of information and how prospective offerors may apply for consideration. The request must require information only on their qualifications, experience, and ability to perform the requirements of the contract.
  - (b) After receipt of the responses to the request for qualifications from prospective offerors, rank of the prospective offerors must be determined in writing from most qualified to least qualified on the basis of the information provided. Proposals then must be solicited from at least the top two prospective offerors by means of a request for proposals. The determination regarding how many proposals to solicit is not subject to review pursuant to Article 17.
- (5) Evaluation Factors. The request for proposals must state the relative importance of the factors to be considered in evaluating proposals but may not require a numerical weighting for each factor. Price may, but need not, be an evaluation factor.
- (6) Discussion with Offerors. As provided in the request for proposals, and under regulations, discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. All offerors whose proposals, in the procurement officer's sole judgment, need clarification must be accorded that opportunity.

*[Model Comment: (1) Cross reference Regulation 2095(I). (2) Communications pursuant to this subsection (6) must be conducted in accordance with the guidance appearing in the District's internal operating procedures. See attached.]*

- (7) Selection and Ranking. Proposals must be evaluated using only the criteria stated in the request for proposals and there must be adherence to weightings that have been assigned previously. Once evaluation is complete, all responsive offerors must be ranked from most advantageous to least advantageous to the District, considering only the evaluation factors stated in the request for proposals. If price is an initial evaluation factor, award must be made in accordance with Section 1530(9) below.

- (8) Negotiations. Whether price was an evaluation factor or not, the procurement officer, in his sole discretion and not subject to review under Article 17, may proceed in any of the manners indicated below, except that in no case may confidential information derived from proposals and negotiations submitted by competing offerors be disclosed:
- (a) negotiate with the highest ranking Offeror on price, on matters affecting the scope of the contract, so long as the changes are within the general scope of the request for proposals, or on both. If a satisfactory contract cannot be negotiated with the highest ranking Offeror, negotiations may be conducted, in the sole discretion of the procurement officer, with the second, and then the third, and so on, ranked offerors to the level of ranking determined by the procurement officer in his sole discretion;
  - (b) during the negotiation process as outlined in item (a) above, if the procurement officer is unsuccessful in his first round of negotiations, he may reopen negotiations with any Offeror with whom he previously negotiated; or
  - (c) the procurement officer may make changes within the general scope of the request for proposals and may provide all responsive offerors an opportunity to submit their best and final offers.
- (9) Award. Award must be made to the responsible Offeror whose proposal is determined in writing to be the most advantageous to the District, taking into consideration price and the evaluation factors set forth in the request for proposals, unless the procurement officer determines to utilize one of the options provided in Section 1530(8). The contract file must contain the basis on which the award is made and must be sufficient to satisfy external audit. Procedures and requirements for the notification of intent to award the contract must be the same as those provided in Section 1520(10).

*[Model Comment: (1) Materials Management Office's three chief procurement officers have jointly issued guidance to assist procurement officers in conducting negotiations and in requesting best-and-final offers. Issued as Procurement Policy Statement 2008-2, this guidance is available at [www.mmo.sc.gov/policy](http://www.mmo.sc.gov/policy).]*

**1540. NEGOTIATIONS AFTER UNSUCCESSFUL COMPETITIVE SEALED BIDDING. (SC Code § 11-35-1540)**

1540.1 **Negotiations After Unsuccessful Competitive Sealed Bidding.** When bids received pursuant to an invitation for bids under Section 1520 are considered unreasonable by the District, or are not independently reached in open competition, or the low bid exceeds available funds as certified by the appropriate fiscal officer, and it is determined in writing by the Superintendent, Chief Procurement Officer or designee above the level of Procurement Officer that time or other circumstances will not permit the delay required to re-solicit competitive sealed bids, a contract may be negotiated pursuant to this section, provided that:

- 1540.1.1 Each responsible bidder who submitted a bid under the original solicitation is notified of the determination and is given reasonable opportunity to negotiate;
- 1540.1.2 The negotiated price is lower than the lowest rejected bid by a responsible and responsive bidder under the original solicitation;
- 1540.1.3 The negotiated price is the lowest negotiated price offered by any responsible and responsive Offeror.

**1550. SMALL PURCHASES. (SC Code § 11-35-1550; SC Reg. § 19-445.2100)**

- 1550.1 **Authority.** The following small purchase procedures may be utilized in conducting procurements for the District that are up to fifty thousand dollars (\$50,000) in actual or potential value. Procurement requirements shall not be artificially divided by the District so as to constitute a small purchase pursuant to this section. (SC Code § 11-35-1550(1))
- 1550.2 **Competition and Price Reasonableness.**
- 1550.2.1 **Small purchases not exceeding \$2,500.** Small purchases not exceeding two thousand five hundred dollars (\$2,500.) may be accomplished without securing competitive quotations if the prices are considered reasonable. The purchases must be distributed equitably among qualified suppliers. When practical, a quotation must be solicited from other than the previous supplier before placing a repeat order. The administrative cost of verifying the reasonableness of the price of purchase “not in excess of” may more than offset potential savings in detecting instances of overpricing. Action to verify the reasonableness of the price need be taken only when the Procurement Officer suspects that the price may not be reasonable, e.g., by comparison to previous price paid, or personal knowledge of the item involved. (SC Code § 11-35-1550(2))
- 1550.2.2 **Purchases over \$2500 to \$10,000.** Solicitation of written quotes from a minimum of three (3) qualified sources of supply must be made and documentation of the quotes attached to the purchase requisition for a small purchase over two thousand five hundred dollars (\$2,500) but not in excess of ten thousand dollars (\$10,000). The award shall be made to the lowest responsive and responsible sources\_(SC Code § 11-35-1550(2) (b))
- 1550.2.3 **Purchases over \$10,000 to \$50,000.** Written solicitation of written quotes, bids, or proposals must be made for a small purchase over ten thousand dollars (\$10,000) but not in excess of fifty thousand dollars (\$50,000). The procurement shall be advertised at least once in South Carolina Business Opportunities or a newspaper of general circulation in the District or a means of central electronic advertising approved by the board. A copy of the written solicitation and written quotes must be attached to the purchase requisition. The award must be made to the lowest responsive and responsible source or, when a request for proposal process is used, the highest-ranking Offeror. (SC Code § 11-35-1550(2) (c))
- 1550.3 **Requirement to Advertise.** All competitive procurements above ten thousand dollars (\$10,000) must be advertised a least once in the South Carolina Business Opportunities or a newspaper of general circulation in the District or a means of central electronic advertising as approved by the board in accordance with § 1520.3 (Notice). The District may charge vendors the cost incurred for copying and mailing bid or proposal documents requested in response to procurement. (SC Code § 11-35-1550(3))
- 1550.4 **Establishment of Blanket Purchase Agreements “BPA”** A blanket purchase agreement is a simplified method of filling anticipated repetitive needs for small quantities of supplies or services by establishing “charge accounts” with qualified sources of supply. Blanket purchase agreements are designed to reduce administrative costs in accomplishing small purchases by eliminating the need for issuing individual purchase documents. (SC Reg. § 19-445.2100(B) (1))

- 1550.4.1 **Alternate Sources.** To the extent practicable, blanket purchase agreements for items of the same type should be placed concurrently with more than one supplier. All competitive sources shall be given an equal opportunity to furnish supplies or services under such agreements. (SC Reg. §19-445.2100(B) (2))
- 1550.4.2 **Terms and Conditions.** Blanket purchase agreements shall contain the following provision: (SC Reg. § 19-445.2100(B) (3))
- 1550.4.2.1 **Description of agreement.** A statement that the supplier shall furnish supplies or services, described therein in general terms, if and when requested by the Procurement Officer or his authorized representative, during a specified period and within a stipulated aggregate amount, if any. Blanket purchase agreements may encompass all items that the supplier is in a position to furnish. (SC Reg. § 19-445.2100(B) (3) (a))
- 1550.4.2.2 **Extent of obligation.** A Statement that the District is obligated only to the extent of authorized calls actually placed against the blanket purchase agreement. (SC Reg. § 19-445.2100(B) (3) (b))
- 1550.4.2.3 **Notice of Individuals Authorized to Place Calls and Dollar Limitations.** A provision that a list of names of individuals authorized to place calls under the agreement, identified by organizational component, and the dollar limitation per call for each individual shall be furnished to the supplier by the Procurement Officer. (SC Reg. § 19-445.2100(B) (3) (c))
- 1550.4.2.4 Delivery **Tickets.** A requirement that all shipments under the agreement, except subscriptions and other charges for newspapers, magazines, or other periodicals, must be accompanied by delivery tickets or sales slips which shall contain the following minimum information:
- 1550.4.2.4.1 Name of supplier;
- 1550.4.2.4.2 Blanket purchase agreement number;
- 1550.4.2.4.3 Date of call;
- 1550.4.2.4.4 Call number;
- 1550.4.2.4.5 Itemized list of supplies or services furnished;
- 1550.4.2.4.6 Quantity, unit price, and extension of each item less applicable discounts (unit price and extensions need not be shown when incompatible with the use of automated systems, provided that the invoice is itemized to show this information); and
- 1550.4.2.4.7 Date of delivery or shipment. (SC Reg. § 19-445.2100(B) (3) (d))
- 1550.4.2.5 **Invoices.** A statement that one of the following procedures should be used when invoicing:
- 1550.4.2.5.1 A summary invoice shall be submitted at least monthly or upon expiration of the blanket purchase agreement, whichever occurs first, for all deliveries made during a billing period, identifying the delivery tickets covered therein, stating their total dollar value, and supported by receipted copies of the delivery tickets;



- 1550.4.2.5.2 An itemized invoice shall be submitted at least monthly or upon expiration of the blanket purchase agreement, whichever occurs first, for all deliveries made during a billing period and for which payment has not been received. Such invoices need not be supported by copies of delivery tickets;
- 1550.4.2.5.3 When billing procedures provide for an individual invoice for each delivery, these invoices must be accumulated provided that a consolidated payment will be made for each specified period; and the period of any discounts will commence on final date of billing period or on the date of receipt of invoices for all deliveries accepted during the billing period, whichever is later. This procedure should not be used if the accumulation of the individual invoices materially increases the administrative costs of this purchase method. (SC Reg. § 19-445.2100(B) (3) (e))
- 1550.4.2.6 **Competition Under Blanket Purchase Agreements.** Calls against blanket purchase agreements shall be placed after prices are obtained. When concurrent agreements for similar items are in effect, calls must be equitably distributed. In those instances where there is an insufficient number of BPA's for any given class of supplies or services to assure adequate competition, the individual placing the order shall solicit quotations from other sources. (SC Reg. § 19-445.2100(C))
- 1550.4.2.7 **Calls Against Blanket Purchase Agreements.** Calls against blanket purchase agreements generally will be made orally, except that informal correspondence may be used when ordering against agreements outside the local trade area. Written calls may be executed on a District purchase order form. Documentation of calls shall be limited to essential information. . (SC Reg. § 19-445.2100(D))
- 1550.4.2.8 **Receipt and Acceptance of Supplies or Services.** Acceptance of supplies or services shall be indicated by signature and date on the appropriate form by the authorized District representative after verification and notation of any exceptions. . (SC Reg. § 19-445.2100(E))
- 1550.4.2.9 **Review Procedures.** The Procurement Officer or designee shall review blanket purchase agreement files at least semi-annually to assure that authorized procedures are being followed. Blanket purchase agreements shall be issued for a period of not longer than twelve (12) months. (SC Reg. § 19-445.2100(F))

**1560. SOLE SOURCE PROCUREMENTS. (SC Code § 11-35-1560; SC Reg. § 19-445-2105)**

- 1560.1 **Written Determination.** A contract may be awarded for a supply, service, information technology, or construction item without competition if, the Superintendent, Chief Financial and Operations Officer or Chief Procurement Officer or their designee determines in writing that there is only one source for the required supply, service, information technology or construction item. (SC Code § 11-35-1560)(A)). Sole source procurement is not

permissible unless there is only a single supplier. Written documentation must include the determination and basis for the proposed sole source procurement. In cases of reasonable doubt, competition must be solicited. Any decision by a District that procurement be restricted to one potential vendor must be accompanied by an explanation as to why no other will be suitable or acceptable to meet the need. (SC Code § 11-35-1560(B))

1560.2 **Examples.** The following are examples of circumstances which could necessitate sole source procurement:

1560.1.1 Where the compatibility of equipment, accessories, or replacement parts is the paramount consideration.

1560.1.2 Where a sole supplier's item is needed for trial use or testing.

1560.1.3 Where the item is one of a kind. (SC Reg. § 19-445-2105(B))

**1570. EMERGENCY PROCUREMENTS. (SC Code § 11-35-1570; SC Reg. § 19-445-2110)**

1570.1 **Circumstances for Emergency Procurements.** Notwithstanding any other provision of this Code, the Superintendent, Chief Financial and Operations Officer, Chief Procurement Officer or their designee may make or authorize others to make emergency procurements only when there exists an immediate threat to public health, welfare, critical economy and efficiency, or safety under emergency conditions provided that such emergency procurements shall be made with as much competition as is practicable under the circumstances. (SC Code § 11-35-1570)

An emergency condition is a situation which creates a threat to public health, welfare, or safety such as may arise by reason of floods, epidemics, riots, equipment failures, fire, loss, or such other reason as may be proclaimed an emergency by the Superintendent, Chief Financial and Operations Officer, Chief Procurement Officer or their designee. The existence of such conditions must create an immediate and serious need for supplies, services, information technology, or construction that cannot be met through normal procurement methods and the lack of which would seriously threaten: (1) the functioning of the District; (2) the preservation or protection of property; or (3) the health or safety of any person. (SC Reg. § 19-445-2110(B))

1570.2 **Written Determination.** A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. (SC Code § 11-35-1570)

1570.3 **Limitations.** Emergency procurements shall be made with as much competition as is practicable under the circumstances. Emergency procurement shall be limited to those supplies, services, equipment, or construction items necessary to meet the emergency. (SC Reg. § 19-445-2110(C)) The procedure used shall be selected to assure that the required supplies, services, or construction items are procured in time to meet the emergency. Given this constraint, such competition as is practicable shall be obtained. (SC Reg. § 19-445-2110(E))

1570.4 **Conditions.** The District may make emergency procurements when an emergency condition arises and the need cannot be met through normal procurement methods, provided that whenever practical, approval by the Superintendent, Chief Financial and Operations Officer, Chief Procurement Officer or their designee shall be obtained prior to the procurement. (SC Reg. § 19-445-2110(D))

1570.5 **Failed Competitive Sealed Bidding.** Competitive sealed bidding is unsuccessful when bids received pursuant to an invitation for Bids are unreasonable, noncompetitive, 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. (SC Reg. § 19-445-2110(F))

**1575. PROCUREMENTS AT AUCTION. (SC Code § 11-35-1575)**

1575.1 The District, having knowledge of either an auction or a sale of supplies from a bankruptcy, may elect to participate. The District shall (a) survey the needed items being offered to ascertain their condition and usefulness, (b) determine a fair market value for new like items through informal quotes, (c) determine the fair market value from similar items considering age and useful life, and (d) estimated repair cost and delivery cost, if any, of the desired items. Using this information, the District shall determine the maximum price that it can pay for each item desired. At the auction or sale, the District shall not exceed the maximum price so determined.

**1710. CANCELLATION OF SOLICITATIONS. (SC Code § 11-35-1710)**

1710.1 Consistent with § 1520.6.4 (Rejection of Bids; Cancellation of Bids) and § 1520.6.5 (Rejection of Individual Bids), any solicitation under this Code may be cancelled, or any or all bids or proposals may be rejected in whole or part as may be specified in the solicitation, when it is in the best interests of the District. The reasons for rejection, supported with documentation sufficient to satisfy external audit, must be made a part of the contract file.

**1810. RESPONSIBILITY OF BIDDERS AND OFFERORS. (SC Code § 11-35-1810; SC Reg. § 19-445-2125)**

1810.1 **Determination of Responsibility.** Responsibility of the bidder or Offeror shall be ascertained for each contract let by the District based upon full disclosure to the Procurement Officer concerning capacity to meet the terms of the contract and based upon past record of performance for similar contracts. (SC Code § 11-35-1810(1))

1810.1.1 **District Standards of Responsibility.** (SC Reg. § 19-445-2125(A)) Factors to be considered in determining whether the District standards of responsibility have been met include whether a prospective contractor has:

1810.1.1.1 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;

1810.1.1.2 A satisfactory record of performance;

1810.1.1.3 A satisfactory record of integrity;

1810.1.1.4 Qualified legally to contract with the District and State; and

1810.1.1.5 Supplied all necessary information in connection with the inquiry concerning responsibility.

1810.1.2 **Duty of Bidder/Offeror to Supply Information.** The prospective contractor shall supply information requested by the Procurement Officer concerning the responsibility of such contractor. The unreasonable failure of a bidder or Offeror to supply information promptly in connection with an inquiry with respect to responsibility may be grounds for a determination of non-responsibility with respect to such bidder or Offeror. If such contractor fails to supply the requested information, the Procurement Officer shall base the determination of responsibility upon any available information or

may find the prospective contractor non-responsible if such failure is unreasonable. . (SC Reg. § 19-445-2125(B); (SC Code § 11-35-1810(2))

- 1810.1.3 **Demonstration of Responsibility.** (SC Reg. § 19-445-2125(C)) The prospective contractor may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request:
- 1810.1.3.1 Evidence that such contractor possesses such necessary items;
- 1810.1.3.2 Acceptable plans to subcontract for such necessary items; or.
- 1810.1.3.3 A documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items.
- 1810.1.4 **Justification for Contract Award.** Before awarding a contract, the Procurement Officer must be satisfied that the prospective contractor is responsible.
- 1810.2 **Written Determination of Non-responsibility.** If a bidder or Offeror who otherwise would have been awarded a contract is found non-responsible, a written determination of non-responsibility setting forth the issues of the finding shall be prepared by the Procurement Officer. A copy of the determination shall be sent promptly to the non-responsible bidder or Offeror. The final determination shall be made part of the procurement file. (SC Reg. § 19-445-2125(E))
- 1810.3 **Right to Nondisclosure.** Except as otherwise provided by law, information furnished by a bidder or Offeror pursuant to this section shall not be disclosed outside of the offices of the District without prior written consent by the bidder or Offeror. (SC Code § 11-35-1810(3))

#### **SECTION 1820.** Prequalification of supplies and suppliers.

The regulations may provide for prequalification of suppliers or supplies.

#### **1830. COST OR PRICING DATA. (SC Code § 11-35-1830)**

- 1830.1 **Contractor Certification.** (SC Code § 11-35-1830(1)) A contractor must, except as provided in § 1830.3 (Cost or Pricing Data Not Required), submit cost or pricing data and must certify that, to the best of his/her knowledge and belief, the cost or pricing data submitted is accurate, complete, and current as of a mutually determined specified date prior to the date of:
- 1830.1.1 The pricing of any contract awarded by competitive sealed proposals pursuant to Section § 1530 or pursuant to sole source procurement authority as provided in Section 1560 where the total contract price exceeds an amount established by the Board, or;
- 1830.1.2 The pricing of any change order or contract amendment which exceeds an amount established by the Board.
- 1830.2 **Price Adjustments.** Any contract, change order or contract amendment under which a certificate is required shall contain a provision that the price to the District, including profit or fee, shall be adjusted to exclude any significant sums by which the District 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 parties.

1830.3 **Cost or Pricing Data Not Required.** The requirements of this section shall not apply to contracts:

- 1830.3.1 Where the contract price is based on adequate price competition;
- 1830.3.2 Where the contract price is based on established catalog prices or market prices;
- 1830.3.3 Where contract prices are set by law or regulations; or
- 1830.3.4 Where it is determined in writing by the District that the requirements of this section may be waived and the reasons for such waiver are stated in writing.

**2010. TYPES AND FORMS OF CONTRACTS. (SC Code § 11-35-2010)**

2010.1 Subject to the limitations of this section, any type of contract that will promote the best interests of the District may be used, except that the use of a cost-plus-a-percentage-of-cost contract must be approved by the Superintendent. A cost reimbursement contract, including a cost-plus-a-percentage-of-cost contract may be used only when a determination sufficient for external audit is prepared showing that the contract is likely to be less costly to the District than any other type or that it is impracticable to obtain the supplies, services, information technology, or construction required except under such a contract.

**2020. APPROVAL OF ACCOUNTING SYSTEM. (SC Code § 11-35-2020)**

2020.1 The Chief Procurement Officer may require that:

- 2020.1.1 The proposed contractors accounting system permit timely development of all necessary cost data in the form required by the specific contract type contemplated;
- 2020.1.2 The proposed contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles.

**2030. MULTI-TERM CONTRACTS. (SC Code §11-35-2030; SC Reg. § 19-445.2135)**

2030.1 **Specified Period.** Unless otherwise provided by law, a contract for supplies, services, or information technology must not be entered into for any period of more than one (1) year unless approved in the manner prescribed herein. The term of the contract and conditions of renewal or extension must be included in the solicitation and funds must be available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods must be subject to the availability and appropriation of funds for them. (SC Code §11-35-2030(1))

2030.2 **Determination Prior to Use.** Before the utilization of a multi-term contract, it must be determined in writing that; estimated requirements cover the period of the contract and are reasonably firm and continuing, and such a contract serves the best interests of the District by encouraging effective competition or otherwise promotes economies in procurement. (SC Code §11-35-2030(2))

- 2030.2.1 **Appropriateness.** A multi-term contract is appropriate when it is in the best interest of the District to obtain uninterrupted services extending over one fiscal period, where the performance of such services involves high start-up costs, or when a changeover of service contracts 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 District's needs but funds are available only for the initial fiscal period.

Special production refers to production for contract performance when it requires alteration in 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 shall provide that, in the event funds are not available for any succeeding fiscal period, the remainder of such contract shall be cancelled. (SC Reg. § 19-445.2135(A))

- 2030.2.2 **Objective.** The objective of the multi-term contract is to promote economy and efficiency in procurement by obtaining the benefits of sustained volume production and consequent low prices, and by increasing competitive participation in procurements which involve special production with consequent high start-up costs and in the procurement of services which involve high start-up costs or high phase-in/phase-out costs during changeover of service contracts. (SC Reg. § 19-445.2135(B))
- 2030.2.3 **Conditions of Use.** (SC Reg. § 19-445.2135(D)) (1) A multi-term contract may be used when it is determined in writing by the Procurement Officer that: (a) special production of definite quantities or the furnishing of long-term services are required to meet District needs; or (b) a multi-term contract will serve the best interests of the District by encouraging effective competition or otherwise promoting economies in District procurement. (2) The following factors are among those relevant for such a determination:
- 2030.2.3.1 Firms which are not willing or able to compete because of high start-up costs or capital investment in facility expansion will be encouraged to participate in the competition when they are assured of recouping such costs during the period of contract performance;
- 2030.2.3.2 Lower production costs because of larger quantity or service requirements, and substantial continuity of production or performance over a longer period of time, can be expected to result in lower unit prices;
- 2030.2.3.3 Stabilization of the contractor's work force over a longer period of time may promote economy and consistent quality;
- 2030.2.3.4 The cost and burden of contract solicitation, award, and administration of the procurement may be reduced.
- 2030.3 **Cancellation Due to Unavailability of Funds in Succeeding Fiscal Periods.** When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract must be cancelled. (SC Code §11-35-2030(3))
- 2030.4 **Maximum Time for Use.** The maximum time for any multi-term contract is five (5) years. Contract terms of up to seven (7) years may be approved by the Superintendent. Contract exceeding seven (7) years may be approved by the Board. (SC Code §11-35-2030(4)) (SC Reg. § 19-445.2135(D))
- 2030.5 **Solicitation.** The solicitation must state:
- 2030.5.1 The estimated amount of supplies or services required for the proposed contract period;
- 2030.5.2 That a unit price shall be given for each supply or service, and that such unit prices shall be the same throughout the contract (except to the extent price adjustments may be provided in the solicitation and resulting contract);

- 2030.5.3 That the multi-term contract will be cancelled only if funds are not appropriated or otherwise made available to support continuation of performance in any fiscal period succeeding the first; however, this does not affect either the District's rights or the contractor's rights under any termination clause in the contract;
- 2030.5.4 That the Procurement Officer must notify the contractor on a timely basis that the funds are, or are not, available for the continuation of the contract for each succeeding fiscal year;
- 2030.5.5 Whether bidders or offerors may submit prices for:
- 2030.5.5.1 The first fiscal period only;
- 2030.5.5.2 The entire time of performance only; or
- 2030.5.5.3 Both the first fiscal period and the entire time of performance;
- 2030.5.6 That a multi-term contract may be awarded and how the award will be determined including, if prices for the first fiscal period and entire time of performance are submitted, how such prices will be compared; and
- 2030.5.7 That, in the event of cancellation as provided in Section 2030.3, the contractor will be reimbursed the unamortized, reasonably incurred, nonrecurring costs.
- 2030.6 **Award.** Award shall be made as stated in the solicitation and permitted under the source selection method utilized. Care should be taken when evaluating multi-term prices against prices for the first fiscal period that the award on the basis of prices for the first period does not permit the successful bidder or Offeror to "buy in", that is, give such bidder or Offeror an undue competitive advantage in subsequent procurements. (SC Reg. § 19-445.2135(F))
- 2030.7 **Limitation.** Section 2030 does not apply to contracts for construction.

**2210. RIGHT TO INSPECT PLANT. (SC Code § 11-35-2210)**

- 2210.1 **Right to Inspect Plant.** The Chief Procurement Officer or designee is authorized, at reasonable times, to inspect the part of the plant or place of business of a contractor or any subcontractor which is related to the performance of a contract awarded or to be awarded by the District.

**2220. RIGHT TO AUDIT RECORDS. (SC Code § 11-35-2220)**

- 2220.1 **Audit of Cost or Pricing Data.** All District contracts shall contain a clause setting forth the District's right at reasonable times and places to audit the books and records of any contractor or subcontractor who has submitted cost or pricing data pursuant to § 1830 (Cost or Pricing Data) to the extent that such books and records relate to such cost or pricing data. The contract shall further set forth that the contractor or subcontractor who receives a contract, change order, or contract modification for which cost or pricing data is required, must maintain such books and records that relate to such cost or pricing data for three (3) years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing by the Chief Procurement Officer; provided, however, that such records shall be retained for additional periods of time beyond this three-year period upon request of the Chief Procurement Officer. (SC Code § 11-35-2220(1))
- 2220.2 **Contract Audit.** The District is entitled to audit the books and records of a contractor or any subcontractor under any negotiated contract or subcontract other than a firm-fixed price contract to the extent that such books and

records relate to the performance of such contract or subcontract. Such books and records must be maintained by the contractor for a period of three (3) years from the date of final payment under the prime contract and by the subcontractor for a period of three (3) years from the date of final payment under the subcontractor, unless a shorter period is otherwise authorized in writing by the Chief Procurement Officer. (SC Code § 11-35-2220(2))

**2410. FINALITY OF DETERMINATIONS. (SC Code § 11-35-2410)**

- 2410.1 **Finality.** The determinations required by the following sections are final and conclusive, unless they are clearly erroneous, arbitrary, capricious or contrary to law: Section 1520(7) (Competitive Sealed Bidding: Correction or Withdrawal of Bids; Cancellation of Awards), Section 1520(11) (Competitive Sealed Bidding: Request for Qualifications), Section 1525(1) (Competitive Fixed Price Bidding: Conditions for Use), Section 1528(1) (Competitive Best Value Bidding: Conditions for Use), Section 1528(8) (Competitive Best Value Bidding: Award), Section 1529(1) (Competitive On-line Bidding: Conditions for Use), Section 1530(1) (Competitive Sealed Proposals, Conditions for Use), Section 1530(4) (Competitive Sealed Proposals: Request for Qualifications), Section 1530(7) (Competitive Sealed Proposals, Selection and Ranking of Prospective Offerors), Section 1530(9) (Competitive Sealed Proposals Award), Section 1540 (Negotiations After Unsuccessful Competitive Sealed Bidding), Section 1560 (Sole Source Procurement), Section 1570 (Emergency Procurement), Section 1710 (Cancellation of Invitation for Bids or Requests for Proposals), Section 1810(2) (Responsibility of Bidders and Offerors, Determination of Non-responsibility), Section 1825 (Prequalification of Construction Bidders), Section 1830(3) (Cost or Pricing Data, Cost or Pricing Data Not Required), Section 2010 (Types and Forms of Contracts), Section 2020 (Approval of Accounting System), Section 2030(2) (Multi-Term Contracts, Determination Prior to Use), Section 3020(2)(d) (Construction Procurement Procedures: Negotiations after Unsuccessful Competitive Sealed Bidding), Section 3220(5) (Procurement Procedure, Selection and Ranking of the Five Most Qualified), Section 4210(7) (Stay of Procurement During Protests, Decision to Proceed), and Section 4810 (Cooperative Use of Supplies, Services, or Information Technology).
- 2410.2 **Periodic Review.** The Superintendent or a designee shall review samples of the determinations periodically and issue reports and recommendations on the appropriateness of the determinations made.

**2420. REPORTING OF ANTICOMPETITIVE PRACTICES. (SC Code § 11-35-2420)**

- 2420.1 When any information or allegations concerning anti-competitive practices among any bidders or offerors, come to the attention of any employee of the District, immediate notice of the relevant facts must be transmitted to the South Carolina Attorney General's Office.

**2430. RETENTION OF PROCUREMENT RECORDS. (SC Code § 11-35-2430)**

- 2430.1 All procurement records of the District must be retained and disposed of in accordance with records retention guidelines and schedules approved by the Department of Archives and History. All retained documents shall be made available to the Attorney General or a designee upon request and proper receipt therefore.

**2440. RECORDS OF PROCUREMENT ACTIONS. (SC Code § 11-35-2440)**



- 2440.1 **Contents of Records.** (SC Code § 11-35-2440) The District shall submit semi-annually a record listing all contracts made pursuant to § 1560 (Sole Source Procurements) or § 1570 (Emergency Procurements) to the Superintendent. The record must contain:
- 2440.1.1 Each contractor's name.
  - 2440.1.2 The amount and type of each contract.
  - 2440.1.3 A listing of supplies, services, information technology, or construction procured under each contract.
- 2440.2 **Retention.** The District shall maintain these records for five (5) years
- 2440.3 **Publication of Records.** A copy of these records must be submitted to the Board through the Superintendent on an annual basis and must be available for public inspection.

## **ARTICLE 7** **SPECIFICATIONS**

**2710. ISSUANCE OF SPECIFICATIONS. (SC Reg. § 19-445.2140)**

- 2710.1 **Purpose of Specifications.** The purpose of a specification is to serve as a basis for obtaining supplies, services, information technology, or construction items adequate and suitable for the District's needs in a cost effective manner, taking into account, to the extent practicable, the cost of ownership and operation as well as initial acquisition costs. It is the policy of the District that specifications permit maximum practicable competition consistent with this purpose. Specifications shall be drafted with the objective of clearly describing the District's requirements. All specifications shall be written in a non-restrictive manner so as to describe the requirements to be met. (SC Reg. § 19-445.2140(B))
- 2710.2 **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 District. To facilitate the use of such criteria, the District must endeavor to include as part of its 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. (SC Reg. § 19-445.2140(C))
- 2710.3 **Preference for Commercially Available Products.** It is the general policy of this District 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. (SC Reg. § 19-445.2140(D))

**2720. DISTRICT SPECIFICATION PREPARATION AND REVIEW. (SC Code § 11-35-2720)**

- 2720.1 The District shall prepare or review, issue, revise, and maintain the specifications for supplies, services, information technology, and construction required by the District.

**2730. ASSURING COMPETITION. (SC Code § 11-35-2730)**

2730.1 All specifications shall be drafted so as to assure cost effective procurement of the District's actual needs and shall not be unduly restrictive.

**2750. SPECIFICATIONS PREPARED BY ARCHITECTS AND ENGINEERS. (SC Code § 11-35-2750)**

2750.1 The requirements of this article regarding the non-restrictiveness of specifications applies to each solicitation and include, among others things, all specifications prepared by architects, engineers, designers, draftsmen and land surveyors for District contracts.

**ARTICLE 9**

**CONSTRUCTION, ARCHITECT-ENGINEER, CONSTRUCTION MANAGEMENT, AND LAND SURVEYING SERVICES**

*[Model Comment: Article 9 of the Model School Code parallels Article 9 of the Consolidated Procurement Code, which is adapted in large part from Article 5 of the ABA's 2000 Model Procurement Code for State and Local Governments (hereinafter "MPC"). The General Assembly adopted many of construction related provisions of the ABA's Model Code when it enacted 2008 Act 174. In doing so, the General Assembly stated that "the relevant official comments to the [ABA] model code, and the construction given to the [ABA] model code, should be examined as persuasive authority for interpreting and construing the new code provisions created by this act." Accordingly, a number of the following Model Comments include quotes from the ABA's Official Comments.]*

**SECTION 2910.** Definitions of terms used in this article.

- (1) "Architect-engineer and land surveying services" are those professional services associated with the practice of architecture, professional engineering, land surveying, landscape architecture, and interior design pertaining to construction, as defined by the laws of this State, as well as incidental services that members of these professions and those in their employ may logically or justifiably perform, including studies, investigations, surveys, evaluations, consultations, planning, programming conceptual designs, plans and specifications, cost estimates, inspections, shop drawing reviews, sample recommendations, preparation of operating and maintenance manuals, and other related services.
- (2) "Construction manager agent" means a business that has been awarded a separate contract with the District to provide construction management services but not construction.
- (3) "Construction manager at-risk" means a business that has been awarded a separate contract with the District to provide both construction management services and construction using the construction management at-risk project delivery method. A contract with a construction manager at-risk may be executed before completion of design.
- (4) "Construction management services" are those professional services associated with contract administration, project management, and other specified services provided in connection with the administration of a project delivery method defined in Section 3005 (Project Delivery Methods Authorized).
- (5) "Construction management at-risk" means a project delivery method in which the District awards separate contracts, one for architectural and engineering services to design an infrastructure facility and the second to a construction

- manager at-risk for both construction of the infrastructure facility according to the design and construction management services.
- (6) “Design-bid-build” means a project delivery method in which the District sequentially awards separate contracts, the first for architectural and engineering services to design an infrastructure facility and the second for construction of the infrastructure facility according to the design.
- (7) “Design-build” means a project delivery method in which the District enters into a single contract for design and construction of an infrastructure facility.
- (8) “Design-build-finance-operate-maintain” means a project delivery method in which the District enters into a single contract for design, construction, finance, maintenance, and operation of an infrastructure facility over a contractually defined period. Money appropriated by the District is not used to pay for a part of the services provided by the contractor during the contract period.
- (9) “Design-build-operate-maintain” means a project delivery method in which the District enters into a single contract for design, construction, maintenance, and operation of an infrastructure facility over a contractually defined period. All or a portion of the money required to pay for the services provided by the contractor during the contract period are either appropriated by the District before the award of the contract or secured by the District through fare, toll, or user charges.
- (10) “Design requirements” means the written description of the infrastructure facility to be procured pursuant to this article, including:
- (a) required features, functions, characteristics, qualities, and properties that are required by the District;
  - (b) the anticipated schedule, including start, duration, and completion; and
  - (c) estimated budgets as applicable to the specific procurement, for design, construction, operation, and maintenance. The design requirements may, but need not, include drawings and other documents illustrating the scale and relationship of the features, functions, and characteristics of the project.

*[Model Comment: (1) Read in conjunction with Regulation 2145(K) (2). (2) The following official comments to the Model Procurement Code provide insight into the role of design requirements. MPC '5-101, cmt.2. ("Government prepares a functional description that sets forth only the essential features of each project, including anticipated schedule and estimated budget for design, construction, operation, and maintenance. . . . If the design requirements go beyond functional description into particular design, construction, finance, or operational requirements, the scope and the intensity of this competition is compromised, to the detriment of both government and offerors. For example, "design-build" competitions in which major design decisions are already set forth in the design requirements -- known in the industry as "detail-build" -- are not likely to produce innovation in the integration of design and construction. "Detail-build" procurements split the professional design function between government and the contractor, an allocation that leads to confusion and disputes over liability for design, for construction results, and for performance problems. The Code encourages government: (1) to prepare design requirements for each project before a procurement method is selected; and (2) to procure the design function from a single entity."); MPC, opening commentary ("The starting gate for these competitions is the statement of "design requirements" in the RFP, which establishes a common minimum threshold of owner requirements in*

*these competitions. The finish gate is the submission of "proposal development documents" by offerors in response to the RFP.".]*

- (11) "Independent peer reviewer services" are additional architectural and engineering services that a District shall acquire in design-build, design-build-operate-maintain, or design-build-finance-operate-maintain procurements. The function of the independent peer reviewer is to confirm that the key elements of the professional engineering and architectural design provided by the contractor are in conformance with the applicable standard of care. If a District elects not to contract with the independent peer reviewer proposed by the successful Offeror, the independent peer reviewer must be selected through competitive sealed proposals.

*[Model Comment: Read in conjunction with Section 3024(3) (b) and Regulation 2145(A) (7). (2) The following official comments to the Model Procurement Code provide insight into the role of an independent peer reviewer: MPC ' 5-204(3), cmt. ("The Independent Peer Reviewer provides an independent professional peer review of key elements of the design of major public facilities. The Independent Peer Reviewer's function is not to conduct a second design alongside the designers of record. The Independent Peer Reviewer's purpose is to provide the government with independent professional advice and assurance that key design elements of the project are consistent with the functional description in the Request for Proposals and with the common law standard of professional care. The Independent Peer Reviewer's contractual relationship and professional obligation is to the [State]. By requiring that the Offeror recommend an appropriate Independent Peer Reviewer (upon which the Offeror is evaluated), the professional quality of the Independent Peer Reviewer is assured to be high."); MPC ' 5-101(7), cmt. 2 ("(3)*

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

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

- (13) "Operations and maintenance" means a project delivery method in which the District enters into a single contract for the routine operation, routine repair, and routine maintenance of an infrastructure facility.
- (14) "Proposal development documents" means drawings and other design-related documents that are sufficient to fix and describe the size and character of an infrastructure facility as to architectural, structural, mechanical and electrical systems, materials, and such other elements as may be appropriate to the applicable project delivery method.

*[Model Comment: Read in conjunction with Regulation 2145(K) (3).]*

**SECTION 3005.** Project delivery methods authorized.

- (1) The following project delivery methods are authorized for procurements relating to infrastructure facilities:
- (a) design-bid-build;
  - (b) construction management at-risk;
  - (c) operations and maintenance;
  - (d) design-build;
  - (e) design-build-operate-maintain; and
  - (f) design-build-finance-operate-maintain.
- (2) In addition to those methods identified in item (1), the regulations may:
- (a) approve as an alternate project delivery method any combination of design, construction, finance, and services for operations and maintenance of an infrastructure facility; and
  - (b) allow or require the governmental body to follow any of the additional procedures established by Section 11-35-3024.
- (3) Participation in a report or study that is later used in the preparation of design requirements for a project does not disqualify a firm from participating as a member of a proposing team in a construction management at-risk, design-build, design-build-operate-maintain, or design-build-finance-operate-maintain procurement unless the participation provides the business with a substantial competitive advantage.

**SECTION 3010.** Choice of project delivery method.

The project delivery method used for a District construction project must be that method which is most advantageous to the District and results in the most timely, economical, and successful completion of the construction project. The District shall select, in accordance with regulations, the appropriate project delivery method for a particular project and shall state in writing the facts and considerations leading to the selection of that particular method.

**SECTION 3015.** Source selection methods assigned to project delivery methods.

- (1) Scope. This section specifies the source selection methods applicable to procurements for the project delivery methods identified in Section 3005 (Project delivery methods authorized), except as provided in Sections 1550 (Small Purchases), 1560 (Sole Source Procurement), and 1570 (Emergency Procurements).

(2) Design-bid-build:

- (a) Design. Architect-engineer, construction management, and land surveying services. The qualifications based selection process in Section 3220 (Qualifications Based Selection Procedures) must be used to procure architect-engineer, construction management, and land surveying services, unless those services are acquired in conjunction with construction using one of the project delivery methods provided in Section 3015 (3), (5), (6), (7), and (8).
- (b) Construction. Competitive sealed bidding, as provided in Section 1520 (Competitive Sealed Bidding), must be used to procure construction in design-bid-build procurements.
- (3) Construction Management at-risk. Contracts for construction management at-risk must be procured as provided in either Section 1520 (Competitive Sealed Bidding) or Section 1530 (Competitive Sealed Proposals).
- (4) Operations and Maintenance. Contracts for operations and maintenance must be procured as set forth in Section 1510 (Methods of Source Selection).
- (5) Design-build. Contracts for design-build must be procured by competitive sealed proposals, as provided in Section 1530 (Competitive Sealed Proposals), except that the regulations may describe the circumstances under which a particular design-build procurement does not require the submission of proposal development documents as required in Section 3024(2)(b).

*[Model Comment: Despite this authority, the regulations do not allow design-build solicitations that do not require submission of proposal development documents. Stated differently, a design-build procurement cannot be evaluated on qualifications alone.]*

- (6) Design-build-operate-maintain. Contracts for design-build-operate-maintain must be procured by competitive sealed proposals, as provided in Section 1530 (Competitive Sealed Proposals).
- (7) Design-build-finance-operate-maintain. Contracts for design-build-finance-operate-maintain must be procured by competitive sealed proposals, as provided in Section 1530 (Competitive Sealed Proposals).
- (8) Other. Contracts for an alternate project delivery method approved pursuant to Section 3005(2) must be procured by a source selection method provided in Section 1510, as specified by the authority approving the alternative project delivery method.

**SECTION 3020.** Additional bidding procedures for construction procurement.

Exceptions in Competitive Sealed Bidding Procedures. The process of competitive sealed bidding as required by Section 3015(2) (b) must be performed in accordance with the procedures outlined in Article 5 of this code subject to the following exceptions:

- (a) Invitation for Bids. The District is responsible for developing a formal invitation for bids for each construction project. The invitation must include, but not be limited to, all contractual terms and conditions applicable to the procurement. A copy of each invitation for bids must be advertised formally in South Carolina Business Opportunities.

- (b) Bid Acceptance. Instead of Section 1520(6), the following provision applies. Bids must be accepted unconditionally without alteration or correction, except as otherwise authorized in this code. The District's invitation for bids must set forth all requirements of the bid including, but not limited to:
- (i) The District, in consultation with the architect-engineer assigned to the project, shall identify by specialty in the invitation for bids all subcontractors who are expected to perform work for the prime contractor to or about the construction when those subcontractors' contracts are each expected to exceed three percent of the prime contractor's total base bid. In addition, the District, in consultation with the architect-engineer assigned to the project, may identify by specialty in the invitation for bids a subcontractor who is expected to perform work which is vital to the project. The determination of which subcontractors are included in the list provided in the invitation for bids is not protestable pursuant to Section 4210 or another provision of this code. A bidder in response to an invitation for bids shall set forth in his bid the name of only those subcontractors to perform the work as identified in the invitation for bids. If the bidder determines to use his own employees to perform a portion of the work for which he would otherwise be required to list a subcontractor and if the bidder is qualified to perform that work under the terms of the invitation for bids, the bidder shall list himself in the appropriate place in his bid and not subcontract that work except with the approval of the District for good cause shown.
  - (ii) Failure to complete the list provided in the invitation for bids renders the bidder's bid unresponsive.
  - (iii) The District shall send all responsive bidders a copy of the bid tabulation within ten working days following the bid opening.
- (c) Instead of Section 1520(10), the following provisions apply:
- (i) Unless there is a compelling reason to reject bids as prescribed by regulation, notice of an intended award of a contract to the lowest responsive and responsible bidder whose bid meets the requirements set forth in the invitation for bids must be given by posting the notice at a location that is specified in the invitation for bids. The invitation for bids and the posted notice must contain a statement of the bidder's right to protest pursuant to Section 4210(1) and the date and location of posting must be announced at bid opening. In addition to posting notice, the District promptly shall send all responsive bidders a copy of the notice of intended award and of the bid tabulation. The mailed notice must indicate the posting date and must contain a statement of the bidder's right to protest pursuant to Section 4210(1).
  - (ii) After ten days' notice is given, the District may enter into a contract with the bidder named in the notice in accordance with the provisions of this code and of the bid solicited. The procurement officer must comply with Section 1810.
  - (iii) If, at bid opening, only one bid is received and determined to be responsive and responsible and within the District's construction budget, award may be made without the ten day waiting period.
- (d) Negotiations after Unsuccessful Competitive Sealed Bidding. Instead of Section 1540, the following provisions apply:
- (i) If bids received pursuant to an invitation for bids exceed available funds, and it is determined in writing by the District that circumstances do not permit the delay required to resolicit competitive sealed bids, and the base bid, less deductive alternates, does not exceed available funds by an amount greater than ten percent of the construction budget established for that portion of the work, a contract may be negotiated pursuant to this section with the lowest responsible and responsive bidder. The District may change the scope of the work to reduce the cost to be within the established construction budget but may not reduce the cost below the established construction budget

more than ten percent without a written determination by the chief business official on the best interest of the District.

**SECTION 3021.** Subcontractor substitution.

- (1) After notice of an award or intended award has been given, whichever is earlier, the prospective contractor identified in the notice may not substitute a business as subcontractor in place of a subcontractor listed in the prospective contractor's bid or proposal, except for one or more of the following reasons:
  - (a) upon a showing satisfactory to the District by the prospective contractor that:
    - (i) the listed subcontractor is not financially responsible;
    - (ii) the listed subcontractor's scope of work did not include a portion of the work required in the plans and specifications, and the exclusion is not clearly set forth in the subcontractor's original bid;
    - (iii) the listed subcontractor was listed as a result of an inadvertent clerical error, but only if that request is made within four working days of opening;
    - (iv) the listed subcontractor failed or refused to submit a performance and payment bond when requested by the prospective contractor after the subcontractor had represented to the prospective contractor that the subcontractor could obtain a performance and payment bond; and
    - (v) the listed subcontractor must be licensed and did not have the license at the time required by law;
  - (b) if the listed subcontractor fails or refuses to perform his subcontract;
  - (c) if the work of the listed subcontractor is found by the District to be substantially unsatisfactory;
  - (d) upon mutual agreement of the contractor and subcontractor; and
  - (e) with the consent of the District for good cause shown.
- (2) The request for substitution must be made to the District in writing. This written request does not give rise to a private right of action against the prospective contractor in the absence of actual malice.
- (3) If substitution is allowed, the prospective contractor, before obtaining prices from another subcontractor, must attempt in good faith to negotiate a subcontract with at least one subcontractor whose bid was received before the submission of the prospective contractor's offer. This section does not affect a contractor's ability to request withdrawal of a bid in accordance with the provisions of this code and the regulations.
- (4) This section applies to a procurement conducted using the source selection methods authorized by Section 3015(2) (b), (3), (5), (6), (7), and (8).

**SECTION 3023.** Prequalification on District construction.

- (A) In accordance with this section and procedures published by the State Engineer, a District may limit participation in a solicitation for construction to only those businesses, including potential subcontractors that are prequalified. The prequalification process may be used only with the approval of the Superintendent. If businesses are prequalified, the District must issue a request for qualifications. Adequate public notice of the request for qualifications must be given in the manner provided in Section 1520(3). The request must contain, at a minimum, a description of the general scope of work to be acquired, the deadline for submission of information, and how businesses may apply



for consideration. The evaluation criteria must include, but not be limited to, prior performance, recent past references on all aspects of performance, financial stability, and experience on similar construction projects. Using only the criteria stated in the request for qualifications, businesses must be ranked from most qualified to least qualified. The basis for the ranking must be determined in writing. If fewer than two businesses are prequalified, the prequalification process must be canceled. The determination regarding how many offers to solicit is not subject to review pursuant to Article 17 of this code. Section 1520(4) (Request for Qualifications) and Section 1530(4) (Request for Qualifications) do not apply to a procurement of construction.

- (B) In a design-bid-build procurement, the prequalification process may be used only if the construction involved is unique in nature, over ten million dollars in value, or involves special circumstances, as determined by the board. In a design-bid-build procurement, the minimum requirements for prequalification must be published in the request for qualifications. Offers must be sought from all businesses that meet the published minimum requirements for prequalification.

*[Model Comment: (1) Read in conjunction with Section 3024(2) (c) (i) and Regulation & 2132. (2) The procedures published by the State Engineer are attached.]*

**SECTION 3024.** Additional procedures applicable to procurement of certain project delivery methods.

- (1) Applicability. In addition to the requirements of Section 1530 (Competitive Sealed Proposals), the procedures in this section apply as provided in items (2), (3), and (4) below.

*[Model Comment: Read in conjunction with Regulation 2145(K) (1).]*

- (2) Content of Request for Proposals. A Request for Proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain:
- (a) must include design requirements;

*[Model Comment: Read in conjunction with Section 2910(10).]*

- (b) must solicit proposal development documents; and

*[Model Comment: Read in conjunction with Section 2910(14).]*

- (c) may, if the District determines that the cost of preparing proposals is high in view of the size, estimated price, and complexity of the procurement:
- (i) prequalify offerors in accordance with Section 3023 by issuing a request for qualifications in advance of the request for proposals;
- (ii) select, pursuant to procedures designated in the State of South Carolina's Manual for Planning and Execution of State Permanent Improvements, a short list of responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award before discussions and evaluations pursuant to Section 1530, if the number

of proposals to be short-listed is stated in the Request for Proposals and prompt public notice is given to all offerors as to which proposals have been short-listed; or

[Model Comment: According to Section 3023(A) above, the determination regarding how many offers to prequalify is not subject to protest. No aspect of the short list process is insulated from protest. Given the option of prequalification under paragraph (i) above, Materials Management Office anticipates little if any need for the type of short listing authorized by this paragraph. Accordingly, the Model retains the reference to state level guidance on this process.]

(iii) pay stipends to unsuccessful offerors, if the amount of the stipends and the terms under which stipends are paid are stated in the Request for Proposals.

(3) Evaluation Factors. A Request for Proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain must:

(a) state the relative importance of (i) demonstrated compliance with the design requirements, (ii) Offeror qualifications, (iii) financial capacity, (iv) project schedule, (v) price, or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements, and (vi) other factors, if any; and

[Model Comment: Read in conjunction with Regulation 2145(K) (4).]

(b) require each Offeror to identify an Independent Peer Reviewer whose competence and qualifications to provide that service must be an additional evaluation factor in the award of the contract.

[Model Comment: Read in conjunction with Section 2910(111) and Regulation 2145(A) (7).]

### **SECTION 3030. Bond and security.**

(1) Bid Security.

(a) Requirement for Bid Security. Bid security is required for all competitive sealed bidding for construction contracts in a design-bid-build procurement in excess of fifty thousand dollars and other contracts as may be prescribed by the District's internal operational procedures (§ 540). Bid security is a bond provided by a surety company meeting the criteria established by the regulations or otherwise supplied in a form that may be established by regulation.

(b) Amount of Bid Security. Bid security must be in an amount equal to at least five percent of the amount of the bid at a minimum.

(c) Rejection of Bids for Noncompliance with Bid Security Requirements. When the invitation for bids requires security, noncompliance requires that the bid be rejected except that a bidder who fails to provide bid security in the proper amount or a bid bond with the proper rating must be given one working day from bid opening to cure the deficiencies. If the bidder is unable to cure these deficiencies within one working day of bid opening, his bid must be rejected.

(d) Withdrawal of Bids. After the bids are opened, they must be irrevocable for the period specified in the invitation for bids. If a bidder is permitted to withdraw its bid before bid opening pursuant to Section 1520(7), action must not be had against the bidder or the bid security.

(2) Contract Performance Payment Bonds.

(a) When Required-Amounts. The following bonds or security must be delivered to the District and become binding on the parties upon the execution of the contract for construction:

- (i) a performance bond satisfactory to the District, executed by a surety company meeting the criteria established by the regulations, or otherwise secured in a manner satisfactory to the District, in an amount equal to one hundred percent of the portion of the contract price that does not include the cost of operation, maintenance, and finance;
- (ii) a payment bond satisfactory to the District, executed by a surety company meeting the criteria established by the regulations, or otherwise secured in a manner satisfactory to the District, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the construction work provided for in the contract. The bond must be in an amount equal to one hundred percent of the portion of the contract price that does not include the cost of operation, maintenance, and finance;

*[Model Comment: (1) The District's internal operational procedures (§ 540) may wish to address the impact on the District of the Subcontractors' and Suppliers' Payment Protection Act, appearing in Title 29, Chapter 6, Article 3 of the South Carolina Code of Laws. (2) The Office of State Engineer includes in the OSE Manual a guide entitled: Bid, Payment, and Performance Bonds, What they are, How they work, and a Checklist of what you need (December 2009).]*

(iii) in the case of a construction contract valued at fifty thousand dollars or less, the District may waive the requirements of (i) and (ii) above, if the District has protected itself;

(iv) in the case of a construction manager at-risk contract, the solicitation may provide that bonds or security are not required during the project's preconstruction or design phase, if construction does not commence until the requirements of (i) and (ii) above have been satisfied.

(b) Authority to Require Additional Bonds. Item (2) does not limit the authority of the District to require a performance bond or other security in addition to these bonds, or in circumstances other than specified in sub item (a) of that item in accordance with regulations.

(c) Suits on Payment Bonds-Right to Institute. A person who has furnished labor, material, or rental equipment to a bonded contractor or his subcontractors for the work specified in the contract, and who has not been paid in full for it before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by the person or material or rental equipment was furnished or supplied by the person for which the claim is made, has the right to sue on the payment bond for the amount, or the balance of it, unpaid at the time of institution of the suit and to prosecute the action for the sum or sums justly due the person. A remote claimant has a right of action on the payment bond only upon giving written notice to the contractor within ninety days from the date on which the person did or performed the last of the labor or furnished or supplied the last of the material or rental equipment upon which the claim is made, stating with substantial accuracy the amount claimed as unpaid and the name of the party to whom the material or rental equipment was furnished or supplied or for whom the labor was done or performed. The written notice to the bonded contractor must be served personally or served by mailing the notice by registered or certified mail, postage prepaid, in an envelope addressed to the bonded contractor at any place the bonded contractor maintains a permanent office for the conduct of its business, or at the current address as shown on the records of the Department of Labor, Licensing and Regulation. The aggregate amount of a claim

against the payment bond by a remote claimant may not exceed the amount due by the bonded contractor to the person to whom the remote claimant has supplied labor, materials, rental equipment, or services, unless the remote claimant has provided notice of furnishing labor, materials, or rental equipment to the bonded contractor. The written notice to the bonded contractor must be served personally or sent by fax or by electronic mail or by registered or certified mail, postage prepaid, to the bonded contractor at any place the bonded contractor maintains a permanent office for the conduct of its business, or at the current address as shown on the records of the Department of Labor, Licensing and Regulation. After receiving the notice of furnishing labor, materials, or rental equipment, payment by the bonded contractor may not lessen the amount recoverable by the remote claimant. The aggregate amount of claims on the payment bond may not exceed the penal sum of the bond.

A suit under this section must not be commenced after the expiration of one year after the last date of furnishing or providing labor, services, materials, or rental equipment.

For purposes of this section, "bonded contractor" means the contractor or subcontractor furnishing the payment bond, and "remote claimant" means a person having a direct contractual relationship with a subcontractor of a bonded contractor, but no expressed or implied contractual relationship with the bonded contractor.

(d) Suits on Payment Bonds-Where and When Brought. Every suit instituted upon a payment bond must be brought in a court of competent jurisdiction for the county or circuit in which the construction contract was to be performed; except that a suit must not be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by the person bringing suit. The obligee named in the bond need not be joined as a party in the suit.

*[Model Comment: Districts may wish to consider the following legal authorities: (1) D.W. Flowe & Sons, Inc. v. Christopher Constr. Co., 326 S.C. 17, 482 S.E.2d 558 (1997), and (2) S.C. Code Ann. § 11-1-120]*

(3) Bonds Forms and Copies.

(a) Bonds Forms. The regulations specify the form of the bonds required by this section.

(b) Certified Copies of Bonds. A person may request and obtain from the District a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond is prima facie evidence of the contents, execution, and delivery of the original.

(4) Retention.

(a) Maximum amount to be withheld. In a contract or subcontract for construction which provides for progress payments in installments based upon an estimated percentage of completion, with a percentage of the contract's proceeds to be retained by the District or general contractor pending completion of the contract or subcontract, the retained amount of each progress payment or installment must be no more than three and one-half percent.

(b) Release of Retained Funds. When the work to be performed on a District construction project or pursuant to a District construction contract is to be performed by multiple prime contractors or by a prime contractor and multiple subcontractors, the work contracted to be done by each individual contractor or subcontractor is considered a separate division of the contract for the purpose of retention. As each division of the contract is certified as having been completed, that portion of the retained funds which is allocable to the completed division of the contract must be released forthwith to the prime contractor, who, within ten days of its receipt, shall release to the subcontractor

responsible for the completed work the full amount of retention previously withheld from him by the prime contractor.

- (5) Bonds for Bid Security and Contract Performance. The requirement of a bond for bid security on a construction contract, pursuant to subsection (1), and a construction contract performance bond, pursuant to subsection (2), may not include a requirement that the surety bond be furnished by a particular surety company or through a particular agent or broker.

**SECTION 3035.** Errors and omissions insurance.

Regulations shall specify when the District shall require offerors to provide appropriate errors and omissions insurance to cover architectural and engineering services under the project delivery methods set forth in Section 3005(1)(a), (d), (e), and (f).

**SECTION 3037.** Other forms of security.

The District may require one or more of the following forms of security to assure the timely, faithful, and uninterrupted provision of operations and maintenance services procured separately or as one element of another project delivery method:

- (a) operations period surety bonds that secure the performance of the contractor's operations and maintenance obligations;
- (b) letters of credit in an amount appropriate to cover the cost to the District of preventing infrastructure service interruptions for a period up to twelve months; and
- (c) appropriate written guarantees from the contractor, or depending upon the circumstances, from a parent corporation, to secure the recovery of reprourement costs to the District if the contractor defaults in performance.

**SECTION 3040.** Contract clauses and their administration.

(1) Contract Clauses. District construction contracts and subcontracts may include clauses providing for adjustments in prices, time of performance, and other appropriate contract provisions including, but not limited to:

- (a) the unilateral right of a District to order in writing:
  - (i) all changes in the work within the scope of the contract, and
  - (ii) all changes in the time of performance of the contract which do not alter the scope of the contract work;
- (b) variations occurring between estimated quantities of work in the contract and actual quantities;
- (c) suspension of work ordered by the District;
- (d) site conditions differing from those indicated in the contract or ordinarily encountered.

(2) Price Adjustments.

- (a) Adjustments in price pursuant to such clauses promulgated by regulation must be computed and documented with a written determination. The price adjustment agreed upon must approximate the actual cost to the contractor and all costs incurred by the contractor must be justifiably compared with prevailing industry standards, including reasonable profit. Costs must be properly itemized and supported by substantiating data sufficient to permit

evaluation before commencement of the pertinent performance or as soon after that as practicable, and must be arrived at through whichever one of the following ways is the most valid approximation of the actual cost to the contractor:

- (i) by unit prices specified in the contract or subsequently agreed upon;
  - (ii) by the costs attributable to the events or situations under those clauses with adjustment of profits or fee, all as specified in the contract or subsequently agreed upon;
  - (iii) by agreement on a fixed price adjustment;
  - (iv) in another manner as the contracting parties may mutually agree; or
  - (v) in the absence of agreement by the parties, through unilateral determination by the District of the costs attributable to the events or situations under those clauses, with adjustment of profit or fee, all as computed by the District in accordance with applicable sections of the regulations and subject to the provisions of Article 17 of this code.
- (b) A contractor is required to submit cost or pricing data if an adjustment in contract price is subject to the provisions of Section 1830.
- (3) Additional Contract Clauses. The construction contracts and subcontracts may include clauses providing for appropriate remedies that cover as a minimum:
- (a) specified excuses for delay or nonperformance;
  - (b) termination of the contract for default;
  - (c) termination of the contract in whole or in part for the convenience of the District.
- (4) Modification of Required Clauses. The chief procurement officer may vary the clauses promulgated by regulation for inclusion in a particular construction contract if the variations are supported by a written determination that states the circumstances justifying the variations, if notice of a material variation is stated in the invitation for bids.

**SECTION 3050.** Cost principles regulations for construction contractors.

The regulations may set forth cost principles which shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under provisions in construction contracts which provide for the reimbursement of costs.

**SECTION 3070.** Approval of architectural, engineering or construction changes which do not alter scope or intent or exceed approved budget.

A District may approve and pay for amendments to architectural/engineering contracts and change orders to construction contracts which do not alter the original scope or intent of the project and which do not exceed the previously approved project budget.

**SECTION 3210.** Policy.

Policy. It is the policy of this District to announce publicly all requirements for architect-engineer, construction management, and land surveying services and to negotiate contracts for such services on the basis of demonstrated competence and qualification for the particular type of services required and at fair and reasonable prices.

*[Model Comment: Sections 1520 and 1550 are inapplicable to construction related professional design services. This provision requires public notice of all A/E, CM, and land surveying contracts, except as otherwise allowed by Section 3230. Consistent with Section 3220 and R. 2145(D), advertisement must be in South Carolina Business Opportunities.]*

**SECTION 3215.** Preference for resident design service; definitions; exceptions.

(A) As used in this section:

- (1) 'Design services' means architect engineer, construction management, or land surveying services as defined in Section 2910 and awarded pursuant to Section 3220.
  - (2) 'Resident' means a business that employs, either directly or through consultants, an adequate number of persons domiciled in South Carolina to perform a majority of the design services involved in the procurement.
- (B) A business responding to an invitation involving design services shall submit a certification with its response stating whether the business is a resident for purposes of the procurement. Submission of a certification under false pretenses is grounds for suspension or debarment.
- (C) An award to a nonresident of a contract involving design services must be supported by a written determination explaining why the award was made to the selected firm.
- (D) In an evaluation conducted pursuant to Section 3220, a resident firm must be ranked higher than a nonresident firm if the District's selection committee finds the two firms otherwise equally qualified.
- (E) This section does not apply to a procurement if either the procurement does not involve construction or the design services are a minor accompaniment to a contract for nondesign services.

**SECTION 3220.** Qualifications based selection procedures.

- (1) District Selection Committee. A District shall establish its own architect-engineer, construction management, and land surveying services selection committee, referred to as the District selection committee, which must be composed of those individuals the Superintendent determines to be qualified to make an informed decision as to the most competent and qualified firm for the proposed project. The Superintendent or his qualified responsible designee shall sit as a permanent member of the District selection committee for the purpose of coordinating and accounting for the committee's work.
- (2)(a) Advertisement of Project Description. The District selection committee is responsible for:
  - (i) developing a description of the proposed project;
  - (ii) enumerating all required professional services for that project; and
  - (iii) preparing a formal invitation to firms for submission of information.

- (b) The invitation must include, but not be limited to, the project title, the general scope of work, a description of all professional services required for that project, the submission deadline, and how interested firms may apply for consideration. The invitation must be advertised formally in South Carolina Business Opportunities.
- (3) Response to Invitation. The date for submission of information from interested persons or firms in response to an invitation must not be less than fifteen days after publication of the invitation. Interested architect-engineer, construction management, and land surveying persons or firms shall respond to the invitation with the submission of a current and accurate Federal Standard Form 254, Architect-Engineer and Related Services Questionnaire, and Federal Standard Form 255, Architect-Engineer and Related Services Questionnaire for Specific Project, or their successor forms or similar information as may be prescribed by regulation, and other information that the particular invitation may require.
- (4) Interviews with Interested Firms. Following receipt of information from all interested persons and firms, the District selection committee shall hold interviews with at least three persons or firms who respond to the committee's advertisement and who are considered most qualified on the basis of information available before the interviews. A list of firms selected for interview must be sent to all firms that submitted information in response to the advertisement, before the date selected for the interviews. If less than three persons or firms respond to the advertisement, the committee shall hold interviews with those that did respond. The District selection committee's determination as to which are to be interviewed must be in writing and based upon its review and evaluation of all submitted materials. The written report of the committee must list specifically the names of all persons and firms that responded to the advertisement and enumerate the reasons of the committee for selecting those to be interviewed. The purpose of the interviews is to provide the further information that may be required by the District selection committee to fully acquaint itself with the relative qualifications of the several interested firms.
- (5) Selection and Ranking of the Three Most Qualified.
- (a) The District selection committee shall evaluate each of the persons or firms interviewed in view of their:
- (i) past performance;
  - (ii) the ability of professional personnel;
  - (iii) demonstrated ability to meet time and budget requirements;
  - (iv) location and knowledge of the locality of the project if the application of this criterion leaves an appropriate number of qualified firms, given the nature and size of the project;
  - (v) recent, current, and projected workloads of the firms;
  - (vi) creativity and insight related to the project;
  - (vii) related experience on similar projects;
  - (viii) volume of work awarded by the District to the person or firm during the previous five years, with the objective of effectuating an equitable distribution of contracts by the District among qualified firms including Minority Business Enterprises certified by the South Carolina Office of Small and Minority Business Assistance and firms that have not had previous District work; and
  - (ix) any other special qualification required pursuant to the solicitation of the District.
- (b) Based upon these evaluations, the District selection committee shall select the three persons or firms that, in its judgment, are the best qualified, ranking the three in priority order. The District selection committee's report ranking the three chosen persons or firms must be in writing and include data substantiating its determinations.



- (6) Notice of Selection and Ranking. When it is determined by the District that the ranking report is final, written notification of the highest ranked person or firm must be sent immediately to all firms interviewed.
- (7) Negotiation of Contract. The Superintendent or his/her designee shall negotiate a contract for services with the most qualified person or firm at a compensation that is fair and reasonable to the District. If the Board of the District or its designee is unable to negotiate a satisfactory contract with this person or firm, negotiations must be terminated formally. Negotiations must commence in the same manner with the second and then the third most qualified until a satisfactory contract is negotiated. If an agreement is not reached with one of the three, additional persons or firms in order of their competence and qualifications must be selected after consultation with the District selection committee, and negotiations must be continued in the same manner until agreement is reached.

*[Model Comments: The State Engineer's Manual has forms for complying with this provision that may be of assistance.]*

**SECTION 3230.** Exception for small architect-engineer and land surveying services contract.

- (1) Procurement Procedures for Certain Contracts. A District securing architect-engineer or land surveying service which is estimated not to exceed twenty-five thousand dollars may award contracts by direct negotiation and selection, taking into account:
- (a) the nature of the project;
  - (b) the proximity of the architect-engineer or land surveying services to the project;
  - (c) the capability of the architect, engineer, or land surveyor to produce the required service within a reasonable time;
  - (d) past performance; and
  - (e) ability to meet project budget requirements.
- (2) Maximum Fees Payable to One Person or Firm. Fees paid during the twenty-four month period immediately preceding negotiation of the contract by a District for professional services performed by an architectural-engineering or land surveying firm pursuant to Section 3230(1) may not exceed seventy-five thousand dollars. Persons or firms seeking to render professional services pursuant to this section shall furnish the District with whom the firm is negotiating a list of professional services, including fees paid for them, performed for the District during the fiscal year immediately preceding the fiscal year in which the negotiations are occurring and during the fiscal year in which the negotiations are occurring.
- (3) Reserved.
- (4) Splitting of Larger Projects Prohibited. A District may not break a project into small projects for the purpose of circumventing the provisions of Section 3220 and this section.

**SECTION 3245.** Architect, engineer, or construction manager; performance of other work.

- (a) An architect or engineer performing design work, or a construction manager performing construction management services, both as described in Section 2910(1) and (3), under a contract awarded pursuant to the provisions of Section 3220 or Section 3230, may not perform other work, by later amendment or separate contract award, on

that project as a contractor or subcontractor either directly or through a business in which he or his architectural engineering or construction management firm has greater than a five percent interest.

- (b) For purposes of this section, safety compliance and other incidental construction support activities performed by the construction manager are not considered work performed as a contractor or subcontractor. If the construction manager performs or is responsible for safety compliance and other incidental construction support activities, and these support activities are in noncompliance with the provisions of Section 41-15-210, then the construction management firm is subject to all applicable fines and penalties.
- (c) This section applies only to procurements for construction using the design-bid-build project delivery method.

## **ARTICLE 10**

### **INDEFINITE DELIVERY CONTRACTS**

**SECTION 3310.** Indefinite delivery contracts for construction items, architectural-engineering and land surveying services.

- (1) General Applicability. Indefinite delivery contracts may be awarded on an as-needed basis for construction services pursuant to the procedures in Section 3015(2) (b) and for architectural-engineering and land surveying services pursuant to Section 3220.
- (a) Construction Services. When construction services contracts are awarded, each contract shall be limited to a total expenditure of seven hundred fifty thousand dollars for a two-year period with individual project expenditures not to exceed one hundred fifty thousand dollars.
- (b) Architectural-Engineering and Land Surveying Services. When architectural-engineering and land surveying services contracts are awarded, each contract shall be limited to a total expenditure of three hundred thousand dollars for a two-year period with individual project expenditures not to exceed one hundred thousand dollars.
- (2) Small Indefinite Delivery Contracts. Small indefinite delivery contracts for architectural-engineering and land surveying services may be procured as provided in Section 3230. A contract established under this section shall be subject to and included in the limitations for individual and total contract amounts provided in Section 3230, and any regulations.

## **ARTICLE 11**

### **MODIFICATIONS AND TERMINATION OF CONTRACTS FOR SUPPLIES AND SERVICES**

**3410. AMENDMENTS TO AND TERMINATION OF CONTRACTS FOR SUPPLIES, EQUIPMENT AND SERVICES. (SC Code § 11-35-3410).**

3410.1 **Contract Clauses.** The District may require the inclusion in supplies, services and information technology contracts of clauses providing for adjustments in prices, time of performance, or other contract provisions, as appropriate, and covering the following subjects:

3410.1.1 **Change in Work:** the unilateral right of the District to order in writing changes in the work within the scope of the contract and temporary stopping of the work or delaying performance; and

- 3410.1.2 **Change in Quantity:** variations occurring between estimated quantities of work in a contract and actual quantities.
- 3410.2 **Price Adjustments.**
- 3410.2.1 **Adjustment Computation.** Adjustments in price pursuant to clauses used pursuant to § 3410.1 above shall be computed and documented with a written determination. The price adjustment agreed upon shall approximate the actual cost to the contractor, and all costs incurred by the contractor shall be justifiable compared with prevailing industry standards, including a reasonable profit. Costs shall be properly itemized and supported by substantiating data sufficient to permit evaluation before commencement of the pertinent performance or as soon thereafter as practicable, and shall be arrived at through whichever one of the following ways is the most valid approximation of the actual cost to the contractor:
- 3410.2.1.1 by unit prices specified in the contract or subsequently agreed upon;
- 3410.2.1.2 by the costs attributable to the events or situations under such clauses with adjustment for profit or fee, all specified in the contract or subsequently agreed upon;
- 3410.2.1.3 by agreement on a fixed price adjustment;
- 3410.2.1.4 by rates determined by the Public Service Commission and set forth in the applicable tariffs;
- 3410.2.1.5 in such other manner as the contracting parties may mutually agree; or
- 3410.2.1.6 in the absence of agreement by the parties, through unilateral determination by the District of the costs attributable to the events or situations under such clauses, with adjustment of profit or fee, all as computed by the District in accordance with sections of this Code concerning “Cost Principles” and subject to the provisions of Article 17 of this chapter.
- 3410.2.2 **Submittals.** A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of § 1830 (Cost or Pricing Data).
- 3410.3 **Additional Contract Clauses.** The District may, in supplies, services and information technology contracts, require the inclusion of contract clauses providing for appropriate remedies and covering the following subjects:
- 3410.3.1 specified excuses for delay or nonperformance;
- 3410.3.2 Termination of the contract for default; and
- 3410.3.3 Termination of the contract in whole or in part for the convenience of the District.
- 3410.4 **Modification of Clauses.** The Chief Procurement Officer may vary the usual clauses customarily included by the District under § 3410.1 and § 3410.4 in any particular District contract.
- 3410.5 **Lease/Payment, Installment Purchase, and Rental of Personal Property.**
- A. **Justification.** A District proposing to enter into an agreement other than an outright purchase is responsible for the justification of such action. Lease, lease/purchase, installment purchase, or rental agreements are subject to the procedures of this Code.
- B. **Procedures.** Upon written justification by the Procurement Officer of such alternate method, the following procedures will be followed:

Installment purchases will require the Procurement Officer to submit both a justification and purchase requisition to the Chief Financial and Operations Officer or his designee for processing.

All lease/purchase and installment sales contracts must contain an explicitly stated rate of interest to be incurred by the District under the contract.

### **ARTICLE 13 COST PRINCIPLES**

**3510. COST PRINCIPLES REQUIRED FOR SUPPLIES AND SERVICES CONTRACTS. (SC Code § 11-35-3510).**

3510.1 The District may establish cost principles that must be used to determine the allowability of incurred costs for the purpose of reimbursing costs under provisions in supplies, services, and information technology contracts that provide for the reimbursement of costs.

### **ARTICLE 15 SUPPLY MANAGEMENT**

**3810. Regulations for sale, lease, transfer and disposal (SC Code § 11-35-3810)**

3810.1 Subject to this code and existing provisions of law, the board shall adopt rules governing:

3810.1.1 the sale, lease, or disposal of surplus supplies by public auction, competitive sealed bidding, or other appropriate methods; (SC Code § 11-35-3810(1))

3810.1.2 the transfer of excess supplies between schools and departments. (SC Code § 11-35-3810(2))

3810.2 **Definition.** Surplus property is all District owned supplies and equipment, not in actual public use, with remaining useful life and available for disposal. This definition and the ensuing provisions exclude the disposal of solid and hazardous wastes as defined by any federal, state or local statutes and regulations. (§19-445.2150 (A) (1))

3810.3 **Determination of Sale Price.** (SC Reg. §19-445.2150(C) (2)). The sale price for all items will be established by the Procurement Officer or the Procurement Officer's designee. The Procurement Officer or his designee shall have the final authority to accept or reject bids received via a public sale. The following categories and methods will be used:

3810.3.1 Vehicles: NADA loan value shall be used for the sale price. In certain instances, the most recent public sale figures and consultation with the generating governmental body shall be the basis for a sale price. (SC Reg. §19-445.2150(C) (2))

3810.3.2 Boats, motors, heavy equipment, farm equipment, airplanes and other items with an acquisition cost in excess of \$5,000: The sale price shall be set from the most recent public sale figures and/or any other method necessary to establish a reasonable value including consultation with the generating district office. (SC Reg. §19-445.2150(C) (2))

- 3810.3.3 Miscellaneous items with an acquisition cost of \$5,000 or less such as office furniture and machines, shop equipment, cafeteria equipment, etc.: A sale price will be assessed in accordance with the current fair market value. (SC Reg. §19-445.2150(C) (2))
- 3810.4 **Public Sale of Surplus Personal Property.** (SC Reg. §19-445.2150 (D)). All surplus property shall be offered through competitive sealed bids or public auction.
- 3810.4.1 When surplus property is sold via the competitive sealed bid process, notification of such sale shall be given through a Notice of Sale to be posted at the District Office at least fifteen (15) days prior to the bid opening date. The sale shall also be announced through advertisement in newspapers of general circulation and/or the South Carolina Business Opportunities publication. The Notice of Sale shall list the supplies or property offered for sale; designate the location and how property may be inspected; and state the terms and conditions of sale and instructions to bidders including the place, date, and time set for bid opening. Bids shall be opened publicly. (SC Reg. §19-445.2150 (D) (2))
- 3810.4.2 Award shall be made in accordance with the provisions set forth in the Notice of Sale and to the highest responsive and responsible bidder provided that the price offered by such bidder is deemed reasonable by the Procurement Officer or his designee. Where such price is not deemed reasonable, the bids may be rejected in whole, or in part, and the sale negotiated beginning with the highest bidder provided the negotiated sale price is higher than the highest responsive and responsible bid. In the event of a tie bid the award will be made in accordance with the tie bid procedure set forth in Section 1520.9 of the Code. (SC Reg. §19-445.2150 (D) (2))
- 3810.4.3 Property may also be sold at a public auction by an experienced auctioneer. The Notice of Sale shall include, at a minimum, all terms and conditions of the sale and a statement clarifying the authority of the designee of the Procurement Officer or his designee, to reject any and all bids. These auctions will be advertised in a newspaper of general circulation or *South Carolina Business Opportunities* or on the radio, or both. (SC Reg. §19-445.2150 (D) (2))
- 3810.5 Property sold to the public shall be paid for in full at the time of purchase. Transactions shall be documented by a Bill of Sale enumerating all conditions of the sale i.e., “as is, where is,” etc. and must be signed by the purchaser. Personal checks with proper identification, certified checks, or money orders made payable to the District or cash shall be accepted as a form of payment. A copy of the Bill of Sale shall be presented to the purchaser and a copy along with the payment shall be forwarded to the Internal Operations Cashier. (SC Reg. §19-445.2150 (F) (7))
- 3810.6 **Other Means of Disposal.** (SC Reg. §19-445.2150 (D) (3)) Some types and classes of items can be sold or disposed of more economically by some other means of disposal including barter. In such cases, and also where the nature of the supply or unusual circumstances necessitate its sale to be restricted or controlled, the Chief Procurement Officer may employ such other means, including but not limited to appraisal, provided the Chief Procurement Officer makes a written determination that such procedure is advantageous to the District.

**3810.7 Unauthorized Disposal.**

3810.7.1 The ratification of an act of unauthorized and/or improper disposal of District property by any persons without the requisite authority to do so by an appointment or delegation under the Code rests with the Chief Financial and Operations Officer. (SC Reg. §19-445.2150 (I) (1))

3810.7.2 Corrective Action and Liability. In all cases, the Chief Financial and Operations Officer shall prepare a written determination describing the facts and circumstances surrounding the act, corrective action being taken to prevent recurrence, and action taken against the individual committing the act and shall report the matter in writing to the Superintendent within ten (10) days after the determination. (SC Reg. §19-445.2150 (I) (2))

**3810.8 Designation of Surplus Property.** (SC Reg. §19-445.2150 (D) (4)). Upon written determination by the Superintendent that surplus property items are needed to comply with programs authorized by the board, legislature or by executive order of the governor exercising his statutory authority, the Superintendent may designate surplus property items for disposal in order to comply with the program requirements. The Superintendent will develop and implement internal guidelines and procedures for the disposal of surplus property items designated as necessary to comply with the program requirements established by the Board, legislature or the governor.

**3810.9 Authority to Debar or Suspend.** (SC Reg. §19-445.2150 (J)). The procedures and policies set forth in Section 4220 of the Procurement Code shall apply to the disposal of District property. The authority to debar a person from participation in the public sales of State-owned property shall rest with the Chief Procurement Officer.

**3820. ALLOCATION OF PROCEEDS FROM SALE OR DISPOSAL OF SURPLUS.** (SC Code § 11-35-3820)

3820.1 Except as provided in § 3830, the sale of all District owned supplies, or personal property not in actual public use must be conducted and directed by the designated District office. Such sales must be held at such places and in a manner as in the judgment of the designated District office is most advantageous to the District. Unless otherwise determined, sales must be by either public auction or competitive sealed bid to the highest bidder. Each school shall inventory and report to the designated District office all surplus property not in actual public use held by that school for sale.

**3830. TRADE-IN SALES.** (SC Code § 11-35-3830)

3830.1 **Trade-in Value.** Unless otherwise provided by law, the District may trade-in personal property, the trade in value of which may be applied to the procurement or lease of like items. The trade-in value of such personal property shall not exceed an amount specified in § 3830.2.3. (SC Code § 11-35-3830(1))

3830.2 **Approval of Trade-in Sales.** When the trade-in value of the personal property of the District exceeds the specified amount, the board shall have the authority to determine whether: (SC Code § 11-35-3830(2))

3830.2.1 The subject personal property shall be traded in and the value applied to the purchase of new like items; or (SC Code § 11-35-3830(2)(a))

- 3830.2.2 The property shall be classified as surplus and sold in accordance with the provisions of § 3820. The District's determination shall be in writing and be subject to the provisions of this Code. (SC Code § 11-35-3830(2)(b))
- 3830.2.3 The Procurement Officer may trade in personal property, whose original unit purchase price did not exceed \$5,000, the trade in value of which must be applied to the purchase of new items. When the original unit purchase price exceeds \$5,000, the Procurement Officer shall refer the matter to the Chief Financial and Operations Officer for disposition. The Chief Financial and Operations Officer shall have the authority to determine whether the property shall be traded in and the value applied to the purchase of new like items or classified as surplus and sold in accordance with the provisions of Section 3820 of the Code. When the original purchase price exceeds one hundred thousand dollars (\$100,000), the Superintendent or his/her designee must make a written determination as to price reasonableness and document such trade-in transaction. (SC Reg. §19-445.2150 (G))
- 3830.3 **Record of Trade-in Sales.** The designated District office shall submit quarterly to the Chief Financial and Operations Officer a record listing all trade-in sales made under subsections (1) and (2) of this section. (SC Code § 11-35-3830(3))
3850. **Sale of unserviceable supplies** (SC Code § 11-35-3850).
- 3850.1 The District may sell any supplies owned by it after the supplies have become entirely unserviceable and can properly be classified as "junk", in accordance with procedures established by the board. All sales of unserviceable supplies by the District must be made in public to the highest bidder, after advertising for fifteen days. (SC Code § 11-35-3850)
- 3850.2 **Definition and Sale of Junk.** Junk is District-owned supplies and equipment having no remaining useful life in public service or the cost to repair or to refurbish the property in order to return it to public use would exceed the value of like used equipment with remaining useful life. (SC Reg. §19-445.2150 (H))

## **ARTICLE 17**

### **LEGAL AND CONTRACTUAL REMEDIES**

4210. **PROTESTS (RIGHT TO PROTEST; PROCEDURE; SETTLEMENT OF PROTEST; ADMINISTRATIVE REVIEW AND DECISION; NOTICE OF DECISION; FINALITY; STAY OF PROCUREMENT PENDING; EXCLUSIVITY OF REMEDY.)** (SC Code § 11-35-4210)
- 4210.1 **Right to Protest; Exclusive Remedy.** (SC Code § 11-35-4210)
- 4210.1.1 **Protest of Solicitation.** A prospective bidder, Offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the Chief Procurement Officer in the manner stated in § 4210.2 below within fifteen (15) days of the date of issuance of the Invitation for Bids or Requests for Proposals or other solicitation documents, whichever is applicable, or any amendment to it, if the amendment is at issue. An

Invitation for Bids or Request for Proposals or other solicitation document, not including an amendment to it, is considered to have been issued on the date required notice of the issuance is given in accordance with this Code.

- 4210.1.2 **Protest of Intended Award or Award.** Any actual bidder, Offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the Chief Procurement Officer in the manner stated in subsection 4210.2.2 within ten (10) days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this Code; except that a matter that could have been raised pursuant to § 4210.1.1 (Protest of Solicitation) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.
- 4210.1.3 **Exclusive Right and Remedy.** The rights and remedies granted in this article to bidders, offerors, contractors, or subcontractors, either actual or prospective, are to the exclusion of all other rights and remedies of bidders, offerors, contractors, or subcontractors against the District.
- 4210.1.4 **Minimum Value Required.** The rights and remedies granted by subsection 4210.1.1 and Section § 4410.1.2 are not available for contracts with an actual or potential value of up to fifty thousand dollars.
- 4210.2 **Protest Procedure.**
- 4210.2.1 Solicitation A protest pursuant to subsection § 4210.1.1 (Protest of Solicitation) must be in writing, filed with the Chief Procurement Officer, and set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided. The protest must be received by the Chief Procurement Officer within the time provided in § 4210.1.1 above
- 4210.2.2 Intended Award or Award. A protest pursuant to § 4210.1.2 (Protest of Intended Award or Award) must be in writing and must be received by the Chief Procurement Officer within the time limits established by § 4210.1.2. At any time after filing a protest, but no later than fifteen days after the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code, a protestant may amend a protest that was first submitted within the time limits established by § 4210.1.2. A protest, including amendments, must set forth both the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided.
- 4210.3 **Duty and Authority to Attempt to Settle Protests.** Before commencement of an administrative review as provided in § 4210.4 below, the Chief Procurement Officer or designee may attempt to settle by mutual agreement a protest of an aggrieved bidder, Offeror, contractor, or subcontractor, actual or prospective, concerning the solicitation or award of the contract. The Chief Procurement Officer or designee has the authority to approve any settlement reached by mutual agreement.
- 4210.4 **Review and Decision.** If in the opinion of the Chief Procurement Officer, after reasonable attempt, a protest cannot be settled by mutual agreement, the Chief Procurement Officer shall conduct promptly an administrative review. The Chief Procurement Officer shall commence the administrative review no later than fifteen (15) days after the deadline for receipt of a protest has expired and shall issue a decision in writing within ten (10) days of completion of the review. The decision must state the reasons for the action taken.
- 4210.5 **Notice of Decision.** A copy of the decision under § 4210.4 along with a statement of appeal rights pursuant to § 4210.6 (Finality) below must be mailed or otherwise furnished immediately to the protestant and other party intervening. The Chief Procurement Officer also shall post a copy of the decision at a date and place



communicated to all parties participating in the administrative review, and such posted decision must indicate the date of posting on its face and must be accompanied by a statement of the right to appeal provided in Section § 4210.6 (Finality) of this Code.

- 4210.6 **Finality.** A decision pursuant to § 4210.4 above is final and conclusive, unless fraudulent, or unless a person adversely affected by the decision requests, in writing, a further administrative review by the District Procurement Review Panel pursuant to § 4410.1 within ten (10) days of the posting of the decision in accordance with § 4210.5 above. The request for review must be directed to the Chief Procurement Officer, who shall forward the request to the Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the Chief Procurement Officer. The person also may request a hearing before the District Procurement Review Panel.
- 4210.7 **Stay of Procurement During Protests.** In the event of a timely protest pursuant to § 4210.1, the District shall not proceed further with the solicitation or award of the contract until ten (10) days after a decision is posted by the Chief Procurement Officer, or, in the event of timely appeal to the District Procurement Review Panel, until a decision is rendered by the Panel, except that solicitation or award of a protested contract is not stayed if the Chief Procurement Officer, after consultation with the Superintendent, makes a written determination that the solicitation or award of the contract without further delay is necessary to protect the best interests of the District.
- 4210.8 **Notice of Chief Procurement Officer Address.** Notice of the address of the Chief Procurement Officer must be included in every notice of an intended award and in every invitation for bids, request for proposals, or other type of solicitation.

**4215. POSTING OF BOND OR IRREVOCABLE LETTER OF CREDIT. (SC Code § 11-35-4215)**

- 4215.1 **Right to Require Protest Bond or Irrevocable Letter of Credit.** The Superintendent may require any bidder or Offeror who files an action protesting the intended award or award of a contract solicited under Article 5 (Source Selection and Contract Formation) of this Code and valued at one million dollars (\$1,000,000) or more to post with the District a bond or irrevocable letter of credit payable to the District in an amount equal to one percent (1%) of the total potential value of the contract as determined by the Superintendent. The Superintendent's decision to require a bond or irrevocable letter of credit is not appealable under § 4210 (Protests). The bond or irrevocable letter of credit shall be conditioned upon the payment of all reasonable reimbursement costs which may be adjudged against the bidder or Offeror filing the protest in the administrative hearing in which the action is brought and in any subsequent appellate court proceeding. For protests of intended award or award of a contract of the District's request for sole source or emergency procurement, the bond or irrevocable letter of credit shall be in an amount equal to one percent (1%) of the District's estimate of the contact amount for the sole source or emergency procurement requested. In lieu of a bond or irrevocable letter of credit, the Superintendent may accept a cashier's check or money order in the amount of the bond or irrevocable letter of credit. If, after completion of the administrative hearing process and any appellate court proceedings, the District prevails, it may request that the District Procurement Review Panel allow it to recover all reasonable reimbursement costs and charges associated with the protest which shall be included in the final order or judgment, excluding attorney's fees. Upon payment of such costs and charges by the bidder or Offeror protesting the intended award or award of a contract, the bond, irrevocable letter of credit, cashier's check, or money order shall be returned to the bidder or Offeror. Failure to pay such costs and charges by the bidder or Offeror protesting the intended award or award of a contract

shall result in the forfeiture of the bond, irrevocable letter of credit, cashier's check, or money order to the extent necessary to cover the payment of all reasonable reimbursement costs adjudged against the protesting bidder or Offeror. If the bidder or Offeror prevails in the protest, the cost of providing the bond, irrevocable letter of credit or cashier's check may be sought from the District.

**4220. AUTHORITY TO DEBAR OR SUSPEND. (SC Code § 11-35-4220)**

4220.1 **Authority.** After reasonable notice to the person or firm involved, and a reasonable opportunity for that person or firm to be heard, the Chief Procurement Officer has the authority to debar a person for cause from consideration for award of contracts or subcontracts if doing so is in the best interest of the District and there is probable cause for debarment. The Chief Procurement Officer also may suspend a person or firm from consideration for award of contracts or subcontracts during an investigation where there is probable cause for debarment. The period of debarment or suspension is as prescribed by the Chief Procurement Officer.

4220.2 **Causes for Debarment or Suspension.** The causes for debarment or suspension shall include, but not be limited to:

4220.2.1 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 the contract or subcontract;

4220.2.2 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 professional honesty which currently, seriously and directly affects responsibility as a contractor;

4220.2.3 conviction under state or federal antitrust laws arising out of the submission of bids or proposals;

4220.2.4 Violation of contract provisions, as set forth below, of a character regarded by the Chief Procurement Officer to be so serious as to justify debarment action:

4220.2.4.1 deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or

4220.2.4.2 a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; except that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor must not be considered a basis for debarment;

4220.2.5 Violation of an order of the Chief Procurement Officer or the District Procurement Review Panel; and

4220.2.6 any other cause the Chief Procurement Officer determines to be so serious and compelling as to affect responsibility as a contractor or subcontractor, including debarment by another governmental entity for any cause listed in § 4420.2.

4220.3 **Decision.** The Chief Procurement Officer shall issue a written decision to debar or suspend within ten (10) days of the completion of his administrative review of the matter. The decision must state the action taken, the specific reasons for it, and the period of debarment or suspension, if any.

4220.4 **Notice of Decision.** A copy of the decision pursuant to § 4420.3 and a statement of appeal rights pursuant to § 4220.5 must be mailed or otherwise furnished immediately to the debarred or suspended person and any other

- party intervening. The Chief Procurement Officer also shall post a copy of the decision at a date and place communicated to all parties participating in the administrative review, and the posted decision must indicate the date of posting on its face and shall be accompanied by a statement of the right to appeal provided in § 4220.5.
- 4220.5 **Finality of Decision.** A decision pursuant to § 4220.3 above is final and conclusive, unless fraudulent or unless the debarred or suspended person requests further administrative review by the District Procurement Review Panel pursuant to § 4410, within ten (10) days of posting the decision in accordance with § 4220.4. The request for review must be directed to the Chief Procurement Officer, who shall forward the request to the Panel, and must be in writing, setting forth the reasons why the person disagrees with the decision of the Chief Procurement Officer. The person also may request a hearing before the Panel.
- 4220.6 Debarment constitutes debarment of all divisions or other organizational elements of the contractor, unless the debarment decision is limited by its terms to specific divisions, organization elements, or commodities. The debarment official may extend the debarment decision to include any principals and affiliates of the contractor if they are specifically named and given written notice of the proposed debarment and an opportunity to respond. For purposes of this section, business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or a third party controls or has the power to control both. Indications of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment. For purposes of this section, the term ‘principals’ means officers, directors, owners, partners, and persons having primary management or supervisory responsibilities within a business entity including, but not limited to, a general manager, plant manager, head of subsidiary, division, or business segment, and similar positions.
- 4230. AUTHORITY TO RESOLVE CONTRACT AND BREACH OF CONTRACT CONTROVERSIES. (SC Code § 11-35-4230)**
- 4230.1 **Applicability.** This section applies to controversies between the District and a contractor or subcontractor when the subcontractor is the real party in interest, which arises under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation or other cause for contract modification or rescission. The procedure set forth in this section constitutes the exclusive means of resolving a controversy between the District and a contractor or subcontractor when the subcontractor is the real party in interest, concerning a contract solicited and awarded pursuant to the provisions of this Code.
- 4230.2 **Request for Resolution; Time for Filing.** Either the District or the contractor or subcontractor, when the subcontractor is the real party in interest, may initiate resolution proceedings before the Chief Procurement Officer by submitting a request for resolution to the Chief Procurement Officer in writing setting forth the specific nature of the controversy and the specific relief requested with enough particularity to give notice of every issue to be decided. A request for resolution of contract controversy must be filed within one (1) year of the date the contractor last performs work under the contract; except that in the case of latent defects a request for resolution of

- a contract controversy must be filed within three (3) years of the date the requesting party first knows or should know of the grounds giving rise to the request for resolution.
- 4230.3 **Duty and Authority to Attempt to Settle Contract Controversies.** Before commencement of an administrative review as provided in § 4230.4 below, the Chief Procurement Officer or his designee shall attempt to settle by mutual agreement a contract controversy brought pursuant to this section.. The Chief Procurement Officer shall have the authority to approve any settlement reached by mutual agreement.
- 4230.4 **Administrative Review and Decision.** If, in the opinion of the Chief Procurement Officer, after reasonable attempt, a contract controversy cannot be settled by mutual agreement, the Chief Procurement Officer or his designee promptly shall conduct an administrative review and issue a decision in writing within ten (10) days of completion of the review. The decision shall state the reasons for the action taken.
- 4230.5 **Notice of Decision.** A copy of the decision pursuant to § 4230.4 above and a statement of appeal rights pursuant to § 4230.6 below must be mailed or otherwise furnished immediately to all parties participating in the administrative review proceedings. The Chief Procurement Officer shall post a copy of the decision at a date and place communicated to all parties participating in the administrative review, and the posted decision must indicate the date of posting on its face and must be accompanied by a statement of the right to appeal under § 4230.6.
- 4230.6 **Finality of Decision.** A decision pursuant to § 4230.4 is final and conclusive, unless fraudulent, or unless a person adversely affected requests further administrative review by the District Procurement Review Panel pursuant to § 4410.1 within ten (10) days of posting the decision in accordance with § 4230.5. The request for review must be directed to the Chief Procurement Officer, who shall forward the request to the Panel, and must be in writing, setting forth the reasons why the person disagrees with the decision of the Chief Procurement Officer. The person also may request a hearing before the Panel.
- 4310. SOLICITATION OR AWARDS IN VIOLATION OF THE LAW. (SC Code § 11-35-4310)**
- 4310.1 **Applicability.** The provisions of this section apply where it is determined by either the Chief Procurement Officer or the District Procurement Review Panel, upon administrative review, that a solicitation or award of a contract is in violation of the law. The remedies set forth herein may be granted by either the Chief Procurement Officer after review under § 4210, or by the District Procurement Review Panel after review under § 4410.
- 4310.2 **Remedies Prior to Award.** If, prior to award of a contract, it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award may be:
- 4310.2.1 Cancelled;
- 4310.2.2 Revised to comply with the law and re-bid; or.
- 4310.2.3 Awarded in a manner that complies with the provisions of this Code.
- 4310.3 **Remedies after Award.** If, after an award of a contract, it is determined that the solicitation or award is in violation of law:
- 4310.3.1 The contract may be ratified and affirmed, provided it is in the best interests of the District; or
- 4310.3.2 The contract may be terminated and the payment of such damages, if any, as may be provided in the contract, may be awarded.
- 4310.4 **Entitlement to Costs.** In addition to or in lieu of any other relief, when a protest submitted under § 4210 (Protests) is sustained, and it is determined that the protesting bidder or Offeror should have been awarded the

contract under the solicitation but is not, then the protesting bidder or Offeror may request and be awarded a reasonable reimbursement amount, including reimbursement of its reasonable bid preparation costs.

**4320. CONTRACT CONTROVERSY REMEDIES. (SC Code § 11-35-4320)**

4320.1 **Remedies.** Remedies available in a contract controversy brought under the provisions of § 4230. The Chief Procurement Officer or the Procurement Review Panel, in the case of review under § 4410, may award such relief as is necessary to resolve the controversy as allowed by the terms of the contract or by applicable law.

**4330. FRIVOLOUS PROTESTS. (SC Code § 11-35-4330)**

4330.1 **Signature on Protest Constitutes Certificate.** The signature of an attorney or party on a request for review, protest, motion, or other document constitutes a certificate by the signer that the signer has read the document, to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for an improper purpose, such as to harass, limit competition, or to cause unnecessary delay or needless increase in the cost of the procurement or of the litigation. (SC Code § 11-35-4330(1))

4330.2 **Sanctions for Violation.** If a request for review, protest, pleading, motion, or other document is filed with the Chief Procurement Officer is signed in violation of this subsection, the District Procurement Review Panel, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, that may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the protest, pleading, motion, or other paper, including a reasonable attorney's fee. (SC Code § 11-35-4330(2))

4330.3 **Filing.** A motion regarding a matter that is not otherwise before the Panel may not be filed until after a final decision has been issued by the Chief Procurement Officer. A motion for sanctions pursuant to this section must be filed with the Panel no later than fifteen (15) days after the later of either the filing of a request for review, protest, motion, or other document signed in violation of this section, or the issuance of an order that addresses the request for review, protest, motion, or other document that is the subject of the motion for sanctions.

**4410. DISTRICT PROCUREMENT REVIEW PANEL. (SC Code § 11-35-4410)**

4410.1 **Creation.** There is created the District's Procurement Review Panel which is charged with the responsibility to review and determine de novo:

4410.1.1 Requests for review of written determinations of the Chief Procurement Officer issued under §§ 4210.6, 4220.5, and 4230.6; and

4410.1.2 Requests for review of other written determinations, decisions, policies, and procedures as arise from or concern the procurement of supplies, services, information technology, or construction procured in accordance with the provisions of this Code; except that a matter that could have been brought before the Chief Procurement Officer in a timely and appropriate manner pursuant to §§ 4210, 4220, or 4230, but was not, must not be the subject of review under this paragraph. Requests for reviews under this paragraph must be submitted in writing to the Chief Procurement Officer for submission to the Procurement Review Panel, setting forth the grounds, within fifteen (15) days of the date of the

written determinations, decisions, policies, and procedures. The Chief Procurement Officer shall immediately submit such requests to the panel, through its Chairman.

4410.2 **Membership.** The panel must be composed of

4410.2.1 A member of the Board appointed by the Board, who will chair the Panel;

4410.2.2 For one-year terms running from July 1 through June 30 annually, four (4) persons from the community who are well respected representatives of several of the professions and businesses affected by this Code, including, but not limited to:

(i) Goods and services

(ii) Information technology

(iii) Construction

(iv) Architects, engineering, construction management, and land surveying.

4410.2.2.1 One of these persons will be appointed by the Chair of the Board of Trustees, one by the Vice-Chair of the Board of Trustees, one by the Superintendent, and one by the District's Chief Financial and Operations Officer, in that order; these persons shall recuse themselves in any matter in which they have an actual or apparent conflict of interest.

4410.2.3 When a vacancy is created, the official responsible for originally appointing the member vacating his or her seat shall appoint the successor to complete the term of service.

4410.2.4 Members may be reappointed to succeed themselves.

4410.3 **Meetings.** The Panel shall meet as often as necessary to afford a swift resolution of the controversies submitted to it. Four (4) members present and voting constitute a quorum. In the case of a tie vote, the decision of the Chief Procurement Officer is sustained and final. The members of the Procurement Review Panel may be paid a per diem, mileage, and subsistence by the District.

4410.4 **Administrative and Legal Support.** The Panel shall receive such administrative and clerical support as is necessary for the orderly transaction of business. The District will also provide the Panel with independent legal counsel to assist the Panel in all aspects of its operations.

4410.5 **Jurisdiction and Practices.** The Panel is vested with the authority to establish its own procedures for the conduct of its business and the holding of its hearings:

- issue subpoenas

- interview any person it considers necessary, and

- record all determinations.

4410.6. Within fifteen (15) days of receiving a grievance filed pursuant to Section 4210.6, 4220.5, 4230.6 or 4410.1.2, the chairman shall either convene the review panel to conduct an administrative review or schedule a hearing to facilitate its administrative review. Except for grievances filed pursuant to § 4230.6 (Contract Controversies), the Panel shall record its determination with ten (10) working days and communicate its decision to those involved in the determination. In matters designated by the Panel as complex, the Panel shall record its determination within thirty (30) days.

4410.7 **Finality.** Notwithstanding another provision of law, the decision of the Procurement Review Panel is final as to administrative review and may be appealed only to the circuit court. The standard of review is as provided by the

provisions of the South Carolina Administrative Procedures Act. The filing of an appeal does to automatically stay a decision of the panel.

## **ARTICLE 19**

### **COOPERATIVE PURCHASING**

**4810. COOPERATIVE PURCHASING AUTHORIZED. (SC Code § 11-35-4810)**

4810.1 All rights, powers, duties and authority granted to the District by Title 11, Chapter 35, Article 19 of the South Carolina Code of Laws are hereby vested in the Superintendent provided that the District conduct cooperative purchasing in accordance with Title 11, Chapter 35, Article 19 of the Code including the requirement that should the District participate in a multi-state, multi-party solicitation, thirty days notice of the proposed multi-party solicitation shall be provided through central advertising and such contracts may be only awarded to manufacturers who will be distributing the products to South Carolina governmental bodies (in this case, District offices) through South Carolina vendors.

**4880. DISTRICT IN COMPLIANCE WITH CODE REQUIREMENTS. (SC Code § 11-35-4880)**

4880.1 Where a public procurement unit or external procurement activity administering a cooperative purchase complies with the requirements of this code, the District participating in such a purchase shall be deemed to have complied with this code. The District shall not enter into a cooperative purchasing agreement for the purpose of circumventing this code.

## **ARTICLE 21**

### **ASSISTANCE TO MINORITY BUSINESS ENTERPRISES**

**5210. STATEMENT OF IMPLEMENTATION. (SC Code § 11-35-5210)**

5210.1 **Statement of Implementation.** The District recognizes that the General Assembly, in SC Code Ann. 11-35-5210, has declared that business firms owned and operated by minority persons have been historically restricted from full participation in the free enterprise system to a degree disproportionate to other businesses. The Board intends to ensure that those businesses owned and operated by minorities are afforded the opportunity to fully participate in the overall procurement process of the District. The Board, therefore, sets these procedures that will result in awarding contracts and subcontracts to minority business firms in order to enhance minority capital ownership, overall District and state economic development and reduce dependency on the part of minorities.

5210.2 For purposes of this Article, the term “minority business” means a business holding a Certificate of Eligibility issued by the South Carolina Small and Minority Business Assistance Office (OSMBA). (SC Reg. § 19-455.2160(B))

**5220. DUTIES OF THE Chief Procurement Officer. (SC Code § 11-35-5220)**

5220.1 **Assistance.** The District shall provide appropriate staff to assist minority businesses with the District’s procurement procedures and in the interpretation of this code.

- 5220.2 **Special Publications.** The District in cooperation with other appropriate private and state agencies may issue supplementary instructions designed to assist minority businesses with the District procurement procedures.
- 5220.3 **Source Lists.** The District shall maintain special source lists of minority business firms detailing the products and services, which they provide
- 5220.4 **Solicitation Mailing List.** The District shall include and identify certified South Carolina based minority business on the District's bidders list and shall ensure that these firms are solicited on an equal basis.
- 5220.5 **Fee Waivers.** Upon request by an MBE certified by the Small and Minority Business Assistance Office, user or subscription fees for services provided by the Chief Procurement Officer may be waived for an MBE.

**5230. REGULATIONS FOR NEGOTIATION WITH DISTRICT AND STATE MINORITY FIRMS. (SC Code § 11-35-5230(A))**

- 5230.1 The District may designate such procurement contracts as it may deem appropriate for negotiation with OSMBA certified, South Carolina-based minority firms. Among the criteria that shall be used to determine such designations are:
- 5230.1.1 The total dollar value of procurements in the District.
- 5230.1.2 The availability of South Carolina-based minority firms.
- 5230.1.3 The potential for breaking the contracts into smaller units, where necessary, to accommodate such firms.
- 5230.1.4 Ensuring that the District shall not be required to sacrifice quality of goods or services.
- 5230.1.5 Ensuring that the price has been determined to be fair and reasonable, and competitive both to the District and to the contractor,

**5240. MINORITY BUSINESS ENTERPRISE (MBE) UTILIZATION PLAN. (SC Code § 11-35-5240(1))**

- 5240.1 To emphasize the use of minority small businesses, the District shall develop a Minority Business Enterprise (MBE) Utilization Plan annually. The MBE Utilization Plan must include, but not be limited to:
- 5240.1.1 A policy statement expressing a commitment by the Board of Trustees to use MBEs in all aspects of procurement;
- 5240.1.2 The name of the MBE Liaison Officer responsible for monitoring the MBE Utilization Plan;
- 5240.1.3 Goals that include expending with Minority Business Enterprises certified by the Office of Small and Minority Business Assistance an amount equal to ten percent (10%) of the District's total procurements. Upon petition by the District, the Board may authorize an MBE utilization plan that establishes a goal of less than ten percent.
- 5240.1.4 Solicitation of certified minority vendors listed by the South Carolina Office of Small and Minority Business Assistance, in each commodity category for which the minority vendor is qualified.
- 5240.1.5 Procedures to be used when it is necessary to divide total project requirements into smaller tasks which will permit increased MBE participation;
- 5240.1.6 Procedures to be used when the governmental body subcontracts the scope of service to another governmental body.



**5250. PROGRESS PAYMENTS AND LETTER OF CREDIT. (SC Code § 11-35-5250)**

5250.1 **Progress Payments.** The District may make special provisions for progress payments and letters of credit, as deemed reasonable to assist minority vendors to carry out the terms of a contract.

5250.2 **Letter of Contract Award.** Upon request, when an MBE receives a District contract, the Chief Procurement Officer shall furnish a letter, stating the dollar value, the duration of, the payment schedule, and other information concerning the contract, which may be used by the certified minority firm to negotiate lines of credit with lending institutions.

**5260 REPORT TO THE BOARD OF TRUSTEES. (SC Code § 11-35-5260)**

5260.1 The Superintendent shall report annually in writing to the Board concerning the number and dollar value of contracts awarded to eligible certified South Carolina-based MBEs during the preceding fiscal year. These records must be maintained to evaluate the progress of this program.

## 2000. District Procurement Regulations.

### A. General.

These Regulations establish policies, procedures, and guidelines relating to the procurement, management, control, and disposal of supplies, services, information technology, and construction, as applicable. These Regulations are designed to achieve maximum practicable uniformity in purchasing throughout the District. Hence, implementation of this Code shall be consistent with these Regulations. Nothing contained in these Rules and Regulations shall be construed to waive any rights, remedies or defenses the District might have under any laws of the State of South Carolina. The Charleston County School District Consolidated Procurement Code takes precedence over these regulations to the extent of any conflict between them. The procurement regulations shall have the same relationship to the District's code as regulations promulgated under the administrative procedures act have to statutes enacted by the General Assembly.

### B. Organizational Authority.

The Chief Procurement Officers acting on behalf of the Board shall have the responsibility to audit and monitor the implementation of these Regulations and requirements of the South Carolina Consolidated Procurement Code. In accordance with Section 510 of the Code, all rights, powers, duties and authority relating to the procurement of supplies, services, and information technology and to the management, control, warehousing, sale and disposal of supplies, construction, information technology, and services now vested in or exercised by the District under the provisions of law relating thereto, and regardless of source funding, are hereby delegated to the chief procurement officer by the Board. The chief business official shall be responsible for developing such organizational structure as necessary to implement the provisions of the District's Code and these Regulations.

### C. Duty to Report Violations

The District shall comply in good faith with all applicable requirements of the consolidated procurement code and these procurement regulations. When any information or allegations concerning improper or illegal conduct regarding a procurement governed by this code comes to the attention of any employee of the District, immediate notice of the relevant facts shall be transmitted to the chief business official.

## 2095. Competitive Sealed Proposals.

### A. Request for Proposals.

The provisions of Regulation 2040 shall apply to implement the requirements of Section 1530 (2), Public Notice.

### B. Receipt and Safeguarding of Proposals.

The provisions of Regulation 2045 shall apply for the receipt and safeguarding of proposals.

### C. Receipt of Proposals.

The provisions of Regulation 2050(B) shall apply to the receipt and safeguarding of proposals. For the purposes of implementing Section 1530 (3), Receipt of Proposals, the following requirements shall be followed:

- (1) Proposals shall be opened publicly by the procurement officer or his designee in the presence of one or more witnesses at the time and place designated in the request for proposals. Proposals and modifications shall be time stamped upon receipt and held in a secure place until the established due date. After the date established for receipt of proposals, a Register of Proposals shall be prepared which shall include for all proposals the name of each Offeror,

the number of modifications received, if any, and a description sufficient to identify the item offered. The Register of Proposals shall be certified in writing as true and accurate by both the person opening the proposals and the witness. The Register of Proposals shall be open to public inspection only after the issuance of an award or notification of intent to award, whichever is earlier. Proposals and modifications shall be shown only to District personnel having a legitimate interest in them and then only on a "need to know" basis. Contents and the identity of competing offers shall not be disclosed during the process of opening by District personnel.

- (2) As provided by the solicitation, offerors must visibly mark all information in their proposals that they consider to be exempt from public disclosure.

D. [Repealed]

E. Clarifications and Minor Informalities in Proposals.

The provisions of Sections 1520(8) and 1520(13) shall apply to competitive sealed proposals.

F. Specified Types of Construction.

Consistent with Section 48-52-670, which allows the use of competitive sealed proposals, it is generally not practicable or advantageous to the District to procure guaranteed energy, water, or wastewater savings contracts by competitive sealed bidding.

G. Procedures for Competitive Sealed Proposals.

Reserved.

*[Model Comment: State regulation 19-445.2095(G), which is the state parallel to this paragraph, authorizes the state CPOs to issue procedures which must be followed by all state agencies using the competitive sealed proposal method of acquisition. Pursuant to this authority, the CPOs have issued mandatory procedures entitled "Guidance & Best Practices for Permissible Communications in a Competitive Sealed Proposal After Opening but Prior to Award." Dated April 28, 2008, these procedures have been issued as Procurement Policy Statement 2008-2 and are available at the following URL: [www.procurement.sc.gov](http://www.procurement.sc.gov). Materials Management Office believes these procedures reflect the agency's best interpretation of how these rules should be applied. While they are not mandatory for school districts, they are highly recommended.]*

H. Other Applicable Provisions.

The provisions of the following Regulations shall apply to competitive sealed proposals:

- (1) Regulation 2042, Pre-Bid Conferences,
- (2) Regulation 2060, Telegraphic and Electronic Bids,
- (3) Regulation 2075, All or None Qualifications,
- (4) Regulation 2085, Correction or Withdrawal of Bids; Cancellation of Awards, and Cancellation of Awards Prior to Performance.
- (5) [reserved]

I. Discussions with Offerors

- (1) Classifying Proposals.

For the purpose of conducting discussions under Section 1530(6) and item (2) below, proposals shall be initially classified in writing as:

- (a) acceptable (i.e., reasonably susceptible of being selected for award);
- (b) potentially acceptable (i.e., reasonably susceptible of being made acceptable through discussions); or
- (c) unacceptable.

(2) Conduct of Discussions.

If discussions are conducted, the procurement officer shall exchange information with all offerors who submit proposals classified as acceptable or potentially acceptable. The content and extent of each exchange is a matter of the procurement officer's judgment, based on the particular facts of each acquisition. In conducting discussions, the procurement officer shall:

- (a) Control all exchanges;
  - (b) Advise in writing every Offeror of all deficiencies in its proposal, if any, that will result in rejection as non-responsive;
  - (c) Attempt in writing to resolve uncertainties concerning the cost or price, technical proposal, and other terms and conditions of the proposal, if any;
  - (d) Resolve in writing suspected mistakes, if any, by calling them to the Offeror's attention.
  - (e) Provide the Offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal, but only to the extent such revisions are necessary to resolve any matter raised by the procurement officer during discussions under items (2)(b) through (2)(d) above.
- (3) Limitations. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. Ordinarily, discussions are conducted prior to final ranking. Discussions may not be conducted unless the solicitation alerts offerors to the possibility of such an exchange, including the possibility of limited proposal revisions for those proposals reasonably susceptible of being selected for award.
- (4) Communications authorized by Section 1530(6) and items (1) through (3) above may be conducted only by procurement officers authorized by the chief business official.

J. Rejection of Individual Proposals.

- (1) Proposals need not be unconditionally accepted without alteration or correction, and to the extent otherwise allowed by law, the District's stated requirements may be 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 nonresponsible as determined under Section 1810;
  - (b) the proposal ultimately (that is, after an opportunity, if any is offered, has passed for altering or clarifying the proposal) fails to meet the announced requirements of the District in some material respect; or
  - (c) the proposed price is clearly unreasonable.
- (2) The reasons for cancellation or rejection shall be made a part of the procurement file and shall be available for public inspection.

*[Model Comment: Materials Management Office' three chief procurement officers have jointly issued guidance to assist procurement officers in conducting discussions pursuant to this Regulation 2095(1). Issued as Procurement Policy Statement 2008-2, this guidance is available at [www.mmo.sc.gov/policy](http://www.mmo.sc.gov/policy).]*

2097. Rejection of Proposals.

A. Unless there is a compelling reason to reject one or more proposals, award will be made to the highest ranked responsible Offeror or otherwise as allowed by Section 1530. Every effort shall be made to anticipate changes in a requirement prior to the date of opening and to notify all prospective offerors of any resulting modification or cancellation.

B. Cancellation of Solicitation Prior to Award.

(1) When it is determined prior to the issuance of an award or notification of intent to award, whichever is earlier, but after opening, that the requirements relating to the availability and identification of specifications have not been met, the request for proposals shall be cancelled. A request for proposals may be cancelled after opening, but prior the issuance of an award or notification of intent to award, whichever is earlier, when such action is consistent with subsection A above and the procurement officer determines in writing that:

- (a) inadequate or ambiguous specifications were cited in the solicitation;
  - (b) specifications have been revised;
  - (c) the supplies, services, information technology, or construction being procured are no longer required;
  - (d) the solicitation did not provide for consideration of all factors of cost to the District, such as cost of transporting District furnished property to bidders' plants;
  - (e) proposals received indicate that the needs of the District can be satisfied by a less expensive article differing from that on which the proposals were requested;
  - (f) all otherwise acceptable proposals received are at unreasonable prices;
  - (g) the proposals were not independently arrived at in open competition, were collusive, or were submitted in bad faith; or
  - (h) for other reasons, cancellation is clearly in the best interest of the District.
- (2) Determinations to cancel a request for proposals shall state the reasons therefore.

C. Extension of Bid Acceptance Period.

Should administrative difficulties be encountered after opening which may delay award beyond Offeror's acceptance periods, the relevant offerors should be requested, before expiration of their offers, to extend the acceptance period (with consent of sureties, if any).

D. Return of Proposals

If a request for proposals is canceled, proposals shall be returned to the offerors.

2130. Prequalification of Supplies and Suppliers.

A. Qualified Products Lists.

A qualified products list may be developed with the approval of the Chief Procurement Officer or the procurement officer of the District authorized to develop qualified products lists, when testing or examination of the supplies or construction items prior to issuance of the solicitation is desirable or necessary in order to best satisfy District requirements. The procedures for the inclusion of a product on the qualified products list ("QPL") must be available to prospective vendors for consideration of their product to the list.

B. Prospective suppliers may be prequalified, and distribution of the solicitation may be limited to prequalified suppliers. Suppliers who meet the prequalification standards at any time shall be added to the prequalified list for subsequent

solicitations. The fact that a prospective supplier has been prequalified does not necessarily represent a finding of responsibility.

2132. Prequalification for a Single Solicitation.

A. Application.

The pre-qualification process shall not be used to unduly limit competition. Any mandatory minimum requirements shall comply with Section 2730. In a competitive bid, the pre-qualification process is not intended to eliminate bidders capable of completing the work being procured. Before a request for qualifications may be issued pursuant to Section 1520(11) or 1530(4), the Superintendent or designee shall prepare a written justification stating the necessity for pre-qualifying offerors. Prior to issuance of the solicitation, each potential Offeror seeking qualification must be promptly informed as to whether qualification is attained and, in the event qualification is not attained, is promptly furnished specific information why qualification was not attained.

B. Receipt and Safeguarding of Responses.

Prior to opening submittals received in response to a request for prequalification, the provisions of Regulation 2045 shall apply to the receipt and safeguarding of all such submittals received.

2145. Construction, Architect Engineer, Construction Management, and Land Surveying Services.

A. Definitions

- (1) Designer, as used in these regulations, means a person who has been awarded, through the qualifications based process set forth in Section 3220, a contract with the District for the design of any infrastructure facility using the design-bid-build project delivery method defined in Section 2910(6).
- (2) Builder, as used in these regulations, means a person who has been awarded, through competitive sealed bidding, a separate contract with the District to construct (alter, repair, improve, or demolish) any infrastructure facility using the design-bid-build project delivery method defined in Section 2910(6).
- (3) Design-Builder, as used in these regulations, means a person who has been awarded a contract with the District for the design and construction of any infrastructure facility using the design-build project delivery method defined in Section 2910(7).
- (4) DBO Producer, as used in these regulations, means a person who has been awarded a contract with the District for the design, construction, operation, and maintenance of any infrastructure facility using the design-build-operate-maintain project delivery method defined in Section 2910(9).
- (5) DBFO Producer, as used in these regulations, means a person who has been awarded a contract with the District for the design, construction, finance, operation, and maintenance of any infrastructure facility using the design-build-finance-operate-maintain project delivery method defined in Section 2910(8).
- (6) Guaranteed Maximum Price (GMP) means a price for all costs for the construction and completion of the project, or designated portion thereof, including all construction management services and all mobilization, general conditions, profit and overhead costs of any nature, and where the total contract amount, including the contractor's fee and general conditions, will not exceed a guaranteed maximum amount.
- (7) Independent Peer Reviewer means a person who has been awarded a contract with the District for an independent, contemporaneous, peer review of the design services provided to the District by a DBO or DBFO Producer. In the

event the District does not elect to contract with the Independent Peer Reviewer proposed by the successful DBO or DBFO Producer, the Independent Peer Reviewer shall be selected as provided in Section 2910(11).

- (8) Operator, as used in these regulations, means a person who has been awarded, through competitive sealed bidding, a separate contract with the District for the routine operation, routine repair, and routine maintenance (Operation and Maintenance) of any infrastructure facility, as defined in Section 2910(13).

**B. Choice of Project Delivery Method.**

- (1) This Subsection contains provisions applicable to the selection of the appropriate project delivery method for constructing infrastructure facilities, that is, the method of configuring and administering construction projects which is most advantageous to the District and will result in the most timely, economical, and otherwise successful completion of the infrastructure facility. The District shall have sufficient flexibility in formulating the project delivery approach on a particular project to fulfill the District's needs. Before choosing the project delivery method, a careful assessment must be made of requirements the project must satisfy and those other characteristics that would be in the best interest of the District.

**(2) Selecting An Appropriate Project Delivery Method.**

In selecting an appropriate project delivery method for each of the District's Infrastructure Facilities, the District should consider the results achieved on similar projects in the past and the methods used. Consideration should be given to all authorized project delivery methods, the comparative advantages and disadvantages of each, and how these methods may be appropriately configured and applied to fulfill District requirements. Additional factors to consider include:

- (a) the extent to which the District's design requirements for the Infrastructure Facility are known, stable, and established in writing;
- (b) the extent to which qualified and experienced District personnel are available to the District to provide the decision-making and administrative services required by the project delivery method selected;
- (c) the extent to which decision-making and administrative services may be appropriately assigned to designers, builders, construction managers at-risk, design-builders, DBO producers, DBFO producers, peer reviewers, or operators, as appropriate to the project delivery method;
- (d) the extent to which outside consultants, including construction manager agent, may be able to assist the District with decision-making and administrative contributions required by the project delivery method;
- (e) the District's projected cash flow for the Infrastructure Facility to be acquired (both sources and uses of the funds necessary to support design, construction, operations, maintenance, repairs, and demolition over the facility life cycle);
- (f) the type of infrastructure facility or service to be acquired - for example, public buildings, schools, water distribution, wastewater collection, highway, bridge, or specialty structure, together with possible sources of funding for the infrastructure facility - for example, state or federal grant federal loans, local tax appropriations, special purpose bonds, general obligation bonds, user fees, or tolls;
- (g) the required delivery date of the infrastructure facility to be constructed;
- (h) the location of the infrastructure facility to be constructed;
- (i) the size, scope, complexity, and technological difficulty of the infrastructure facility to be constructed;

(j) the District's current and projected sources and uses of public funds that are currently generally available (and will be available in the future) to support operation, maintenance, repair, rehabilitation, replacement, and demolition of existing and planned infrastructure facilities.

(3) Except for guaranteed energy, water, or wastewater savings contracts (Section 48-52-670), design-bid-build (acquired using competitive sealed bidding) is hereby designated as an appropriate project delivery method for any infrastructure facility and may be used by any District without further project specific justification.

(4) District Determination.

The Superintendent shall make a written determination. The determination shall describe the project delivery method (Section 3005), source selection method (Section 3015 and 1510), any additional procurement procedures (3023 and 3024(2) (c)), and types of performance security (Sections 3030 and 3037) selected and set forth the facts and considerations leading to those selections. This determination shall demonstrate either reliance on paragraph (3) above, or that the considerations identified in paragraphs (1) and (2) above, as well as the requirements and financing of the project, were all considered in making the selection. Any determination to use a project delivery method other than design-bid-build must explain why the use of design-bid-build is not practical or advantageous to the District. Any determination to use any of the additional procedures allowed by Section 3024(2) (c) must explain why the use of such procedures is in the best interests of the District. Any request to use the prequalification process in a design-bid-build procurement must be in writing and must set forth facts sufficient to support a finding that pre-qualification is appropriate and that the construction involved is unique in nature, over ten million dollars in value, or involves special circumstances.

#### C. Bonds and Security.

(1) Bid Security. Bid Security shall be a certified cashier's check or a bond, in a form to be specified in the District's internal operational procedures (§ 540), provided by a surety company licensed in South Carolina with an "A" minimum rating of performance as stated in the most current publication of "Best Key Rating Guide, Property Liability", which company shows a financial strength rating of at least five (5) times that portion of the contract price that does not include operations, maintenance, and finance. In the case of a construction contract under \$100,000, the District may, upon written justification, allow the use of a "B+" rated bond when bid security is required. Each bond shall be accompanied by a "Power of Attorney" authorizing the attorney in fact to bind the surety.

(2) Contract Performance and Payment Bonds. The contractor shall provide a certified cashier's check in the full amount of the Performance and Payment Bonds or may provide, and pay for the cost of, Performance and Payment Bonds in a form to be specified in the District's internal operational procedures (§ 540). Each bond shall be issued by a Surety Company licensed in South Carolina with an "A" minimum rating of performance as stated in the most current publication of "Best Key Rating Guide, Property Liability", which company shows a financial strength rating of at least five (5) times that portion of the contract price that does not include operations, maintenance, and finance. In the case of construction under \$50,000, the agency may, upon written justification and with the approval of the Office of the District Engineer, allow the use of a "B+" "rated bond when bid security is required. Each bond shall be accompanied by a "Power of Attorney" authorizing the attorney in fact to bind the surety.

#### D. Architect Engineer, Construction Management and Land Surveying Services Procurement.



(1) The Advertisement of Project Description

The provisions of Regulation 19-445.2040 shall apply to implement the requirements of Code Section 11-35-3220 (2), Advertisement of Project Description.

(2) [reserved]

E. Contract Forms.

(1) Pursuant to Section 11-35-2010(2), the following contract forms shall be used as applicable, as amended by the District, and as provided in the District's internal operational procedures (§ 540). Subject to the foregoing:

(a) If the District conducts a competitive sealed bid to acquire construction independent of architect-engineer or construction management services, the District may use a document in the form of AIA Document A701.

(b) If the District acquires architect-engineer services independent of construction, the District may use a document in the form of AIA Document B151.

(c) If the District acquires construction independent of architect-engineer or construction management services, the District may use documents in the form of AIA Document A101 and A201. Other contract forms may be used as are approved by the Chief Business Official.

(d) If the District acquires architect-engineer services, construction management services, and construction on the same project, each under separate contract, the District may use documents in the form of AIA Documents A101/CMA, A201/CMA, B141/CMA, and B801/CMA. This paragraph does not apply if the District acquires both construction and construction management services from the same business under the same contract.

(2) The District may supplement the contract forms identified in paragraph (1).

(3) Paragraph (1) does not apply to a contract entered into pursuant to Sections 11-35-1530, 11-35-1550, 11-35-3230, or 11-35-3310.

(4) For any contract forms specified herein, the District's internal operational procedures (§ 540) may specify the appropriate edition or, if applicable, replacement form.

(5) For any contract forms not specified herein or otherwise required by law, the District's internal operational procedures (§ 540) may, without limitation, require the use of any appropriate contract document, standard industry contract form, standard state amendments to such documents or forms, or publish state specific contract forms. Absent contrary instructions, the District may use a contract written for an individual project.

(6) Construction under Section 1550 and 1530 may be in a format and description of services approved by the State Engineer.

F. Reserved.

G. Prequalifying Construction Bidders.

The State Engineer's Office has developed procedures for a prequalification process and these procedures are included in the District's internal operational procedures (§ 540). The provisions of Regulation 2132 shall apply to implement Section 3023.

H. With regard to Section 3310, the District will establish working procedures for indefinite delivery construction contracts, and shall include them in the District's internal operational procedures (§ 540)

I. Construction Procurement-The Invitation for Bids.

The provisions of Regulation 2040 shall apply to implement the requirements of Section 3020(a), Invitation for Bids, The provisions of Regulation 2090(B) shall not apply to implement the requirements of Code Section 3020.

J. Participation in Prior Reports or Studies.

- (1) Before awarding a contract for a report or study that could subsequently be used in the creation of design requirements for an infrastructure facility or service, the procurement officer should address, to the extent practical, the contractor's ability to compete for follow-on work.
- (2) Before issuing a request for proposals for an infrastructure facility or service, the procurement officer should take reasonable steps to determine if prior participation in a report or study could provide a firm with a substantial competitive advantage, and, if so, the procurement officer should take appropriate steps to eliminate or mitigate that advantage.
- (3) In complying with items (1) and (2) above, the procurement officer shall consider the requirements of Section 3245.

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

- (1) Content of Request for Proposals. Each request for proposals (RFP) issued by the District for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain services shall contain a cover sheet that:
  - (a) confirms that design requirements are included in the RFP, (b) confirms that proposal development documents are solicited in each Offeror's response to the RFP, and (c) states the District's determination for that procurement
  - (i) whether offerors must have been prequalified through a previous request for qualifications; (ii) whether the District will select a short list of responsible offerors prior to discussions and evaluations (along with the number of proposals that will be short-listed); and (iii) whether the District will pay stipends to unsuccessful offerors (along with the amount of such stipends and the terms under which stipends will be paid).
- (2) Purpose of Design Requirements. The purpose and intent of including design requirements in the RFP is to provide prospective and actual offerors a common, and transparent, written description of the starting point for the competition and to provide the District with the benefit of having responses from competitors that meet the same RFP requirements. In order to be effective, the District must first come to understand and then to communicate its basic requirements for the infrastructure facility to those who are considering whether they will participate in the procurement competition.
- (3) Purpose of Requirement for Proposal Development Documents. The purpose and intent of including the requirement for submittal of proposal development documents in each RFP for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain is to provide actual offerors with a common, and transparent, written description of the finish point for the competition. To be responsive, each Offeror must submit drawings and other design related documents that are sufficient to fix and describe the size and character of the infrastructure facility to be acquired, including price (or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements).
- (4) Content of Request for Proposals: Evaluation Factors. Each request for proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain shall state the relative importance of (1) demonstrated compliance with the design requirements, (2) Offeror qualifications, (3) financial capacity, (4) project schedule, (5) price (or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements), and (6) other factors, if any by listing the required factors in descending order of importance (without numerical weighting), or by listing each factor along with a numerical

weight to be associated with that factor in the District's evaluation. Subfactors, if any, must be stated in the RFP and listed, pursuant to the requirements of this Regulation, either in descending order, or with numerical weighting assigned to each subfactor. The purpose and intent of disclosing the relative importance of factors (and subfactors) is to provide transparency to prospective and actual competitors from the date the RFP is first published.

- (5) The District's internal operational procedures (§ 540) must include guidelines for the proper drafting of design requirements, proposal development documents, and requests for proposals.

L. Errors and Omissions Insurance.

- (1) For design services in design-bid-build procurements. A District shall include in the solicitation such requirements as the procurement officer deems appropriate for errors and omissions insurance (commonly called "professional liability insurance" in trade usage) coverage of architectural and engineering services in the solicitation for design services in design-bid-build procurements.
- (2) For design services to be provided as part of design-build procurements. A District shall include in the solicitation for design-build such requirements as the procurement officer deems appropriate for errors and omissions insurance coverage of architectural and engineering services to be provided as part of such procurements. Prior to award, the Superintendent, or his delegee, shall review and approve the errors and omissions insurance coverage for all design-build contracts in excess of \$25,000,000.
- (3) For design services to be provided as part of design-build-operate-maintain and design-build-finance-operate-maintain procurements. A District shall include in the solicitation for design-build-operate-maintain and design-build-finance-operate-maintain such requirements as the procurement officer deems appropriate for errors and omissions insurance coverage of architectural and engineering services to be provided as part of such procurements. Prior to award, the Superintendent, or his delegee, shall review and approve the errors and omissions insurance coverage for all design-build-operate-maintain and design-build-finance-operate-maintain contracts in excess of \$25,000,000.
- (4) For Construction Management (Agency) services. A District shall include in the solicitation for construction management agency services such requirements as the procurement officer deems appropriate for errors and omissions insurance coverage.
- (5) Errors and omissions (or professional liability) insurance coverage for construction management services is typically not required when the District is conducting a construction management at-risk procurement.

M. Other Security; Operations Period Performance Bonds.

(1) Purpose.

To assure the timely, faithful, and uninterrupted provision of operations and maintenance services procured separately, or as one element of design-build-operate-maintain or design-build-finance-operate-maintain services, the District shall identify, in the solicitation, one or more of the other forms of security identified in Section 3037 that shall be furnished to the District by the offerors (or bidders) in order to be considered to be responsive.

(2) Operations Period Performance Bonds.

- (a) If required in a solicitation for operation and maintenance, design-build-operate-maintain, or design-build-finance-operate-maintain, each Offeror shall demonstrate in its offer that it is prepared to provide, and upon award of the contract, to maintain in effect an operations period performance bond that secures the

- timely, faithful, and uninterrupted performance of operations and maintenance services required under the contract, in the amount of 100% of that portion of the contract price that includes the cost of such operation and maintenance services during the period covered by the bond. In those procurements in which the contract period for operation and maintenance is longer than 5 years, the procurement officer may accept an operations period performance bond of five years' duration, provided that such bond is renewable by the contractor every five (5) years during the contract, and provided further, that the contractor has made a firm contractual commitment to maintain such bond in full force and effect throughout the contract term.
- (b) The operations period performance bond shall be delivered by the contractor to the District at the same time the contract is executed. If a contractor fails to deliver the required bond, the contractor's bid (or offer) shall be rejected, its bid security shall be enforced, award of the contract shall be made to the next ranked bidder (or Offeror), or the contractor shall be declared to be in default, as otherwise provided by these regulations.
- (c) Operations period performance bond shall be in a form to be specified in the District's internal operational procedures (§ 540). Each bond shall be issued by a Surety Company licensed in South Carolina with an "A" minimum rating of performance as stated in the most current publication of "Best Key Rating Guide, Property Liability", which company shows a financial strength rating of at least five (5) times the bond amount.
- (3) Letters of Credit to Cover Interruptions in Operation.
- (a) If required in a solicitation for operation and maintenance, design-build-operate-maintain, or design-build-finance-operate-maintain, each Offeror shall demonstrate in its offer that it is prepared to post, and upon award of the contract shall post, and in each succeeding year adjust and maintain in place, an irrevocable letter of credit with a banking institution in this State that secures the timely, faithful, and uninterrupted performance of operations and maintenance services required under the contract, in an amount established under the contract that is sufficient to cover 100% of the cost of performing such operation and maintenance services during the next 12 months.
- (b) The letter of credit required under this Section shall be posted by the contractor at the same time the contract is executed, and thereafter, shall be annually adjusted in amount and maintained by the contractor. If an Offeror or bidder fails to demonstrate in its offer that it is prepared to post the required letter of credit, the bid (or offer) shall be rejected, the bid security shall be enforced, and award of the contract shall be made to the next ranked bidder (or Offeror), as otherwise provided by these regulations. If the contractor fails to place and maintain the required letter of credit, the contractor shall be declared to be in default, as otherwise provided by these regulations.
- (c) If required by the solicitation, letters of credit shall be in a form to be specified in the District's internal operational procedures (§ 540)
- (4) Guarantees.
- (a) If required in a solicitation for operation and maintenance, design-build-operate-maintain, or design-build-finance-operate-maintain, the contractor and affiliated organizations (including parent corporations) shall provide a written guarantee that secures the timely, faithful, and uninterrupted performance of operations and maintenance services required under the contract, in an amount established under the contract that is sufficient to cover 100% of the cost of performing such operation and maintenance services during the contract period.
- (b) The written guarantee required under this Section shall be submitted by each Offeror at the time the proposal is submitted. If the contractor fails to submit the required guarantee, the contractor's bid (or offer) shall be rejected,

its bid security shall be enforced, and award of the contract shall be made to the next ranked bidder (or Offeror) as otherwise provided by these regulations.

- (c) If required by the solicitation, guarantees shall be in a form to be specified in the District's internal operational procedures (§ 540).

N. Construction Management At-Risk.

- (1) Absent the approval required by Section 2010, a contract with a construction manager at-risk may not involve cost reimbursement.
- (2) Prior to contracting for a GMP, all construction management services provided by a construction manager at-risk must be paid as a fee based on either a fixed rate, fixed amount, or fixed formula.
- (3) As required by Section 3030(2) (a) (iv), construction may not commence until the bonding requirements of Section 3030(2) (a) have been satisfied. Subject to the foregoing, bonding may be provided and construction may commence for a designated portion of the construction.
- (4) In a construction management at-risk project, construction may not commence for any portion of the construction until after the District and the construction manager at risk contract for a fixed price or a GMP regarding that portion of the construction. Prior to executing a contract for a fixed price or a GMP, a District shall comply with Section 1830 and Regulation 2120, if applicable. For purposes of Section 1830(3) (a), adequate price competition exists for all components of the construction work awarded by a construction manager at-risk on the basis of competitive bids.
- (5) When seeking competitive sealed proposals in a construction management at-risk procurement, the solicitation shall include a preliminary budget, and if applicable, completed programming and the conceptual design. The solicitation shall request information concerning the prospective Offeror's qualifications, experience, and ability to perform the requirements of the contract, including but not limited to, experience on projects of similar size and complexity, and history of on time, on budget, on schedule construction. The Offeror's proposed fee may be a factor in determining the award.
- (6) After all preconstruction services and final construction drawings have been completed, or prior thereto upon written determination by the procurement officer, a District must negotiate with and contract for a GMP with a construction manager at-risk. If negotiations are unsuccessful, the District may issue an invitation for bids, as allowed by this code, for the remaining construction.
- (7) A District shall have the right at any time, and for three years following final payment, to audit the construction manager at-risk to disallow and to recover costs not properly charged to the project. Any costs incurred above the GMP shall be paid for by the construction manager at-risk.
- (8) A construction manager at-risk may not self perform any construction work for which subcontractor bids are invited, unless no acceptable bids are received or a subcontractor fails to perform. Ordinarily, the contract with a construction manager at-risk should require the construction manager at-risk to invite bids for all major components of the construction work. Section 4210 does not apply to any subcontractor bid process conducted by a construction manager at-risk.

## PROCUREMENT CODE &amp; REGULATIONS

Charleston County School District

**District Internal Operating Procedures**

The following documents, as updated, are incorporated by reference into the District's Internal Operating Procedures:

- Materials Management Office's Procurement Policy Statement No. 2008-2 (Issued April 28, 2008), entitled *Guidance & Best Practices for Permissible Communications in a Competitive Sealed Proposal After Opening but Prior to Award* (Version Date: November 26, 2007). Available at [www.mmo.sc.gov/policy](http://www.mmo.sc.gov/policy)
- *Pre-Qualification Handbook for Construction Bidding* (2009), as published by the South Carolina Office of the State Engineer.
- *Indefinite Delivery Contracts*, appearing as Chapter 9 of the *South Carolina Manual for Planning and Execution of State Permanent Improvements Part II* (2009), as published by the South Carolina Office of the State Engineer.

# APPENDIX A

# DEFINITIONS

(Part of the Code, the same as if included therein)

**DEFINITIONS**

Unless the context clearly indicates otherwise:

“Information Technology (IT)” means data processing, telecommunications, and office systems technologies and services:

- (a) “data processing” means the automated collection, storage, manipulation, and retrieval of data including: central processing units for micro, mini, and mainframe computers; related peripheral equipment such as terminals, document scanners, word processors, intelligent copiers, off-line memory storage, printing systems, and data transmission equipment; and related software such as operating systems, library and maintenance routines, and applications programs.
- (b) “telecommunications” means voice, data, message, and video transmissions, and includes the transmission and switching facilities of public telecommunications systems, as well as operating and network software.
- (c) “office systems technology” means office equipment such as typewriters, duplicating and photocopy machines, paper forms, and records; microfilm and microfiche equipment and printing equipment and services.
- (d) “services” means the providing of consultant assistance for any aspect of information technology, systems, and networks.

“Board” means the Board of Trustees of the School District of Charleston County.

“Business” means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other legal entity.

“Change order” means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual agreement of the parties to the contract.

“Chief Business Officer” means a District employee, above the level of procurement officer and reporting directly to the superintendent, designated in writing by the Superintendent as having primary management responsibility for District business operations and finance. Unless otherwise provided by the Superintendent, the “Chief Business Officer” shall also serve as the “Chief Procurement Officer.” The name and official District title of the person currently serving as the District's chief business officer must be published in the internal operating procedures issued pursuant to Section 540.

*[Model Comment: (1) In order to accommodate districts with limited staff, the person appointed as the CBO also serves as the CPO, by default. The preference is to separate these functions by having the Superintendent appoint different people to each. The intent is to elevate the role of the CBO to a person at least one step removed from the purchasing office, hopefully more. (2) Unlike the CPO, the CBO is not authorized to delegate authority to others. If the same person serves both functions, responsibilities assigned to the CBO may not be delegated. Those assigned to the CPO may be delegated. (3) The wording of this definition is critical and should not be modified. It is carefully tied to numerous decisions regarding how best to adapt the Consolidated Procurement Code to the school district context.]*

“Chief procurement officer” means a District employee, above the level of procurement officer, designated in writing by the Superintendent as having primary management responsibility for supervising procurement or disposal by the District. The Superintendent may provide for the division or sharing of duties and powers assigned by this Code to the Chief Procurement Officer to more than one person. Unless otherwise designated in writing by the



Superintendent, the Chief Business Officer serves as the Chief Procurement Officer. The name and official District title of the person currently serving as the District's chief procurement officer must be published in the internal operating procedures issued pursuant to Section 540.

*[Model Comment: (1) This CPO must be a person above the level of procurement officer and below the level of superintendent. Preferably someone outside the procurement office. By default, the person serving as the CPO is also the CBO. While this approach may be necessary for smaller districts, it tends to undermine the level of independence the Code envisions for a CPO. (2) The district should identify the district's position title for the person serving as the chief procurement officer in its published internal operating procedures. See § 540(2). (3) Subject to the organizational relationship outlined in Comment No. 1 above, a district may elect to have more than one chief procurement officer. For example, a district may have one chief procurement officer for supplies and services, one for construction related services, and another for disposal of surplus property.]*

“Construction” means the process of building, altering, repairing, remodeling, improving, or demolishing a public infrastructure facility, including any public structure, public building, or other public improvements of any kind to real property. It does not include the routine operation, routine repair, or routine maintenance of an existing public infrastructure facility, including structures, buildings, or real property.

*[Model Comment: For a thorough discussion of "routine operation, routine repair, or routine maintenance" and how to determine whether an acquisition is one for construction, you may wish to consult with the OSE Manual.]*

“Contract” means all types of agreements, regardless of what they may be called, for the procurement or disposal of supplies, services, information technology, or construction.

“Contract modification” means a written order signed by the procurement officer, directing the contractor to make changes which the changes clause of the contract authorizes the procurement officer to order without the consent of the contractor.

“Contractor” means any person having a contract with the District.

“Cost effectiveness” means the ability of a particular product or service to efficiently provide goods or services to the District. In determining the cost effectiveness of a particular product or service, the procurement officer shall list the relevant factors in the bid notice or solicitation and use only those listed relevant factors in determining the award.

“Data” means recorded information, regardless of form or characteristics.

“Days” means calendar days. In computing any period of time prescribed by this code or the regulations, or by any order of the Procurement Review Panel, the day of the event from which the designated period of time begins to run is not included. If the final day of the designated period falls on a Saturday, Sunday, or a legal holiday for the District or federal government, then the period shall run to the end of the next business day.

“Debarment” means the disqualification of a person to receive invitations for bids, or requests for proposals, or the award of a contract by the District, for a specified period of time commensurate with the seriousness of the offense or the failure or inadequacy of performance.

“Designee” means a duly authorized representative of a person with formal responsibilities under the code.

"District" means Charleston County School District.

"Employee" means an individual drawing a salary from the District, whether elected or not, and any non-salaried individual performing personal services for the District.

"Grant" means the furnishing by the District, State or the United States government of assistance, whether financial or otherwise, to a person to support a program authorized by law. It does not include an award, the primary purpose of which is to procure specified end products, whether in the form of supplies, services, information technology, or construction. A contract resulting from such an award must not be considered a grant but a procurement contract.

"Invitation for bids" means a written or published solicitation issued by an authorized procurement officer for bids to contract for the procurement or disposal of District supplies, services, information technology, or construction, which will ordinarily result in the award of the contract to the responsible bidder making the lowest responsive bid.

"Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring any supplies, services, information technology, or construction. It also includes all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection, and solicitation of sources, preparation and award of contracts, and all phases of contract administration.

"Procurement officer" means any person duly authorized by the District in accordance with procedures prescribed by regulation, to enter into and administer contracts and make written determinations and findings with respect thereto. The term also includes an authorized representative of the governmental body within the scope of his authority.

"Real property" means any land, all things growing on or attached thereto, and all improvements made thereto including buildings and structures located thereon.

"Request for proposals (RFP)" means a written or published solicitation issued by an authorized procurement officer for proposals to provide supplies, services, information technology, or construction which ordinarily result in the award of the contract to the responsible bidder making the proposal determined to be most advantageous to the District. The award of the contract must be made on the basis of evaluation factors that must be stated in the RFP.

"Services" means the furnishing of labor, time, or effort by a contractor not required to deliver a specific end product, other than reports which are merely incidental to required performance. This term includes consultant services other than architectural, engineering, land surveying, construction management, and related services. This term does not include employment agreements or services as defined in the definition of information technology.

"Subcontractor" means any person having a contract to perform work or render service to a prime contractor as a part of the prime contractor's agreement with the District.

"Supplies" means all personal property including, but not limited to, equipment, materials, printing, and insurance.

"State Engineer" means the person holding the position as head of the state engineer's office.

"Superintendent" means the District's chief executive official, usually known as the Superintendent.

"Suspension" means the disqualification of a person to receive invitations for bids, requests for proposals, or the award of a contract by the District, for a temporary period pending the completion of an investigation and any legal proceedings that may ensue because a person is suspected upon probable cause of engaging in criminal, fraudulent, or seriously improper conduct or failure or inadequacy of performance which may lead to debarment.

# **APPENDIX B**

## **BOARD OF TRUSTEES**

### **“EXEMPTIONS”**

**(Part of the Code, the same as if included therein)**

**Board of Trustees Exemptions**

- 710.1.1 **Copyrighted Educational Materials** to include, but not be limited to:
- a. Books, dictionaries, textbooks, newspapers, diplomas
  - b. Professional journals, technical pamphlets, periodicals, subscriptions
  - c. Educational films, filmstrips, slides and transparencies
  - d. Video tapes, cassettes, DVDs
- 710.1.2 **Copyrighted Technology Materials** to include, but not be limited to:
- a. Computer assisted instructional materials, interactive video programs
  - b. CD-ROM documents, data bases
  - c. Site Licenses, maintenance contracts, upgrades, and related information/materials for District-adopted software only available or provided by the software company
- 710.1.3 **Medical and/or Psychological Services** to include, but not be limited to:
- a. Hospitals, health maintenance organizations (HMOs), medical clinics and clinical services
  - b. Licensed medical doctors, physicians, surgeons, dentists, optometrists, doctors of osteopathy, pathologists, etc.
  - c. Licensed/registered/certified physician assistants, nurses, occupational and physical therapists
  - d. Mental health organizations and services
  - e. Psychiatrists, psychologists, behaviorists, counselors, etc.
  - f. Speech, language, audiology, orientation, mobility, occupational and physical therapy services
  - g. Long-term care medical or educational organizations and treatment programs
  - h. Hepatitis B and other vaccines
- 710.1.4 **Governmental Services** to include, but not be limited to:
- a. Services and supplies provided by the Federal government, State agencies, county, city or town governments, and special purpose districts
  - b. Leasing of public parking lots, lecture halls, theatres, coliseums, convention centers, athletic facilities, recreation areas for District-sponsored events
  - c. Purchasing of goods and services under cooperative and piggyback arrangements with other governmental entities provided the contract established under the bidding or RFP process establishes such right.
  - d. Purchase of goods and services provided by MMO and ITMO generated contracts
  - e. Purchase of grant specified and approved equipment, subcontracts and consultants required for the successful completion of the grant funded project and where competitive bidding is not required or practical (subject to Procurement Officer approval)
  - f. Payments of taxes, social security, annuities, etc.
  - g. School Resource Officer services
- 710.1.5 **Educational Services** to include, but not be limited to:
- a. Contractual and cooperative agreements for provision of services to students
  - b. Consultants for evaluation of academic programs
  - c. Evaluation services and expenses of visiting committees such as the Southern Association of Colleges and Schools

- d. Tuitions paid to institutions of higher education
  - e. Professional artists utilized by S.C. Arts Commission
  - f. Other professional artist services, including dancers, writers, poets, theatre groups, craftsmen, folk artists or other such services
- 710.1.6 **Policy and Legal Services** to include, but not be limited to:
- a. Attorney services (subject to Board approval), court recorders, expert witness services
  - b. Investment management and advisory, debt service, and brokerage services and professionals (subject to Board approval)
  - c. Legislative consultant (subject to Board approval)
  - d. Certified public accountants, actuarial auditing services and providers
  - e. Employment services, employee services and consultant services as defined in § 310 (Definitions) and professional services where the person employed is customarily employed on a fee basis rather than by competitive bidding.
  - f. Payment of bond rating services, and costs associated with issuance or refinancing of bonds, public accountants, and banking services
  - g. Insurance coverage (primary and reinsurance)
  - h. Appraisals, land utilization and condemnation services
  - i. Advertising in professional and technical publications, newspapers, radio and television
  - j. Goods and services of a confidential/sensitive nature that would cause injury to students, staff and/or District if procured through public solicitation (subject to Superintendent approval)
- 710.1.7 **Staff Development** to include, but not be limited to:
- a. Training provided by consultants, certified teachers/trainers or District personnel
  - b. Training materials secured or prepared for instructional purposes
  - c. Workshop, conference, seminar registrations
  - d. Travel expenses, such as airfare, hotels, and registrations
- 710.1.8 **Student Services** to include, but not be limited to:
- a. Local school funds from booster clubs, canteens, fund raising events, donations, etc. except when used to procure capital equipment site improvements and facilities, construction, architect, engineering, construction management and land surveying services
  - b. Electronic and printed exams, tests, testing materials, including scoring services and materials
  - c. Canine drug and/or weapon detection services and related support services
  - d. Homebound services, home visits and home health services
  - e. Instruction provided by certified teachers, English tutors, interpreters or interpreter services
  - f. Professional dues and membership fees, but only for the benefit of students
  - g. Clergy services
  - h. Travel expenses
- 710.1.9 **Public Service and Utilities, Telecommunication and Energy Expenses** to include, but not be limited to:
- a. Fuel, propane, natural gas, electric, oil company credit card purchases of gas, oil or fluids

- b. Local and long distance telecommunication services; telecommunications equipment, upgrades, additions, maintenance and repair contracts, and purchase or continued lease of imbedded telephone systems, except when competitive bidding is required for E-rate reimbursement
  - c. Water/sewer services and installation costs and fees
- 710.1.10 **Refunds** to include, but not be limited to:
- a. Refunds of health insurance, earnest monies, bid securities, or other funds temporarily entrusted to the District
- 710.1.11 **One-of-a-Kind Items** to include, but not be limited to:
- b. Paintings, sculptures, antiques, art reproductions, historical artifacts, or other rare items
  - c. Scientific specimens, skeletal and taxidermy mounts, models, fossils, rocks, and minerals, etc.
- 710.1.12 **Emergency Repairs** to include, but not be limited to:
- a. Repairs to life safety, fire and security systems to prevent disruption to the educational process
  - b. Repairs to buses or other vehicles while transporting students or required to transport students where alternative transportation is not available or practical
  - c. Environmental remediation services where the issues giving rise to remedial services disrupt the educational process
- 710.1.13 **Items Purchased for Resale**
- 710.1.14 **Livestock, Feed and Veterinary Supplies and Services**
- 710.1.15 **Mailing and Delivery Services and Postage**
- 710.1.16 **Perishable Foods**
- 710.1.17 **Travel reimbursement to district employees only**
- 710.1.18 **Diplomas**
- 710.1.19 **Testing Materials & Scoring**
- 710.1.20 **Food items for nutritional instructional classes, after school programs and community schools**
- 710.1.21 **Security officers at school level**
- 710.1.22 **Immunization vaccines**
- 710.1.23 **Educational kits and replacement parts**
- 710.1.24 **Pilot programs**
- 710.1.25 **Training Facilities to include food, materials and equipment**
- 710.1.26 **Items listed as exempt in the South Carolina Consolidated Procurement Code**