

CHAPTER 1 - GENERAL PROVISIONS

§ 1-101 Authority and Purpose

(1) The Dallas Area Rapid Transit Authority (the "Authority") is a regional transportation authority under Chapter 452 of the Texas Transportation Code. These regulations are issued under the general authority of Chapter 452 of the Texas Transportation Code and, more specifically, Section 452.055 thereof empowering the Authority to enter into contracts, Sections 452.101 and 452.104 providing for the Board of Directors to prescribe policies for the duties of employees, Section 452.105 authorizing the Board of Directors to adopt rules and regulations, and Section 452.106 authorizing the Board of Directors to adopt and enforce procedures and rules covering all aspects of the procurement process.

(2) These regulations also constitute delegations of authority to employees of the Authority to assist the Board of Directors in discharging its management responsibility under Chapter 452 of the Texas Transportation Code.

(3) These regulations establish policies, procedures, rules, and guidelines relating to the procurement, management, control, and disposal of property, services, and construction in order to define the terms in and implement the provisions of Chapter 452 of the Texas Transportation Code, and to:

(a) Provide for public confidence in the integrity, fairness, and accountability of the Authority's procurement system.

(b) Ensure the fair and equitable treatment of all persons who deal with the procurement system of the Authority.

(c) Promote contracting opportunities for all Disadvantaged Business Enterprises (DBEs) Minority-Owned Business Enterprises (MBEs), and Women-Owned Business Enterprises (WBEs), both as prime contractors and subcontractors.

(d) Foster full and open competition.

(e) Meet the customer's needs in terms of cost, quality and timeliness of the delivered product or service.

(f) Promote positive relationships through courtesy and impartiality in all phases of the procurement process.

(g) Handle confidential information or proprietary information with proper consideration of the ethical and legal ramifications of disclosure.

(h) Maintain the integrity of the Authority's procurement system.

(i) Provide for the timely, impartial resolution of all procurement issues.

(j) Provide increased efficiency and effectiveness in the Authority's procurement activities, thereby exercising good stewardship of public funds and maximizing, to the fullest extent possible, the purchasing value of those public funds.

(4) Pursuant to Section 452.106(b) of the Texas Transportation Code, the procedures, guidelines, and rules in these regulations are for the benefit of the Authority and do not confer any rights on actual or potential bidders, offerors, contractors, or any other person, except as provided in Chapter 10 of these regulations.

(5) These regulations cover the procurement of real property only to the extent provided in § 1-501 (Acquisition of Real Property).

§1-102 General Principles of Law and Interpretation

(1) Unless modified by the particular provisions of these regulations, the principles of law and equity, including the Texas Business and Commerce Code, the law merchant, and applicable law relative to capacity to contract, agency, fraud, misrepresentation, duress, coercion, mistake, or bankruptcy shall supplement the provisions of these regulations.

(2) Unless the context of these regulations requires otherwise:

(a) words in the singular number include the plural, and those in the plural include the singular; and

(b) words of a particular gender include any gender and the neuter, and, when the sense so indicates, words of the neuter gender may refer to both genders.

(3) The titles of chapters, sections, and subsections, or other titles contained in these regulations are for convenience and reference only and in no way define, describe, extend, or limit the scope or intent of the substantive provision to which the title applies unless the context so requires.

(4) Unless otherwise stated, a listing of factors, criteria, or subjects in these regulations does not constitute an order of preference.

§ 1-103 Requirement of Good Faith

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

§ 1-104 Application of Regulations

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

(2) These regulations shall apply to every expenditure of public funds irrespective of their source, including federal assistance monies, by the Authority under any contract, except that these regulations shall not apply to:

(a) grants;

(b) contracts between the Authority and other public agencies under Chapter 791 (Interlocal Cooperation Contracts) of the Government Code, as amended; or

(c) any transaction for, or related to, the borrowing of money as described in Section 452.107(c) of the Texas Transportation Code.

These regulations also shall apply to the disposal of the Authority's supplies. Nothing in these regulations shall prevent the Authority from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement.

§ 1-105 Severability

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

§ 1-106 Specific Repealer

All prior policies and resolutions of the Authority which are inconsistent with these regulations are superseded by these regulations.

§ 1-107 Construction Against Implicit Repealer

Since these regulations are general policies of the Authority, no part of these regulations shall be deemed to be impliedly repealed or modified by subsequent action of the Authority if such construction reasonably can be avoided.

§ 1-108 Effective Date

These regulations shall become effective at 12:01 A.M. on June 4, 1986.

§ 1-109 Dissemination of the Regulations

Private firms, individuals, and others may obtain copies of these regulations by purchasing them for a price established by the President & Chief Executive Officer at the offices of the Authority or at such other places as the President & Chief Executive Officer may designate. All operational procedures implementing these regulations shall be similarly available.

§ 1-201 Written Determinations

(1) Where these regulations require a written determination, the person responsible for making the determination may delegate its preparation, but the responsibility for and the execution of the determination shall not be delegated and shall be signed by the appropriate official in accordance with Authority regulations. The failure to make any written determination required by these regulations shall not affect the validity of any action taken with or relating to any other party.

(2) Written determinations shall set out sufficient facts, circumstances, and reasoning as will substantiate the specific determinations made.

(3) While a designated person is responsible for the execution of a written determination, other Authority personnel (particularly technical personnel) are responsible for furnishing to the cognizant procurement official, in an accurate and adequate fashion, the information pertinent to the determination. When requested, such information shall be furnished in writing to the cognizant procurement official, who shall have the authority to decide the final form and content of the determination and to resolve any questions or conflicts arising with respect thereto.

(4) The President & Chief Executive Officer is authorized to prescribe methods and operational procedures to be used in preparing written determinations.

(5) Written determinations shall be filed in the appropriate solicitation or contract file, shall be retained as part of such file for so long as the file is required to be maintained, and (except as otherwise provided by law or regulation) shall be open to public inspection.

§ 1-301 Definitions

The words defined in this section shall have the meanings set forth below whenever they appear in these regulations unless the context in which they are used clearly requires a different meaning or a different definition is prescribed for a particular section or provision.

- (1) "Actual Costs" is defined in § 7-101(1).
- (2) "Board" means the Board of Directors (Executive Committee) of the Dallas Area Rapid Transit Authority.
- (3) "Brand Name or Equal Specification" is defined in § 4-101(2).
- (4) "Brand Name Specification" is defined in § 4-101(1).
- (5) "Business" means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity.
- (6) "Change Order" means a written order, signed by the Contracting Officer, directing the contractor to make a change which the Changes Clause authorizes the Contracting Officer to order without the contractor's consent.
- (7) "Construction" is defined in § 6-401.
- (8) "Contract" means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction). It includes all types of commitments and that, except as otherwise authorized, are in writing and signed by the parties, regardless of what they may be called, including but not limited to, the procurement or disposal of property (other than real property), services, or construction.
- (9) "Contracting Officer" means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives (contract officer representatives) of the contracting officer acting within the limits of their authority as delegated by the contracting officer.
- (10) "Contract Modification" means any written change in the terms of a contract, as further described in § 8-303.
- (11) "Contractor" means any person having a contract with the Authority.
- (12) "Cost Analysis" is defined in § 3-101(1).
- (13) "Cost Data" is defined in § 3-101(2).
- (14) "Cost Objective" is defined in § 7-101(2).
- (15) "Data" means recorded information, regardless of form or characteristic.

(16) "Day" means, unless otherwise specified, a calendar day. In computing any period of time prescribed by these regulations, the day of the event from which the designated period of time begins to run shall not be included, but the last day shall be included unless it is a Saturday, Sunday, or Federal or Texas holiday, in which event the period shall run to the end of the next business day.

(17) "Designee" means a duly authorized representative of a person having specific authority or holding a superior position.

(18) "Discussions" is defined in § 3-101(4).

(19) "Employee" means an individual drawing a salary or wages directly from the Authority.

(20) "Equitable Adjustment" is an adjustment to contract provisions pursuant to a contract clause specifically providing for an "equitable adjustment" and as defined in applicable court and administrative decisions construing the same clause or similar clauses. See also § 8-305.

(21) "President & Chief Executive Officer" is the person appointed by the Board to be the chief operating officer of the Authority pursuant to Sections 452.101(1) and 452.104 of the Texas Transportation Code.

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

(23) "Joint Venture" shall be defined as a partnership, teaming arrangement or association of two or more persons or business entities to carry on a business limited to one particular enterprise for the Authority. For purposes of § 3-114, no Joint Venture shall be comprised of more than one company that has sufficient technical capability and productive capacity for contract performance as set forth in FAR 3.303(c)(7). No Joint Venture shall be comprised of two or more companies whose owners are related within the second degree of affinity (marriage) or within the third degree of consanguinity (blood).

(24) "May" denotes the permissive. However, the words "no person may..." mean that no person is authorized, or permitted to do the act prescribed.

(25) "Offer" means a response to a solicitation, that if accepted, would bind the offeror to perform the resultant contract. "Offeror" means bidder. Responses to invitation for bids (sealed bidding) are offers called "bids" or "sealed bids"; responses to requests for proposals (negotiation) are offers called "proposals"; however, responses for requests for quotations are "quotations" not offers.

(26) "Person" means any business, individual, union, committee, club, other organization, or group of individuals.

(27) "Price Analysis" is defined in § 3-101(7).

(28) "Price Data" is defined in § 3-101(8).

(29) "Prime Contractor" is defined in § 5-101(2).

(30) "Procurement" means acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Authority through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Procurement begins when Authority needs are established and includes the description of requirements to satisfy Authority needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling Authority needs by contract.

(31) "Property" means tangible or intangible property of any type, except real property, including supplies, material, machinery, equipment, and intellectual property.

(32) "Protest" means a written statement concerning any unresolved disagreement or controversy arising out of the solicitation or award of a contract filed in accordance with § 10-201.

(33) "Protester" is defined in § 10-202(3).

(34) "Purchase Request" or "Purchase Requisition" means that document whereby a person requests that a contract be entered into for a specific need, and may include, but is not limited to, the description of the requested item, delivery schedule, transportation data, criteria for evaluation, suggested sources of supply, and information supplied for the making of any written determination required by these regulations.

(35) "Qualified Products List" is defined in § 4-101(3).

(36) "Small Business" shall have the meaning set forth by the Small Business Administration Standards found in 13 C.F.R. §21 and in 49 C.F.R. §26.65.

(37) "Solicitation" is defined in § 3-101(13).

(38) "Specification" is defined in § 4-101(4).

(39) "Standard Commercial Products" are items and/or services regularly used, for other than Federal Government purposes, in the course of normal business operations.

a. "Items," including computer software, are those that:

- i. have been sold or traded to the general public;
 - ii. have been offered for sale to the general public at established prices but not yet sold;
 - iii. although intended for sale or trade to the general public, have not yet been offered for sale but will be available for commercial delivery in a reasonable period of time; or
 - iv. are described in paragraphs (i), or (ii), or (iii) and would require only minor modification in order to meet the requirements of the Authority.
- b. "Services" include:
- i. installation, maintenance, repair, training, and other services if such services are procured for support of an item referred to in paragraphs (a)(i), (ii), (iii), or (iv) above, and the source of such services offers them to the general public under similar terms and conditions; or
 - ii. services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices.

(40) "Supplies" is defined, for the purposes of Chapter 9, in § 9-101(4). As used elsewhere in these regulations, "supplies" means all tangible property owned by the Authority, except land or interest in land, and includes (but is not limited to) public works, buildings, and facilities, accessories, equipment, machine tools, and the alteration or installation of any of the foregoing.

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

§ 1-401 Public Access to Procurement Information

(1) Procurement information shall be a public record to the extent provided in Chapter 552 (Public Information Act) of the Government Code, as amended, and shall be available to the public as provided in such statute.

(2) All solicitations shall contain a provision requiring all bids and proposals to identify, specifically and by page or diagram, any information deemed to be exempt from disclosure as trade secrets or commercial or financial or proprietary information.

§ 1-501 Acquisition of Real Property

(1) This section sets forth the policy of the Authority in connection with the procurement of real property. For the purpose of these regulations, "real property" includes ownership in fee, leases of real property, easements, rights-of-way, and all other ownership interests in real property.

(2) It is the policy of the Authority to make every reasonable effort to acquire real property by agreement with the owners. Where agreement is not possible, the acquisition of such property may be considered under the power of eminent domain described in Sections 452.058 and 452.059 of the Texas Transportation Code.

(3) Whenever practical, the Authority shall establish an amount estimated to be fair compensation for real property prior to initiation of negotiations with the owner. If only part of the property is to be acquired or the interest to be acquired is less than the full interest of the owner, the estimated amount will include a statement explaining the basis for the determination of fair value. Any increase or decrease in the fair market value of the real property, prior to the date of valuation, caused by the public improvement or project for which the real property is to be acquired, or by the likelihood that the real property would be acquired for such improvement or project, should be disregarded in making the estimate.

(4) In establishing the amount estimated to be fair compensation, an appraisal of each parcel or tract may be obtained. If an appraisal is obtained, the owner or his designated representative shall be given the opportunity to accompany the appraiser during his inspection of the property. Only one appraisal should be obtained unless it is determined that special circumstances require an additional appraisal or appraisals.

(5) The President & Chief Executive Officer shall establish procedures for the selection and procurement of real property; provided, however, no acquisition of real property shall be made without the approval of the Board.

CHAPTER 2 – PROCUREMENT AUTHORITY AND OFFICIALS**Section 2-100 - Authority and Responsibility****§ 2-101 Procurement Authority**

(1) The authorization to enter into contracts on behalf of the Authority will be conferred only by resolution of the Board of Directors providing general authorizations to enter into contracts or authority for specific contracts or types of contracts. Any provision in these procurement regulations describing the methods and procedure for procurement and designating Authority representatives for procurement actions shall be subject to authorization from the Board to award a contract.

(2) No contract, modification, change order, or commitment shall be made on behalf of the Authority unless it is made in writing and executed by a representative of the Authority acting within the scope of his actual authority. Contracts, modifications, change orders, or commitments made on behalf of the Authority by Authority personnel acting outside the scope of their actual authority may be ratified by the President & Chief Executive Officer, provided the President & Chief Executive Officer determines in writing that such action is in the Authority's best interest and all such ratification actions (together with a description of the circumstances and the justification therefor) shall be reported quarterly by the President & Chief Executive Officer in a written report to the Board of Directors.

(3) No person shall be authorized or permitted to commence work for or on behalf of the Authority in contemplation of a contract prior to the execution of a written contract.

(4) Except for multi-year contracts authorized by Section 452.108 of the Texas Transportation Code, no contract, modification, change order, or contract price adjustment shall be made unless sufficient funds are authorized and available for expenditure for such purpose in the Authority's current budget; provided, however, that with respect to the validity, as to the contractor, of any contract, modification, change order, or adjustment in contract price which the contractor has reasonably relied upon, there shall be a rebuttable presumption that there has been compliance with this provision.

(5) No contract for the services of legal counsel may be entered into without the approval of the Board of Directors.

§ 2-102 Procurement Responsibility

(1) The President & Chief Executive Officer shall be responsible for the procurement of property, services, and construction in accordance with these regulations as well as the management and disposal of supplies.

(2) In accordance with these regulations and subject to § 2-101, the President & Chief Executive Officer shall:

(a) procure or supervise the procurement of all property, services, and construction needed by the Authority;

(b) supervise and control all assets, equipment, and inventories of supplies belonging to the Authority;

(c) sell, trade, or otherwise dispose of surplus assets, equipment, or supplies belonging to the Authority; and

(d) establish and maintain programs for specification development, contract administration, and inspection and acceptance of supplies, services, and construction.

(3) The President & Chief Executive Officer may adopt operational procedures consistent with these regulations pertaining to the execution of procurement duties.

Section 2-200 - Delegations of Authority**§ 2-201 Authority to Delegate**

(1) As authorized by Sections 452.104(a) and 452.108(b) of the Texas Transportation Code, and with the approval of the Board, the President & Chief Executive Officer may delegate authority to purchase certain property, services, or construction to persons designated, and within budgeted amounts approved by the Board.

(2) The authority conferred on the President & Chief Executive Officer in these regulations with respect to the following matters shall not be delegated:

(a) appointment of contracting officers under § 2-203;

(b) deviations from these regulations under § 2-301;

(c) reduction of bond amounts under § 5-302(3);

(d) stay of procurements during protests under § 10-204; and

(e) authority to debar or suspend under § 10-302(1).

§ 2-202 Delegations and Revocations of Authority

(1) The President & Chief Executive Officer's delegations of authority shall be in writing and shall specify:

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

(2) Any authority delegated by the President & Chief Executive Officer may be revoked at any time and without prior approval of the Board.

§ 2-203 Contracting Officers

(1) The selection, appointment, and terminations of appointments of contracting officers shall be made only by the President & Chief Executive Officer in writing, which shall state any limitations on the scope of authority to be exercised, other than limitations contained in applicable law or regulation. In selecting contracting officers, the President & Chief Executive Officer shall consider public contract experience, training, education, business acumen, judgment, character, reputation, and ethics.

(2) Appointment of contracting officers shall be made in a Certificate of Appointment signed by the President & Chief Executive Officer in the following form:

CERTIFICATE OF APPOINTMENT

Pursuant to the authority vested in the undersigned by the Dallas Area Rapid Transit Authority Procurement Regulations,

is hereby appointed Contracting Officer for the Dallas Area Rapid Transit Authority subject to the limitations in the Authority's Procurement Regulations and to the following:

Unless sooner revoked, this appointment is effective as long as the appointee named herein is an employee of the Authority.

Date

Signature of President & Chief Executive Officer

Section 2-300 - Deviations from Regulations

§ 2-301 Deviations from Regulations

The President & Chief Executive Officer may approve deviations from these regulations with respect to an individual procurement; provided, however, that any such deviation (together with a description of the circumstances and the justification therefor) shall be reported quarterly by the President & Chief Executive Officer in a written report to the Board of Directors.

Section 2-400 - Changes to Regulations

§ 2-401 Changes to Regulations

The President & Chief Executive Officer is empowered to approve one-time deviations from the regulations in accordance with the provisions of Section 2-301. No permanent change shall be made to the Procurement Regulations without the express approval of the Board of Directors, except for minor, insignificant changes that are matters of form rather than substance, e.g., style changes, typographical, punctuation, and transposition errors. All permanent changes approved pursuant to the provisions of this section shall be incorporated into a Procurement Circular and promulgated by the President & Chief Executive Officer.

Section 2-500 Procurements Using Federal Funds

§ 2-501 Procedures

Procurements involving the use of federal assistance grant funds will be conducted in accordance with the terms of these Procurement Regulations and requirements of the grantor agency. In the instance of Federal Transit Administration (FTA) grants, the requirements contained in the grant itself, the FTA Circular 4220.1 in effect on the applicable date, and any other requirements of the Federal Government will be followed. In the event of any inconsistency with these Procurement Regulations, the provisions of any required federal rules, regulations or grant terms shall be controlling.

§ 2-502 Procurement Clauses

The President & Chief Executive Officer shall promulgate required clauses to be used in all federally-funded solicitations and contracts.

CHAPTER 3 - SOURCE SELECTION AND CONTRACT FORMATION

Section 3-100 - General Provisions

§ 3-101 Definition of Terms

(1) "Cost Analysis" is the evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.

(2) "Cost Data or Pricing Date" ([10 U.S.C. 3701\(1\)](#) and [41 U.S.C. chapter 35](#)) means all facts that, as of the date of price agreement, or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price, prudent buyers and sellers would reasonably expect to affect price negotiations significantly. *Cost or pricing data* are factual, not judgmental; and are verifiable. While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. *Cost or pricing data* are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. They also include, but are not limited to, such factors as-

- (1) Vendor quotations;
- (2) Nonrecurring costs;
- (3) Information on changes in production methods and in production or purchasing volume;
- (4) Data supporting projections of business prospects and objectives and related operations costs;
- (5) Unit-cost trends such as those associated with labor efficiency;
- (6) Make-or-buy decisions;
- (7) Estimated resources to attain business goals; and
- (8) Information on management decisions that could have a significant bearing on costs.

(3) "Cost-Reimbursement Contract" means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of these regulations and is paid a fee, if any.

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

(5) "Established Catalogue Price" means the price included in a catalogue, price list, schedule, or other form that:

- a. is regularly maintained by a manufacturer or contractor;

b. is either published or otherwise available for inspection by customers; and

c. states prices at which sales are currently or were last made to a significant number of buyers constituting the general buying public for the property or services involved.

(6) "Invitation for Bids" means solicitations under sealed bid procedures.

(7) "Price Analysis" is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit.

(8) "Purchase Description" means the words used in a solicitation to describe the property, services, or construction to be purchased, and includes specifications attached to, or made a part of, the solicitation.

(9) "Request for Proposals" means solicitations under negotiated procedures, including all documents, whether attached or incorporated by reference, utilized for soliciting proposals.

(10) "Responsible Bidder" or "Responsible Offeror" means a person who has the capability in all respects at the time of award to perform fully the contract requirements and the integrity and reliability which will ensure good faith performance.

(11) "Responsive Bidder" means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.

(12) "Solicitation" means any request to submit offers or quotations to the Authority to perform a contract.

§ 3-102 Extension of Time for Bid or Proposal Acceptance

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

§ 3-103 Extension of Time on Indefinite Quantity Contracts

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

§ 3-104 Only One Bid or Proposal Received

(1) If only one responsive bid is received in response to an Invitation for

Bids (including multi-step bidding), an award may be made to the single bidder if the Contracting Officer finds that the price submitted is fair and reasonable and that either (i) other prospective bidders had reasonable opportunity to respond or (ii) there is not adequate time for resolicitation. Otherwise, the bid may be rejected pursuant to the provisions of § 3-300 (Cancellation of Solicitations; Rejection of Bids or Proposals) and:

(a) new bids or offers may be solicited;

(b) the proposed procurement may be cancelled; or

(c) if a Contracting Officer above the level of the procuring Contracting Officer determines in writing that the need for the property, service, or construction continues but that the price of the one bid is not fair and reasonable and there is no time for resolicitation (or resolicitation would likely be futile), the procurement then may be conducted under § 3-205 (Sole Source Procurement).

(2) If only one proposal is received in response to a Request for Proposals, a determination must be made by a Contracting Officer above the level of the procuring Contracting Officer to:

(a) make an award in accordance with the procedures set forth in **§ 3-203 (Competitive Sealed Proposals)**;

(b) conduct the procurement under § 3-205 (Sole Source Procurement); or

(c) if time permits, resolicit proposals.

§ 3-105 Multiple or Alternate Bids or Proposals

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

§ 3-106 Bonds for Supply or Service Contracts

Bid and performance bonds or other security may be required for supply contracts or service contracts as the Contracting Officer deems advisable to protect the interest of the Authority. Any such requirements must be set forth in the solicitation. Bid or performance bonds should not be used as a substitute for a determination of bidder or offeror responsibility. Sections 5-301 (Bid Bonds), 5-302 (Performance Bonds), and 5-303 (Payment Bonds) set forth bond requirements applicable to construction contracts and may be considered when

establishing any such requirements for supply contracts or service contracts.

§ 3-107 Conditioning Bids or Proposals Upon Other Awards

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

§ 3-108 Determination of Contractual Terms and Conditions

The Contracting Officer is authorized to determine the contractual provisions, terms, and conditions of solicitations and contracts; provided, such provisions, terms, and conditions are not contrary to these regulations or statutory requirements governing the procurement.

§ 3-109 Unsolicited Offers

(1) An unsolicited offer is any offer other than one submitted in response to a solicitation. The President & CEO shall consider the offer as provided in this section.

(2) To be considered for evaluation, an unsolicited offer must not be for an item for which competitive sealed bids or competitive sealed proposals are required by law and:

- (a) must be in writing;
- (b) must be sufficiently detailed to permit a determination that Authority support could be worthwhile and the proposed work could benefit the Authority's research and development or other mission responsibilities;
- (c) must be unique and innovative;
- (d) must be independently originated and developed by the offeror;
- (e) must be prepared without Authority supervision, endorsement, direction, or direct Authority involvement
- (f) must not be an advance proposal for a known Authority requirement that can be acquired by competitive methods; and
- (g) must not be addressed by a previously published Authority requirement.

(3) An unsolicited offer meeting the requirements of (2), above, shall be evaluated to determine its utility to the Authority and whether it would be to the Authority's advantage to enter into a contract based on the offer. If an award is to be made on the basis of the offer, the sole source procedures in § 3-205 (Sole Source

Procurement) shall be followed.

(4) Any written request for confidentiality of data contained in an unsolicited offer that is made in writing shall be honored if permitted by law. If an award is contemplated, confidentiality of data shall be agreed upon by the parties and governed by the provisions of law and the contract. If agreement cannot be reached on confidentiality, the Authority may reject the unsolicited offer.

§ 3-110 Novation or Change of Name

(1) No Authority contract is transferable or otherwise assignable without the written consent of the Contracting Officer; provided, however, that a contractor may assign monies receivable under a contract after due notice to the Authority.

(2) When in the best interest of the Authority, a successor in interest may be recognized in a novation agreement in which the transferor, transferee, and the Authority shall agree that:

(a) the transferee assumes all of the transferor's obligations;

(b) the transferor waives all rights under the contract as against the Authority; and

(c) unless the transferor guarantees performance of the contract by the transferee, the transferee shall, if required, furnish a satisfactory performance bond.

(3) When a contractor requests to change the name in which it holds a contract with the Authority, the Contracting Officer shall, upon receipt of a document indicating such change of name (for example, an amendment to the articles of incorporation of the corporation), enter into an agreement with the requesting contractor to effect the change of name. The agreement changing the name shall specifically indicate that no other terms and conditions of the contract are thereby changed.

§ 3-111 Contracting for Installment Purchase Payments

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

§ 3-112 Purchase of Items Separately from Construction Contract

The President & CEO is authorized to determine whether a supply item or group of supply items shall be included as a part of, or procured separately from, any

contract for construction.

§ 3-113 Purchase of Standard Commercial Products

If the Contracting Officer makes a determination that the items or services to be purchased qualify as Standard Commercial Products in accordance with the definition at § 1-301 (39), the procurement shall be fully and openly competed, whenever practicable.

§ 3-114 Maximizing Participation of Small Business Private Enterprises

§ 3-114.01 Purpose and General Requirements

(1) In order to give full effect to Tex. Trans. Code §§ 452.105 and 452.201, and other relevant law, the Authority adopts this program to encourage or require, to the maximum extent feasible, the participation of small business private enterprises in Authority procurements. This program is reasonably designed to increase the participation of minority- and women-owned business enterprises in Authority procurements through race-neutral means. Accordingly, the Authority has adopted the following Joint Venture Program to stimulate the formation of Joint Ventures as one means to accomplish this objective.

(2) This section sets out parameters and guidelines regarding Joint Venture formation and participation in Authority procurements. The determination whether to incorporate solicitation considerations for such entities shall be made by the Contracting Officer.

§ 3-114.02 Utilization of Joint Ventures

(1) Where appropriate, the Contracting Officer shall encourage the participation of Joint Ventures in procurements.

(2) When the Contracting Officer determines, in writing, that appropriate business circumstances warrant, the Contracting Officer may require that bids or offerors in response to the solicitation be submitted by Joint Ventures. By inserting such language in the solicitation, any bid or offer submitted in response to the solicitation that does not comply with this requirement shall be determined nonresponsive and rejected.

(a) The President & CEO or his or her designee shall promulgate Authority policies and procedures for determining the types of procurements for which the Contracting Officer shall require responses by

Joint Ventures. As a general guideline, such procurements shall involve the following:

(i) Large, complex, and/or multi-disciplinary statements of work;

(ii) Work to be performed at more than one Authority

site;

(iii) Long-term repetitive task performance for a variety of tasks;

(iv) Efficiency-enhancing activities; or

(v) Requirements related to the quality or competence of the work.

(b) In adopting policies and procedures for determining the types of procurements for which the Contracting Officer shall require responses by Joint Ventures, the President & CEO shall be guided by the Antitrust Guidelines for Collaboration Among Competitors published by the Federal Trade Commission and the Department of Justice.

(3) The requiring activity (“customer”) shall make an initial determination whether a procurement is appropriate for Joint Ventures at the time the requirement is identified for inclusion in the Authority Procurement Plan. This determination shall be provided to the Board of Directors and notated for that procurement in the Authority Procurement Plan.

(4) When the requiring activity provides the appropriate funding and procurement requisition to the Contracting Officer to commence the solicitation process, the Contracting Officer shall initially review the requirement to ascertain if the requiring activity made a determination concerning the utilization of joint ventures for the solicitation and work performance.

(a) If the requiring activity identified the procurement as appropriate for the use of Joint Ventures, the Contracting Officer shall review that determination and either concur or nonconcur. If the Contracting Officer concurs with the requiring activity’s determination, the Contracting Officer shall ensure that the solicitation contains the appropriate clauses and shall further ensure that the public notice issued for the solicitation advises potential bidders/offerors that the Authority shall require the formation and submission of bids/offers by Joint Ventures. If the Contracting Officer nonconcur, then the reasons shall be written and placed in the contract file.

(b) If the requiring activity did not identify the procurement as appropriate for the use of Joint Ventures, the Contracting Officer shall make the determination. If the Contracting Officer determines that the use of Joint Ventures is appropriate to the specific procurement, the Contracting Officer shall prepare a written determination for the contract file. The Contracting Officer shall subsequently ensure that the public notice issued for the solicitation advises potential bidders/offerors that the Authority requires the formation and submission of bids/offers by Joint Ventures.

(5) The Contracting Officer’s determination must be in writing and comply with applicable statutory and regulatory criteria for conducting Authority procurements.

Section 3-200 - Methods of Source Selection

§ 3-201 General Requirements

- (1) Section 452.106 of the Texas Transportation Code provides:
 - (a) The executive committee may adopt and enforce procurement procedures, guidelines, and rules:
 - (1) defining the terms in and implementing Sections 452.107 and 452.108(a) and (b); or
 - (2) covering:
 - (A) the appointment of contracting officers;
 - (B) the solicitation for and award of contracts, including the electronic transmission of bids and proposals and the use of the reverse auction procedures, as defined by Section 2155.052, Texas Government Code;
 - (C) the resolution of protests and contract disputes;
 - (D) foreign currency transactions and conversions and foreign exchange rate risk management; or
 - (E) other aspects of the procurement process for domestic and international contracts.
 - (b) Sections 452.107 and 452.108(a) and (b) and the procedures, guidelines, or rules adopted under this section confer no rights on an actual or potential bidder, offeror, contractor, or other person except as expressly stated in the procedures, guidelines, or rules.
 - (c) A procurement procedure, guideline, or rule covering the electronic transmission of bids and proposals must provide:
 - (1) for the identification, security, and confidentiality of an electronic bid or proposal;
 - (2) that an electronic bid or proposal is not required to be sealed; and
 - (3) that an electronic bid or proposal remains effectively unopened until the appropriate time.

(2) Section 452.107 of the Texas Transportation Code provides as follows:

(a) Except as provided by subsection (c), an authority may not award a contract for construction, services, or property, other than real property, except through the solicitation of competitive sealed bids or proposals ensuring full and open competition.

(b) The authority shall describe in a solicitation each factor to be used to evaluate a bid or proposal and give the factor's relative importance.

(c) The executive committee may authorize the negotiation of a contract without competitive sealed bids or proposals if:

(1) the aggregate amount involved in the contract is \$50,000 or less;

(2) the contract is for construction for which not more than one bid or proposal is received;

(3) the contract is for services or property for which there is only one source or for which it is otherwise impracticable to obtain competition;

(4) the contract is to respond to an emergency for which the public exigency does not permit the delay incident to the competitive process;

(5) the contract is for personal or professional services or services for which competitive bidding is precluded by law; or

(6) the contract, without regard to form and which may include bonds, notes, loan agreements, or other obligations, is for the purpose of borrowing money or is a part of a transaction relating to the borrowing of money, including:

(A) a credit support agreement, such as a line or letter of credit or other debt guaranty;

(B) a bond, note, debt sale or purchase, trustee, paying agent, remarketing agent, indexing agent, or similar agreement;

(C) an agreement with a securities dealer or investment adviser, broker, or underwriter; and

(D) any other contract or agreement considered by the executive committee to be appropriate or necessary in support of the authority's financing activities.

(3) Section 452.108 (a) and (b) of the Texas Transportation Code provides:

(a) An authority may contract for payment with debt obligations and for performance and payments to extend longer than one fiscal year if the contract provides for the discharge of the authority's contractual obligations by any method, including:

(1) committing current year funds, future tax revenues, or

cancellation charges; and

(2) making the contract subject to the future availability of funds.

(b) The executive committee may delegate to designated persons the power to contract for construction, services, and property, within budgeted amounts approved by the executive committee.

(4) Section 452.109 of the Texas Transportation Code provides:

(a) A subregional board created under Subchapter O that governs an authority consisting of one subregion shall document the reasons for the award of a contract for:

(1) professional services awarded to a person other than the person proposing to deliver the services at the lowest cost; or

(2) construction, services, or property awarded to a person other than the person recommended by the staff of the authority.

(b) The documentation required by subsection (a) must include all the reason for not selecting, as appropriate, the person proposing to deliver the services at the lowest cost or the person recommended by the staff.

(5) All contracts of the Authority shall be awarded by competitive sealed bidding pursuant to § 3-202 (Competitive Sealed Bidding), except as provided in:

(a) section 2-101(5) (contracts for legal services);

(b) section 3-203 (Competitive Sealed Proposals);

(c) section 3-204 (Small Purchase);

(d) section 3-205 (Sole Source Procurement);

(e) section 3-206 (Emergency Procurements);

(f) section 3-207 (Statutory Professional Services); or

(g) § 5-500 (Architect-Engineer and Land Surveying Services).

Section 3-202 - Competitive Sealed Bidding

§ 3-202.01 General Requirements

Competitive sealed bidding is the preferred method for the procurement of property, services, or construction. The provisions of this § 3-202 apply to every procurement made by competitive sealed bidding, including multi-step sealed

bidding.

§ 3-202.02 The Invitation for Bids

(1) An Invitation for Bids shall be used to initiate a competitive sealed bid procurement.

(2) The Invitation for Bids shall include the following:

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

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

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

(3) Reserved.

(4) The Invitation for Bids may incorporate documents by reference provided that the Invitation for Bids specifies where such documents can be obtained.

(5) The Invitation for Bids shall require bidders to acknowledge the receipt of all amendments issued.

§ 3-202.03 Bidding Time

Bidding time is the period of time between the date of distribution of the Invitation for Bids and the time and date set for receipt of bids. In each case, bidding time will be set to provide bidders a reasonable time to prepare their bids. A minimum of 21 days shall be provided, unless a shorter time is deemed necessary for a particular procurement as determined in writing by the Contracting Officer.

§ 3-202.04 Bidder Submissions

(1) The Invitation for Bids shall provide a form which shall include space in which the bid price shall be inserted and which the bidder shall sign and submit along with all other necessary submissions.

(2) Reserved.

(3) Bid samples or descriptive literature may be required when it is necessary to evaluate required characteristics of the items bid. The Invitation for Bids shall state that bid samples or descriptive literature should not be submitted unless expressly requested and that, regardless of any attempt by a bidder to

condition the bid, unsolicited bid samples or descriptive literature which are submitted at the bidder's risk will not be examined or tested and will not be deemed to vary any of the provisions of the Invitation for Bids.

§ 3-202.05 Public Notice

(1) Invitations for Bids or notices of the availability of Invitations for Bids shall be mailed or otherwise furnished to a sufficient number of bidders for the purpose of securing competition. Notices of availability shall indicate where, when, and for how long Invitations for Bids may be obtained; generally describe the property, service, or construction desired; and may contain other appropriate information. When appropriate, the Contracting Officer may require payment of a fee or a deposit for the supplying of the Invitation for Bids.

(2) Any procurement for which competitive sealed bids are required by law, as described in § 3-201(1), shall require notice published once, at least 15 days before the date fixed for receiving bids, in a newspaper of general circulation in the Authority's service area.

(3) A copy of the Invitation for Bids shall be made available for public inspection at the office of the Authority.

§ 3-202.06 Bidders Lists

(1) Bidders lists may be compiled to provide the Authority with the names of businesses that may be interested in competing for various types of contracts. Unless otherwise provided, inclusion or exclusion of the name of a business does not indicate whether the business is responsible in respect to a particular procurement or otherwise capable of successfully performing a contract with the Authority.

(2) Businesses that fail to respond to Invitations for Bids or notices of availability on three consecutive procurements of similar items may be removed from the applicable bidders list after notice to the bidder. Prospective bidders currently meeting any criteria established by the Authority for inclusion on the list may be reinstated on such lists at their request.

(3) Names and addresses on bidders lists shall be available for public inspection.

§ 3-202.07 Pre-Bid Conferences

Pre-bid conferences may be conducted to explain the procurement requirements. They shall be announced to all prospective bidders known to have received an Invitation for Bids. The conference should be held long enough after the Invitation for Bids has been issued to allow bidders to become familiar with it but sufficiently before bid opening to allow consideration of the conference results in preparing their bids. Nothing stated at the pre-bid conference shall change the Invitation for Bids unless a change is made by written amendment as provided in §

3-202.08 (Amendments to Invitations for Bids), and the Invitation for Bids or the notice of pre-bid conference shall so provide. A summary of the conference shall be supplied to all those prospective bidders known to have received an Invitation for Bids. If a transcript is made, it shall be a public record.

§ 3-202.08 Amendments to Invitations for Bids

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

- (1) make any changes in the Invitation for Bids such as changes in quantity, purchase descriptions, delivery schedules, and opening dates;
- (2) correct defects or ambiguities; or
- (3) furnish to other bidders information given to one bidder if such information will assist the other bidders in submitting bids or if the lack of such information would prejudice the other bidders. No award shall be made on the invitation unless such amendment has been issued in sufficient time to permit all prospective bidders to consider such information in submitting or modifying their bids.

§ 3-202.09 Pre-Opening Modification or Withdrawal of Bids

- (1) Bids may be modified or withdrawn through the electronic bid portal designated in the Invitation for Bids prior to the time and date set for bid opening.
- (2) If a bid is withdrawn in accordance with this section, the bid security, if any, shall be returned to the bidder.
- (3) All documents relating to the modification or withdrawal of bids shall be made a part of the appropriate procurement file.

§ 3-202.10 Late Bids, Withdrawals, and Modifications

- (1) Any bid received after the time and date set for receipt of bids is late. Any withdrawal or modification of a bid received after the time and date set for opening of bids at the place designated for opening is late.
- (2) Except as provided in § 3-802.05 or § 3-804.05 below, no late bid, late modification, or late withdrawal will be considered unless received before contract award and the bid, modification, or withdrawal would have been timely but for the action or inaction of Authority personnel.
- (3) Bidders submitting late bids that will not be considered for award shall be so notified as soon as practicable.

(4) Records shall be made and kept for each late bid, late modification, or late withdrawal.

§ 3-202.11 Receipt, Opening, and Recording of Bids

(1) Upon its receipt, each bid and modification shall be time-stamped but not opened and shall be stored in a secure place until the time and date set for bid opening.

(2) Bids and modifications shall be opened publicly, in the presence of one or more witnesses, at the time, date, and place designated in the Invitation for Bids. The name of each bidder, the bid price, and such other information as is deemed appropriate by the Contracting Officer shall be read aloud or otherwise made available. Such information also shall be recorded at the time of bid opening; that is, the bids shall be tabulated or a bid abstract made. The names and addresses of required witnesses also shall be recorded at the opening. The opened bids shall be available for public inspection except to the extent the bidder designates trade secrets or other proprietary data to be confidential as set forth in this section. Material so designated shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid. Prices and makes and model or catalogue numbers of the items offered, deliveries, and terms of payment shall be publicly available at the time of bid opening regardless of any designation to the contrary.

(3) The Contracting Officer shall examine the bids to determine the validity of any requests for nondisclosure of trade secrets and other proprietary data identified in writing. If the parties do not agree as to the disclosure of data, the Contracting Officer shall inform the bidders in writing what portions of the bids will be disclosed and that, unless the bidder protests under Chapter 10 (Administrative Remedies) of these regulations, the bids will be so disclosed. The bids shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data.

§ 3-202.12 Mistakes in Bids

(1) Correction or withdrawal of a bid because of an inadvertent, nonjudgmental mistake in the bid requires careful consideration to protect the integrity of the competitive bidding system and to ensure fairness. If the mistake is attributable to an error in judgment, the bid may not be corrected. Bid correction or withdrawal by reason of a nonjudgmental mistake is permissible but only to the extent it is not contrary to the interest of the Authority or the fair treatment of other bidders.

(2) A bidder may correct mistakes discovered before the time and date set for bid opening by withdrawing or correcting the bid as provided in § 3-202.09 (Pre-Opening Modification or Withdrawal of Bids).

(3) When the Contracting Officer knows or has reason to conclude that a

mistake has been made, such officer should advise the bidder why a mistake is suspected and request the bidder to confirm the bid. Situations in which confirmation of bids should be requested include obvious errors apparent on the face of the bid or a bid unreasonably lower than the other bids submitted or the Authority's estimate. If the bidder alleges mistake, the bid may be corrected or withdrawn if the conditions set forth in this section are met.

(4) This subsection sets forth procedures to be applied in three situations described in this subsection in which mistakes in bids are discovered after the time and date set for bid opening but before award.

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

(i) return the number of signed bids required by the Invitation for Bids;

(ii) furnish required information concerning the number of its employees;

(iii) sign the bid, but only if the unsigned bid is accompanied by other material clearly indicating the bidder's intent to be bound; or

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

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

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

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

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

- (i) a mistake is clearly evident on the face of the bid document but the intended correct bid is not similarly evident; or
- (ii) the bidder submits proof which clearly and convincingly demonstrates that a mistake was made.

(5) Mistakes discovered after award shall not be corrected except where the Vice President of Procurement, or equivalent position, Procurement, or equivalent position, makes a written determination that it would be unconscionable not to allow the mistake to be corrected.

(6) When a bid is corrected or withdrawn, or correction or withdrawal is denied, the Contracting Officer shall prepare a written determination showing that the relief was granted or denied in accordance with these regulations.

§ 3-202.13 Bid Evaluation

(1) Bids shall be unconditionally accepted without alteration or correction, except as authorized by these regulations. Bids shall be evaluated based on the requirements set forth in the Invitation for Bids, which may include criteria to determine acceptability (such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose) and the bid price (such as discounts, transportation costs, and total or life-cycle costs). All criteria that will be considered in evaluation for award shall be objectively measurable. The Invitation for Bids shall set forth all evaluation factors for source selection and the relative importance of each factor. No factor may be used in bid evaluation that is not set forth in the Invitation for Bids.

(2) To be considered for award, a bid must be "responsive"; i.e., comply in all material respects with the Invitation for Bids (see § 3-101(12) defining "responsive bidder"). Bids must be responsive so that all bidders may stand on an equal footing and the integrity of the competitive procurement system may be maintained. Only minor informalities in bids described in § 3-202.12(4)(a) can be contained in bids to be considered for award. Examples of nonresponsive bids include:

- (a) failure to sign the bid;
- (b) failure to acknowledge receipt of a material amendment to the Invitation for Bids;
- (c) bids containing any exception to, or any qualification of, any material requirement of the Invitation for Bids;
- (d) bids imposing any condition or altering the rights of the Authority (e.g., conditioned on the occurrence of any event, the receipt of material or parts, "negotiation" of the warranty, or nondisclosure of information);

(e) failure to furnish items or information required to be submitted with the bid;

(f) bids which are indefinite, uncertain, or ambiguous (the consideration of which would give the bidder an unfair competitive advantage); and

(g) bids containing unsolicited descriptive literature if the bid creates any uncertainty as to whether the bidder is offering to conform to the specifications.

(3) Responsibility of prospective contractors is covered by § 3-400 (Responsibility) of these regulations.

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

(a) inspection or testing of a product prior to award for such characteristics as quality or workmanship;

(b) examination of such elements as appearance, finish, taste, or feel; or

(c) other examinations to determine whether it conforms with any other purchase description requirements.

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

(5) Following determination of product acceptability as set forth in this section (if any is required), bids will be evaluated to determine which bidder offers the lowest cost to the Authority in accordance with the evaluation criteria set forth in the Invitation for Bids.

(6) Nothing in this section shall be deemed to permit contract award to a bidder submitting a higher quality item than that designated in the Invitation for Bids if such bidder is not also the lowest bidder as determined under this section. Further, this section does not permit negotiations with any bidder.

(7) Pursuant to Chapter 2252, Subchapter A, of the Government Code, V.T.C.A., as amended, the Authority may not award a contract for general construction, improvements, services, or public works projects or purchases of supplies, materials, or equipment to a nonresident bidder unless the nonresident's bid is lower than the lowest bid submitted by a responsible Texas resident bidder by the same amount that a Texas resident bidder would be required to underbid a nonresident bidder to obtain a comparable contract in the state in which the

nonresident's principal place of business is located.

(a) "Nonresident bidder", for purposes of this section, means a bidder whose principal place of business is not in Texas but excludes a contractor whose ultimate parent company or majority owner has its principal place of business in Texas.

(b) "Texas resident bidder", for purposes of this section, means a bidder whose principal place of business is in Texas and includes a contractor whose ultimate parent company or majority owner has its principal place of business in Texas.

(c) This subsection (7) does not apply to a contract involving federal funds.

§ 3-202.14 Low Tie Bids

(1) Low tie bids are low responsive bids from responsible bidders that are identical in price and which meet all the requirements and criteria set forth in the Invitation for Bids.

(2) Award upon receipt of low tie bids shall not be made by drawing lots, except as set forth below, or by dividing business among the tie bidders. In the discretion of the Vice President of Procurement, or equivalent position award shall be made in any manner provided below that will resolve a low tie bids situation. If no permissible method will be effective in resolving the situation and a written determination is made so stating, award may be made by drawing lots.

(3) Procedures which can be used to resolve a low tie bids situation include:

(a) awarding the contract to a business providing property produced or manufactured in Texas or to a business that otherwise maintains a place of business in the Authority's service area;

(b) awarding to the tie bidder which is a disadvantaged, minority and/or woman-owned business enterprise as defined by policies of the Authority;

(c) where identical low bids include the cost of delivery, awarding the contract to the tie bidder farthest from the point of delivery;

(d) awarding the contract to the tie bidder who received the previous award and continuing to award succeeding contracts to the same bidder so long as all low bids are identical; or

(e) rejecting all bids and negotiating a price with the tie bidders provided that the contract shall be let for less than the lowest responsive bid received.

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

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

A copy of each such record shall be provided to legal counsel.

§ 3-202.15 Award

(1) The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids. In the event all bids for a construction project exceed available funds as certified by the appropriate fiscal officer and the low responsive and responsible bid does not exceed such funds by more than five percent, the President & CEO is authorized in situations where time or economic considerations preclude resolicitation of work of a reduced scope to negotiate an adjustment of the bid price (including changes in the bid requirements) with the low responsive and responsible bidder in order to bring the bid within the amount of available funds.

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

(3) All new contract awards made under this section shall be reported quarterly by the President & CEO in a written report to the Board of Directors.

§ 3-202.16 Publicizing Awards

Written notice of award shall be sent to the successful bidder. In procurements over \$50,000, each unsuccessful bidder shall be notified of the award. Notice of the award shall be made available to the public.

§ 3-202.17 Multi-Step Competitive Sealed Bidding

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

(2) The multi-step competitive sealed bidding method may be used when it is not practical to prepare initially a definitive purchase description which will be suitable to permit an award based on price. Multi-step competitive sealed bidding may be used when it is considered desirable:

(a) to invite and evaluate technical offers to determine their acceptability to fulfill the purchase description requirements;

(b) to conduct discussions for the purposes of facilitating understanding of the technical offer and purchase description requirements and, where appropriate, obtain supplemental information, permit amendments of technical offers, or amend the purchase description;

(c) to accomplish the purposes in subsections (a) and (b), above, prior to soliciting priced bids; and

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

§ 3-202.18 Pre-Bid Conferences in Multi-Step Competitive Sealed Bidding

Prior to the submission of unpriced technical offers, a pre-bid conference as contemplated by § 3-202.07 (Pre-Bid Conferences) may be conducted by the Contracting Officer. The Contracting Officer also may hold a conference of all potential bidders in accordance with § 3-202.07 at any time during the evaluation of the unpriced technical offers.

§ 3-202.19 Phase One of Multi-Step Competitive Sealed Bidding

(1) Multi-step competitive sealed bidding shall be initiated by the issuance of an Invitation for Bids in the form required by § 3-202.02 (The Invitation for Bids), except as hereinafter provided. In addition to the requirements set forth in § 3-202.02, the multi-step Invitation for Bids shall state:

(a) that unpriced technical offers are requested;

(b) whether priced bids are to be submitted at the same time as technical offers (if they are, such priced bids shall be submitted in a separate electronic submission);

(c) that it is a multi-step competitive sealed bid procurement and priced bids will be considered only in the second phase and only from those bidders whose technical offers are found acceptable in the first phase;

(d) the criteria to be used in the evaluation of the technical offers;

(e) that the Authority, to the extent the Contracting Officer finds necessary, may conduct oral or written discussions regarding the technical

offers;

(f) that bidders may designate those portions of the technical offers which contain trade secrets or other proprietary data which are to remain confidential; and

(g) that the item being procured shall be furnished generally in accordance with the bidder's technical offer as found to be finally acceptable and shall meet the requirements of the Invitation for Bids.

(2) After receipt of technical offers, amendments to the Invitation for Bids shall be distributed only to bidders who submitted technical offers, and they shall be permitted to submit new technical offers or to amend those submitted. If, in the opinion of the Contracting Officer, a contemplated amendment will significantly change the nature of the procurement, the Invitation for Bids shall be cancelled in accordance with § 3-300 (Cancellation of Solicitations; Rejection of Bids or Proposals) of these regulations and a new Invitation for Bids issued.

(3) Technical offers shall not be opened publicly but shall be opened in front of two or more Authority employees. Such offers shall not be disclosed to unauthorized persons. Bidders may request nondisclosure of trade secrets and other proprietary data in writing.

(4) The technical offers submitted by bidders shall be evaluated solely in accordance with the criteria set forth in the Invitation for Bids. The unpriced technical offers shall be categorized as:

(a) acceptable;

(b) potentially acceptable (that is, reasonably susceptible of being made acceptable); or

(c) unacceptable (the Contracting Officer shall record in writing the basis for finding an offer unacceptable and make it part of the procurement file).

(5) The Contracting Officer may conduct discussions with any bidder who submits an acceptable or potentially acceptable technical offer. Discussions shall be conducted in accordance with the provisions of § 3-203.15(3). Once discussions have begun, any bidder who has not been notified that its offer has been finally found unacceptable may submit supplemental information amending its technical offer (and any price proposal previously submitted) at any time until the closing date established by the Contracting Officer. Such submission may be made at the request of the Contracting Officer or upon the bidder's own initiative.

(6) The Contracting Officer may initiate Phase Two of the procedure without technical discussions if, in the Contracting Officer's opinion, there are sufficient acceptable technical offers to ensure effective price competition in the second phase. If the Contracting Officer finds that such is not the case, the Contracting Officer shall issue an amendment to the Invitation for Bids or engage in

technical discussions as set forth below.

(7) When the Contracting Officer determines a bidder's technical offer to be unacceptable, such offeror shall be notified and shall not be afforded an additional opportunity to supplement its technical offer.

§ 3-202.20 Mistakes During Multi-Step Competitive Sealed Bidding

Mistakes may be corrected or bids may be withdrawn during Phase One at any time. During Phase Two, mistakes may be corrected or withdrawal permitted in accordance with § 3-202.12 (Mistakes in Bids).

§ 3-202.21 Phase Two of Multi-Step Competitive Sealed Bidding

(1) Upon the completion of Phase One, the Contracting Officer shall either:

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

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

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

(a) as specifically set forth in § 3-202.17 (Multi-Step Competitive Sealed Bidding) through this § 3-202.21; and

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

Section 3-203 - Competitive Sealed Proposals

§ 3-203.01 Authority for Use

When the Contracting Officer determines in writing that the use of competitive sealed bidding is either not practical or not advantageous to the Authority, a contract may be entered into by competitive sealed proposals. The provisions of this § 3-203 apply to every procurement made by competitive sealed proposals.

§ 3-203.02 Conditions for Use

(1) As used in this section, the words "practicable" and "advantageous" are to be given ordinary dictionary meanings. The term "practicable" denotes what may be accomplished or put into practical application. "Advantageous" connotes a

judgmental assessment of what is in the Authority's best interest. Competitive sealed bidding may be practicable (that is, reasonably possible) but not necessarily advantageous (that is, in the Authority's best interest).

(2) Competitive sealed bidding is the preferred method of procurement; however, if it is not practicable, competitive sealed proposals should be used. If competitive sealed bidding is practicable, it may then be considered whether competitive sealed bidding is advantageous. If competitive sealed bidding is determined not to be advantageous, competitive sealed proposals may be used when authorized as provided in this section. The key element in determining advantageousness is the need for flexibility. The competitive sealed proposals method differs from competitive sealed bidding in three important ways:

(a) it provides considerably more flexibility in utilizing evaluation factors other than price in source selection;

(b) it permits discussions with competing offerors and changes in their proposals, including price; and

(c) it allows comparative judgmental evaluations to be made when selecting among acceptable proposals for award of the contract.

(3) An important difference between competitive sealed proposals and competitive sealed bidding is the finality of initial offers. Under competitive sealed proposals, alterations in the nature of a proposal, and in prices, may be made after proposals are opened. Such changes are not allowed, however, under competitive sealed bidding (except to the extent allowed in the first phase of multi-step competitive sealed bidding). Therefore, unless it is anticipated that a contract can be awarded solely on the basis of information submitted by bidders at the time of opening, competitive sealed bidding is not practicable or advantageous. Another consideration concerns the type of evaluations needed after offers are received. Where evaluation factors involve the relative abilities of offerors to perform, including degrees of technical or professional experience or expertise, use of competitive sealed proposals is the appropriate procurement method. Similarly, such method is appropriate where the need to be satisfied involves weighing design and aesthetic values to the extent that price is a secondary consideration. Further, where the types of property, services, or construction may require the use of comparative, judgmental evaluations to evaluate them adequately, use of competitive sealed proposals is the appropriate method.

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

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

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

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

(d) whether award may need to be based upon a comparative evaluation as stated in the Request for Proposals of differing price, quality, and contractual factors in order to determine the most advantageous offering to the Authority. Quality factors include technical and performance capability and the content of the technical proposal; and

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

(5) A determination may be made to use competitive sealed proposals if it is determined that it is not advantageous to the Authority (even though practicable) to use competitive sealed bidding. Factors to be considered in determining whether competitive sealed bidding is not advantageous include:

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

(b) whether the factors listed in subsections 4(b) through (d), above, are desirable in conducting a procurement rather than necessary; if they are, then such factors may be used to support a determination that competitive sealed bidding is not advantageous.

(6) When the Vice President of Procurement, or equivalent position, Vice President of Procurement, or equivalent position, has determined in writing, in accordance with § 3-305(3), that the use of negotiation after cancellation of an Invitation for Bids is appropriate, the Contracting Officer may negotiate and make award without initiating a new procurement, provided the negotiated price is the lowest price offered by any responsible offeror. The Contracting Officer shall reestablish the procurement as a Request for Proposals, and ensure that each bidder that submitted a bid in response to the Invitation for Bids is given the opportunity to participate.

§ 3-203.03 Determinations

The determinations required by this section for the use of competitive sealed proposals may be made by category of property, service, or construction item that it is either not practicable or not advantageous to the Authority to procure specified types of property, services, or construction by competitive sealed bidding. Procurements of the specified types of property, services, or construction then may be made by competitive sealed proposals based upon such determination. The officer who made such determination may modify or revoke it at any time, and such determination should be reviewed for current applicability from time to time.

§ 3-203.04 Content of the Request for Proposals

The Request for Proposals shall be prepared in accordance with § 3-202.02 (The Invitation for Bids) provided that it shall also include:

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

§ 3-203.05 Proposal Preparation Time

Proposal preparation time shall be set to provide offerors a reasonable time to prepare their proposals. A minimum of 21 days shall be provided unless a shorter time is deemed necessary for a particular procurement as determined in writing by the Contracting Officer.

§ 3-203.06 Form of Proposal

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

§ 3-203.07 Public Notice

Public notice shall be given by advertising and by distributing the Request for Proposals in the same manner as provided for Invitation for Bids under § 3-202.05 (Public Notice).

§ 3-203.08 Use of Bidders List

Bidders lists compiled and maintained in accordance with § 3-202.06 (Bidders Lists) may serve as a basis for soliciting competitive sealed proposals.

§ 3-203.09 Pre-Proposal Conferences

Pre-proposal conferences may be conducted in accordance with § 3-202.07 (Pre-Bid Conferences). Any such conference should be held prior to submission of initial proposals.

§ 3-203.10 Amendments to Requests for Proposals

Amendments to Requests for Proposals may be made in accordance with § 3-202.08 (Amendments to Invitations for Bids) prior to submission of proposals. After submission of proposals, amendments may be made in accordance with § 3-202.19 (Phase One of Multi-Step Competitive Sealed Bidding).

§ 3-203.11 Modification or Withdrawal of Proposals

Proposals may be modified or withdrawn prior to the established due date in accordance with § 3-202.09 (Pre-Opening Modification or Withdrawal of Bids). For the purposes of this section and § 3-203.12 (Late Proposals, Withdrawals, and

Modifications), the established due date is either the time and date announced for receipt of proposals or receipt of modifications to proposals, if any; or if discussions have begun, it is the time and date by which best and final

offers must be submitted; provided, that only offerors who submitted proposals by the time announced for receipt of proposals may submit best and final offers.

§ 3-203.12 Late Proposals, Withdrawals, and Modifications

Any proposal, withdrawal, or modification received after the established due date at the place designated for receipt of proposals is late. See § 3-203.11 (Modification or Withdrawal of Proposals) for the definition of "established due date." They may be considered only in accordance with § 3-202.10 (Late Bids, Withdrawals, and Modifications).

§ 3-203.13 Receipt and Registration of 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 property, service, or construction item offered. The Register of Proposals shall be open to public inspection only after award of the contract. Proposals shall not be opened publicly but shall be opened in the presence of two or more Authority representatives. Proposals and modifications shall be shown only to Authority personnel having a legitimate interest in them.

§ 3-203.14 Evaluation of Proposals

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

(2) The evaluation shall be based on the evaluation factors set forth in the Request for Proposals. Numerical rating systems are encouraged but are not required. If a numerical rating system is used, however, it shall be set forth in the Request for Proposals. Factors not specified in the Request for Proposals shall not be considered.

(3) For the purpose of conducting discussions under § 3- 203.15 (Proposal Discussions with Individual Offerors), proposals initially shall be classified as:

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

Offerors whose proposals are unacceptable shall be so notified promptly.

§ 3-203.15 Proposal Discussions with Individual Offerors

(1) For the purposes of this section, the term "offerors" includes only those businesses submitting proposals that are acceptable or potentially acceptable. The term shall not include businesses who submitted unacceptable proposals.

(2) Discussions are held with offerors in order to:

(a) promote understanding of the Authority's requirements and the offerors' proposals; and

(b) facilitate arriving at a contract that will be most advantageous to the Authority taking into consideration price and the other evaluation factors set forth in the Request for Proposals.

(3) Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. The Contracting Officer should establish procedures and schedules for conducting discussions. Those aspects of proposals which are unclear, improperly substantiated, or fail to meet the requirements of the solicitation must be discussed with offerors. If during discussions there is a need for any substantial clarification of or change in the Request for Proposals, the Request shall be amended to incorporate such clarification or change. Any substantial oral clarification of a proposal shall be reduced to writing by the offeror. In conducting discussions, the Contracting Officer and other Authority representatives involved shall not engage in --

(a) technical leveling (i.e., helping offerors to improve their proposals through successive rounds of discussions that point out those weaknesses that are the offeror's sole responsibility or conducting discussions which eliminate the technical discrimination necessary for source selection so that price, however weighted, assumes disproportionate importance);

(b) technical transfusion (i.e., the Authority's disclosure of technical information pertaining to a proposal that results in improvement of a competing proposal); or

(c) auction techniques, such as --

(i) indicating to an offeror a cost or price that it must meet in order to obtain further consideration;

(ii) advising an offeror of its price standing relative to another offeror (however, it is permissible to inform an offeror that its cost or price is considered by the Authority to be too high or unrealistic); and

(iii) otherwise furnishing information about other offerors' prices.

(4) The Contracting Officer shall establish a common date and time for the submission of best and final offers. Best and final offers shall be submitted only once; provided, however, the President & CEO may make a written determination that it is in the Authority's best interest to conduct additional discussions or change the Authority's requirements and require another submission of best and final offers. Otherwise, no discussion of or changes in the best and final offers shall be allowed prior to award. Offerors also shall be informed that, if they do not submit a notice of withdrawal or another best and final offer, their most recent offer will be construed as their best and final offer.

§ 3-203.16 Mistakes in Proposals

(1) Proposals may be modified or withdrawn as provided in § 3-203.11 (Modification or Withdrawal of Proposals).

(2) When the Contracting Officer knows or has reason to conclude before award that a mistake has been made, the offeror should be requested to confirm the proposal. If the offeror alleges mistake, the proposal may be corrected or withdrawn during any discussions that are held or if the conditions set forth in subsections (3) through (5), below, are met.

(3) This subsection sets forth procedures to be applied in four situations in which mistakes in proposals are discovered after receipt of proposals but before award.

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

(b) Minor informalities, unless otherwise corrected by an offeror as provided in this section, shall be treated as they are under competitive sealed bidding. See § 3-202.12 (Mistakes in Bids).

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

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

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

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

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

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

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

(4) Mistakes shall not be corrected after award of the contract except where the Vice President of Procurement, or equivalent position, Vice President of Procurement, or equivalent position, finds it would be unconscionable not to allow the mistake to be corrected.

(5) When a proposal is corrected or withdrawn, or correction or withdrawal is denied under this subsection, the Contracting Officer shall prepare a written determination showing that the relief was granted or denied in accordance with these regulations.

§ 3-203.17 Award

(1) Award shall be made to the responsible offeror whose proposal is determined by the Contracting Officer in writing to be the most advantageous to the Authority taking into consideration the price and evaluation factors set forth in the Request for Proposals.

(2) All new contract awards made under this section shall be reported quarterly by the President & CEO in a written report to the Board of Directors.

§ 3-203.18 Publicizing Awards

After a contract is entered into, notice of award shall be made available to the public. When the award exceeds \$50,000, each unsuccessful offeror shall be notified of the award.

Section 3-204 - Small Purchases

§ 3-204.01 Authority to Make Small Purchases

(1) This section may be used for the procurement of property, services, or construction if the aggregate amount involved is \$50,000 or less. Property,

services, or construction items which may be obtained under current Authority contracts shall be procured under such agreements in accordance with the terms of such contracts. The Contracting Officer may prescribe solicitation provisions, contract clauses, and purchase order forms for small purchases made under the authority of this section.

(2) If the property, service, or construction item is available from only one business, Sole Source Procurement § 3-205.02 and § 3-205.03 of these regulations shall be used. A record of the sole source procurement shall be maintained along with the small purchase file which sets forth in writing that the conditions for use have been satisfied.

(3) Procurement requirements shall not be artificially divided to avoid using the other source selection methods set forth in these regulations.

(4) Other sections of this Chapter 3 may be used if determined by the Contracting Officer to be in the Authority's best interest.

(5) Where in these regulations written determinations are required, if the small purchases method of procurement is being utilized, these requirements shall be considered satisfied by execution of the purchasing instrument by the Contracting Officer. In all cases a record shall be maintained along with the small purchase file which sets forth in writing the rationale for the determination(s).

§ 3-204.02 Competition for Small Purchases

(1) Businesses shall be solicited to submit written quotations or oral quotations that are recorded and placed in the procurement file. The names of the businesses submitting quotations and the date and amount of each quotation shall be recorded and maintained as a public record.

(2) Insofar as it is practical for small purchases, no less than three (3) businesses shall be solicited to submit quotations, if it is expected that the required property, services or construction cannot be procured for \$2,500 or less. Award shall be made to the business offering the lowest acceptable quotation.

(3) Small purchases not exceeding \$2,500 may be accomplished without securing competitive quotations if the prices quoted are considered by the Contracting Officer to be fair and reasonable. To the extent practicable, such purchases shall be distributed equitably among qualified businesses. When practical, a quotation shall be solicited from other than the previous supplier prior to placing a repeat order. The administrative cost of verifying the fairness and reasonableness of the price of a purchase not exceeding \$2,500 may more than offset potential savings from detecting instances of overpricing. Therefore, action to verify that prices submitted are fair and reasonable need to be taken only when:

(a) the Contracting Officer suspects or has information (i.e., comparison to previous prices paid or personal knowledge of the item involved) to indicate that the price may not be fair and reasonable; or

(b) purchasing an item for which no comparable pricing information is readily available (i.e., an item that is not the same as, or is not similar to, other items that have been recently purchased on a competitive basis).

§ 3-204.03 Small Purchases of Professional Services

(1) If it is expected that the services of accountants, architects, landscape architects, engineers, land surveyors, physicians, surgeons, optometrists, real estate appraisers, registered nurses, forensic science, or interior designers can be procured for \$50,000 or less, the methods specified in this subsection may be used in lieu of the procedure specified in § 3- 207 (Statutory Professional Services) and in § 5-500 (Architect-Engineer and Land Surveying Services) of these regulations.

Before contacting any person to perform the required services, the Contracting Officer shall examine any current statements of qualifications on file with the Authority. Based on this examination, the Contracting Officer shall contact the most competent and qualified firm and attempt to negotiate a contract for the required services at a fair and reasonable price. If no current statements of qualifications are on file or the statements on file are inadequate to determine the most competent and qualified firm, technical proposals or statements of qualifications shall be solicited. A minimum of three firms shall be considered unless there are only one or two qualified firms; in the latter case, the Contracting Officer shall make a written determination justifying the consideration of only one or two firms. A price or fee shall not be solicited until the most competent and qualified firm is chosen, and only the most competent and qualified firm will be requested to submit a price. If, after negotiations, a fair and reasonable price cannot be agreed to, negotiations will be terminated with such firm and negotiations begun with the next most competent and qualified firm. The process shall continue until a contract can be negotiated at a fair and reasonable price to the Authority.

Section 3-205 - Sole Source Procurement

§ 3-205.01 General Authority

A contract for property, services, or construction may be awarded without competition when a Contracting Officer above the level of the procuring Contracting Officer determines in writing that the conditions for use set forth in this section have been satisfied.

§ 3-205.02 Conditions for Use

Sole source procurement is permissible only under the following conditions. In cases of reasonable doubt, competition should be solicited.

(1) The contract is for construction and:

- (a) no bid or proposal is received and there is no time for resolicitation or resolicitation likely would be futile, or
 - (b) only one bid or proposal is received and an appropriate determination has been made under 3-104 (Only One Bid or Proposal Received).
- (2) the contract is for services or property for which there is only one source. Examples include:
- (a) the existence of patent rights, copyrights, secret processes, or similar circumstances which have precluded more than one supplier;
 - (b) where the compatibility of equipment, accessories, or replacement parts is the paramount consideration and there is no assurance that other supplies will perform the same function;
 - (c) where a sole supplier's item is needed for trial use or testing or is being procured for resale; or
 - (d) the procurement of public utility services.
- (3) The contract is for services or property for which it is impracticable to obtain competition. Examples include:
- (a) bids or proposals have been solicited and no responsive bid or proposal has been received from a responsible bidder or offeror;
 - (b) only one bid or proposal is received and an appropriate determination has been made under 3-104 (Only One Bid or Proposal Received);
 - (c) the contract is for maintenance, repairs, or inspections where the exact nature or amount is not known;
 - (d) it is impossible to draft an adequate specification or statement of work; or
 - (e) the Authority will be reimbursed for the procurement by a third party who requires the use of a particular source.

§ 3-205.03 Negotiation

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

§ 3-205.04 Record of Sole Source Procurement

A record of sole source procurements shall be maintained that lists:

- (1) each contractor's name;
- (2) the amount and type of each contract;
- (3) the property, services, or construction procured under each contract; and
- (4) the identification number of each contract file.

The record of sole source procurements shall be submitted quarterly by the President & CEO in a written report to the Board of Directors.

Section 3-206 - Emergency Procurements

§ 3-206.01 General Authority

Subject to § 2-101 and notwithstanding any other provision of these regulations, the Vice President of Procurement, or equivalent position, or his or her designee may make or authorize others to make procurements in emergency conditions for which the public exigency will not permit the delay incident to competition.

§ 3-206.02 Definition of Emergency Conditions

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

- (1) the functioning of the Authority's operations;
- (2) the preservation or protection of property; or
- (3) the health or safety of any person.

§ 3-206.03 Scope of Emergency Procurements

Emergency procurements shall be limited to the property, services, or construction items necessary to meet the emergency.

§ 3-206.04 Source Selection Methods

- (1) The procedure used shall be selected to ensure that the required property, services, or construction items are procured in time to meet the emergency. Given this constraint, such competition as is practicable shall be obtained.
- (2) Competitive procurement is unsuccessful when bids or proposals received are unreasonable, noncompetitive, or exceed available funds as certified by

the appropriate fiscal officer, and time or other circumstances will not permit the delay required to resolicit competitive sealed bids or proposals. If emergency conditions exist after an unsuccessful attempt to use competitive procurement methods, an emergency procurement may be made.

§ 3-206.05 Determination and Record of Emergency Procurements

The Contracting Officer or the Authority official responsible for procurement shall make a written determination stating the basis for an emergency procurement and for the selection of the particular contractor. A record of each emergency procurement shall be made as soon as practicable and shall set forth:

- (1) the contractor's name;
- (2) the amount and type of the contract;
- (3) a listing of the property, services, or construction procured under the contract; and
- (4) the identification number of the contract file.

The record of emergency procurements shall be submitted quarterly by the President & CEO in a written report to the Board of Directors.

Section 3-207 - Statutory Professional Services

§ 3-207.01 Definitions

(1) The phrase "Statutory Professional Services" shall mean those professional services within the scope of the practice of accounting, architecture, landscape architecture, land surveying, optometry, medicine, professional engineering, real estate appraising, professional nursing, or forensic science, as defined by the laws of the State of Texas, or those performed by any licensed architect, landscape architect, land surveyor, optometrist, physician, surgeon, certified public accountant, professional engineer, state certified or state licensed real estate appraiser, registered nurse, forensic analyst, forensic science expert, or interior designers in connection with his professional employment or practice, or those provided by a person lawfully engaged in interior design, regardless of whether the person is registered as an interior designer under Chapter 1053 Occupations Code.

(2) The "Texas Professional Services Procurement Act" shall mean Chapter 2254, Subchapter A, of the Government Code, V.T.C.A., as amended.

§ 3-207.02 Application

The provisions of this section apply to the procurement of Statutory Professional Services which, under the Texas Professional Services Procurement Act, may not be obtained by the Authority on the basis of competitive bids; provided,

however, that architect-engineer services shall be obtained under § 5-501. Contracts for Statutory Professional Services must be awarded on the basis of demonstrated competence and qualifications for such services and at fair and reasonable prices as long as professional fees are consistent with and not higher than any published recommended practices and fees of the applicable professional association and do not exceed any maximum provided by Texas law.

§ 3-207.03 Requirement for Competitive Selection

Except as authorized under § 3-205 (Sole Source Procurement) or § 3-206 (Emergency Procurements), the competitive selection procedures of this section shall be used for all procurements of Statutory Professional Services in excess of \$50,000. Any procurement of such services not in excess of this amount may be procured in accordance with § 3-204 (Small Purchases).

§ 3-207.04 Statement of Qualifications

When Statutory Professional Services are needed on a recurring basis, the Contracting Officer shall actively solicit persons engaged in providing such services to submit annual statements of qualifications in a prescribed format which shall include the following information:

- (1) technical education and training;
- (2) general or special experience, certifications, licenses, and memberships in professional associations, societies, or boards;
- (3) an expression of interest in providing a particular Statutory Professional Service; and
- (4) any other pertinent information requested by the Contracting Officer.

Persons may amend statements of qualifications at any time by filing a new statement.

§ 3-207.05 Public Notice

Notice of the need for Statutory Professional Services shall be made by the Contracting Officer in the form of a Request for Proposals at least 21 days before the proposals are due. Adequate public notice shall be given as provided in § 3-202.05 (Public Notice) and, additionally, shall consist of distributing Requests for Proposals to persons interested in performing the services required by the proposed contract.

§ 3-207.06 Request for Proposals

The Request for Proposals shall be in the form specified by the Contracting Officer and contain at least the following information:

- (1) the type of services required;
- (2) a description of the work involved;
- (3) an estimate of when and for how long the services will be required;
- (4) the type of contract to be used;
- (5) a date by which proposals for the performance of the services shall be submitted;
- (6) a statement that the proposals shall be in writing;
- (7) a statement that offerors may designate those portions of the proposals which contain trade secrets or other proprietary data which may remain confidential;
- (8) a statement of the minimum information that the proposal shall contain, including:
 - (a) the name of the offeror, the location of the offeror's principal place of business and, if different, the place of performance of the proposed contract;
 - (b) if deemed relevant by the Contracting Officer, the age of the offeror's business and average number of employees over a previous period of time, as specified in the Request for Proposals;
 - (c) the abilities, qualifications, and experience of all persons who would be assigned to provide the required services;
 - (d) a listing of other contracts under which services similar in scope, size, or discipline to the required services were performed or undertaken within a previous period of time, as specified in the Request for Proposals; and
 - (e) a plan giving as much detail as is practical explaining how the services will be performed;
 - (f) the professional fees proposed for the services to be provided; and
- (9) the factors to be used in the evaluation and selection process and their relative importance.

§ 3-207.07 Evaluation Factors

Proposals shall be evaluated only on the basis of evaluation factors stated in the Request for Proposals. The following factors may be appropriate to use in

conducting the evaluation. The relative importance of these and other factors will vary according to the type of services being procured. The minimum factors are:

- (1) the plan for performing the required services;
- (2) ability to perform the services as reflected by technical training and education, general experience, specific experience in providing the required services, and the qualifications and abilities of personnel proposed to be assigned to perform the services;
- (3) the personnel, equipment, and facilities to perform the services currently available or demonstrated to be made available at the time of contracting;
- (4) a record of past performance of similar work; and
- (5) the fairness and reasonableness of the proposed fees.

§ 3-207.08 Pre-Proposal Conferences

Pre-proposal conferences, as appropriate, may be conducted in accordance with § 3-202.07 (Pre-Bid Conferences). Such a conference may be held anytime prior to the date established for submission of proposals.

§ 3-207.09 Receipt and Handling of Proposals

(1) Proposals and modifications shall be time-stamped upon receipt and held in a secure place until the established due date. Proposals shall not be opened publicly or disclosed to unauthorized persons but shall be opened in the presence of two or more Authority representatives. A Register of Proposals shall be established 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 services offered. The Register of Proposals shall be open to public inspection only after award of the contract.

(2) If the offeror selected for award has requested in writing the nondisclosure of trade secrets and other proprietary data so identified, the Contracting Officer shall examine the request in the proposal to determine its validity prior to entering negotiations. If the parties do not agree as to the disclosure of data in the contract, the Contracting Officer shall inform the offeror in writing what portion of the proposal will be disclosed and that, unless the offeror withdraws the proposal or protests under Chapter 10 (Administrative Remedies), the proposal will be so disclosed.

§ 3-207.10 Discussions

(1) The Contracting Officer or his designee shall evaluate all proposals submitted and may conduct discussions with any offeror. The purposes of such discussions shall be to:

- (a) determine in greater detail such offeror's competence and

qualifications; and

(b) explore with the offeror the scope and nature of the required services, the offeror's proposed method of performance, and the relative utility of alternative methods of approach.

(2) Discussions shall not disclose any information derived from proposals submitted by other offerors, and the Authority shall not disclose any information contained in any proposals until after award of the proposed contract has been made. The proposal of the offeror awarded the contract shall be open to public inspection except as otherwise provided in the contract.

(3) Proposals may be modified or withdrawn at any time prior to the conclusion of discussions.

§ 3-207.11 Selection of the Best Qualified Offerors

After conclusion of validation of qualifications, evaluation, and discussions, the Contracting Officer shall select, in the order of their respective ranking, no fewer than three acceptable offerors (or such lesser number if less than three acceptable proposals were received) whose proposals to provide the required services have received the highest evaluation.

§ 3-207.12 Negotiation and Award of Contract

(1) The Contracting Officer shall negotiate a contract with the highest evaluated offeror for the required services at compensation determined in writing to be fair and reasonable.

(2) Contract negotiations shall be directed toward:

(a) making certain that the offeror has a clear understanding of the scope of the work, specifically the essential requirements involved in providing the required services;

(b) determining that the offeror will make available the necessary personnel and facilities to perform the services within the required time; and

(c) agreeing upon compensation which is fair and reasonable, taking into account the estimated value of the required services and the scope, complexity, and nature of such services.

(3) If compensation, contract requirements, and contract documents can be agreed upon with the highest evaluated offeror, the contract shall be awarded to that offeror.

(4) If compensation, contract requirements, or contract documents cannot be agreed upon with the highest evaluated offeror, a written record stating the reasons therefor shall be placed in the file, and the Contracting Officer shall advise

such offeror of the termination of negotiations, which shall be confirmed by written notice within three days.

(5) Upon failure to negotiate a contract with the highest evaluated offeror, the Contracting Officer may enter into negotiations with the next highest evaluated offeror. If compensation, contract requirements, and contract documents can be agreed upon, then the contract shall be awarded to that offeror.

If negotiations again fail, negotiations shall be terminated as provided in subsection (4), above, and commenced with the next highest evaluated offeror.

(6) Written notice of award shall be public information and made a part of the contract file.

(7) Should the Contracting Officer be unable to negotiate a contract with any of the offerors initially selected, offers may be resolicited or additional offerors may be selected based on original, acceptable submissions in the order of their respective evaluation ranking and negotiations may continue in accordance with subsections (4) and (5), above, until an agreement is reached and the contract awarded.

§ 3-207.13 Memorandum of Evaluation and Negotiation

At the conclusion of negotiations resulting in the award of the contract, the Contracting Officer shall prepare a memorandum setting forth the bases of award, including:

(1) how the evaluation factors stated in the Request for Proposals were applied to determine the highest evaluated offerors; and

(2) the principal elements of the negotiations, including the significant considerations relating to price and the other terms of the contract.

All memoranda shall be included in the contract file and be a matter of public record.

§ 3-207.14 Reports

The President & CEO shall submit a written report quarterly to the Board of Directors listing all contracts awarded under this section in the preceding fiscal quarter. The report shall identify the parties to the contract, the contract amount, duration, and the services to be performed thereunder.

Section 3-300 - Cancellation of Solicitations; Rejection of Bids or Proposals

§ 3-301 Application

The provisions of this section shall govern the cancellation of any solicitations whether issued by the Authority under competitive sealed bidding, competitive sealed proposals, small purchases, or any other source selection method,

and rejection of bids or proposals in whole or in part.

§ 3-302 Policy

Solicitations should be issued only when there is a valid procurement need, unless the solicitation states that it is for informational purposes only. Preparing and distributing a solicitation requires the expenditure of the Authority's time and funds. Businesses likewise incur expense in examining and responding to solicitations. Therefore, although issuance of a solicitation does not compel award of a contract, a solicitation is to be cancelled only when there are cogent and compelling reasons to believe that the cancellation of the solicitation is in the Authority's best interest.

§ 3-303 Cancellation of Solicitation - Notice

Each solicitation issued by the Authority shall state that the solicitation may be cancelled as provided in this section.

§ 3-304 Cancellation Prior to Opening

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

(2) Prior to opening, a solicitation may be cancelled in whole or in part when the Contracting Officer determines in writing that such action is clearly in the Authority's best interest for reasons including, but not limited to, the fact that:

(a) the Authority no longer requires the property, services, or construction;

(b) the Authority no longer can reasonably expect to fund the procurement; or

(c) proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable.

(3) When a solicitation is cancelled prior to opening, bids that have been received shall be returned unopened to the bidders and notice of cancellation shall be sent to all businesses solicited. The notice of cancellation shall:

(a) identify the solicitation by number and short title or subject matter;

(b) briefly explain the reason for cancellation; and

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

§ 3-305 Cancellation After Opening

(1) After opening but prior to award, all bids or proposals may be rejected in whole or in part when the Contracting Officer determines in writing that such action is in the Authority's best interest for reasons including, but not limited to, the following:

(a) the construction, property, or services being procured are no longer required;

(b) ambiguous or otherwise inadequate specifications were part of the solicitation;

(c) the solicitation did not provide for consideration of all factors of significance to the Authority;

(d) prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds or bids received indicate that the needs of the Authority can be satisfied by a less expensive article differing from that for which the bids were invited;

(e) all otherwise acceptable bids or proposals received are at unreasonable prices, or only one bid is received, and the Contracting Officer cannot determine the reasonableness of the bid price;

(f) there is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith; or

(g) no responsive bid has been received from a bidder;

(h) specifications have been revised; or

(i) for other reasons, cancellation is clearly in the public's interest.

(2) When it is determined necessary to reject all bids under § 3-305(1) above, the Contracting Officer shall notify each bidder that all bids have been rejected and shall state the reason for such action.

(3) If the Invitation for Bids has been cancelled for the reasons specified in subparagraphs (1)(e), (1)(f), or (1)(g) above, the Vice President of Procurement or equivalent position or designee may authorize the Contracting Officer to complete the procurement through negotiation, in accordance with § 3-203.02(6).

§ 3-306 Rejection of Individual Bids or Proposals

This section applies to rejections of individual bids or proposals in whole or in part. Each solicitation issued by the Authority shall provide that any bid or proposal may be rejected in whole or in part when in the best interest of the Authority as provided in this section.

(1) As used in this subsection, "bid" means any bid submitted in competitive sealed bidding or in the second phase of multi-step competitive sealed bidding and includes submissions under § 3-204 (Small Purchases) if no changes in offers are allowed after submission. The following applies to the rejection of bids:

(a) the bid shall be rejected if the business that submitted the bid is non-responsible as determined under § 3-400;

(b) the bid shall be rejected if the bid is not responsive (that is, it does not conform in all material respects to the Invitation for Bids or the property, service, or construction item offered in the bid is unacceptable by reason of its failure to meet the requirements of the specifications or permissible alternates or other acceptability criteria set forth in the Invitation for Bids);

(c) the bid shall be rejected if the bidder imposes conditions that would modify requirements of the invitation or limit the bidder's liability to the Authority, since to allow the bidder to impose such conditions would be prejudicial to other bidders, which conditions include, but are not limited to when the bidder:

- (i) protects against future changes in conditions, such as increased costs, if total possible costs to the Authority cannot be determined;
- (ii) fails to state a price and indicates that price shall be "price in effect at time of delivery;"
- (iii) states a price but qualifies it as being "price in effect at time of delivery;"
- (iv) when not authorized by the invitation, conditions or qualifies a bid by stipulating that it is to be considered only if, before date of award, the bidder receives (or does not receive) award under a separate solicitation;
- (v) requires that the Authority is to determine that the bidder's product meets applicable Authority or other governmental regulations; or
- (vi) limits the rights of the Authority under any contract clause; or

(d) the bid may be rejected if the bid is materially unbalanced so that there is a risk that evaluation under the stated criteria may not result in the lowest overall cost to the Authority.

(e) the bid may be rejected if the contracting officer determines in writing that it is unreasonable as to price. Unreasonableness of price includes not only the total price of the bid, but the prices for individual line items as well.

(2) As used in this subsection, "proposal" means any offer submitted in response to any solicitation, including an offer under § 3-204 (Small Purchases), except a bid as

defined in subsection (2), above. Unless the solicitation states otherwise, proposals need not be unconditionally accepted without alteration or correction, and the Authority's stated requirements may be revised or clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include, but are not limited to, the following:

- (a) the business that submitted the proposal is non-responsible as determined under § 3-400;
 - (b) the proposal ultimately (that is, after any opportunity has passed for altering or clarifying the proposal) fails to meet the announced requirements of the Authority in some material respect;
 - (c) the proposed price is clearly unreasonable; or
 - (d) the offer is materially unbalanced so that there is a risk that evaluation under the stated criteria may not result in the lowest overall cost to the Authority.
- (4) Upon request, unsuccessful bidders or offerors shall be advised of the reasons for the rejection of their bids or proposals.

Section 3-400 - Responsibility

§ 3-401 Application

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

§ 3-402 Standards of Responsibility

(1) Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only. The award of a contract to a supplier based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional procurement or administrative costs. A prospective contractor must demonstrate affirmatively its responsibility, including (when necessary) that of its proposed subcontractors.

- (2) To be determined responsible, a prospective contractor must:
- (a) have the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
 - (b) be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;

- (c) have a satisfactory record of performance, including quality;
- (d) have a satisfactory record of integrity and business ethics;
- (e) have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors);
- (f) have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them;
- (g) have legal qualifications to contract with the Authority;
- (h) have supplied all necessary information in connection with the inquiry concerning responsibility; and
- (i) have complied with all applicable federal, state, and local laws regarding nondiscrimination and equal opportunity.

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

§ 3-403 Ability to Meet Standards

The prospective contractor may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request: evidence that the prospective contractor possesses such necessary items;

- (1) acceptable plans to subcontract for such necessary items; or
- (2) a documented commitment from, or explicit arrangement (which will be in existence at the time of award) with, a satisfactory source to provide the necessary items.

§ 3-404 Pre-award Surveys

When the information available to the Contracting Officer is insufficient to make a determination regarding responsibility, a pre-award survey of the prospective contractor's business and facilities may be conducted. A pre-award survey may cover one or more areas, including technical ability, production capacity, facilities, equipment, quality control, accounting system, financial capability, and record of

performance on other contracts.

§ 3-405 Responsibility Determination

Before awarding a contract, the Contracting Officer must be satisfied that the prospective contractor is responsible. 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 basis of the finding shall be prepared by the Contracting Officer. The Contracting Officer shall promptly cause to be sent a letter to the non-responsible bidder or offeror indicating that the Contracting Officer has determined it to be non-responsible and stating the reason(s) for the determination. The final determination shall be made part of the procurement file. Any determination by a Contracting Officer regarding responsibility shall be sustained under the procedures in Chapter 10 (Administrative Remedies) if there is a rational basis for such determination.

Section 3-500 - Cost or Pricing Data

§ 3-501 Scope of Section

This section sets forth the pricing policies which are applicable to contracts of any type and any price adjustments thereunder when cost or pricing data are required to be submitted. The provisions of this section requiring submission of cost or pricing data do not apply to a contract let by competitive sealed bidding (including multi-step bidding) or small purchases. However, cost or pricing data may be required under a contract let by competitive sealed bidding when price adjustments are subsequently made in such a contract.

§ 3-502 Requirement for Cost or Pricing Data

(1) Except as provided in § 3-502(2), cost or pricing data may be required to be submitted in support of a proposal when:

(a) any contract for property, services (except professional services), or construction expected to exceed \$500,000 is to be awarded by competitive sealed proposals or by sole source procurement; or

(b) adjusting the price of any contract for property, services (except professional services), or construction (including a contract awarded by competitive sealed bidding containing a cost or pricing data clause, whether or not cost or pricing data were required in connection with the initial pricing of the contract) if the adjustment involves aggregate increases and/or decreases in costs plus applicable profits expected to exceed \$100,000. For example, the requirement applies to a \$30,000 net modification resulting from a reduction of \$70,000 and an increase of \$40,000 when the reduction and increase are related. However, this requirement shall not apply when unrelated and separately priced adjustments for which cost or pricing data would not be required if considered separately are consolidated for administrative convenience.

(2) Cost and pricing data shall not be required:

(a) when the Contracting Officer determines the contract or adjusted price is based on:

(i) adequate price competition;

(ii) established catalogue prices or market prices; or

(iii) prices set by law or regulation; or

(b) when the Vice President of Procurement, or equivalent position, Vice President of Procurement, or equivalent position, determines in writing to waive the applicable requirement for submission of cost or pricing data in a particular pricing action and the reasons for such waiver are stated in the determination. A copy of such determination shall be kept in the contract file and made available to the public upon request.

(3) If, after cost or pricing data were initially requested and received, it is determined that adequate price competition does exist, the data need not be certified.

(4) Any contractor required to submit and certify cost or pricing data shall be required to submit accurate, current, and complete cost or pricing data from prospective or actual subcontractors in support of each subcontract cost estimate included in the contractor's submission whenever the subcontract cost estimate is either (i) more than \$100,000 or (ii) more than 10% of the contractor's price for the contract or contract modification, as the case may be. The exceptions stated in subsection (2), above, also shall be applicable to this requirement for subcontractor cost or pricing data. Contractors agree to include provisions in all subcontracts by which the contractor can require subcontractors to submit cost or pricing data in accordance with this subsection in support of subcontract modifications. While contractors shall be required to submit a subcontractor's certified cost or pricing data only from the prospective subcontractor most likely to be awarded the subcontract, other subcontractor quotations and information may be cost or pricing data of the contractor required to be submitted. Prospective subcontractor cost or pricing data shall be certified to be current, accurate, and complete as of the same date specified in contractors' certificates.

§ 3-503 Meaning of Terms

As used in the exceptions to the requirement for cost or pricing data, the terms "adequate price competition," "established catalogue prices or market prices," and "prices set by law or regulations" shall be construed in accordance with the following definitions.

(1) Adequate Price Competition. Price competition exists when competitive sealed proposals are solicited and at least two unaffiliated, responsible offerors independently compete for a contract to be awarded to the responsible

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

(2) Established Catalogue or Market Prices.

(a) "Established catalogue price" means the price included in a catalogue, price list, schedule, or other form that:

(i) is regularly maintained by a manufacturer or contractor;

(ii) is either published or otherwise available for inspection by customers; and

(iii) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved.

"Established market price" means a current price, established in the usual and ordinary course of trade between buyers and sellers, free to bargain and that can be substantiated through competition or from sources independent of offerors.

(3) Prices Set by Law or Regulation. The price of a supply or service is set by law or regulation if some governmental body establishes the price that the offeror or contractor may charge the Authority and other customers.

§ 3-504 Submission of Cost or Pricing Data and Certification

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

(2) The offeror or contractor is required to keep such submission current until the negotiations are concluded.

(3) The offeror or contractor shall certify, as soon as practicable after agreement is reached on price, that the cost or pricing data submitted are accurate, complete, and current as of a mutually determined date prior to reaching agreement. Certification shall be made using the certificate set forth in § 3-505.

(4) A refusal by the offeror to supply the required data shall be referred to the Vice President of Procurement, or equivalent position, Vice President of Procurement, or equivalent position, , whose duty shall be to determine in writing whether to disqualify the noncomplying offeror, to defer award pending further

investigation, or to enter into the contract. A refusal by a contractor to submit the required data to support a price adjustment shall be referred to the Vice President of Procurement, or equivalent position, Vice President of Procurement, or equivalent position, , who shall determine in writing to further investigate the price adjustment, not to allow any price adjustment, or to set the amount of the price adjustment, subject to the contractor's rights under the Disputes Clause of the contract.

§ 3-505 Certificate of Current Cost or Pricing Data

(1) When cost or pricing data must be certified, a certificate substantially as set forth below shall be included in the contract file along with any award documentation required under these regulations. The offeror or contractor shall be required to submit the certificate as soon as practicable after agreement is reached on the contract price or adjustment.

CERTIFICATE OF CURRENT COST OR PRICING DATA

This is to certify that, to the best of my knowledge and belief, cost or pricing data as defined in the DART Procurement Regulations submitted, either actually or by specific identification, in writing, to the Contracting Officer in

support of _____*, are accurate, complete, and current as of (date) (month) (year) _____***

This certification includes the cost or pricing data supporting any advance agreement(s) between the offeror and the Authority which are part of the proposal.

Firm _____
 Signature _____
 Name _____
 Title _____
 Date of Execution _____***

(End of Certificate)

*Describe the proposal, quotation, request for price adjustment or other submission involved, giving appropriate identifying number (e.g., RFP No. _____)

**The effective date shall be a mutually determined date prior to but as close to the date when price negotiations were concluded and the contract price was agreed to as possible. The responsibility of the offeror or contractor is not limited by the personal knowledge of the offeror's or contractor's negotiator if the offeror or contractor had information reasonably available, at the time of agreement, showing that the negotiated price is not based on accurate, complete, and current data.

***This date should be as soon after the date when the price negotiations were concluded and the contract price was agreed to as practical.

(2) Although the certificate pertains to "cost or pricing data," it is not to

be construed as a representation as to the accuracy of the offeror's or contractor's judgment on the estimated portion of future costs or projections. It does, however, constitute a representation as to the accuracy of the data upon which the offeror's or contractor's judgment is based. A Certificate of Current Cost or Pricing Data shall not substitute for examination and analysis of the offeror's or contractor's proposal.

(3) Whenever it is anticipated that a Certificate of Current Cost or Pricing Data may be required, notice of this requirement shall be included in the solicitation. If such a certificate is required, the contract shall include a clause giving the Authority a contract right to a reduction in the price as provided in § 3- 506.

(4) The exercise of an option at the price established in the initial negotiation in which certified cost or pricing were used does not require recertification or further submission of data.

§ 3-506 Defective Cost or Pricing Data

(1) If certified cost or pricing data subsequently are found to have been inaccurate, incomplete, or noncurrent as of the date stated in the certificate, the Authority is entitled to an adjustment of the contract price, including profit or fee, to exclude any significant sum by which the price, including profit or fee, was increased because of the defective data. Judgmental errors made in good faith concerning the estimated portions of future costs or projections do not constitute defective data. It is presumed that overstated cost or pricing data increased the contract price in the amount of the overstatement plus related overhead and profit or fee. Therefore, unless there is a clear indication that the defective data were not used or relied upon, the price should be reduced in such amount. In establishing that the defective data caused an increase in the contract price, the Contracting Officer is not expected to reconstruct the negotiation by speculating as to what would have been the mental attitudes of the negotiating parties if the correct data had been submitted at the time of agreement on price.

(2) In determining the amount of a downward adjustment, the contractor shall be entitled to an offsetting adjustment for any understated cost or pricing data submitted in support of price negotiations for the same pricing action up to the amount of the Authority's claim for overstated cost or pricing data arising out of the same pricing action.

(3) If the contractor and the Contracting Officer cannot agree as to the existence of defective cost or pricing data or the amount of adjustment due to defective cost or pricing data, the Contracting Officer shall set an amount in accordance with this section, and the contractor may appeal this decision as a contract controversy under the Disputes Clause of the contract.

§ 3-507 Price Analysis Techniques

Price analysis is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit and is used to determine if a price is reasonable and acceptable. It involves an evaluation of the

prices for the same or similar items or services. Examples of price analysis criteria include, but are not limited to:

- (1) price submission of prospective bidders or offerors in the current procurement;
- (2) prior price quotations and contract prices charged by the bidder, offeror, or contractor for the same or similar items;
- (3) prices published in catalogues or price lists;
- (4) prices available on the open market; and
- (5) in-house estimates of cost.

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

§ 3-508 Cost Analysis Techniques

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

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

§ 3-509 Evaluations of Cost or Pricing Data

Evaluations of cost or pricing data should include comparisons of costs and prices of an offeror's cost estimates with those of other offerors and any independent price and cost estimates by the Authority. They also shall include consideration of whether such costs are reasonable and allocable under the pertinent provisions of Chapter 7 (Cost Principles) of these regulations.

Section 3-600 - Types of Contracts

§ 3-601 Scope of Section

This section contains descriptions of types of contracts and limitations as to when they should be utilized by the Authority in its procurements. The use of any type of contract not prohibited by this section is permissible.

§ 3-602 Cost-Plus-a-Percentage-of-Cost Contracting

The use of a cost-plus-a-percentage-of-cost contract is prohibited. A cost-plus-a-percentage-of-cost contract is one in which, prior to completion of the work, the parties agree that the fee will be a predetermined percentage of the total

cost of the work. The more the contractor spends, therefore, the greater its fee. The contractor's incentive may be to incur cost at the expense of the Authority and not to economize.

§ 3-603 Policy Regarding Selection of Contract Types

(1) The selection of an appropriate contract type depends on factors such as the nature of the property, services, or construction to be procured, the uncertainties which may be involved in contract performance, and the extent to which the Authority or the contractor is to assume the risk of the cost of performance of the contract. Contract types differ in the degree of responsibility assumed by the contractor. The objective when selecting a contract type is to obtain the best value in needed property, services, or construction in the time required and at the lowest cost or price to the Authority. In order to achieve this objective, the Contracting Officer, before choosing a contract type, should review those elements of the procurement which directly affect the cost, time, risk, and profit incentives bearing on the performance. Among the factors to be considered in selecting any type of contract are:

(a) the type and complexity of the property, service, or construction item being procured;

(b) the difficulty of estimating performance costs, such as the inability of the Authority to develop definitive specifications, to identify the risks to the contractor inherent in the nature of the work to be performed, or otherwise to establish clearly the requirements of the contract;

(c) the administrative costs to both parties;

(d) the degree to which the Authority must provide technical coordination during the performance of the contract;

(e) the effect of the choice of the type of contract on the amount of competition to be expected;

(f) the stability of material or commodity market prices or wage levels;

(g) the urgency of the requirement; and

(h) the length of contract performance.

(2) The provisions of this section describe and define the contract types. Any other type of contract, except cost-plus-a- percentage-of-cost, may be used, provided the Vice President of Procurement, or equivalent position, Procurement or equivalent position determines in writing that such use is in the Authority's best interest.

§ 3-604 Types of Fixed-Price Contracts

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

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

(a) adequate price competition for the contract;

(b) comparison of prices in similar prior procurements in which prices were fair and reasonable;

(c) establishment of realistic costs of performance by utilizing available cost or pricing data and identifying uncertainties in contract performance; or

(d) performance uncertainties can be identified and reasonable estimates of their cost impact can be made, and the contractor is willing to accept a firm fixed price representing assumption of the risks involved.

(3) A fixed-price contract with price adjustment provides for variation in the contract price under special conditions defined in the contract, other than customary provisions authorizing price adjustments due to modifications to the work. The formula or other basis by which the adjustment in contract price can be made shall be specified in the solicitation and the resulting contract. Adjustment allowed may be upward or downward only or both upward and downward. Examples of conditions under which adjustments may be provided in fixed-price contracts are:

(a) changes in the contractor's labor agreement rates as applied to industry or area wide;

- (b) changes due to rapid and substantial price fluctuation, which can be related to an accepted index (such as contracts for gasoline and oil); and
- (c) in requirements contracts:
 - (i) when a general price change applicable to all customers occurs; or
 - (ii) when a general price change alters the base price (such as a change in a manufacturer's published price list or posted price to which a fixed discount is applied pursuant to the contract to determine the contract price).

If the contract permits unilateral action by the contractor to bring about the condition under which a price increase may occur, the contract shall reserve to the Authority the right to reject the price increase and terminate without cost the future performance of the contract. The contract also shall require that notice of any such price increase shall be given within such time prior to its effective date as specified in the contract. These restrictions shall not apply to fixed-price cost incentive contracts and fixed-price performance incentive contracts.

§ 3-605 Types of Cost-Reimbursement Contracts

(1) The cost-reimbursement type contract provides for payment to the contractor of allowable costs incurred in the performance of the contract as determined in accordance with Chapter 7 (Cost Principles) of these regulations and as provided in the contract. This type of contract establishes at the outset an estimated cost for the performance of the contract and a dollar ceiling which the contractor may not exceed (except at its own expense) without prior approval or subsequent ratification by the Contracting Officer and, in addition, may provide for payment of a fee. The contractor agrees to perform as specified in the contract until the contract is completed or until the costs reach the specified ceiling, whichever first occurs. This type of contract is appropriate when the uncertainties involved in contract performance are of such magnitude that the cost of contract performance cannot be estimated with sufficient certainty to realize economy by use of any type of fixed-price contract. In addition, a cost-reimbursement contract necessitates appropriate monitoring by Authority personnel during performance so as to give reasonable assurance that the objectives of the contract are being met. It is particularly suitable for research, development, and study type contracts.

(2) A cost-reimbursement type contract may be used only when the Vice President of Procurement, or equivalent position, Procurement or equivalent position determines in writing that:

- (a) such a contract is likely to be less costly to the Authority than any other type or that it is impracticable to obtain otherwise the property, services, or construction;
- (b) the proposed contractor's accounting system will permit timely

development of all necessary cost data in the form required by the specific contract type contemplated; and

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

(3) A cost contract provides that the contractor will be reimbursed for allowable costs incurred in performing the contract but will not receive a fee.

(4) A cost-plus-fixed-fee contract is a cost-reimbursement type contract which provides for payment to the contractor of an agreed fixed fee in addition to reimbursement of allowable incurred costs. The fee is established at the time of contract award and does not vary whether or not the actual cost of contract performance is greater or less than the initial estimated cost established for such work. Thus, the fee is fixed but not the contract amount because the final contract amount will depend on the allowable costs reimbursed. The fee is subject to adjustment only if the contract is modified to provide for an increase or decrease in the scope of work specified in the contract. The cost-plus-fixed-fee contract can be either a Completion Form or Term Form.

(a) The Completion Form is one which describes the scope of work to be done as a clearly defined task or job with a definite goal or target expressed and with a specific end-product required. This form of contract normally requires the contractor to complete and deliver the specified end-product (in certain instances, final report of research accomplishing the goal or target) as a condition for payment of the entire fixed-fee established for the work and within the estimated cost if possible; however, in the event the work cannot be completed within the estimated cost, the Authority can elect to require more work and effort from the contractor without increase in fee, provided it increases the estimated cost.

(b) The Term Form is one which describes the scope of work to be done in general terms and which obligates the contractor to devote a specified level of effort for a stated period of time. Under this form, the fixed fee is payable at the termination of the agreed period of time upon certification that the contractor has exerted the level of effort specified in the contract in performing the work called for, and that such performance is considered satisfactory by the Authority.

(c) The Completion Form of contract, because of differences in obligation assumed by the contractor, is to be preferred over the Term Form whenever the work itself or specific milestones can be defined with sufficient precision to permit the development of estimates within which prospective contractors reasonably can be expected to complete the work. A milestone is a definable point in a program when certain objectives can be said to have been accomplished.

(d) In no event should the Term Form of contract be used unless the contractor is obligated by the contract to provide a specific level-of-effort within a definite period of time.

§ 3-606 Cost Incentive Contracts

(1) A cost incentive type of contract provides for the reimbursement to the contractor of allowable costs incurred up to the ceiling amount and establishes a formula whereby the contractor is rewarded for performing at less than target cost (that is, the parties' agreed best estimate of the cost of performing the contract) or is penalized if it exceeds target cost. The profit or fee under such a contract will vary inversely with the actual, allowable costs of performance and, consequently, is dependent on how effectively the contractor controls cost in the performance of the contract.

(2) In a fixed-price cost incentive contract, the parties establish at the outset a target cost, a target profit (that is, the profit which will be paid if the actual cost of performance equals the target cost), a formula which provides a percentage increase or decrease of the target profit depending on whether the actual cost of performance is less than or exceeds the target cost, and a ceiling price. After performance of the contract, the actual cost of performance is arrived at based on the total incurred allowable costs as determined in accordance with Chapter 7 (Cost Principles) of these regulations and as provided in the contract. The final contract price then is established in accordance with the formula using the actual price of performance. The final contract price may not exceed the ceiling price. The contractor is obligated to complete performance of the contract, and, if actual costs exceed the ceiling price, the contractor suffers a loss.

(3) In a cost-reimbursement contract with cost incentive fee, the parties establish at the outset a target cost; a target fee; a formula for increase or decrease of fee depending on whether actual cost of performance is less than or exceeds the target cost; the maximum and minimum fee limitations; and a cost ceiling which represents the maximum amount which the Authority is obligated to reimburse the contractor. The contractor continues performance until the work is complete or costs reach the ceiling specified in the contract, including any modification thereof, whichever first occurs. After performance is complete or costs reach the ceiling, the total incurred, allowable costs reimbursed in accordance with Chapter 7 (Cost Principles) of these regulations and as provided in the contract are applied to the formula to establish the incentive fee payable to the contractor.

(4) Prior to entering into any cost incentive contract, the Contracting Officer shall make the written determination required by § 3-612 regarding the proposed contractor's accounting system. Prior to entering any cost-reimbursement contract with cost incentive fee, the written determination required by § 3-605(2) shall be made.

§ 3-607 Performance Incentive Contracts

In a performance incentive contract, the parties establish at the outset a pricing basis for the contract (i.e., cost reimbursement or fixed price), performance goals, and a formula which varies the profit or the fee if the specified performance goals are exceeded or not met. For example, early completion may entitle the

contractor to a bonus while late completion may entitle the Authority to a price decrease.

§ 3-608 Time and Materials and Labor Hour Contracts

(1) Time and materials contracts provide an agreed basis for payment for materials supplied and labor performed. Such contracts shall, to the extent possible, contain a stated ceiling or an estimate that shall not be exceeded without prior approval by the Authority and shall be entered into only after the Contracting Officer determines in writing that:

(a) Authority representatives have been assigned to closely monitor the performance of the work; and

(b) in the circumstances, it would not be practicable to use any other type of contract to obtain needed property, services, or construction in the time required and at the lowest cost or price to the Authority.

(2) A labor hour contract provides only for the payment of labor performed. It shall contain the same ceiling as provided in subsection (1), above. Prior to the award of such contract, the Contracting Officer shall make the determination as required in subsection (1), above.

§ 3-609 Definite and Indefinite Quantity Contracts

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

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

(3) A requirements contract is an indefinite quantity contract for property or services that obligates the Authority to order all its actual requirements for such property or services during a specified period of time. For information, a realistic estimated total quantity shall be stated in the solicitation and the resulting contract; however, this estimate is not a representation to an offeror that the total quantity will be required or ordered. The obligation to order the Authority's actual requirements is limited by the provisions of Texas Business & Commerce Code § 2.306(a) (i.e., no quantity unreasonably disproportionate to any stated estimate or, in the absence of a stated estimate, to any normal or otherwise comparable prior output or requirements may be tendered or demanded). For the protection of the Authority and the contractor, requirements contracts shall include the following:

(a) a provision which requires the Authority to order its actual

requirements of the property or services covered (however, the Authority must reserve in the solicitation and in the resulting contract the right to take bids separately if a particular quantity requirement arises which exceeds the Authority's normal requirements or an amount specified in the contract);

(b) two exemptions from ordering under the contract when:

(i) the Vice President of Procurement, or equivalent position, approves a finding that the property or service available under the contract will not meet a nonrecurring, special need of the Authority; or

(ii) property is produced or services are performed incidental to the Authority's own programs.

§ 3-610 Leases

(1) A lease is a contract for the use of equipment or other property under which title will not pass to the Authority at any time. Section 3-611 (Option Provisions) applies to a lease with a purchase option where title may pass to the Authority.

(2) A lease may be entered into provided:

(a) it is in the best interest of the Authority;

(b) all conditions for renewal and costs of termination are set forth in the lease; and

(c) the lease is not used to circumvent normal procurement procedures.

(d) must be compliant with Transportation Code 452.108, as applicable.

§ 3-611 Option Provisions

(1) When a contract is to contain an option for renewal, extension, or purchase, notice of such provision shall be included in the solicitation. Exercise of the option is always at the Authority's discretion only and not subject to agreement or acceptance by the contractor.

(2) Before exercising any option for renewal, extension, or purchase, the Contracting Officer should attempt to ascertain whether a competitive procurement is practical (in terms of pertinent competitive and cost factors) and would be more advantageous to the Authority than renewal or extension of the existing contract.

(3) A purchase option in a lease may be exercised only if the lease containing the purchase option was awarded under competitive sealed bidding or competitive sealed proposals. Before exercising such an option, the Contracting Officer shall:

(a) investigate alternative means of procuring comparable property or facilities; and

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

§ 3-612 Approval of Accounting Systems

Except with respect to firm fixed-price contracts, no contract type shall be used unless the Vice President of Procurement, or equivalent position, makes a determination in writing that the proposed contractor's accounting system is sufficient to comply with the provisions of § 3-605(2)(b) and (c).

§ 3-613 Multi-Term Contracts - General

(1) A multi-term contract is appropriate when it is in the best interest of the Authority to obtain uninterrupted services extending over more than one fiscal period, where the performance of such services involves high start-up costs, or where a change over of service contractors involves high phase-in/phase-out costs during a transition period. The multi-term method of contracting also is appropriate when special production of definite quantities of supplies for more than one fiscal period is necessary to best meet the Authority's needs but funds are available only for the initial fiscal period. Special production refers to production for contract performance, which 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 authorization and

availability of funds therefor. The contract shall provide that, in the event that funds are not available for any succeeding fiscal period, the remainder of such contract shall be cancelled and the contractor shall be reimbursed the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies delivered or services performed under the contract to the extent that nonrecurring costs are identified in the contract.

(2) 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 contractors.

(3) This § 3-613 applies only to contracts for property or services described in 3-613(1) of this section and does not apply to any other contracts including, but not limited to, contracts for construction and leases (including leases of real property).

§ 3-613.01 Conditions for Use

A multi-term contract may be used when it is determined in writing by the Contracting Officer that:

(1) special production of definite quantities or the furnishing of long-term services is required to meet the Authority's needs; and

(2) a multi-term contract will serve the best interests of the Authority by encouraging effective competition or otherwise promoting economies in procurement. The following factors are among those relevant to such a determination.

(a) 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;

(b) 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;

(c) stabilization of the contractor's work force over a longer period of time may promote economy and consistent quality; or

(d) the cost and burden of contract solicitation, award, and administration of the procurement may be reduced.

§ 3-613.02 Multi-Term Contract Procedure

(1) The solicitation for multi-term contracts shall state:

(a) the amount of property or services required for the proposed contract period;

(b) that a unit price shall be given for each item of property or service and that such unit prices shall be the same throughout the contract (except to the extent price adjustments may be provided in the solicitation and resulting contract);

(c) that the multi-term contract will be cancelled only if funds are not authorized or otherwise made available to support continuation of performance in any fiscal period succeeding the first; however, this does not affect either the Authority's rights or the contractor's rights under any termination clause in the contract;

(d) that the Contracting Officer must notify the contractor on a timely basis that the funds are, or are not, available for the continuation of the contract for each succeeding fiscal period;

(e) whether bidders or offerors may submit prices for:

- (i) the first fiscal period only;
 - (ii) the entire time of performance only; or
 - (iii) both the first fiscal period and the entire time of performance;
- (f) that a multi-term contract may be awarded and how award will be determined including, if prices for the first fiscal period and entire time of performance are submitted, how such prices will be compared; and
- (g) that, in the event of cancellation for lack of funds, the contractor will be reimbursed the unamortized, reasonably incurred, nonrecurring costs.

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

(3) "Cancellation," as used in multi-term contracting, means the cancellation of the total requirements for the remaining portion of the contract because funds were not authorized or otherwise made available. The contract for the first fiscal period shall not be cancelled. Cancellation results when the Contracting Officer (a) notifies the contractor of nonavailability of funds for contract performance for any fiscal period subsequent to the first; or (b) fails to notify the contractor by the date set forth in the contract (unless the parties agree to extend such date) that funds are available for performance of the succeeding fiscal period and funds which may be used for the contract have not been authorized or otherwise made available. This provision on cancellation of multi-term contracts does not limit the rights of the Authority or the contractor under any termination clause of the contract if the contract is terminated pursuant to that clause rather than cancelled as provided in this subsection.

3-614 Incremental Award

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

(2) If an incremental award is anticipated prior to issuing a solicitation, the Authority shall reserve the right to make such an award, and the criteria for award shall be stated in the solicitation.

(3) The Contracting Officer shall make a written determination setting

forth the reasons for the incremental award, and the determination shall be made a part of the procurement file.

§ 3-615 Multiple Award

(1) A multiple award is an award of an indefinite quantity contract for one or more similar supplies or services to more than one bidder or offeror when the Authority is obligated to order all of its actual requirements for the specified supplies or services from those contractors. The obligation to order the Authority's actual requirements is limited by the provisions of Texas Business & Commerce Code § 2.306(a) (no quantity unreasonably disproportionate to any stated estimate or, in the absence of a stated estimate, to any normal or otherwise comparable prior output or requirements may be tendered or demanded).

(2) A multiple award may be made when award to two or more bidders or offerors for similar products is necessary for adequate delivery, service, or product compatibility. Any multiple award shall be made in accordance with

the provisions of § 3-202 (Competitive Sealed Bidding), § 3-203 (Competitive Sealed Proposals), § 3-204 (Small Purchases), and § 3-206 (Emergency Procurements), as applicable. Multiple awards shall not be made when a single award will meet the Authority's needs without sacrifice of economy or service. Awards shall not be made for the purpose of dividing the business, making available product or supplier selection to allow for user preference unrelated to utility or economy, or avoiding the resolution of tie bids. Any such awards shall be limited to the least number of suppliers necessary to meet the Authority's valid requirements.

(3) If a multiple award is anticipated prior to issuing a solicitation, the Authority shall reserve the right to make such an award, and the criteria for award shall be stated in the solicitation.

(4) The Contracting Officer shall make a written determination setting forth the reasons for a multiple award, and the determination shall be made a part of the procurement file.

Section 3-700 - Audits

§ 3-701 Authority to Audit

Audits by or on behalf of the Authority of the books and records of a contractor, prospective contractor, subcontractor, or a prospective subcontractor may be performed when authorized by a solicitation, contract, or subcontract provision. Audits may be performed by representatives of the Authority or for the Authority by an independent contractor.

§ 3-702 Cost or Pricing Data Audit

(1) The President & CEO or his designee may require an audit of cost or pricing data that has been submitted under § 3- 500. An audit should be required when, with respect to the contractor, prospective contractor, subcontractor, or

prospective subcontractor, there is:

- (a) a question as to the adequacy of accounting policies or cost systems;
- (b) a substantial change in the methods or levels of operation;
- (c) previous unfavorable experience indicating doubtful reliability of estimating, accounting, or purchasing methods;
- (d) a lack of cost experience due to the procurement of a new supply or service; or
- (e) other evidence that an audit is in the Authority's best interests.

§ 3-703 Cost or Pricing Data Audit Report

When an audit is required under § 3-702 (Cost or Pricing Data Audit), the auditor shall submit a written report to the Contracting Officer by an agreed-upon date. The report should contain the following with respect to the contractor, prospective contractor, subcontractor, or prospective subcontractor:

- (1) a description of the original proposal and all submissions of cost or pricing data;
- (2) an explanation of the basis and the method used in preparing the proposal;
- (3) a statement identifying any cost or pricing data not physically submitted with the proposal but examined by the auditor which has a significant effect on the proposed cost or price;
- (4) a description of any deficiency in the cost or pricing data submitted and an explanation of its effect on the proposal;
- (5) a statement summarizing those major points where there is a disagreement as to the cost or pricing data submitted; and
- (6) a statement identifying any information obtained from other sources.

§ 3-704 Contract Audit

(1) The type of contract under which books and records should be audited is that in which price is based on costs or is subject to adjustment based on costs, or that in which auditing would be appropriate to ensure satisfactory performance (such as a time and materials contract), or to ensure compliance with the requirements to

submit current, accurate, and complete cost or pricing data.

(2) A contract audit may be warranted when a question arises in connection with:

- (a) the financial condition, integrity, and reliability of the contractor or subcontractor;
- (b) any prior audit experience;
- (c) the adequacy of the contractor's or subcontractor's accounting system;
- (d) the number or nature of invoices or reimbursement vouchers submitted by the contractor or subcontractor for payment;
- (e) the use of federal assistance funds;
- (f) the fluctuation of market prices affecting the contract;
- (g) adequacy of cost or pricing data; or
- (h) any other circumstance when the Contracting Officer finds that such an audit is necessary for the protection of the Authority's interest.

The scope of the audit may be limited as specified in the audit request.

§ 3-705 Contract Audit Report

Where a contract audit is required under § 3-704 (Contract Audit), the auditor shall submit a written report to the Contracting Officer by an agreed upon date. The scope of the report will depend on the scope of the audit ordered. However, the report should contain specific reference to the terms of the contract to which the audited data relate and a statement of the degree to which the auditor believes the audited data evidence compliance with those terms.

§ 3-706 Retention of Books and Records

(1) Any contractor who receives a contract, change order, or contract modification for which cost or pricing data are required under § 3-500 (Cost or Pricing Data) shall be required to maintain such books and records that relate to such cost or pricing data for three years from the date of final payment under the contract.

(2) Contracts shall require that books and records relating to a contract with the Authority, including subcontracts, other than a firm fixed-price contract, shall be maintained:

- (a) by a contractor, for four years from the date of final payment under the prime contract; and

(b) by a subcontractor, for four years from the date of final payment under the subcontract.

Section 3-800 - Solicitation Provisions

§ 3-801 General

This section prescribes required provisions for incorporation in solicitations issued by the Authority. The provisions set forth the rules under which the solicitation will be conducted. Nothing herein shall preclude the Authority from incorporating additional, special solicitation instructions and conditions in individual procurements.

§ 3-802 Solicitations for Competitive Sealed Bids

The following solicitation instructions and conditions shall be included in all solicitations for competitive sealed bids.

§ 3-802.01 Preparation of Bids

PREPARATION OF BIDS (JUL 91)

- (a) Bidders are expected to examine the Schedule, solicitation instructions, Special Provisions, General Provisions, all drawings, specifications, the statement of work, and all other provisions of, and exhibits to, the solicitation, whether incorporated by reference or otherwise, prior to the submission of bids. Failure to do so will be at the bidder's risk.
- (b) Each bidder shall furnish the information required by the solicitation. Bids shall be submitted on the bid form contained in the solicitation. Bidders shall sign and print or type their name on the bid form and each continuation sheet on which they make an entry. Erasures or other changes must be initialed by the person signing the bid. Bids signed by an agent of the bidder are to be accompanied by evidence of the agent's authority (unless such evidence has been previously furnished to the Authority).
- (c) For each item offered, bidders shall (1) show the unit price, which includes all costs to be recovered and (2) enter the extended price for the quantity of each item offered in the "Amount" column of the Schedule. In case of discrepancy between a unit price and an extended price, the unit price will be presumed to be correct, subject, however, to correction to the same extent and in the same manner as any other mistake.
- (d) Bids for supplies or services other than those specified in the Schedule will not be considered unless specifically authorized in the solicitation. Any condition, qualification, or limitation of the bid will be a basis for rejection of the bid as nonresponsive.
- (e) The bidder must state a definite time for delivery of

supplies or for performance of services unless otherwise specified in the solicitation. All measurements shall be in the system of weights and measures in common usage in the United States, and pricing shall be in U.S. dollars.

(f) In computing any period of time for the solicitation or any resulting contract, "days" means calendar days, and the day of the event from which the designated period of time begins to run shall not be included, but the last day shall be included unless it is a Saturday, Sunday, or Federal or State of Texas holiday, in which event the period shall run to the end of the next business day.

§ 3-802.02 Explanation to Bidders

EXPLANATION TO BIDDERS (JUL 91)

Any prospective bidder desiring an explanation or interpretation of the solicitation, drawings, specifications, etc., must request it in writing from the Authority's Contracting Officer soon enough to allow for a reply to reach all prospective bidders before the submission of their bids. Oral explanations or instructions given before the award of any contract, at any pre-bid conferences or otherwise, will not be binding on the Authority. Any information given to a prospective bidder concerning an interpretation of the solicitation will be furnished promptly to all other prospective bidders as an amendment to the solicitation, if such information is necessary to prospective bidders in submitting bids on the solicitation or if the lack of such information would be prejudicial to uninformed prospective bidders.

§ 3-802.03 Acknowledgment of Amendments to Invitation for Bids

ACKNOWLEDGMENT OF AMENDMENTS TO INVITATION FOR BIDS (JUN 91)

(a) If this solicitation is amended, then all terms and conditions which are not modified remain unchanged.

(b) Bidders shall acknowledge receipt of any amendment to this solicitation: (1) by signing and returning the amendment; (2) by identifying the amendment number and date in the space provided for this purpose on the bid form; (3) by letter; (4) by facsimile, if facsimile bids are authorized in the solicitation; or (5) by email, if email bids are authorized in the solicitation. The Authority must receive the acknowledgment by the time and at the place specified for receipt of bids.

§ 3-802.04 Submission of Bids (Except Quotes)

SUBMISSION OF BIDS (FEB 94)

(a) Bids and modifications shall be submitted in sealed envelopes or packages (unless submitted by electronic means) (1) addressed to the Contracting Officer of the Dallas Area Rapid Transit Authority at the address specified in the solicitation and (2) showing the hour and date specified in the solicitation for receipt of bids, the solicitation number, and the bidder's name, address, and telephone number on the face of the envelope or package.

(b) Facsimile bids will not be considered unless authorized by the solicitation.

(c) Samples of items, when required, must be submitted within the time specified and, unless otherwise specified in the solicitation, at no expense to the Authority. If not destroyed by testing, samples will be returned at the bidder's request and expense, unless otherwise specified in the solicitation.

(d) Each copy of the bid shall include the legal name of the bidder and a statement whether the bidder is a sole proprietorship, a corporation, or any other legal entity. A bid for a corporation shall further give the state of incorporation and have the corporate seal affixed to it.

(e) Bids that reject any of the representations, certifications, terms, conditions, or provisions of the solicitation, may be excluded from consideration.

§ 3-802.05 Late Submissions, Modifications, and Withdrawals of Bids**LATE SUBMISSIONS, MODIFICATIONS, AND WITHDRAWALS OF BIDS (FEB 04)**

(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt is "late" and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late bid would not unduly delay the acquisition; and:

(1) if it was transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to the Authority infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of bids;

(2) there is acceptable evidence to establish that it was received at the Authority installation designated for receipt of bids and was under the Authority's control prior to the time set for receipt of bids .

(b) Any modification or withdrawal of a bid is subject to the same

conditions as in (a) of this provision.

(c) Acceptable evidence to establish the time of receipt at the Authority is the time-date stamp of the Authority on the bid wrapper or other documentary evidence of receipt maintained by the Authority, or oral testimony or statements of Authority personnel.

(1) the date of mailing of a late bid, modification, or withdrawal sent by U. S. Postal Service Express Mail Next Day Service - Post Office to Addressee is the date entered by the post office receiving clerk on the "Express Mail Next Day Service - Post Office to Addressee" label, and the postmark on the envelopes or wrapper and on the original receipt from the U. S. Postal Service. "Postmark" has the same meaning as defined in paragraph (c)(1) of this provision. Therefore, bidders should request the postal clerk to place a legible hand cancellation bull's-eye "postmark" on both the receipt and the envelope or wrapper.

(d) Notwithstanding (a) of this provision, a late modification of an otherwise successful bid which makes its terms more favorable to the Authority will be considered at any time it is received and may be accepted.

(e) Bids may be withdrawn by written notice received at any time before the exact time set for receipt of bids. A bid may be withdrawn in person by a bidder or the bidder's authorized representative before the exact time set for receipt of bids, provided the identity of the person requesting withdrawal is established and the person signs a receipt for the bid.

§ 3-802.06 Discounts

DISCOUNTS (FEB 96)

(a) Prompt payment discounts will not be considered in evaluating bids for award. However, offered discounts will form a part of the award, and will be taken if payment is made within the discount period indicated in the offer by the offeror even though not considered in the evaluation of bids. As an alternative to offering a discount for prompt payment in conjunction with the offer, offerors awarded contracts may include discounts for prompt payment on individual invoices.

(b) In connection with any discount offered for prompt payment, time shall be computed from the date of the invoice.

If the contractor has not placed a date on the invoice, the due date shall be calculated from the date the correct invoice or voucher is received in the office specified by the Authority, provided the Authority annotates such invoice with the date of receipt at the time of receipt. For the purpose of computing the discount earned, payment shall be considered to have been made on the date of the Authority's check, or, for an electronic funds transfer,

the specified payment date.

§ 3-802.07 Award of Contract

AWARD OF CONTRACT (FEB 04)

(a) The contract will be awarded to the responsible bidder whose bid, conforming to the solicitation, will be most advantageous to the Authority, considering only price and other price-related factors specified elsewhere in the solicitation. A responsible bidder is one who affirmatively demonstrates to the Authority that the bidder has adequate financial resources and the requisite capacity, capability, and facilities to perform the contract within the delivery period or period of performance, has a satisfactory record of performance on other comparable projects, has a satisfactory record of integrity and business ethics, and is otherwise qualified and eligible to receive award under the solicitation and laws or regulations applicable to the procurement.

(b) The Authority reserves the right to reject any or all bids in part or in total for any reason, to accept any bid even if not the lowest bid if considered best for its interest, and to waive informalities and minor irregularities in bids received.

(c) The Authority may accept any item or group of items of any bid, unless the bidder qualifies the bid by specific limitations. Unless otherwise provided in the solicitation, bids may be submitted for any quantities less than those specified, and the Authority reserves the right to make an award on any item for a unit quantity less than the quantity offered at the unit prices bid unless the bidder specified otherwise in the bid.

(d) A written award (or acceptance of bid) which is mailed or otherwise furnished to the successful bidder within the time for acceptance specified in the solicitation shall be deemed to result in a binding contract without further action by either party.

§ 3-802.08 Authority-Furnished Property

AUTHORITY-FURNISHED PROPERTY (JUN 86)

No material, labor, or facilities will be furnished by the Authority unless otherwise provided for in the solicitation.

§ 3-802.09 Encouragement of Joint Ventures

Consistent with the language in § 3-114.01, the Contracting Officer shall insert the following provision in all Authority solicitations in excess of the small

purchase threshold for which the Contracting Officer has determined, in writing, that award to a joint venture is appropriate for the work to be performed.

JOINT VENTURES (JUN 01)

The Authority encourages bids or offers, as appropriate, from duly constituted Joint Ventures in response to this solicitation. The Authority intends to maximize opportunities for all vendors to participate as prime contractors and actively seeks to do business with these entities. Any offeror that submits a bid or offer as a Joint Venture must identify itself as such an entity and provide a copy with its bid or offer of the Joint Venture Agreement.

§ 3-802.091 Mandating Award to Joint Ventures

Consistent with the language in § 3-114.01, the Contracting Officer shall insert the following provision in all Authority solicitations in excess of the small purchase threshold for which the Contracting Officer has determined, in writing, that award to a joint venture shall be mandated for the work to be performed.

AWARD TO JOINT VENTURE (JUN 01)

The Authority shall accept bids and/or offers, as appropriate, only from duly constituted Joint Ventures in response to this solicitation. Any bid or offer that is not submitted by a Joint Venture in full compliance with the provisions shall be rejected as nonresponsive.

§ 3-802.10 Order of Precedence

ORDER OF PRECEDENCE (JUN 86)

In the event of any inconsistency between the provisions of the solicitation (including any resulting contract), the inconsistency shall be resolved by giving precedence in the following order: (a) the Schedule; (b) Special Solicitation Instructions and Conditions; (c) Solicitation Instructions and Conditions; (d) Special Provisions; (e) General Provisions; (f) other provisions of the contract whether incorporated by reference or otherwise; and (g) the specifications or statement of work.

§ 3-802.11 Confidential Data

CONFIDENTIAL DATA (FEB 96)

Each bidder may clearly mark each page of the bid that contains trade secrets or other confidential commercial or financial information which the bidder believes should not be disclosed outside the Authority. Disclosure of requested information will be determined in accordance with the Texas Open Records Act.

§ 3-802.12 Administrative Remedies

Include the provision at § 10-102.

§ 3-802.13 Cancellation of Solicitation

CANCELLATION OF SOLICITATION (JUN 91)

This solicitation may be cancelled by the Authority before or after receipt of bids or proposals (as applicable) in accordance with the provisions of Section 3-300 of DART's Procurement Regulations.

§ 3-803 Solicitations for Construction

Solicitations for construction shall include all provisions set forth in § 3- 802 hereof (with such modifications as may be appropriate to substitute "construction" for references to property, supplies, or services). In addition, such solicitations shall include the following provisions.

§ 3-803.01 Bonds

BONDS (JUN 86)

(a) A Bid Bond on the form accompanying this solicitation (or a certified check payable to the Authority from a bank acceptable to the Authority) in an amount equal to 5% of the total bid price must be submitted by each bidder prior to bid opening date and time under this solicitation. The Bid Bond must be executed strictly in accordance with the instructions printed thereon. Failure to comply with the requirements for a Bid Bond may render a bid ineligible for further consideration for award.

(b) The successful bidder will be required to submit Performance and Payment Bonds on the forms accompanying this solicitation (each in an amount equal to the total contract price) within the time prescribed by the Authority.

§ 3-803.02 Site Investigation

SITE INVESTIGATION (JUL 91)

All bidders are cautioned to read the Site Investigation and Conditions Affecting the Work Clause of the General Provisions accompanying the solicitation and (prior to bidding) to conduct a site investigation sufficient to apprise bidders of the nature of the work to be performed to the extent specified in that Clause.

§ 3-803.03 Drug-Free Workplace Program Certification

DRUG-FREE WORKPLACE PROGRAM CERTIFICATION (FEB 04)

(a) By submission of a bid, the bidder certifies and agrees that, with respect to the bidder and all employees of the bidder to be utilized in the

performance of any contract resulting from the solicitation, it will establish a drug-free workplace program that complies with the provisions of the Drug-Free Workplace Program Clause of the General Provisions.

(b) Failure of the bidder to have the drug-free workplace program complying with this certification and the Drug-Free Workplace Program Clause of the General Provisions available for the Authority's review and approval as part of the Authority's pre-award responsibility survey will be deemed a lack of responsibility rendering the bidder unqualified and ineligible for award.

§ 3-804 Solicitations for Competitive Sealed Proposals

The following provisions shall be included in all solicitations for competitive sealed proposals.

§ 3-804.01 Preparation of Offers

PREPARATION OF OFFERS (JUL 91)

(a) Offerors are expected to examine the Schedule, solicitation instructions, Special Provisions, General Provisions, all drawings, specifications, the statement of work, and all other provisions of, and exhibits to, the solicitation, whether incorporated by reference or otherwise, prior to the submission of offers. Failure to do so will be at the offeror's risk.

(b) Each offeror shall furnish the information required by the solicitation. Offerors shall sign and print or type their name on the form provided by the Authority for submitting an offer and each continuation sheet on which they make an entry. Deletions or other changes must be initialed by the person signing the offer. Offers signed by an agent of the offeror are to be accompanied by evidence of the agent's authority (unless such evidence has been previously furnished to the Authority).

(c) . In case of any discrepancy between a unit price and any extended or total price, the unit price will be presumed to be correct, subject, however, to correction to the same extent and in the same manner as any other mistake.

(d) Offers for supplies or services other than those specified in the Schedule will not be considered unless specifically authorized in the solicitation.

(e) The offeror must state a definite time for delivery of supplies or for performance of services unless otherwise specified in the solicitation. All measurements shall be in the system of weights and measures in common usage in the United States, and pricing shall be in U.S. dollars.

(f) In computing any period of time for the solicitation or any resulting contract, "days" means calendar days, and the day of the event from which the designated period of time begins to run shall not be included, but the last day shall be included unless it is a Saturday, Sunday, or Federal or State of Texas holiday, in which event the period shall run to the end of the next business day.

§ 3-804.02 Explanation to Offerors

EXPLANATION TO OFFERORS (JUL 91)

Any prospective offeror desiring an explanation or interpretation of the solicitation, drawings, specifications, etc., must request it in writing from the Authority's Contracting Officer soon enough to allow for a reply to reach all prospective offerors before the submission of their offers. Oral explanations or instructions given before the award of any contract, at any pre-proposal conferences or otherwise, will not be binding on the Authority. Any information given to a prospective offeror concerning an interpretation of the solicitation will be furnished promptly to all other prospective offerors as an amendment to the solicitation, if such information is necessary to offerors in submitting offers on the solicitation or if the lack of such information would be prejudicial to uninformed prospective offerors.

§ 3-804.03 Acknowledgment of Amendments to Request for Proposals

ACKNOWLEDGMENT OF AMENDMENTS TO REQUEST FOR PROPOSALS (JUN 91)

(a) If this solicitation is amended, then all terms and conditions which are not modified remain unchanged.

(b) Offerors shall acknowledge receipt of any amendment to this solicitation: (1) by signing and returning the amendment; (2) by identifying the amendment number and date in the space provided for this purpose on the form for submitting an offer; (3) by letter; (4) by facsimile, if facsimile offers are authorized in the solicitation; or (5) by email, if email offers are authorized in the solicitation. The Authority must receive the acknowledgment by the time and at the place specified for receipt of offers.

§ 3-804.04 Submission of Offers

SUBMISSION OF OFFERS (FEB 94)

(a) Offers and modifications shall be submitted in sealed envelopes or packages (unless submitted by electronic means) (1) to the Contracting Officer of the Dallas Area Rapid Transit Authority at the address

specified in the solicitation and (2) showing the hour and date specified in the solicitation for receipt of offers, the solicitation number, and the offeror's name, address, and telephone number on the face of the envelope or package.

(b) Facsimile offers will not be considered unless authorized by the solicitation .

(c) Samples of items, when required, must be submitted within the time specified and, unless otherwise specified in the solicitation, at no expense to the Authority. If not destroyed by testing, samples will be returned at the offeror's request and expense, unless otherwise specified in the solicitation.

(d) Each copy of the offer shall include the legal name of the offeror and a statement whether the offeror is a sole proprietorship, a corporation, or any other legal entity. An offer for a corporation shall further give the state of incorporation and have the corporate seal affixed to it.

(e) Offers that reject any of the representations, certifications, terms, conditions, or provisions of the solicitation, may be excluded from consideration.

§ 3-804.05 Late Submissions, Modifications, and Withdrawals of Offers (or quotations as applicable)

LATE SUBMISSIONS, MODIFICATIONS, AND WITHDRAWALS OF OFFERS (FEB 04)

(a) Any offer received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made, and:

(1) it was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for receipt of offers (e.g., an offer submitted in response to a solicitation requiring receipt of offers by the 20th of the month must have been mailed by the 15th or earlier);

(2) it was sent by mail, facsimile or hand-carried (including delivery by commercial carrier) and it is determined by the Authority that the late receipt was due solely to mishandling by the Authority after receipt at the Authority's offices; or, if an emergency or unanticipated event interrupts normal Authority process, as determined by the Authority, so as to prevent submission of the offer at specified time; or

(3) it was sent by U. S. Postal Service Express Mail Next Day Service-Post Office to Addressee, not later than 5:00

P.M. at the place of mailing two (2) working days prior to the date specified for receipt of offers. The term "working days" excludes weekends and U. S. Federal holidays; or

(4) it is the only offer or quotation received.

(b) Any modification of an offer, except a modification resulting from the Contracting Officer's request for a "best and final" offer, is subject to the same conditions as in (a)(1), (a)(2), and (a)(3) of this provision.

(c) A modification resulting from the Contracting Officer's request for a "best and final" offer received after the time and date specified in the request will not be considered unless received before award, and the late receipt is due solely to mishandling by the Authority after receipt at the Authority's offices.

(d) The only acceptable evidence to establish:

(1) the date of mailing of a late offer or modification sent either by registered or certified mail is the U.S. Postal Service postmark on both the envelope or wrapper and on the original receipt from the U.S. Postal Service. Both postmarks must show a legible date or the offer, modification or withdrawal shall be processed as if mailed late. The term "postmark" means a printed, stamped, or otherwise placed impression, exclusive of a postage meter machine impression, that is readily identifiable without further action as having been supplied and affixed on the date of mailing by an employee of the U.S. Postal Service. Therefore, offerors should request the postal clerk to place a legible hand cancellation bull's-eye "postmark" on both the receipt and the envelope or wrapper; and

(2) the time of receipt at the Authority is the time-date stamp of the Authority on the offer wrapper or other documentary evidence of receipt maintained by the Authority.

(3) the date of mailing of a late offer, modification, or withdrawal sent by U. S. Postal Service Express Mail Next Day Service - Post Office to Addressee is the date entered by the post office receiving clerk on the "Express Mail Next Day Service - Post Office to Addressee" label and the postmark on the envelope or wrapper and on the original receipt from the U. S. Postal Service. "Postmark" has the same meaning as defined in paragraph (d)(1) of this provision. Therefore, offerors should request the postal clerk to place a legible hand cancellation bull's-eye "postmark" on both the receipt and the envelope or wrapper.

(e) Notwithstanding (a), (b), and (c) of this provision, a late modification of an otherwise successful offer which makes its terms more favorable to the Authority will be considered at any time it is received and may be accepted.

(f) Offers may be withdrawn by written notice received in accordance with § 3-203.11 (Modification or Withdrawal of Proposals). An offer may be withdrawn in person by an offeror or the offeror's authorized representative, provided the identity of the person requesting withdrawal is established and the person signs a receipt for the offer prior to award.

§ 3-804.06 Discounts

DISCOUNTS (FEB 96)

(a) Prompt payment discounts will not be considered in evaluating offers for award, unless otherwise specified in the solicitation. However, offered discounts will form a part of the award, and will be taken if payment is made within the discount period indicated in the offer by the offeror, even though not considered in the evaluation of offers. As an alternative to offering a discount for prompt payment in conjunction with the offer, offerors awarded contracts may include discounts for prompt payment on individual invoices.

(b) In connection with any discount offered for prompt payment, time shall be computed from the date of the invoice. If the contractor has not placed a date on the invoice, the due date shall be calculated from the date the correct invoice or voucher is received in the office specified by the Authority, provided the Authority annotates such invoice with the date of receipt at the time of receipt. For the purpose of computing the discount earned, payment shall be considered to have been made on the date of the Authority's check, or, for an electronic funds transfer, the specified payment date.

§ 3-804.07 Award of Contract

AWARD OF CONTRACT (FEB 04)

(a) The contract will be awarded to the responsible offeror whose offer, conforming to the solicitation, will be most advantageous to the Authority, price and other factors (specified elsewhere in the solicitation) considered. A responsible offeror is one who affirmatively demonstrates to the Authority that the offeror has adequate financial resources and the requisite capacity, capability, and facilities to perform the contract within the delivery period or period of performance, has a satisfactory record of performance on other comparable projects, has a satisfactory record of integrity and business ethics, and is otherwise qualified and eligible to receive award under the solicitation and laws or regulations applicable to the procurement.

(b) The Authority reserves the right to accept other than the lowest offer, reject any or all offers in part or in total for any reason, to accept

any offer if considered best for its interest, and to waive informalities and minor irregularities in offers received.

(c) The Authority may accept any item or group of items of any offer, unless the offeror qualifies the offer by specific limitations.

Unless otherwise provided in the solicitation, offers may be submitted for any quantities less than those specified, and the Authority reserves the right to make an award on any item for a unit quantity less than the quantity offered at the unit prices offered unless the offeror specifies otherwise in the offer.

(d) A written award (or acceptance of offer) which is mailed or otherwise furnished to the successful offeror within the time for acceptance specified in the solicitation shall be deemed to result in a binding contract without further action by either party.

(e) The Authority may, within the time specified therein, accept any offer or part thereof, as provided in (c) above, whether or not there are negotiations subsequent to its receipt, unless the offer is withdrawn by written notice received by the Authority prior to award. If subsequent negotiations are conducted, they shall not constitute a rejection or counter offer on the part of the Authority.

(f) The Authority may award a contract, based on initial offers received, without discussion of such offers. Accordingly, each initial offer should be submitted on the most favorable terms from a price and technical standpoint which the offeror can submit to the Authority.

(g) Any financial data submitted with any offer hereunder or any representation concerning facilities or financing will not form a part of any resulting contract; provided, however, that if the resulting contract contains a clause providing for price reduction for defective cost or pricing data, the contract price will be subject to reduction if cost or pricing data furnished hereunder is incomplete, inaccurate, or not current.

§ 3-804.08 Authority-Furnished Property

Include the provision at § 3-802.08.

§ 3-804.09 Order of Precedence

Include the provision at § 3-802.10.

§ 3-804.10 Confidential Data

Include the provision at § 3-802.11, substituting the term "offeror" for the term "bidder" and the term "offer" for the term "bid" wherever they appear.

§ 3-804.11 Administrative Remedies

Include the provision at § 10-102.

§ 3-804.12 Cancellation of Solicitation

Include the provision at § 3-802.13.

§ 3-804.13 Encouragement of Joint Ventures

Include the provisions at § 3-802.09 when the Contracting Officer has determined, in writing, that award to a Joint Venture is appropriate for the work to be performed.

§ 3-804.131 Mandating Award to Joint Ventures

Include the provisions at § 3-802.091 when the Contracting Officer has determined, in writing, that it is appropriate to mandate award to Joint Ventures.

CHAPTER 4 - SPECIFICATIONS

Section 4-100 - General

§ 4-101 Definitions

(1) "Brand Name Specification" means a specification limited to one or more items by manufacturers' brand names and make or model numbers.

(2) "Brand Name or Equal Specification" means a specification which uses one or more manufacturer's brand names and make or model numbers to describe the salient physical, functional, or performance characteristics needed to meet the Authority's requirements and which provides for the submission of equivalent products.

(3) "Qualified Products List" means an approved list of property, services, or construction items described by make or model numbers, which, prior to competitive solicitation, the Authority has determined will meet the applicable specification requirements.

(4) "Specification" means any statement of work or any description of the physical, functional, or performance characteristics, or of the nature of property, service, or construction. A specification includes, as appropriate, requirements for inspecting, testing, or preparing a property, service, or construction item for delivery. Whenever possible, Contracting Officers shall ensure that references in specifications are to widely recognized standards or specifications promulgated by governments, industries, or technical societies. Unless the context requires otherwise, the terms "specification" and "purchase description" are used interchangeably throughout these procurement regulations.

Section 4-200 - Policies and Requirements

§ 4-201 Purpose and Policies

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

(2) 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 Authority. It is recognized, however, that the preference for use of functional or performance specifications is primarily applicable to the procurement of property and services. Such preference often is not practicable in construction apart from the procurement of supply-type items for a

construction project.

(3) It is the general policy of the Authority to procure standard commercial products whenever practicable. In developing specifications, accepted commercial standards or specifications promulgated by governments, industries, or technical societies shall be used and unique requirements shall be avoided, to the extent practicable.

§ 4-202 Authority to Prepare Specifications

The President & Chief Executive Officer or their designee shall be responsible for preparing, approving, revising, and maintaining all specifications used by the Authority for procurement. Such procedures shall ensure that specifications are completed a sufficient time in advance of the Authority's requirements to permit selection and implementation of the appropriate procurement method under these regulations. When there will be no substantial conflict of interest and it is otherwise in the best interest of the Authority, a contract may be entered into to prepare specifications for the Authority's use in the procurement of property, services, or construction. In an emergency under § 3-206 (Emergency Procurements), any necessary specifications may be utilized without regard to provisions of this Chapter.

§ 4-203 Procedures for the Development of Specifications

(1) This section applies to all persons who may prepare a specification for the Authority's use. A specification may provide alternate descriptions of property, services, or construction items where two or more design, functional, or performance criteria will satisfactorily meet the Authority's requirements. Specifications should not include any solicitation or contract term or condition such as a requirement for time or place of bid opening, time of delivery, payment, liquidated damages, or qualification of bidders.

(2) This subsection covers brand name or equal specifications and shall apply whenever brand names are used in specifications, except as provided in § 4-203(3), below.

(a) Brand name or equal specifications may be prepared to be used when the Contracting Officer determines in writing that:

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

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

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

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

(b) Brand name or equal specifications shall seek to designate three or as many different brands as are practicable as "or equal" references and shall further state that substantially equivalent products to those designated will be considered for award. Brand name or equal specifications shall include a description of the particular design, functional, or performance characteristics which are required to meet the needs of the Authority.

(c) Where a brand name or equal specification is used in a solicitation, the solicitation shall clearly identify and describe the particular physical, functional, or other characteristics of the brand-name items which are considered essential to satisfying the requirement, including any explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance, and characteristics desired and is not intended to limit or restrict competition.

(3) A brand name specification is restrictive and may be used only when the Contracting Officer makes a written determination that only the identified brand name item or items will satisfy the Authority's needs. The Contracting Officer shall seek to identify sources from which the designated brand name item or items can be obtained and shall solicit such sources to achieve whatever degree of competition is practicable.

§ 4-204 Qualified Products List

A qualified products list may be developed when testing or examination of manufacturer or distributor products, property or construction items, prior to issuance of the solicitation is desirable or necessary in order to best satisfy the Authority's requirements or specifications. When developing a qualified products list, a representative group of potential suppliers shall be solicited in writing to submit products for testing or examination to determine acceptability for inclusion on a qualified products list. Any potential supplier, even though not solicited, may offer its products for consideration. Generally, qualification is performed in advance and independent of any specific acquisition action, and inclusion on a qualified products list shall be based on results of tests or examinations conducted in accordance with prior published requirements. Except as otherwise provided by law, trade secrets, test data, and similar information provided by the supplier will be kept confidential when requested in writing by the supplier. However, test results used in formulating qualified products lists shall be made public but in a manner so as to protect the confidentiality of the identity of the competitors by, for example, using numerical designations.

§ 4-205 Full and Open Competition

Whenever possible, contracting officers shall ensure that references in specifications shall be written in such a manner as to describe widely recognized

standards or specifications promulgated by governments, industries, or technical societies, without having the effect of exclusively requiring a proprietary supply, service, or construction item, or procurement from a sole source, unless no other manner of description will suffice. In that event, a written determination shall be made that it is not practicable to use a less restrictive specification.

§ 4-206 Specifications Prepared by Others

The requirements of this Chapter shall apply to all specifications prepared by other than Authority personnel, including, but not limited to, those prepared by consultants, architects, engineers, designers, and other draftsmen of specifications for public contracts. Contracts for the preparation of specifications by other than Authority personnel shall require the specification writer to adhere to such requirements.

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

Section 5-100 - Definitions and Application

§ 5-101 Definitions

(1) "Architect-Engineer and Land Surveying Services" are those professional services within the scope of the practice of architecture, professional engineering, or land surveying as defined by the laws of Texas and Part 36.601-4 of the Federal Acquisition Regulation. They may include services described in § 3-207 (Statutory Professional Services).

(2) "Prime Contractor," as used in Chapter 5, means a person who has a contract with the Authority to build, alter, repair, improve, or demolish any structure, building, or other improvements of any kind to any real property.

§ 5-102 Application

The provisions of this Chapter shall apply to all procurements of construction, architect-engineer and land surveying services which are expected to be greater than \$50,000. Procurement of construction, architect-engineer and land surveying services expected to be \$50,000 or less may be made in accordance with § 3-204 (Small Purchases).

Section 5-200 - Management of Construction Contracts

§ 5-201 General Policy

(1) This § 5-200 contains provisions applicable to the selection of the appropriate method of management for construction contracts; that is, the contracting method and configuration that most likely will result in timely, economical, and otherwise successful completion of the construction project.

(2) It is intended that the President & Chief Executive Officer or their designee have sufficient flexibility in formulating the project delivery approach in a particular project to fulfill the Authority's needs. In each instance, consideration commensurate with the project's size and importance should be given to all the appropriate and effective means of obtaining both the design and construction of the project. The methods for achieving those purposes set forth in this section are not to be construed as an exclusive list.

(3) In selecting the construction contracting method, the President & Chief Executive Officer or their designee should consider the results achieved on similar projects in the past and the methods used. Consideration should be given to all appropriate and effective methods and their comparative advantages and disadvantages and how they might be adapted or combined to fulfill the Authority's requirements.

(4) This section is intended to guide Authority personnel in selecting the appropriate contracting method. It is not intended to create any third-party rights.

(5) The Authority will advertise or publish notice of requests for bids, proposals, or qualifications. The Authority will also publish notice of the time and place for the bid or proposal or request for qualifications to be received and opened.

§ 5-202 Lease, Buy, or Build

Before initiating a construction project, consideration shall be given to leasing or buying existing building space as well as to constructing new space. Factors to consider when choosing between these three alternatives include, but are not limited to:

- (1) whether the Authority's requirements will be continuing or temporary;
- (2) the need for control by the Authority over the building or facility ;
- (3) the adequacy of available space to fit the Authority's needs;
- (4) to the extent they are reasonably known or ascertainable, the life-cycle costs associated with leasing, buying, or building;
- (5) which method can most timely meet and continue to meet the Authority's requirements;
- (6) the need to physically separate and distinguish the Authority's facilities from private facilities;
- (7) the dislocation of existing tenants, both commercial and residential, that may result;
- (8) environmental effects;
- (9) market conditions for rent rates, market capitalization rates, and labor and material costs of construction; and
- (10) extent of time commitment needed for Authority staff responsible for the project.

§ 5-203 General Descriptions

(1) The following descriptions are to provide a common vocabulary for use in the context of this section and for general discussion concerning the construction contracting activities of the Authority. The methods described are not all mutually exclusive and often may be combined on one project. These descriptions are not intended to be fixed in respect to all construction projects of the Authority. In each project, these descriptions may be adapted to fit the circumstances of that project. However, the Contracting Officer should endeavor to ensure that these terms are described adequately in the appropriate contracts, are used in a manner that clearly communicates their intent, and are understandable to all relevant parties. Significant deviations from the descriptions provided in this section should be explicitly noted.

(2) The single prime contractor method of contracting normally has one entity (general contractor) contracting with the Authority to complete an entire construction project on a timely basis in accordance with plans and specifications provided by the Authority. These plans and specifications may be prepared by a private architectural firm under contract to the Authority. Further, while the general contractor may take responsibility for successful completion of the project, much of the work may be performed by specialty contractors with whom the prime contractor has entered into subcontracts.

(3) Under the multiple prime contractor method, the Authority contracts directly with a number of specialty contractors to complete portions of the project in accordance with the Authority's plans and specifications. The Authority or its agent may have primary responsibility for successful completion of the entire project, or the contracts may provide that one of the multiple prime contractors has this responsibility.

(4) In a design-build or turnkey project, the Authority contracts with a single entity (or firm) to provide both design and construction services for the construction, rehabilitation, alteration, or repair of a facility as described in a set of performance specifications. Design responsibility and construction responsibility both rest with the design-build contractor.

(5) In a design-build development project, the authority contracts as described in a design-build project, but the design-build contractor also supplies the site as part of the package.

(6) A construction manager is a person experienced in construction who has the ability to evaluate and to implement plans and specifications as they affect time, cost, and quality of construction and the ability to coordinate the design and construction of the project, including the administration of change orders. The Authority contracts with a qualified construction manager to act for the Authority in the construction project as specified in the construction management contract. At times, the construction manager may become the single prime contractor or may guarantee that the project will be completed on time and will not exceed a specified maximum price. At such times, the construction manager will become responsible, just as any single prime contractor, to complete the project at or below the specified price.

(7) Sequential design and construction denotes a method in which design of substantially the entire structure is completed prior to beginning the construction process.

(8) Phased design and construction denotes a method in which construction is begun when appropriate portions have been designed but before substantial design of the entire structure has been completed. This method is also known as "fast-track construction."

§ 5-204 Criteria for Method Selection

(1) Before choosing the construction contracting method to use, a careful assessment must be made of requirements the project must satisfy and those other characteristics that would be desirable. In addition to those set forth in subsections (2) and (3), some of the factors to consider are:

- (a) the date the project must be ready to be occupied;
- (b) the type of project;
- (c) the extent to which the Authority's requirements and the ways in which they are to be met are known;
- (d) the location of the project and whether a contractor's site may be used;
- (e) the size, scope, complexity, risk, and economics of the project, including bonding requirements; and
- (f) the expected duration of the contract.

(2) The following factors relating to the Authority's resources should be considered:

- (a) the amount and type of financing available for the project, including whether the budget is fixed or flexible, and the source of funding (for example, general or special authorization, federal or state assistance monies,

authority assets, or bonds);

(b) a realistic appraisal of the qualifications and experience the Authority's personnel can bring to the project and, of equal importance, how much time such personnel can devote to the project; and

(c) the availability of outside consultants (such consultants may be able to handle tasks and supply valuable expertise otherwise unavailable to the Authority).

(3) Choice of the proper construction contracting method entails not only the internal examination described in this section but must take into account the characteristics, experience, and availability of the contractors who can work on the project. The design firms the Authority may contract with to prepare the plans and specifications must be evaluated as a group to determine whether they can efficiently divide the work into specialty packages, if multiple prime contractors are to be used, or if the project can be designed in phases appropriate to use of phased design and construction. Prospective construction contractors also must be appraised as a group to determine whether they have the capability and willingness to bid on the construction project as designed and as required by the contracting method chosen. Similarly, if the contracting method involves use of consultants, an evaluation of the availability of qualified consultants also should be made. If the design-build method or some variation of it is considered, availability of firms capable of both designing and constructing the facility must be ascertained. In respect to all of the potential contractors, it is important to consider the amount of competition currently in the market for the particular type of contract and whether a price can be obtained that is fair and reasonable when considered together with the benefit to the Authority potentially obtainable from such a contract.

§ 5-205 Single Prime Contractor

(1) When sequential design and construction are used with a single prime contractor, comprehensive plans and specifications that are precise enough to allow prospective prime (general) contractors to submit a competitive sealed bid or proposal should be prepared. The contractor awarded the contract takes responsibility for the coordination of the specialty subcontractors and timely completion of the project at the price specified in the contract. The architect-engineer, the Authority's project manager, and (if used) the construction manager shall monitor the progress of the project and otherwise represent the Authority's interest all as set forth in the pertinent contracts.

(2) The single prime contractor method allows the Authority to look to one prime contractor who has principal responsibility for completing the project. The single prime contractor method places the responsibility on the prime contractor for most subcontractor claims. Typically, when sequential design and construction are used, the Authority is given a fixed price for completion of the entire project before the construction has begun.

(3) The single prime contractor method removes specialty contractors from direct Authority control. The prime contractor will typically include a markup on each specialty contractor's payment. The prime contractor's services in managing these contractors may well offset any possible markup by eliminating the need for a construction manager.

(4) A single prime contractor also may be used with phased design and construction through the letting by the Authority of the early construction phases to specialty contractors and the letting of a portion of the project to a prime contractor when the plans and specifications are sufficiently complete to allow bids to be made. The Authority may transfer or assign to the contractor the administration of the specialty contracts it let earlier, as provided in the contract. Using a single prime contractor with phased

design and construction allows the Authority to retain a single prime contractor responsible for the entire job and while allowing construction to begin before all of the design is completed. The Authority or its construction manager must supervise and coordinate the work of the early specialty contractors, and the prime contractor will not be able to choose those early specialty contractors and may have to work with someone the prime contractor would not have chosen. This could increase the Authority's exposure to more claims, and the prime contractor bids may be proportionately higher than they would have been otherwise.

(5) The rights, duties, and responsibilities of the Authority's representatives, the architect-engineer, the general prime contractor, and (if applicable) the construction manager and any specialty contractors who contract with the Authority must be carefully detailed. If phased design and construction is used, administration of ongoing specialty contracts let before the prime contract will have to be transferred or assigned to the prime contractor. The terms of this assignment or transfer (including the duties of the Authority to ensure that the specialty contractors are at a certain point of completion at the time of the assignment), what liability to the specialty contractors remains with the Authority after assignment, if any, and what duties and responsibilities the general prime contractor has with respect to the assigned specialty contractors must all be set forth in the specialty contracts and the contract with the prime contractor.

§ 5-206 Multiple Prime Contractors

(1) Multiple prime contractors may be used with sequential design and construction by splitting the plans and specifications into packages pertinent to recognized trade specialties. The Authority may manage and coordinate the trade specialties with Authority staff or may contract with a construction manager to do so. The contracts shall specify where responsibility for successful completion of the entire project rests: (1) with the Authority, (2) with the Authority's agent, or (3) with one of the multiple prime contractors. Multiple prime contractors may be used effectively with phased design and construction only if the architect-engineer's work is closely coordinated with the specialty contractors' work. The specialty contractors may either contract directly with the Authority or with its construction manager.

(2) The multiple prime contractors method can lessen the prime contractor's markup (if any) on the specialty contractors' contracts and gives the Authority greater control over the contractors doing the work. It permits the Authority to be more involved in the selection of specialty contractors, allows the Authority to prescribe how they will compete for the contract, and gives the Authority more flexibility in deciding when to enter the construction market and with what size contracts.

(3) This method places the risk of managing and coordinating the construction work with the Authority. The Authority or its representatives must actively and aggressively supervise the project to ensure timely and successful completion. A contract that merely requires specialty contractors to cooperate and to coordinate their work is insufficient. To undertake this responsibility successfully requires vesting clear authority in an Authority representative to quickly make decisions essential to the continuation of the project.

(4) Whenever multiple prime contractors are used, the contract between the Authority and each prime contractor must clearly state the scope of each contractor's responsibility, when the portions of its work are to be complete, and provide a system of timely reports on progress of the contractor's work and problems encountered. The contract also should specify that each contractor is liable for damages caused to other contractors or the Authority, whether because of delay or otherwise. Such clauses should not, however, attempt to relieve the Authority's liability where it fails to coordinate and manage the project properly. Further, the duties of the Authority's representative, the architect-engineer, and the construction manager (if one is employed) with respect to the specialty contractors should be clearly delineated in all the parties' contracts.

§ 5-207 Design-Build or Turnkey

(1) The design-build or turnkey method gives the contractor maximum control of the construction project consistent with the Authority's needs. The Authority prepares a set of performance specifications including functional criteria, any life-cycle cost considerations, and determines the relevant evaluation factors. The Authority shall then prepare a request for qualifications that includes general information on the project site, project scope, budget, special systems, selection criteria and the weighted value for each criterion, and other information that may assist potential design-build firms in submitting proposals for the project. The Authority must also prepare the design criteria package in accordance with Section 2269.306 of the Texas Government Code. The Authority's request for qualifications and/or design criteria package shall specify the degree of detail necessary in a proposal, however the Authority may not require contractors to submit architectural or engineering designs as part of the proposal or response to a request for qualifications.

(2) The contractors are evaluated based on their experience, technical competence, capability to perform, the past performance of the contractor and members of the firm, and other appropriate factors submitted by the contractor in response to the request for qualifications. The Authority may not evaluate contractors using any cost-related or price-related evaluation factors. It may be appropriate to use a multi-step process to lessen the number of firms submitting final design proposals to reduce administrative burden and to keep preparation costs down. In appropriate circumstances, it may be advantageous to provide in the solicitation for payment (to all or any of the firms) stipulated amounts for proposal preparation costs to ensure adequate continuing competition.

(3) If needed, the Authority may request additional information regarding demonstrated competence and qualifications, considerations for the safety and long-term durability of the project, the feasibility of implementing the project as proposed, and the ability of the contractor to meet schedules. The Authority may also request information about the contractor's policies on subcontractor markup, definition of general conditions, range of cost for general conditions, policies on contingencies, discount for prompt payment, and expected staffing for administrative duties (defined as "costing methodology" in Section 2269.307 of the Texas Government Code). However, the Authority may not ask about a guaranteed maximum price or bid for overall design or construction during the evaluation period.

(4) The Authority shall rank the firms based on the published selection criteria, and then select the design-build firm that submits the proposal offering the best value. If the Authority is unable to negotiate a contract with the selected firm, the Authority shall formally terminate the negotiations in writing, and then attempt to negotiate with the next firm. The rankings based upon the published selection criteria shall be made public by the seventh day after a contract is awarded.

(5) After award, the contractor completes the design (subject to review by the Authority or its architect-engineer as set forth in the contract) and constructs the project. The contractor chooses whether to phase the project. Upon completion, the contractor gives the Authority a set of construction documents for the completed project, noting any changes made during construction. The Authority then either accepts or rejects the project depending on how well the contractor has met the specifications.

(6) In the design-build method, a fixed price for the project is established early and the design-builder both designs and builds the project. Consequently, the duty and risk of proper management of project design and construction lies with the contractor. It also allows the design-builder to design and perform in a manner best suited to its operations and experience. It may give the Authority earlier definition of the project. This method is most appropriate when the Authority will not need to be deeply involved in the project's design and construction. The design-build method may reduce the Authority's control over the design and construction process. The contract is awarded on the basis of a design proposal, not a complete set of plans and specifications. The Authority's needs may not be met if

the specifications are deficient, if the contractor's design proposals are not carefully evaluated, and if the design and construction process is not carefully monitored to ensure that both the specifications and the design proposal are being followed.

(7) Careful preparation of the specifications and evaluation criteria is crucial to successful use of the design-build method. The contract documents also should delineate clearly the Authority's rights to inspect plans and specifications and the construction work in progress. They should also indicate precisely what will constitute completion of the project by the contractor.

(8) The Authority's contract with a design-build firm should specify that the design-builder must include the Authority in any changes to the plans and specifications that would not result in a change order and that increases the guaranteed maximum price or contract price. The contract should also specify that the design-builder cannot value engineer aspects of the plans or specifications to stay within the price without first notifying and obtaining written consent from the Authority.

§ 5-208 Construction Manager

(1) A construction manager may bring a valuable practical construction perspective to the Authority in both the planning, and design phases of the project. For purposes of this section, the planning phase encompasses those activities involved in determining the Authority's requirements, selecting the construction contracting management method, selecting an architect-engineer, and establishing progress schedules. During design, the construction manager reviews plans and makes suggestions to cut construction costs that may relate to the practicality of construction, market conditions in the construction industry, and items which should be ordered early. A construction manager also would assist in phasing the design and construction process.

(2) Once construction commences, the construction manager's role may be limited to monitoring construction progress and inspecting and otherwise representing the Authority's interest if sequential design and construction with a single prime contractor are used. If the project is constructed by the phased design and construction method or the multiple prime contractors method, the construction manager will be responsible for the supervision and management of their work and may let contracts to the specialty contractors pursuant to the management contract with the Authority. In a project using phased design, the construction manager also may give the Authority a guaranteed maximum price for completion of the project prior to completion of all the drawings and specifications. To the extent the construction manager is the Authority's representative, the manager may assist in the final inspection and acceptance of the project by the Authority.

(3) The construction manager adds construction expertise to the Authority's team. Several benefits of this expertise are listed below.

(a) The selection of the construction contract management technique, project design, and other crucial decisions in the early phases of the project can be made with a better understanding of their impact upon construction.

(b) The construction manager can manage the work of the various construction contractors as the Authority's representative instead of a single prime contractor whose interests may not coincide with those of the Authority. In this way, the Authority may gain more control of the actual construction project.

(c) Phased design and construction may be used more readily

because a construction manager can relieve the burden on the Authority to coordinate its duties with those of the architect-engineer and the various contractors.

(d) A construction manager may be able to give the Authority a guaranteed maximum price earlier in the design process than a general contractor because of its involvement in the project from the beginning. This may permit the Authority to phase the design and construction effectively and still have a fixed price for funding purposes before construction is begun.

(4) The construction manager's fee is added cost to the construction project. On smaller construction projects of less than \$3 million, construction management may not be cost effective.

(5) It is imperative that the construction management contract clearly set forth the duties and authority of the construction manager with respect to all the participants in the project. The contract should define the possible liability of the Authority and the construction manager for failure to coordinate the specialty contractors' work properly.

(6) If the Authority contracts using the construction manager-agent method under Tex. Gov. Code 2269, Subchapter E, then these additional considerations apply:

(a) the construction manager represents the Authority in a fiduciary capacity;

(b) the construction manager shall be selected on the basis of demonstrated competence and qualifications in the same manner as an architect or engineer (discussed in §5-502 of these regulations);

(c) the construction manager must maintain professional liability or errors and omissions insurance in the amount of at least \$1 million per occurrence.

§ 5-209 Sequential Design and Construction

(1) The initial step in using sequential design and construction is to gather a team to design the project and provide a complete set of drawings and specifications to use in awarding the construction contract or contracts. This team may include a construction manager who, in addition to reviewing the plans as they develop, may assist in separating them into packets if multiple prime contractors are to be used. Except for redesign necessitated by changes in the Authority's requirements or problems encountered during construction, design is complete at the time construction has begun.

(2) A project using sequential design and construction proceeds in clearly defined steps may aid in financing, gaining any necessary approvals, and managing the entire project. Complex or unique projects can be completely thought through and planned before beginning construction. Also, a fixed price for the project can be established before any construction begins. Sequential design and construction may take longer than phased design and construction. The complete package of drawings and specifications also freezes design decisions months or years before occupancy (which will reduce flexibility).

§ 5-210 Phased Design and Construction

(1) Phased design and construction may be used when the architect-engineer, working with the construction manager (if one is used), can settle on the major design decisions and then do the detail design work in the sequence necessary to construct the project. This design process then allows construction to begin before design is complete for the entire project (of course, design is complete on those portions being constructed). Construction should begin only after the Authority's requirements are set, the overall (schematic) design is complete, and the complete drawings and specifications for the first construction phase are ready. (It may be possible to start site preparation prior to this stage.) A construction manager often is necessary to assist in packaging the various specialty contracts and to manage the work under these contracts.

(2) Phased design and construction can reduce the project completion time. It also allows an opportunity to reduce the project's scope if prices on early portions indicate the project may exceed the budget (whereas in a sequential project, such redesign might delay the entire project). It also gives the Authority added flexibility in deciding when to let the various specialty contracts to take advantage of market conditions. However, portions of the project begin before later portions are completely designed. Major changes in these later portions may necessitate costly changes in the early portions and result in costly delays to specialty contractors. The Authority bears the risks coordinating at least some specialty contractors and ensuring the design of later portions does not adversely affect earlier ones. The Authority does not assume either of these risks in sequential design and construction.

(3) The contract must clearly establish the architect-engineer's duty to design to allow phasing, and the contracts with the specialty contractors must clearly delineate their scope of work and duties to other contractors and the Authority. Further, the management rights of the Authority and its construction manager, if one is used, must be set forth.

Section 5-300 - Bonds

§ 5-301 Bid Security

(1) Invitations for Bids on construction contracts shall require the submission of bid security in an amount equal to at least five percent of the bid at the time the bid is submitted. If a bidder fails to accompany its bid with the required bid security, the bid shall be deemed nonresponsive in accordance with § 3-202.13 (Bid Evaluation) of these regulations, except as provided by subsection (3), below.

(2) Acceptable bid security shall be limited to:

(a) an annual or one-time bid bond in a form satisfactory to the Authority underwritten by a company licensed to issue bid bonds in Texas;
or

(b) a certified check from a bank acceptable to the Authority.

(3) If a bid does not comply with the security requirements of this section, the bid shall be rejected as nonresponsive, unless the failure to comply is determined by the President & Chief Executive Officer to be non-substantial when:

(a) only one bid is received, and there is not sufficient time to rebid the contract;

(b) the amount of the bid security submitted, though less than the

amount required by the Invitation for Bids, is equal to or greater than the difference in the price stated in the next higher acceptable bid; or

(c) the bid guarantee becomes inadequate as a result of the correction of a mistake in the bid or bid modification in accordance with § 3-202.12 of these regulations, so long as the bidder increases the amount of guarantee to required limits within 48 hours after the bid opening.

- (4) The bid bond required by this section shall be in substantially the following

form: BID BOND

KNOW ALL MEN BY THESE PRESENTS, that we, the Principal and Surety(ies) hereto, are firmly bound to the Dallas Area Rapid Transit Authority (hereinafter called the Authority) in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally; provided, that, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly, and severally with the Principal, for the payment of such sums only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the Principal has submitted the bid identified above, if the Principal, upon acceptance by the Authority of their bid identified above, within the period specified therein for acceptance (60 days if no period is specified), shall execute such further contractual documents, if any, and give such bond(s) as may be required by the terms of the bid as accepted within the time specified (10 days if no period is specified) after receipt of the forms by him, or in the event of failure so to execute such further contractual documents and give such bonds, if the Principal shall pay the Authority for any cost of procuring the work (including administrative costs) which exceeds the amount of their bid, then the above obligation shall be void and of no effect.

Each Surety executing this instrument hereby agrees that its obligation shall not be impaired by any extension(s) of the time for acceptance of the bid that the Principal may grant to the Authority, notice of which extension(s) to the Surety(ies) being hereby waived; provided, that such waiver of notice shall apply only with respect to extensions aggregating not more than 60 calendar days in addition to the period originally allowed for acceptance of the bid; provided further, that if any legal action be filed upon this bond, venue shall lie exclusively in Dallas County, Texas.

IN WITNESS WHEREOF, the Principal and Surety(ies) have executed this bid bond and have affixed their seals on the date set forth above.

[Signatures of Principal and Surety]

NOTE: The bond must include the name and address of the Surety's Resident Agent in Dallas County, Texas, for delivery of notice and service of process. Any bond executed by an attorney-in-fact must have a certified copy of Power of Attorney attached.

§ 5-302 Performance Bonds

- (1) A performance bond is required for all construction contracts in excess of \$100,000 in the amount of the contract price in accordance with the Texas Government Code, Chapter 2253.021. A performance bond is not required if the contract amount is \$100,000 or less.
- (2) The performance bond shall be solely for the protection of the Authority (and not third parties) and shall be delivered by the contractor to the Authority before receiving a notice to proceed with the work or being allowed to start work.
- (3) The performance bond is conditioned on the faithful performance of the work in accordance with the plans, specifications, and contract documents. If a contractor fails to deliver the required performance bond, the Authority may terminate the contract for default and award of the contract may be made to the next lowest bidder in accordance with § 3-202.15 (Award) of these regulations.
- (4) The performance bond must be executed by a corporate surety in accordance with the Texas Government Code, Chapter 2253.021, and payable to the Authority.
- (5) If permitted by the contract and solicitation, the Contracting Officer may reduce the amount of the performance bond as work is completed if such officer determines in writing that such reduction is in the best interest of the Authority.
- (6) The performance bond required by this section shall be in substantially the following form:

PERFORMANCE BOND

KNOW ALL MEN BY THESE PRESENTS, that we, the Principal and Surety(ies) hereto, are firmly bound to the Dallas Area Rapid Transit Authority (hereinafter called the Authority) in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally; provided, that, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sums only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

THE CONDITION OF THE OBLIGATION IS SUCH that, whereas the Principal has entered into the contract identified above,

NOW, THEREFORE, if the Principal shall perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said

contract during the original term of said contract and any extensions thereof that may be granted by the Authority, with or without notice to the Surety(ies), and during the life of any guaranty required under the contract, and shall also perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the Surety(ies) being hereby waived; and, if the Principal shall repair and/or replace all defects due to faulty materials and workmanship that appear within a period of one (1) year from the date of final completion and acceptance of the work by the Authority; and, if the Principal shall fully indemnify and save harmless the Authority from all costs and damages which the Authority may suffer by reason of failure to so perform and shall fully reimburse and repay the Authority all outlay and expense which the Authority may incur in making good any default or deficiency, then this obligation shall be void; otherwise, it shall remain in full force and effect. This bond is given pursuant to the provisions of Chapter 2253 of the Government Code, as amended, all of the requirements of which are fully incorporated by reference herein. If any legal action be filed upon this bond, venue shall lie exclusively in Dallas County, Texas.

IN WITNESS WHEREOF, the Principal and Surety(ies) have executed this performance bond and have affixed their seals on the date set forth above.

[Signatures of Principal and Surety]

NOTE: The bond must include the name and address of the Surety's Resident Agent in Dallas County, Texas, for delivery of notice and service of process. Any bond executed by an attorney-in-fact must have a certified copy of Power of Attorney attached. The bond must be payable to the state and prominently display the information required in Tex. Gov. Code § 2253.021(f) on the face of the bond or an attachment thereto.

§ 5-303 Payment Bonds

(1) A payment bond is required for all construction contracts in excess of \$25,000 in the amount of 100% of the contract price in accordance with the Texas Government Code, Chapter 2253, as amended. The payment bond shall be solely for the protection of claimants (as defined in Chapter 2253) and shall be delivered by the contractor to the Authority before receiving a notice to proceed with the work or being allowed to start work. If a contractor fails to deliver the required payment bond, the Authority may terminate the contract for default and award of the contract may be made to the next lowest bidder in accordance with § 3-202.15 (Award) of these regulations.

(2) A payment bond shall not be required if the contract amount is \$25,000 or less.

(3) The payment bond required by this section shall be in substantially the following form:

PAYMENT BOND

KNOW ALL MEN BY THESE PRESENTS, that we, the Principal and Surety(ies) hereto, are firmly bound to the Dallas Area Rapid Transit Authority (hereinafter called the Authority) in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally; provided, that, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly, and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

THE CONDITION OF THE OBLIGATION IS SUCH that, whereas the Principal has entered into the contract identified above,

NOW, THEREFORE, if the Principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications to the Surety(ies) being hereby waived, then the above obligation shall be void and of no effect. This bond is given pursuant to the provisions of Chapter 2253 of the Government Code, as amended, all of the requirements of which are fully incorporated by reference herein. If any legal action be filed upon this bond, venue shall lie exclusively in Dallas County, Texas.

IN WITNESS WHEREOF, the Principal and Surety(ies) have executed this payment bond and have affixed their seals on the date set forth above.

[Signatures of Principal and Surety]

NOTE: The bond must include the name and address of the Surety's Resident Agent in Dallas County, Texas, for delivery of notice and service of process. Any bond executed by an attorney-in-fact must have a certified copy of Power of Attorney attached.

Section 5-400 [Reserved]**Section 5-500 - Architect-Engineer and Land Surveying Services****§ 5-501 Application**

The provisions of this section apply to every procurement of services provided in connection with the professional employment or practice of a person who is licensed or registered as an architect, professional engineer, or land surveyor, as defined by the laws of Texas, except as authorized by § 3-204.03 (Small Purchases of Professional Services), § 3-205 (Sole Source Procurement), and § 3-206 (Emergency Procurements) of these regulations.

§ 5-502 Policy

It is the policy of the Authority to:

- (1) give public notice of all requirements for architect-engineer and land surveying services;
- (2) first select and award contracts on the basis of demonstrated competence and qualification to perform the type of services required; and
- (3) then attempt to negotiate contracts with the most highly qualified firms for such services at a fair and reasonable price. The Authority may not select a provider of architecture-engineering or land surveying services, or award a contract for the services, on the basis of competitive bids submitted for the contract or for the services.

§ 5-503 Selection Panel

When a contract for architect-engineer or land surveying services is expected to exceed \$5,000, the President & Chief Executive Officer or their designee shall designate a Selection Panel composed of no less than three persons (which may include representatives who are not employees of the Authority), one of which shall be designated to act as Contracting Officer or Contracting Officer's Representative to negotiate a contract in accordance with these regulations.

§ 5-504 Required Determinations

Prior to announcing the need for any architect-engineer or land surveying services, the President & Chief Executive Officer or their designee shall determine:

- (1) that Authority personnel are unable or unavailable to perform the services required under the proposed contract;
- (2) the nature of the relationship to be established between the Authority and the contractor by the proposed contract; and
- (3) that the Authority has developed, and fully intends to implement, a written plan for utilizing such services, which shall be included in the contractual statement of work.

§ 5-505 Annual Statement of Qualifications

The President & Chief Executive Officer or their designee shall encourage firms engaged in providing architect-engineer or land surveying services to submit annually a statement of qualifications and performance data which shall include, but not be limited to, the following:

- (1) the name of the firm and the location of all of its offices, specifically indicating the principal place of business;
- (2) the age of the firm and its average number of employees over the past five years;
- (3) the education, training, and qualifications of members of the firm and key employees;
- (4) the experience of the firm reflecting technical capabilities and project experience;
- (5) the names of five clients who may be contacted, including at least three for whom

services were rendered within the 90- day period immediately preceding the submission of the statement of qualifications; and

- (6) any other pertinent information requested by the Contracting Officer.

A standard form or format may be developed for these statements of qualifications and performance data. Firms may amend statements of qualifications and performance data at any time by filing a new statement.

§ 5-506 Public Announcement

(1) Notice of need for architect-engineer or land surveying services shall be given by the Contracting Officer as provided in § 3-202.05 (Public Notice). Such notice shall be published sufficiently in advance of when responses must be received in order that firms have an adequate opportunity to submit a proposal. The notice shall contain a brief statement of the services required which adequately describes the project and specifies how a solicitation containing specific information on the project may be obtained.

(2) A solicitation shall be prepared which describes the Authority's requirements and sets forth the evaluation criteria. It shall be distributed upon request and payment of a fee, if any. The solicitation shall include notice of any conference to be held and the criteria to be used in evaluating the proposals and selecting firms, including, but not limited to:

- (a) competence to perform the services as reflected by technical training and education; general experience; experience in providing the required services; and the qualifications, experience, and competence of all persons who would be assigned to perform the services;
- (b) ability to perform the services as reflected by workload and the availability of adequate personnel, equipment, and facilities to perform the services expeditiously;
- (c) past performance as reflected by the evaluations of private persons and officials of other governmental entities that have retained the services of the firm with respect to factors such as control of costs, quality of work, and an ability to meet deadlines; and
- (d) a listing of other contracts under which services or projects similar in scope, size, or discipline of the required services were performed or undertaken within a previous period of time specified in the solicitation.

Amendments of proposals may be required to obtain additional information deemed necessary or desirable by the Selection Committee.

§ 5-507 Evaluation and Selection of Firms for Discussions

- (1) The Selection Panel shall evaluate:
 - (a) annual statements of qualifications and performance data, if available; and

(b) proposals submitted in response to the solicitation for architect-engineer and land surveying services, including proposals for joint ventures.

All annual statements of qualifications and performance data and proposals shall be evaluated in light of the criteria set forth in the solicitation for architect-engineer or land surveying services to determine which firm is the most highly qualified.

(2) If fewer than three responses are received in response to the public announcement provided for in § 5-506, a second public announcement shall be made. If, after this announcement, there remain fewer than three responses, the Selection Panel shall evaluate the responding firm or firms in accordance with this section. If the firm or firms responding are qualified, the procedures set forth in § 5-510 (Negotiation and Award of Contract) shall be followed.

(3) The Selection Panel shall select for discussions no fewer than three firms receiving the highest evaluations. The Contracting Officer shall notify each firm in writing of the date, time, and place of discussions and, if necessary, shall provide each firm with additional information on the project and the services required. Such notice shall provide that a representative of each firm must attend discussions in order for the firm to be considered further.

§ 5-508 Discussions

Following evaluations, the Selection Panel shall hold discussions regarding the proposed contract with the firms selected pursuant to § 5-507. The purposes of such discussions shall be to:

- (1) determine each firm's general competence and qualifications for performing the contract; and
- (2) explore the scope and nature of the required services and the relative utility of alternative methods of approach; and
- (3) evaluate the fairness and reasonableness of the professional fees proposed.

§ 5-509 Selection of Most Qualified Firms

After discussions, the Selection Panel shall reevaluate and select, in order of preference, no fewer than three firms receiving the highest evaluations. The Selection Panel shall prepare a memorandum of the selection process which indicates how the evaluation criteria were applied to determine the ranking of the firms selected.

§ 5-510 Negotiation and Award of Contract

(1) The Contracting Officer shall attempt to negotiate a contract with the most highly qualified firm for the required services at compensation determined in writing to be fair and reasonable. Contract negotiations shall be directed toward:

- (a) making certain that the firm has a clear understanding of the scope of the work (specifically, the essential requirements involved in providing the required services);
- (b) determining that the firm will make available the necessary personnel and facilities to perform the services within the required time; and

(c) agreeing upon compensation which is fair and reasonable, taking into account the estimated value, scope, complexity, and nature of the required services.

(2) If fair and reasonable compensation, contract requirements, and contract documents can be agreed upon with the most competent and qualified firm, the contract shall be awarded to that firm.

(3) If fair and reasonable compensation, contract requirements, and contract documents cannot be agreed upon with the most highly evaluated firm, the Contracting Officer shall formally end negotiations with the firm in writing and then attempt to negotiate a contract with the next most highly qualified firm at a fair and reasonable price. If fair and reasonable compensation, contract requirements, and contract documents can be agreed upon, then the contract shall be awarded to that firm. If negotiations again fail, negotiations shall be terminated and commenced with the next most highly qualified firm.

(4) Written notice of the award shall be sent to the firm with whom the contract is successfully negotiated. Each firm with whom discussions were held shall be notified of the award. Notice of award shall be made available to the public.

(5) Should the Contracting Officer be unable to negotiate a contract with any of the firms initially selected, additional firms shall be selected in preferential order based on the Selection Panel's evaluation, and negotiations shall continue in accordance with this section until an agreement is reached and the contract awarded.

(6) After award of the proposed contract, a memorandum setting forth the principal elements of the negotiations with each firm shall be prepared by the Contracting Officer. Such memorandum shall contain sufficient detail to reflect the significant considerations affecting price and the other terms of the contract. Such memorandum shall be included in the procurement file and be available to the public upon request.

CHAPTER 6 - CONTRACT CLAUSES

Section 6-100 Scope of Coverage

This chapter sets forth standard contract clauses to be used in contracts entered into by the Authority. Any clause designated as “required” for the particular type of contract must be used unless a deviation from these regulations is authorized pursuant to § 2-301. The clauses in this chapter shall not be modified unless such modification is authorized by these regulations or a deviation under § 2-301 authorizes such modification.

Section 6-200 - Fixed Price Supply Contracts

§ 6-201 Applicability

The provisions of this section apply to all fixed price supply contracts. As used in this section, the phrase “fixed price supply contract” shall mean any contract:

(1) entered into either by competitive sealed bidding or by competitive sealed proposals other than small purchases;

(2) at a fixed price (with or without provision for price redetermination, economic price adjustment, or other form of price revision);

(3) for property other than (a) the construction, alteration, or repair of buildings, roads, or other kinds of real property, or (b) experimental, developmental, or research work.

The Contracting Officer may adapt and abbreviate the clauses in this § 6-200 for use in small purchase and purchase order forms.

§ 6-202 Required Clauses for Fixed Price Supply Contracts

The following clauses shall be included in all fixed price supply contracts.

§ 6-202.01 Definitions

As used throughout this contract, the following terms shall have the meaning set forth below:

(a) The term “the Authority” means the Dallas Area Rapid Transit Authority; and the term “duly authorized representative” means any person or persons or board (other than the Contracting Officer) authorized in writing to act for the Authority.

(b) The term “Contracting Officer” means the person executing this contract on behalf of the Authority or their duly appointed successor; and the term includes, except as otherwise provided in this contract, the authorized representative of the Contracting Officer acting within the limits of their authority.

(c) Except as otherwise provided in this contract, the term “subcontracts” includes purchase orders under this contract.

(d) In computing any period of time established under this contract, “days” means calendar days, and the day of the event from which the designated period of time begins to run shall not be included, but the last day shall be included unless it is a Saturday, Sunday, or Federal or State of Texas holiday, in which event the period shall run to the end of the next business day.

[Additional definitions may be included if they are not inconsistent with the foregoing clause or the provisions of these regulations.]

§ 6-202.02 Changes

(a) The Contracting Officer may at any time, and without notice to the sureties, if any, by a written order, make changes within the general scope of this contract in any one or more of the following: (i) drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Authority in accordance with the drawings, designs, or specifications; (ii) method of shipment or packing; and (iii) place of delivery.

(b) If any such change described in subsection (a) causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether changed or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, delivery schedule, or both, and shall modify the contract in writing.

(c) Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the Contracting Officer's written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract; provided, however, that later notice shall not bar the Contractor's claim if the Contractor can demonstrate that the Authority was not prejudiced by the delay in notification. In no event shall any claim be asserted after final payment.

(d) If the Contractor's proposal includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property.

(e) Failure to agree to any adjustment under this clause shall be a dispute concerning a question of fact within the meaning of the Disputes Clause of this contract. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed pending resolution of the dispute.

§ 6-202.03 Extras

Except as otherwise provided in this contract, no payment for extras shall be made unless such extras and the prices therefore have been authorized in writing by the Contracting Officer.

§ 6-202.04 Variation in Quantity

(a) A variation in the quantity of any item called for by this contract will not be accepted unless such variation has been caused by conditions of loading, shipping, or packing, or allowances in manufacturing processes, and then only to the extent, if any, specified in paragraph (b) of this clause.

(b) The permissible variation shall be limited to:

_____ Percent increase;

_____ Percent decrease

This increase or decrease shall apply to _____*

*Contracting Officer shall insert in the blank the designation(s) to which the percentages apply, such as: (1) the total contract quantity; (2) one Item only; (3) each quantity specified in the delivery schedule; (4) the total item quantity for each destination; or (5) the total quantity of each item without regard to destination.

§ 6-202.05 Inspection

(a) The Contractor shall provide and maintain an inspection system acceptable to the Authority covering supplies under this contract and shall tender to the Authority for acceptance only supplies that have been inspected in accordance with the inspection system and have been found by the Contractor to be in conformity with contract requirements. As part of the system, the Contractor shall prepare records evidencing all inspections made under the system and the outcome. These records shall be kept complete and made available to the Authority during contract performance and for as long afterwards as the contract requires. The Authority may perform reviews and evaluations as reasonably necessary to ascertain compliance with this paragraph. These reviews and evaluations shall be conducted in a manner that will not unduly delay the contract work. The right of review, whether exercised or not, does not relieve the Contractor of the obligations under

the contract.

(b) The Authority has the right to inspect and test all supplies called for by the contract, (including without limitation raw materials, components, intermediate assemblies, and end products) at all times (including the period of manufacture) and places and, in any event, prior to acceptance. The Authority shall perform inspections and tests in a manner that will not unduly delay the work. The Authority assumes no contractual obligation to perform any inspection and test for the benefit of the Contractor unless specifically set forth elsewhere in this contract.

(c) In the event any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity with the requirements of this contract, the Authority shall have the right either to reject those supplies (with or without instructions as to their disposition) or to require their correction. Supplies or lots of supplies which have been rejected or required to be corrected shall be removed or, if permitted or required by the Contracting Officer, corrected in place by and at the expense of the Contractor promptly after notice and shall not thereafter be tendered for acceptance unless the former rejection or requirement of correction is disclosed. If the Contractor fails promptly to remove such supplies or lots of supplies which are required to be removed, or promptly to replace or correct such supplies or lots of supplies, the Authority either (i) may by contract or otherwise replace or correct such supplies and charge to the Contractor the cost occasioned the Authority thereby, or (ii) may terminate this contract for default as provided in the Termination for Default Clause of this contract. Unless the Contractor corrects or replaces such supplies within the delivery schedule, the Contracting Officer may require the delivery of such supplies at a reduction in price which is equitable under the circumstances. Failure to agree to such reduction of price shall be a dispute concerning a question of fact within the meaning of the Disputes Clause of this contract.

(d) If any inspection or test is made by the Authority or its authorized representative on the premises of the Contractor or a subcontractor, the Contractor without additional charge shall provide all reasonable facilities and assistance for the safety and convenience of the Authority's inspectors in the performance of their duties. If the Authority's inspection or test is made at a point other than the premises of the Contractor or a subcontractor, it shall be at the expense of the Authority, except as otherwise provided in this contract; provided, that in case of rejection, the Authority shall not be liable for any reduction in value of samples used in connection with such inspection or test. All inspections and tests by the Authority shall be performed in such a manner as not to unduly delay the work. The Authority reserves the right to charge to the Contractor any additional cost of the Authority's inspection and test when supplies are not ready at the time such inspection and test is required by the contract or when reinspection or

retest is necessitated by prior rejection. Acceptance or rejection of the supplies shall be made as promptly as practicable after delivery, except as otherwise provided in this contract; but failure to inspect and accept or reject supplies shall neither relieve the Contractor from responsibility for such supplies as are not in accordance with the contract requirements nor impose liability on the Authority therefor.

(e) The inspection and test by the Authority of any supplies or lots thereof does not relieve the Contractor from any responsibility regarding defects or other failures to meet the contract requirements which may be discovered prior to acceptance. Except as otherwise provided in this contract, acceptance shall be conclusive except for latent defects, fraud, or such gross mistakes as amount to fraud.

§ 6-202.06 Risk of Loss or Damage

Except as otherwise provided in this contract, the Contractor shall be responsible for the supplies covered by this contract until they are delivered at the designated delivery point, regardless of the point of inspection. After delivery to the Authority at the designated point and prior to acceptance by the Authority or rejection and giving notice thereof by the Authority, the Authority shall be responsible for the loss, destruction of, or damage to the supplies only if such loss, destruction, or damage results from the negligence of officers, agents, or employees of the Authority acting within the scope of their employment. The Contractor shall bear all risks as to rejected supplies after notice of rejection, except that the Authority shall be responsible for the loss, destruction of, or damage to the supplies only if such loss, destruction, or damage results from the gross negligence of officers, agents, or employees of the Authority acting within the scope of their employment.

§ 6-202.07 Payments

The Contractor shall be paid, upon the submission of proper invoices or vouchers, the prices stipulated herein for supplies delivered and accepted or services rendered and accepted, less deductions, if any, as herein provided. Unless otherwise specified, payment will be made on partial deliveries accepted by the Authority when the amount due on such deliveries so warrants; or, when requested by the Contractor, payment for accepted partial deliveries shall be made whenever such payment would equal or exceed either \$1,000 or 50% of the total amount of this contract.

§ 6-202.08 Additional Bond Security

The Contractor shall promptly furnish additional security required to protect the Authority and persons supplying labor or materials under this contract if --

(a) any surety upon any bond, or issuing financial institution for other security, furnished with this contract becomes unacceptable to the Authority;

(b) any surety fails to furnish reports on its financial condition as required by the Authority;

(c) the contract price is increased so that the penal sum of any bond becomes inadequate in the opinion of the Contracting Officer; or

(d) an irrevocable letter of credit (ILC) used as security will expire before the end of the period of required security. If the Contractor does not furnish an acceptable extension or replacement ILC, or other acceptable substitute, at least 30 days before an ILC's scheduled expiration, the Contracting Officer has the right to immediately draw on the ILC.

§ 6-202.09 Termination for Default

(a) The Authority may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in either one of the following circumstances:

(1) if the Contractor fails to make delivery of the supplies or to perform the service within the time specified herein or any extension thereof; or

(2) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

(b) In the event the Authority terminates this contract in whole or in part as provided in paragraph (a) of this clause, the Authority may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to the Authority for any excess costs for such similar supplies or services; provided, that the Contractor shall continue the performance of this contract to the extent, if any, it has not been terminated under the provisions of this clause.

(c) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to

perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, the following: acts of God or of the public enemy, acts of the Authority, fires, floods, epidemics, quarantine restrictions mandated by an authority having jurisdiction strikes, freight embargoes, and unusually severe weather; provided, however, in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the default of a subcontractor and if such default arises out of causes beyond the control of both the Contractor and subcontractor and without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

(d) If this contract is terminated as provided in paragraph (a) of this clause, the Authority, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Authority in the manner and to the extent directed by the Contracting Officer (i) any completed supplies and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called “manufacturing materials”) as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Authority has an interest. Payment for completed supplies delivered to and accepted by the Authority shall be at the contract price. Payment for manufacturing materials delivered to and accepted by the Authority and for the protection and preservation of property shall be in an amount agreed upon by the Contractor and Contracting Officer. Failure to agree to such amount shall be a dispute concerning a question of fact within the meaning of the Disputes Clause of this contract. The Authority may withhold from amounts otherwise due the Contractor for such completed supplies or manufacturing materials such sum as the Contracting Officer determines to be necessary to protect the Authority against loss because of outstanding liens or claims of former lien holders.

(e) If, after notice of termination of this contract under the provisions of this clause, it is determined for any reason that the Contractor was not in default or that the default was excusable under the provisions of this clause, the rights and obligations of the parties shall be those provided in the Termination for the Convenience of the Authority Clause hereof. Failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the Disputes Clause of this contract.

(f) The rights and remedies of the Authority provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract. Time is of the essence for all delivery, performance, submittal, and completion dates in this contract.

(g) As used in paragraph (c) of this clause, the terms “subcontractor” and “subcontractors” mean subcontractor(s) at any tier.

§ 6-202.10 Termination for Convenience

The Contracting Officer may, whenever the interests of the Authority so require, terminate this contract, in whole or in part, for the convenience of the Authority. The Contracting Officer shall give written notice of the termination to the Contractor specifying the part of the contract terminated and when termination becomes effective.

(a) The Contractor shall incur no further obligations in connection with the terminated work, and, on the date set forth in the notice of termination, the Contractor will stop work to the extent specified. The Contractor also shall terminate outstanding orders and subcontracts as they relate to the terminated work. With approval or ratification to the extent required by the Contracting Officer, the Contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The Contracting Officer may direct the Contractor to assign the Contractor's right, title, and interest under terminated orders or subcontracts to the Authority. The Contractor must still complete the work not terminated by the notice of termination and may incur such obligations as are necessary to do so.

(b) The Contracting Officer may require the Contractor to transfer title and deliver to the Authority in the manner and to the extent directed by the Contracting Officer: (i) any completed supplies; and (ii) such completed or partially completed supplies and materials, parts (both fabricated and unfabricated), tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called “manufacturing materials”) as the Contractor has specifically produced or specially acquired for the performance of the terminated part of this contract. The Contractor shall, upon direction of the Contracting Officer, protect and preserve property in the possession of the Contractor in which the Authority has an interest. If the Contracting Officer does not exercise this right, the Contractor shall use its best efforts to sell such supplies and manufacturing materials, from which the proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Authority under this contract, credited to the price or cost of the work, or paid in any other manner directed by the Contracting Officer.

- (c) The Authority shall pay the Contractor the following amounts:
- (1) contract prices for supplies or services accepted under the contract;
 - (2) costs incurred in preparing to perform and performing the terminated portion of the work plus a fair and reasonable profit on such portion of the work (such profit shall not include anticipatory profit on work not performed or consequential damages), less amounts paid or to be paid for accepted supplies or services; provided, however, that if it appears that the Contractor would have sustained a loss if the entire contract would have been completed, no profit shall be allowed or included, and the amount of compensation shall be reduced to reflect the anticipated rate of loss;
 - (3) costs of settling and paying claims arising out of the termination of subcontracts (these costs must not include costs paid in accordance with subparagraph (2) of this paragraph); and
 - (4) the reasonable settlement costs of the Contractor including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to the terminated portion of this contract.

The total sum to be paid the Contractor under this section shall not exceed the total contract price plus the reasonable settlement costs of the Contractor reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under this paragraph, and the contract price of work not terminated.

§ 6-202.11 Disputes

- (a) Except as otherwise provided in this contract, any dispute concerning a question of fact or law arising under or related to this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce the decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, on or before the 90th day from the date of receipt of such copy, the Contractor mails or otherwise furnishes a written appeal addressed to the Authority. The decision of the Authority or its duly authorized representative on such appeal shall be final and conclusive as to questions of fact unless determined by a court of competent jurisdiction to have been fraudulent, capricious, arbitrary, so grossly erroneous as necessarily to imply bad

faith, or not supported by substantial evidence. The decision of the Authority or its duly authorized representative shall not be final and conclusive as to questions of law. No action challenging such decision shall be brought more than two years from the date of the Contractor's receipt of such decision. In connection with any appeal of the Contracting Officer's decision, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending the final resolution of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) If it is determined, on appeal, that the Contracting Officer's interpretation of the contract, direction to the Contractor, or any other action required by the Contracting Officer's decision was an erroneous determination of the rights and obligations of the parties under the contract, the Contractor's remedy shall be the same as if such action were a change order under the Changes Clause of this contract.

§ 6-202.12 Payment of Interest on Contractor's Claims

(a) If an appeal is filed by the Contractor from final decision of the Contracting Officer under the Disputes Clause of this contract, denying a claim arising under the contract, simple interest on the amount of the claim finally determined to be owed by the Authority shall be payable to the Contractor. Such interest shall be at the rates determined by the United States Secretary of the Treasury from time to time pursuant to Public Law 92-41, 85 Stat. 97, from the date the Contractor furnishes to the Contracting Officer their written appeal under the Disputes Clause of this contract, to the date of (1) a final judgment by a court of competent jurisdiction, or (2) mailing to the Contractor of a supplemental agreement for execution either confirming completed negotiations between the parties or carrying out a decision of the Authority or its duly authorized representative. In no event shall the interest charged or payable hereunder exceed that allowable under Texas law.

(b) Notwithstanding (a), above, (1) interest shall be applied only from the date payment was due, if such date is later than the filing of appeal, and (2) interest shall not be paid for any period of time that the Contracting Officer determines the Contractor has unduly delayed in pursuing their remedies under this contract or before a court of competent jurisdiction.

§ 6-202.13 Federal, State, and Local Taxes

The contract price includes all applicable federal, state, and local taxes and duties. The Authority is exempt from Texas state and local sales and use taxes, and any such taxes included on any invoice or voucher received by the Authority shall be deducted from the amount of the

invoice or voucher for purposes of payment.

§ 6-202.14 Assignment

The Contractor shall not assign the whole or any part of this contract or any monies due or to become due hereunder without the prior written consent of the Contracting Officer.

§ 6-202.15 Equal Opportunity

During the performance of this contract, the Contractor agrees that it will, in good faith and in every work relationship, afford equal opportunity required by applicable federal, state, or local law to all employees and applicants for employment without regard to race, color, religion, sex, disability, national origin, age, veteran status, sexual orientation, political opinion/affiliation, or any other characteristic protected by law and to fully comply with all applicable laws for establishing and implementing anti-discrimination policies. The Contractor further agrees to afford equal opportunity required by applicable federal, state, or local law to subcontractors and vendors which are “disadvantaged business enterprises” or “women owned enterprises” (both as defined by federal law or regulation in effect on the date of this contract). The Contractor agrees to insert the substance of this clause in all subcontracts and purchase orders.

§ 6-202.16 Interest of Public Officials

The Contractor represents and warrants that no employee, official, or member of the Board (Executive Committee) of the Authority is or will be pecuniarily interested or benefited directly or indirectly in this contract. The Contractor further represents and warrants that it has not offered or given gratuities (in the form of entertainment, gifts, or otherwise) to any employee, official, or member of the Board (Executive Committee) of the Authority with a view toward securing favorable treatment in the awarding, amending, or evaluating the performance of this contract. For breach of any representation or warranty in this clause, the Authority shall have the right to annul this contract without liability and/or have recourse to any other remedy it may have at law.

§ 6-202.17 Order of Precedence

Include the clause at § 3-802.10.

§ 6-202.18 Governing Law and Required Clauses in Federally-Funded Third Party Contracts

In addition to other applicable provisions of federal law, regulations, requirements, and guidance, all third party federally-funded contracts

made by the Authority must contain provisions covering the following, as applicable:

- (a) Governing Law. The rights, obligations, and remedies of the parties shall be governed by the laws of the State of Texas. Whenever there is no applicable state statute or decisional precedent governing the interpretation of, or disputes arising under or related to, this contract, then federal common law, including the law developed by federal boards of contract appeals, the United States Claims Court (formerly the Court of Claims), and the Comptroller General of the United States, shall govern. Venue for any action shall lie exclusively in Dallas County, Texas. This is the complete agreement between the parties. If any provision of the contract is found to be invalid or unenforceable, the remaining provisions shall not be impaired.
- (b) Davis-Bacon Act, as amended (40 U.S.C. §§3141 – 3148).
- (c) Contract Work Hours and Safety Standards (40 U.S.C. §§3701 – 3708).
- (d) Rights to Inventions Made Under a Contract or Agreement pursuant to 37 CFR Part 401.
- (e) Clean Air Act (42 U.S.C. §§74010-07671q.) and Federal Water Pollution Control Act (33 U.S.C. §§12510-01388), as amended.
- (f) Debarment and Suspension (Executive Orders 12549 and 12689).
- (g) Restrictions on Lobbying) 31 U.S.C. §1352).
- (h) Solid Wastes pursuant to §6002 at 40 CFR Part 247.

§ 6-203 Clauses to be Used When Applicable

The clauses in this § 6-203 may be used when applicable to the circumstances of the particular procurement. In addition, clauses contained in sections of these regulations for other types of contracts may be used if the circumstances warrant.

§ 6-203.01 Pricing of Adjustments

When costs are a factor in any determination of a contract price adjustment pursuant to the Changes Clause or any other provision of this contract, such costs shall be in accordance with Chapter 7 (Cost Principles) of the Authority's Procurement Regulations in effect on the date of this contract.

§ 6-203.02 First Article Approval

- (a) If the Contractor tests __unit(s) of Lot/Item __as specified in this contract. At least __calendar days before the beginning of first article tests, the Contractor shall notify the Contracting Officer, in writing, of the time and location of the testing so that the Authority may witness the tests.
- (b) In addition, the Contractor shall deliver _____ unit(s) of Lot/Item _____ [the “first article(s)”] within __ calendar days

from the date of this contract to the Authority at _____ [insert name and address of testing facility] for first article tests. The shipping documentation shall contain this contract number and the Lot/Item identification. The characteristics that the first article must meet, and the testing requirements are specified elsewhere in this contract.

(c) Within _____ calendar days after the Authority receives the first article, the Contracting Officer shall notify the Contractor, in writing, of the conditional approval, approval, or disapproval of the first article. The notice of conditional approval or approval shall not relieve the Contractor from complying with all requirements of the specifications and all other terms and conditions of this contract. A notice of conditional approval shall state any further action required of the Contractor. A notice of disapproval shall cite reasons for the disapproval.

(d) If the first article is disapproved, the Contractor, upon a request by the Authority, shall submit an additional first article for testing. After each request, the Contractor shall make any necessary changes, modifications, or repairs to the first article or select another first article for testing. All costs related to these tests are to be borne by the Contractor, including any and all costs for additional tests following a disapproval. The Contractor shall furnish any additional first article to the Authority under the terms and conditions and within the time specified by the Authority. The Authority shall act on this first article within the time limit specified in paragraph (b) above. The Authority reserves the right to require an equitable adjustment of the contract price for any extension of the delivery schedule or for any additional costs to the Authority related to these tests.

(e) If the Contractor fails to deliver any first article on time, or the Contracting Officer disapproves any first article, the Contractor shall be deemed to have failed to make delivery within the meaning of the Default Clause of this contract.

(f) Unless otherwise provided in the contract, the Contractor
--

(1) may deliver the approved first article as a part of the contract quantity, provided it meets all contract requirements for acceptance and was not consumed or destroyed in testing; and

(2) shall remove and dispose of any first article from the test facility designated by the Authority at the Contractor's expense.

(g) If the Authority does not act within the time specified in paragraph (b) or (c), above, the Contracting Officer shall, upon timely written request from the Contractor, equitably adjust under the Changes

Clause of this contract the delivery or performance dates and/or the contract price and any other contractual term affected by the delay.

(h) The Contractor is responsible for providing operating and maintenance instructions, spare parts support, and repair of the first article during any first article test.

(i) Before first article approval, the acquisition of materials or components for, or the commencement of production of, the balance of the contract quantity is at the sole risk of the Contractor. Before first article approval, the costs thereof shall not be allocable to this contract for (1) progress payments, or (2) termination settlements if the contract is terminated for the convenience of the Authority. The Authority may waive the requirement for first article approval test where supplies identical or similar to those called for in the contract have been previously furnished by the offeror/contractor and have been accepted by the Authority. The Contractor may request a waiver.

§ 6-203.03 New Material

Unless this contract specifies otherwise, the Contractor represents that the supplies and components (including any former property of the Authority identified in this contract) are new, including recycled (not used or reconditioned) and are not of such age or so deteriorated as to impair their usefulness or safety. If the Contractor believes that furnishing used or reconditioned supplies or components will be in the Authority's interest, the Contractor shall so notify the Contracting Officer in writing. The Contractor's notice shall include the reasons for the request along with a proposal for any consideration to the Authority if the Contracting Officer authorizes the use of used or reconditioned supplies or components.

§ 6-203.04 Cancellation of Items

(a) "Cancellation," as used in this clause, means that the Authority is canceling its requirements for all items in program years subsequent to that in which notice of cancellation is provided. Cancellation shall occur by the date or within the time period specified in the contract (unless a later date is agreed to) if the Contracting Officer (1) notifies the Contractor that funds are not available for contract performance for any subsequent program year or (2) fails to notify the Contractor that funds are available for performance of the succeeding program year requirement.

(b) Except for cancellation under this clause or termination under the Default Clause, any reduction by the Contracting Officer in the requirements of this contract shall be considered a termination under the Termination for Convenience of the Authority Clause.

(c) If cancellation under this clause occurs, the Contractor will be paid a cancellation charge not over the cancellation ceiling specified in the contract as applicable at the time of cancellation.

(d) The cancellation charge will cover only (1) costs (i) incurred by the Contractor and/or subcontractor, (ii) reasonably necessary for performance of the contract, and (iii) that would have been equitably amortized in the unit prices for the entire multiyear contract period but, because of the cancellation, are not so amortized, and (2) a reasonable profit on the costs.

(e) The cancellation charge shall be computed, and the claim made for it as if the claim were being made under the Termination for Convenience of the Authority Clause of this contract. The Contractor shall submit the claim promptly but no later than one year from the date (1) of notification of the nonavailability of funds, or (2) specified in the contract by which notification of the availability of additional funds for the next succeeding program year is required to be issued, whichever is earlier, unless extensions in writing are granted by the Contracting Officer.

(f) The Contractor's claim may include --

(1) reasonable nonrecurring costs which are applicable to and normally would have been amortized in all items to be furnished under the multiyear requirements;

(2) allocable portions of the costs of facilities acquired or established for the conduct of the work, to the extent that it is impracticable for the Contractor to use the facilities in its commercial work and if the costs are not charged to the contract through overhead and otherwise depreciated;

(3) costs incurred for the assembly, training, and transportation to and from the job site of a specialized work force; and

(4) costs not amortized by the unit price solely because the cancellation had precluded anticipated benefits of Contractor or subcontractor learning.

(g) The claim shall not include --

(1) labor, material, or other expenses incurred by the Contractor or subcontractors for performance of the cancelled work;

(2) any cost already paid to the Contractor;

(3) anticipated profit on the canceled work; or

(4) for service contracts, the cost or value of the remaining useful commercial life of facilities. "Useful commercial life" means the commercial utility of the facilities rather than their physical life with due consideration given to such factors as location of facilities, their specialized nature, and obsolescence.

(h) This contract may include an Option Clause with the period for exercising the option limited to the date in the contract for notification that funds are available for the next succeeding program year. If so, the Contractor agrees not to include in the price for option quantities any costs of a startup or nonrecurring nature that have been fully provided for in the unit prices of the firm quantities of the program years. The Contractor further agrees that the prices offered for option quantities will reflect only those recurring costs and a reasonable profit necessary to furnish the additional option quantities.

(i) Quantities added to the original contract through the Option Clause of this contract shall be included in the quantity canceled for the purpose of computing allowable cancellation charges.

§ 6-203.05 Option For Increased Quantity

The Authority may increase the quantity of supplies called for in the contract at the unit price specified. The Contracting Officer may exercise the option by written notice to the Contractor within the period specified in the contract. Delivery of the added items shall continue at the same rate as the like items called for under the contract, unless the parties otherwise agree.

§ 6-203.06 Notice of Labor Disputes

(a) If the Contractor has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract, the Contractor immediately shall give notice, including all relevant information, to the Contracting Officer.

(b) The Contractor agrees to insert the substance of this clause, including this paragraph (b), in any subcontract under which a labor dispute may delay the timely performance of this contract; except that each subcontract shall provide that in the event its timely performance is delayed or threatened by delay by any actual or potential labor dispute, the subcontractor shall immediately notify the next higher tier subcontractor or the Contractor, as the case may be, of all relevant information concerning the dispute.

§ 6-203.07 Insurance - Work on Authority Installation

(a) The Contractor shall, at its own expense, provide and maintain during the entire performance period of this contract at least

the kinds and minimum amounts of insurance required in the Schedule or elsewhere in the contract.

(b) Before commencing work under this contract, the Contractor shall certify to the Contracting Officer in writing that the required insurance has been obtained. The policies evidencing required insurance shall contain an endorsement to the effect that any cancellation or any material change adversely affecting the Authority's interest shall not be effective (1) for such period as the laws of Texas prescribe or (2) until 30 days after the insurer or the Contractor gives written notice to the Contracting Officer, whichever period is longer.

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in subcontracts under this contract that require work on an installation owned or operated by, or under the control of, the Authority and shall require subcontractors to provide and maintain the insurance required in the Schedule or elsewhere in the contract. At least five days before entry of each such subcontractor's personnel on the installation, the Contractor shall furnish (or ensure that there has been furnished) to the Contracting Officer a current certificate of insurance, meeting the requirements of paragraph (b) above, for each such subcontractor.

§ 6-203.08 Discounts For Prompt Payment

Unless covered by the solicitation instructions (e.g., § 3- 802.06), insert the following clause:

In connection with any discount offered for prompt payment, time shall be computed from the date of the invoice. If the Contractor has not placed a date on the invoice, the due date shall be calculated from the date the Authority receives a proper invoice, provided the Authority annotates such invoice with the date of receipt at the time of receipt. For the purpose of computing the discount earned, payment shall be considered to have been made on the date that appears on the payment check or, for an electronic funds transfer, the specified payment date. When the discount date falls on a Saturday, Sunday, or legal holiday when Federal Government offices are closed and Authority business is not expected to be conducted, payment may be made on the following business day.

§ 6-203.09 Progress Payments

Progress payments shall be made to the Contractor when requested as work progresses, but not more frequently than monthly, in amounts approved by the Contracting Officer, under the following conditions.

(a) Computation of Amounts.

(1) Unless the Contractor requests a smaller amount, each progress payment shall be computed as (i) 80 percent of the Contractor's cumulative total costs under this contract, as shown by records maintained by the Contractor, plus (ii) progress payments to subcontractors (see paragraph (j) below), all less the sum of all previous progress payments made by the Authority under this contract.

(2) The following conditions apply to the timing of including costs in progress payment requests.

(i) The costs of supplies and services purchased by the Contractor directly for this contract may be included only after payment by cash, check, or other form of actual payment.

(ii) When the Contractor is not delinquent in payment of the costs of contract performance in the ordinary course of business, costs incurred which, in the ordinary course of business, will be paid prior to receipt of payment from the Authority for: (A) materials issued from the Contractor's stores inventory and placed in the production process for use on this contract; (B) direct labor, direct travel, and other direct in house costs; and (C) properly allocable and allowable indirect costs.

(3) The Contractor shall not include the following in total costs for progress payment purposes in subparagraph § (a)(1)(i) above:

(i) costs that are not reasonable, allocable to this contract, and consistent with sound and generally accepted accounting principles and practices;

(ii) costs incurred by subcontractors or suppliers;

(iii) costs ordinarily capitalized and subject to depreciation or amortization except for the properly depreciated or amortized portion of such costs; and

(iv) payments made or amount payable to subcontractors or suppliers, except for -- (A) completed work, including partial deliveries, to which the Contractor has acquired title; and (B) work under cost-reimbursement or time-and-material subcontracts to which the Contractor has acquired title.

(4) The amount of unliquidated progress payments may exceed neither (i) the progress payments made against incomplete work (including allowable unliquidated progress payments to subcontractors) nor (ii) the value, for progress payment purposes, of the incomplete work. Incomplete work shall be considered to be the supplies and services required by this contract, for which delivery and invoicing by the Contractor and acceptance by the Authority are

incomplete.

(5) The total amount of progress payments shall not exceed 80 percent of the total contract price.

(6) If a progress payment or the unliquidated progress payments exceed the amounts permitted by subparagraphs (a)(4) or (a)(5) above, the Contractor shall repay the amount of such excess to the Authority on demand.

(b) Liquidation. Except as provided in the Termination for Convenience of the Authority Clause, all progress payments shall be liquidated by deducting from any payment under this contract, other than advance or progress payments, the unliquidated progress payments, or 80 percent of the amount invoiced, whichever is less. The Contractor shall repay to the Authority any amounts required by a retroactive price reduction after computing liquidations and payments on past invoices at the reduced prices and adjusting the unliquidated progress payments accordingly. The Authority reserves the right unilaterally to change from the ordinary liquidation rate to an alternate rate when deemed appropriate for proper contract financing.

(c) Reduction or Suspension. The Contracting Officer may reduce or suspend progress payments, increase the rate of liquidation, or take a combination of these actions, after finding on substantial evidence any of the following conditions.

(1) The Contractor failed to comply with any material requirement of their contract (which includes paragraphs (f) and (g), below).

(2) Performance of this contract is endangered by the Contractor's (i) failure to make progress or (ii) unsatisfactory financial condition.

(3) Inventory allocated to this contract substantially exceeds reasonable requirements.

(4) The Contractor is delinquent in payment of the costs of performing this contract in the ordinary course of business.

(5) The fair value of the undelivered work is less than the amount of unliquidated progress payments for that work.

(6) The Contractor is realizing less profit than that reflected in the establishment of any alternate liquidation rate in paragraph (b), above, and that rate is less than the progress payment rate stated in subparagraph (a)(1), above.

(d) Title.

(1) Title to the property described in this paragraph (d) shall vest in the Authority. Vestiture shall be immediately upon the date of this contract, for property acquired or produced before that date. Otherwise, vestiture shall occur when the property is or should have been allocable or properly chargeable to this contract.

(2) "Property," as used in this clause, includes all of the below-described items acquired or produced by the Contractor that are or should be allocable or properly chargeable to this contract under sound and generally accepted accounting principles and practices:

(i) parts, materials, inventories, and work in process;

(ii) special tooling and special test equipment to which the Authority is to acquire title under any other clause of this contract;

(iii) nondurable (i.e., noncapital) tools, jigs, dies, fixtures, molds, patterns, taps, gauges, test equipment, and other similar manufacturing aids, title to which would not be obtained as special tooling under subparagraph (ii) above; and

(iv) drawings and technical data, to the extent the Contractor or subcontractors are required to deliver them to the Authority by other clauses of this contract.

(3) Although title to property is in the Authority under this clause, other applicable clauses of this contract (e.g., the termination or special tooling clauses) shall determine the handling and disposition of the property.

(4) The Contractor may sell any scrap resulting from production under this contract without requesting the Contracting Officer's approval, but the proceeds shall be credited against the costs of performance.

(5) To acquire for its own use or dispose of property to which title is vested in the Authority under this clause, the Contractor must obtain the Contracting Officer's advance approval of the action and the terms. The Contractor shall (i) exclude the allocable costs of the property from the costs of contract performance, and (ii) repay to the Authority any amount of unliquidated progress payments allocable to the property. Repayment may be by cash or credit memorandum.

(6) When the Contractor completes all of the obligations under this contract, including liquidation of all progress payments, title shall vest in the Contractor for all property (or the

proceeds thereof) not --

(i) delivered to and accepted by the Authority under this contract; or

(ii) incorporated in supplies delivered to and accepted by the Authority under this contract and to which title is vested in the Authority under this clause.

(7) The terms of this contract concerning liability for property furnished by the Authority shall not apply to property to which the Authority acquired title solely under this clause.

(e) Risk of Loss. Before delivery to and acceptance by the Authority, the Contractor shall bear the risk of loss for property, the title to which vests in the Authority under this clause, except to the extent the Authority expressly assumes the risk. The Contractor shall repay the Authority an amount equal to the unliquidated progress payments that are based on costs allocable to property that is damaged, lost, stolen, or destroyed.

(f) Control of Costs and Property. The Contractor shall maintain an accounting system and controls adequate for the proper administration of this clause.

(g) Reports and Access to Records.

(1) The Contractor shall promptly furnish reports, certificates, financial statements, and other pertinent information reasonably requested by the Contracting Officer for the administration of this clause. Also, the Contractor shall give the Authority reasonable opportunity to examine and verify the Contractor's books, records, and accounts.

(2) The Contractor shall furnish estimates to complete that have been developed or updated within six months of the date of the progress payment request. The estimates to complete shall represent the Contractor's best estimate of total costs to complete all remaining contract work required under the contract. The estimates shall include sufficient detail to permit Authority verification.

(h) Special Terms Regarding Default. If this contract is terminated under the Termination for Default Clause, (i) the Contractor shall, on demand, repay to the Authority the amount of unliquidated progress payments and (ii) title shall vest in the Contractor, on full liquidation of progress payments, for all property for which the Authority elects not to require delivery under the Termination for Default Clause. The Authority shall be liable for no payment except as provided by the Termination for Default Clause.

(i) Reservations of Rights.

(1) No payment or vesting of title under this clause shall (i) excuse the Contractor from performance of obligations under this contract or (ii) constitute a waiver of any of the rights or remedies of the parties under the contract.

(2) The Authority's rights and remedies under this clause (i) shall not be exclusive but rather shall be in addition to any other rights and remedies provided by law or this contract and (ii) shall not be affected by delayed, partial, or omitted exercise of any right, remedy, power, or privilege, nor shall such exercise or any single exercise preclude or impair any further exercise under this clause or the exercise of any other right, power, or privilege of the Authority.

(j) Progress Payments to Subcontractors. The amounts mentioned in (a)(1)(ii), above, shall be all progress payments to subcontractors or divisions, if the following conditions are met.

(1) The amounts included are limited to the unliquidated remainder of progress payments made; plus any unpaid subcontractor requests for progress payments.

(2) The subcontract or interdivisional order is expected to involve a minimum of approximately six months between the beginning of work and the first delivery.

(3) The terms of the subcontract or interdivisional order concerning progress payments --

(i) are substantially similar to the terms of this clause;

(ii) are at least as favorable to the Authority as the terms of this clause;

(iii) are not more favorable to the subcontractor or division than the terms of this clause are to the Contractor; and

(iv) subordinate all subcontractor rights concerning property to which the Authority has title under the subcontract to the Authority's right to require delivery of the property to the Authority if (A) the Contractor defaults or (B) the subcontractor becomes bankrupt or insolvent.

(4) The progress payment rate in the subcontract is the rate not greater than the rate stated herein.

(5) The parties agree, concerning any proceeds received by the Authority for property to which title has vested in the Authority under the subcontract terms, that the proceeds shall be applied to reducing any unliquidated progress payments by the Authority to the Contractor under this contract.

(6) If no unliquidated progress payments to the Contractor remain, but there are unliquidated progress payments that the Contractor has made to any subcontractor, the Contractor shall be subrogated to all the rights the Authority obtained through the terms required by this clause to be in any subcontract, as if all such rights had been assigned and transferred to the Contractor.

(7) The Contractor shall pay the subcontractor's progress payment request under subdivision (j)(1)(ii) above, within a reasonable time after receiving the Authority's progress payment covering those amounts.

§ 6-203.10 Interest on Contractor Indebtedness

(a) Notwithstanding any other clause of this contract, all amounts that become payable by the Contractor to the Authority under this contract shall bear simple interest from the date due until paid unless paid within 30 days of becoming due. The interest rate shall be the interest rate established by the Secretary of the Treasury as provided in Section 12 of the Contract Disputes Act of 1978 (Public Law 95-563), which is applicable to the period in which the amount becomes due, as provided in paragraph (b) of this clause, and then at the rate applicable for each six-month period as fixed by the Secretary until the amount is paid. In no event shall the interest charged or payable hereunder exceed that allowable under Texas law.

(b) Amounts shall be due at the earliest of the following dates:

- (1) the date fixed under this contract;
- (2) the date of the first written demand for payment consistent with this contract, including any demand resulting from a default termination;
- (3) the date the Authority transmits to the Contractor a proposed supplemental agreement to confirm completed negotiations establishing the amount of debt (unless a later date is set forth therein); or
- (4) if this contract provides for revision of prices, the date of written notice to the Contractor stating the amount of refund payable in connection with a pricing proposal or a negotiated pricing

agreement not confirmed by contract modification.

§ 6-203.11 Protection of Authority Property

The Contractor shall use reasonable care to avoid damaging existing buildings, equipment, and vegetation on or about premises owned by, or under the control of, the Authority. If the Contractor's failure to use reasonable care causes damage to any of this property, the Contractor shall replace or repair the damage at no expense to the Authority as the Contracting Officer directs. If the Contractor fails or refuses to make such repair or replacement, the Contractor shall be liable for the cost, which may be deducted from the contract price.

§ 6-203.12 Authority Property

(a) Authority-Furnished Property.

(1) Authority-furnished property means property in the possession of, or directly acquired by, the Authority and subsequently furnished to the Contractor for performance of a contract. Authority-furnished property includes, but is not limited to, spares and property furnished for repair, maintenance, overhaul, or modification. Authority-furnished property also includes contractor-acquired property if the contractor-acquired property is a deliverable under a cost contract when accepted by the Authority for continued use under the contract.

Authority property means all property owned or leased by the Authority. Authority property includes both Authority-furnished and Contractor-acquired property. Authority property includes material, equipment, special tooling, special test equipment, and real property. Authority property does not include intellectual property and software.

(2) The Authority shall deliver to the Contractor, for use in connection with and under the terms of the contract, the property described in the contract or specifications together with any related data and information that the Contractor may request and is reasonably required for the intended use of the property. The delivery or performance dates for this contract are based upon the expectation that Authority-furnished property suitable for use (except for property furnished "as-is") will be delivered to the Contractor at the times stated in the contract or, if not so stated, in sufficient time to enable the Contractor to meet the contract's delivery or performance dates, subject to the obligation of the Contractor to provide information to the Authority sufficiently in advance of the date needed to allow the Authority to comply.

(3) If Authority-furnished property is received by the

Contractor in a condition not suitable for the intended use, the Contractor shall, upon receipt of it, notify the Contracting Officer, detailing the facts, and, as directed by the Contracting Officer and at the Authority's expense, either repair, modify, return, or otherwise dispose of the property. After the Contractor completes the directed action and upon written request of the Contractor, the Contracting Officer shall make an equitable adjustment as provided in paragraph (h) of this clause.

(4) If Authority-furnished property is not delivered to the Contractor by the required time, the Contracting Officer shall, upon the Contractor's timely written request, make a determination of the delay, if any, caused the Contractor and shall make an equitable adjustment in accordance with paragraph (h) of this clause.

(1) The Contracting Officer may, by written notice, (i) increase or decrease the Authority-furnished property provided or to be provided under this contract, (ii) substitute other Authority-furnished property for the property to be provided by the Authority, or to be acquired by the Contractor for the Authority, under this contract, or (iii) withdraw authority to use property. The Contractor shall promptly take such action as the Contracting Officer may direct regarding the removal, shipment, or disposal of the property covered by such notice.

(2) Upon the Contractor's written request, the Contracting Officer shall make an equitable adjustment to the contract in accordance with paragraph (h) of this clause, if the Authority has agreed in the contract to make the property available for performing this contract and there is any -- (i) decrease or substitution in this property pursuant to subparagraph (b)(1) above; or (ii) withdrawal of authority to use this property, if provided under any other contract or lease.

(c) Title in Authority Property.

(1) The Authority shall retain title to all Authority-furnished property.

(2) All Authority-furnished property and all property acquired by the Contractor, title to which vests in the Authority under this paragraph (collectively referred to as "property of the Authority"), are subject to the provisions of this clause. Title to property of the Authority shall not be affected by its incorporation into or attachment to any property not owned by the Authority, nor shall property of the Authority become a fixture or lose its identity as personal property by being attached to any real property.

(3) Title to each item of facilities, special test equipment, and special tooling (other than that subject to a Special

Tooling clause) acquired by the Contractor for the Authority under this contract shall pass to and vest in the Authority when its use in performing this contract commences or when the Authority has paid for it, whichever is earlier, whether or not title previously vested in the Authority.

(4) If this contract contains a provision directing the Contractor to purchase material for which the Authority will reimburse the Contractor as a direct item of cost under this contract --

(i) title to material purchased from a vendor shall pass to and vest in the Authority upon the vendor's delivery of such material; and

(ii) title to all other material shall pass to and vest in the Authority upon -- (A) issuance of the material for use in contract performance; (B) commencement of processing of the material or its use in contract performance; or (C) reimbursement of the cost of the material by the Authority, whichever occurs first.

(d) Use of Authority Property. The Contractor shall use the property of the Authority, either furnished or acquired under this contract, only for performing this contract, unless otherwise provided in this contract or approved by the Contracting Officer.

(1) The Contractor shall be responsible and accountable for all property of the Authority provided under this contract.

(2) The Contractor shall establish and maintain a program for the use, maintenance, repair, protection, and preservation of property of the Authority in accordance with sound industrial practice.

(3) If damage occurs to property of the Authority, the risk of which has been assumed by the Authority under this contract, the Authority shall replace the items or the Contractor shall make such repairs as the Authority directs. However, if the Contractor cannot effect such repairs within the time required, the Contractor shall dispose of the property as directed by the Contracting Officer. When any property for which the Authority is responsible is replaced or repaired, the Contracting Officer shall make an equitable adjustment in accordance with paragraph (h) of this clause.

(4) The Contractor represents that the contract price does not include any amount for repairs or replacement for which the Authority is responsible. Repair or replacement of property for which the Contractor is responsible shall be accomplished by the Contractor at its own expense.

(f) Access. (1) The Authority shall have access to the Contractor's premises and all Authority property, at reasonable times, for the purposes of reviewing, inspecting and evaluating the Contractor's property management plan(s), systems, procedures, records, and supporting documentation that pertains to Authority property. This access includes all site locations and, with the Contractor's consent, all subcontractor premises.

(2) Records of Authority property shall be readily available to authorized Authority personnel and shall be appropriately safeguarded.

(3) Should it be determined by the Authority that the Contractor's (or subcontractor's) property management practices are inadequate or not acceptable for the effective management and control of Authority property under this contract, or present an undue risk to the Authority, the Contractor shall prepare a corrective action plan when requested by the Authority and take all necessary corrective actions as specified by the schedule within the corrective action plan.

(g) Risk of Loss. Unless otherwise provided in this contract, the Contractor assumes the risk of, and shall be responsible for, any loss or destruction of, or damage to, property of the Authority upon its delivery to the Contractor or upon passage of title to the Authority under paragraph (c) of this clause. However, the Contractor is not responsible for reasonable wear and tear to property of the Authority or for property of the Authority properly consumed in performing this contract.

(h) Equitable Adjustment. When this clause specifies an equitable adjustment, it shall be made to any affected contract provision in accordance with the procedures of the Changes Clause. When appropriate, the Contracting Officer may initiate an equitable adjustment in favor of the Authority. The right to an equitable adjustment shall be the Contractor's exclusive remedy. The Authority shall not be liable to suit for breach of contract for --

(1) any delay in delivery of Authority-furnished property;

(2) delivery of Authority-furnished property in a condition not suitable for its intended use;

(3) an increase, decrease, or substitution of, Authority-furnished property; or

(4) failure to repair or replace property of the Authority for which the Authority is responsible.

(i) Final Accounting and Disposition of Property of the Authority. Upon completing this contract, or at such earlier dates as may

be fixed by the Contracting Officer, the Contractor shall submit, in a form acceptable to the Contracting Officer, inventory schedules covering all items of property of the Authority (including any resulting scrap) not consumed in performing this contract or delivered to the Authority. The Contractor shall prepare for shipment, deliver f.o.b. origin, or dispose of the property of the Authority as may be directed or authorized by the Contracting Officer. The net proceeds of any such disposal shall be credited to the contract price or shall be paid to the Authority as the Contracting Officer directs.

(j) Abandonment and Restoration of Contractor's Premises. Unless otherwise provided herein, the Authority –

(1) may abandon any property of the Authority in place, at which time all obligations of the Authority regarding such abandoned property shall cease; and

(2) has no obligation to restore or rehabilitate the Contractor's premises under any circumstances (e.g., abandonment, disposition upon completion of need, or upon contract completion). However, if the Authority-furnished property (listed in the contract or specifications) is withdrawn or is unsuitable for the intended use, or if other property of the Authority is substituted, then the equitable adjustment under paragraph (h) of this clause may properly include restoration or rehabilitation costs.

(k) Communications. All communications under this clause shall be in writing.

§ 6-203.13 Certificate of Conformance

(a) When authorized in writing by the Contracting Officer, the Contractor shall ship with a Certificate of Conformance any supplies for which the contract would otherwise require inspection at source. In no case shall the Authority's right to inspect supplies under the inspection provisions of this contract be prejudiced. Shipments of such supplies will not be made under this contract until use of the Certificate of Conformance has been authorized in writing by the Contracting Officer or inspection and acceptance have occurred.

(b) The Contractor's signed certificate shall be attached to or included on the top copy of the inspection or receiving report distributed to the Authority. In addition, a copy of the signed certificate shall be attached to or entered on copies of the inspection or receiving report accompanying the shipment.

(c) The Authority has the right to reject defective supplies or services within a reasonable time after delivery by written notification to the Contractor. The Contractor shall in such event

promptly replace, correct, or repair the rejected supplies or services at the Contractor's expense.

(d) The certificate shall read as follows:

“I certify that on _____ [insert date], the _____ [insert Contractor's name] furnished the supplies or services called for by Contract No. _____ via _____ [Carrier] on _____ [identify the bill of lading or shipping document] in accordance with all applicable requirements. I further certify that the supplies or services are of the quality specified and conform in all respects with the contract requirements, including specifications, drawings, testing, preservation, packaging, packing, marking requirements, and physical item identification (part number), and are in the quantity shown on this or on the attached acceptance document.”

Date of Execution: _____

Signature: _____

Title: _____

§ 6-203.14 Liquidated Damages

The following clause may be used when the anticipated or actual harm caused by a breach is uncertain or incapable or very difficult of accurate estimation or proof. The amount specified shall be a reasonable forecast of just compensation for the harm that is caused by the breach, and the Contracting Officer shall include the basis for such estimate in the contract file.

(a) If the Contractor fails to deliver the supplies or perform the services within the time specified in this contract, or any extension, the Contractor shall, in place of actual damages, pay to the Authority as fixed, agreed, and liquidated damages, for each calendar day of delay, the sum set forth in the contract as “liquidated damages”.

(b) Alternatively, if delivery or performance is inexcusably delayed by the contractor, the Authority may terminate this contract in whole or in part under the Termination for Default Clause in this contract and assess fixed, agreed, and liquidated damages accruing until the time the Authority may reasonably obtain delivery or performance of similar supplies or services. The liquidated damages shall be in addition to excess costs under the Termination Clause.

(c) The amount of liquidated damages provided in this contract is neither a penalty nor a forfeiture and shall compensate the Authority solely for the Authority's inability to use the supplies or services and is not intended to, and does not, include: (i) any damages, additional costs or extended costs incurred by the Authority for

extended administration of this contract or by the Authority's agents, consultants, or independent contractors for extended administration of this contract, (ii) any increases in financing costs resulting from the delay, or (iii) any additional services relating to, or arising as a result of, the delay. The Authority shall be entitled to claim against the Contractor for its actual damages and amounts not specifically included within the liquidated damages as set forth herein. Such costs shall be computed separately. The Contractor and the Authority agree that the Authority may deduct liquidated damages described in this section from any unpaid amounts then or thereafter due to the Contractor under the contract. Any liquidated damages not so deducted from any unpaid amounts due to the Contractor shall be payable to the Authority at the demand of the Authority, together with interest from the date of the demand at a rate equal to the highest lawful rate of interest payable by the Contractor.

(d) The Contractor shall not be charged with liquidated damages when the delay in delivery or performance arises out of causes beyond the control and without the fault or negligence of the Contractor as defined in the Termination for Default Clause in this contract.

§ 6-203.15 Warranty of Supplies of a Noncomplex Nature

(a) Definitions. "Acceptance," as used in this clause, means the act of an authorized representative of the Authority by which the Authority assumes for itself, or as an agent of another, ownership of existing supplies, or approves specific services as partial or complete performance of the contract.

"Correction," as used in this clause, means the elimination of a defect.

"Supplies," as used in this clause, means the end item(s) furnished by the Contractor and related services required under the contract. The word does not include "data."

(b) Contractor's Obligations.

(1) Notwithstanding inspection and acceptance by the Authority of supplies furnished under this contract, or any condition of this contract concerning the conclusiveness thereof, the Contractor warrants that for _____ [Contracting Officer shall state specific period of time after delivery, or the specified event whose occurrence will terminate the warranty period; e.g., the number of miles or hours of use, or combinations of any applicable events or periods of time] --

(i) all supplies furnished under this contract will be free from defects in material or workmanship and will conform

with all requirements of this contract; and

(ii) the preservation, packaging, packing, and marking, and the preparation for and method of, shipment of such supplies will conform with the requirements of this contract.

(2) When return, correction, or replacement is required, transportation charges and responsibility for the supplies while in transit shall be borne by the Contractor. However, the Contractor's liability for the transportation charges shall not exceed an amount equal to the cost of transportation by the usual commercial method of shipment between the place of delivery specified in this contract and the Contractor's plant, and return.

(3) Any supplies or parts thereof, corrected or furnished in replacement under this clause, shall also be subject to the terms of this clause to the same extent as supplies initially delivered. The warranty, with respect to supplies or parts thereof, shall be equal in duration to that in paragraph(b)(1) of this clause and shall run from the date of delivery of the corrected or replaced supplies.

(4) All implied warranties of merchantability and "fitness for a particular purpose" are excluded from any obligation contained in this contract.

(c) Remedies Available to the Authority.

(1) The Contracting Officer shall give written notice to the Contractor of any breach of warranties in paragraph(b)(1) of this clause within _____ [Contracting Officer shall insert specific period of time; e.g., "45 days of the last delivery under this contract," or "45 days after discovery of the defect"].

(2) Within a reasonable time after the notice, the Contracting Officer may either--

(i) require, by written notice, the prompt correction or replacement of any supplies or parts thereof (including preservation, packaging, packing, and marking) that do not conform with the requirements of this contract within the meaning of paragraph (b)(1) of this clause; or

(ii) retain such supplies and reduce the contract price by an amount equitable under the circumstances.

(3) If the contract provides for inspection of supplies by sampling procedures, conformance of supplies or components subject to warranty action shall be determined by the applicable sampling procedures in the contract. The Contracting Officer --

- (i) may, for sampling purposes, group any supplies delivered under this contract;
- (ii) shall require the size of the sample to be that required by sampling procedures specified in the contract for the quantity of supplies on which warranty action is proposed;
- (iii) may project warranty sampling results over supplies in the same shipment or other supplies contained in other shipments even though all of such supplies are not present at the point of reinspection; provided, that the supplies remaining are reasonably representative of the quantity on which warranty action is proposed; and
- (iv) need not use the same lot size as on original inspection or reconstitute the original inspection lots.

(4) Within a reasonable time after notice of any breach of the warranties specified in paragraph (b)(1) of this clause, the Contracting Officer may exercise one or more of the following options:

- (i) require an equitable adjustment in the contract price for any group of supplies;
- (ii) screen the supplies grouped for warranty action under this clause at the Contractor's expense and return all nonconforming supplies to the Contractor for correction or replacement;
- (iii) require the Contractor to screen the supplies at locations designated by the Authority within the continental United States and to correct or replace all nonconforming supplies; or
- (iv) return the supplies grouped for warranty action under this clause to the Contractor (irrespective of the f.o.b. point or the point of acceptance) for screening and correction or replacement.

(5) The Contracting Officer may, by contract or otherwise, correct or replace the nonconforming supplies with similar supplies from another source and charge to the Contractor the cost occasioned to the Authority thereby if the Contractor --

- (i) fails to make redelivery of the corrected or replaced supplies within the time established for their return; or
- (ii) fails either to accept return of the nonconforming supplies or fails to make progress after their return to correct or replace them so as to endanger performance of the delivery schedule, and in either of these circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing)

after receipt of notice from the Contracting Officer specifying such failure.

(6) Instead of correction or replacement by the Authority, the Contracting Officer may require an equitable adjustment of the contract price. In addition, if the Contractor fails to furnish timely disposition instructions, the Contracting Officer may dispose of the nonconforming supplies for the Contractor's account in a reasonable manner. The Authority is entitled to reimbursement from the Contractor, or from the proceeds of such disposal, for the reasonable expenses of the care and disposition of the nonconforming supplies, as well as for excess costs incurred or to be incurred.

(7) The rights and remedies of the Authority provided in this clause are in addition to and do not limit any rights afforded to the Authority by law, equity, or any other clause of this contract.

§ 6-203.16 Publicity Releases

All publicity releases or releases of reports, papers, articles, maps, or other documents in any way concerning this contract or the work hereunder which the Contractor or any of its subcontractors desires to make for purposes of publication in whole or in part, shall be subject to approval by the Contracting Officer prior to release.

§ 6-203.17 Royalties and Patents

The Contractor shall pay all royalties and license fees. The Contractor shall defend all suits or claims for infringement of any patent rights and shall save the Authority harmless from loss on account thereof, except when a particular design, process, or product of a particular manufacturer is specified by the Authority; provided, that, if the Contractor has reason to believe that the design, process, or product specified infringes a patent, the Contractor shall be responsible for such loss unless it promptly gives such information to the Contracting Officer.

§ 6-203.18 Equal Opportunity Reporting

The following clause may be included in contracts in excess of \$5,000.

The Contractor agrees that, in connection with the award of any subcontracts in excess of \$5,000 under this contract, the Contractor will require the subcontractor to certify to the Contractor (on a form furnished or approved by the Authority) if the subcontractor is, or is not, a Disadvantaged Business Enterprise ("DBE") or Women Business Enterprise ("WBE") (as defined, in both cases, by the Authority). As a condition to final payment under this contract, the Contractor shall

submit to the Authority and certify a list of all DBE and WBE subcontractors, which list shall include a description of the item, work, or services provided by such subcontractors and the dollar amount of each subcontract.

§ 6-203.19 Examination and Retention of Records

The following clause is required for all contracts specified in § 3-704 and § 3-706(1) and in other contracts where substantial modifications may occur or where necessary or appropriate to protect the interests of the Authority.

(a) The Contracting Officer and their representatives shall have the audit and inspection rights described in the applicable paragraphs (b) and (c), below.

(b) Examination of Costs. If this is a cost-reimbursement type, incentive, time and materials, labor hour, or price re-determinable contract, or any combination thereof, the Contractor shall maintain, and the Contracting Officer and his representatives shall have the right to examine, all books, records, documents, and other evidence and accounting procedures and practices sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract. Such right of examination shall include inspection at all reasonable times at the Contractor's plants, or such parts thereof, as may be engaged in or maintain records in connection with the performance of this contract.

(c) Certified cost or pricing data. If the Contractor submitted certified cost or pricing data in connection with the pricing of this contract or if the Contractor's cost of performance is relevant to any change or modification to this contract, the Contracting Officer and his representatives shall have the right to examine all books, records, documents, and other data of the Contractor related to the negotiation, pricing, or performance of such contract, change, or modification for the purpose of evaluating the costs incurred and the accuracy, completeness, and currency of the cost or pricing data submitted. The right of examination shall extend to all documents necessary to permit adequate evaluation of the costs incurred and the cost or pricing data submitted, along with the computations and projections used therein.

(d) The materials described in (b) and (c), above, shall be made available at the office of the Contractor at all reasonable times for inspection, audit, or reproduction until the expiration of three (3) years from the date of final payment under this contract, except that:

(1) if this contract is completely or partially terminated, the records relating to the work terminated shall be made

available for a period of three (3) years from the date of any final settlement;
and

(2) records which relate to appeals under the Disputes Clause of this contract or litigation, or the settlement of claims arising out of the performance of this contract, shall be made available until such appeals, litigation, or claims have been resolved.

(e) The Contractor shall insert a clause containing all the provisions of this clause, including this paragraph (e), in all subcontracts exceeding \$10,000 hereunder, altered to reflect the proper identification of the contracting parties and the Contracting Officer under the prime contract.

§ 6-203.20 Price Reduction for Defective Cost or Pricing Data

Include the following clause in solicitations and contracts when cost or pricing data are expected to be required to be submitted and certified prior to award in accordance with § 3-502 (1)(a):

(a) If any price, including profit or fee, negotiated in connection with this contract or any cost reimbursable under this contract (including any modifications thereto) was increased by any significant amount because (1) the Contractor or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its respective Certificate of Current Cost or Pricing Data, (2) a subcontractor or prospective subcontractor furnished the Contractor cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data, or (3) any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly, and the contract shall be modified to reflect the reduction.

(b) Any reduction in the contract price under paragraph (a), above, due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor (if there was no subcontract) was less than the prospective subcontract cost estimate submitted by the Contractor; provided that the actual subcontract price was not itself affected by defective cost or pricing data.

(c) Before awarding any subcontract expected to exceed \$100,000 when entered into, or before pricing any subcontract modification involving a pricing adjustment expected to exceed \$100,000, the Contractor shall require the subcontractor to submit cost or pricing data (actually or by specific identification in writing), unless the price of the subcontract or modification thereto is --

- (1) based on adequate price competition;
- (2) based on established catalog or market prices of commercial items sold in substantial quantities to the general public;
or
- (3) set by law or regulation.

(d) The Contractor shall require the subcontractor to certify in substantially the form prescribed in § 3-505 of the Authority's Procurement Regulations that, to the best of its knowledge and belief, the data submitted under paragraph (a), above, were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

(e) The substance of subparagraphs (c) and (d) and this subparagraph (e) of this clause shall be included in all subcontracts expected to exceed \$100,000 when entered into.

§ 6-203.21 Price Reduction for Defective Cost or Pricing Data (Modifications)

As prescribed in § 3-502, when cost or pricing data are not expected to be required to be submitted prior to award of a contract, insert the following clause if the contract amount is expected to exceed \$500,000:

(a) This clause shall become operative only for any modification to this contract involving aggregate increases and/or decreases in costs, plus applicable profits, of more than \$100,000, except that this clause does not apply to any modification for which the price is:

- (1) based on adequate price competition;
- (2) based on established catalog or market prices of commercial items sold in substantial quantities to the general public;
or
- (3) set by law or regulation.

(b) If any price (including profit) or fee negotiated in connection with any modification covered by this clause under paragraph (a), above, was increased by any significant amount because (1) the Contractor or subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its respective Certificate of Current Cost or Pricing Data, (2) a subcontractor or prospective subcontractor furnished to the Contractor (in support of the subcontractor cost estimates) cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data, or (3) any of these parties furnished data of any description that were not accurate, the price shall

be reduced accordingly and the contract shall be modified to reflect the reduction.

(c) Any reduction in the contract price under paragraph (b), above, due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor (if there was no subcontract) was less than the prospective subcontract cost estimate submitted by the Contractor; provided, that the actual subcontract price was not itself affected by defective cost or pricing data.

(d) Before awarding any subcontract expected to exceed \$100,000 when entered into, or pricing any subcontract modification involving a pricing adjustment expected to exceed \$100,000, the Contractor shall require the subcontractor to submit cost or pricing data (actually or by specific identification in writing), unless the price of the subcontract or modification thereto is --

(1) based on adequate price competition;

(2) based on established catalog or market prices of commercial items sold in substantial quantities to the general public;
or

(3) set by law or regulation.

(e) The Contractor shall require the subcontractor to certify in substantially the form prescribed in § 3-505 of the Authority's procurement regulations that, to the best of its knowledge and belief, the data submitted under paragraph (d), above, were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

(f) The Contractor shall insert the substance of subparagraphs (d) and (e) and this subparagraph (f) of this clause in each subcontract that exceeds \$100,000 when entered into.

§ 6-203.22 Indemnification

THE CONTRACTOR SHALL DEFEND, FULLY INDEMNIFY AND HOLD HARMLESS THE AUTHORITY AND ALL OF ITS DIRECTORS, OFFICERS, EMPLOYEES, AND AGENTS FROM ANY AND ALL CLAIMS, DEMANDS, CAUSES OF ACTION, DAMAGES, LOSSES, AND EXPENSES (INCLUDING ATTORNEY'S FEES) OF WHAT SO EVER NATURE, CHARACTER, OR DESCRIPTION THAT ANY PERSON OR ENTITY HAS OR MAY HAVE ARISING OUT OF OR RELATED TO THE BREACH OF OR FAILURE TO PERFORM THE CONTRACT OR ANY SUBAGREEMENTS THEREUNDER OR RESULTING FROM ANY NEGLIGENT

ACT, OMISSION, MISCONDUCT, OR FAULT OF THE CONTRACTOR OR SUBCONTRACTORS AND THEIR EMPLOYEES AND AGENTS.

Section 6-300 - Service Contracts

§ 6-301 Applicability

As used in this section, “service contract” means any contract entered into by competitive sealed bidding or by competitive sealed proposals which calls directly for a Contractor's time and effort rather than for delivery of an end product. Service contracts generally are used in areas involving the following:

- (a) maintenance, overhaul, repair, servicing, rehabilitation, salvage, and modernization or modification of supplies, systems, and equipment;
- (b) routine maintenance, repair, rehabilitation, and modification of real property;
- (c) installation of equipment obtained under separate contract;
- (d) operation of equipment, facilities, or other property owned by the Authority;
- (e) engineering and technical services (except architect-engineer and land surveying services);
- (f) housekeeping and facilities services;
- (g) training and education;
- (h) photographic, printing, and publication services;
- (i) test services;
- (j) data processing; and
- (k) warehousing.

§ 6-302 Required Clauses for Service Contracts

The clauses in this § 6-302 shall be included in all service contracts.

§ 6-302.01 Definitions

Include the clause at § 6-202.01.

§ 6-302.02 Independent Contractor

The Contractor at all times shall be an independent contractor. The Contractor shall be fully responsible for all acts and omissions of its employees, subcontractors, and their suppliers, and shall be specifically responsible for sufficient supervision and inspection to ensure compliance in every respect with the contract requirements. There shall be no contractual relationship between any subcontractor or supplier of the Contractor and the Authority by virtue of this contract. No provision of this contract shall be for the benefit of any party other than the Authority and the Contractor.

§ 6-302.03 Composition of Contractor

If the Contractor hereunder is comprised of more than one legal entity, each such entity shall be jointly and severally liable hereunder.

§ 6-302.04 Subcontractors and Outside Consultants

Any subcontractors and outside associates or consultants required by the Contractor in connection with the services covered by the contract will be limited to such individuals or firms as were specifically identified and agreed to by the Authority in connection with the award of this contract. Any substitution in such subcontractors, associates, or consultants will be subject to the prior written approval of the Contracting Officer.

§ 6-302.05 Changes

(a) The Contracting Officer may, at any time, by written order, make changes within the general scope of the contract in the services to be performed. If such changes cause an increase or decrease in the Contractor's cost of, or time required for, performance of any services under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim of the Contractor for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the Contractor of the notification of change unless the Contracting Officer grants a further period of time before the date of final payment under the contract.

(b) No services for which an additional cost or fee will be charged by the Contractor shall be furnished without the prior written authorization of the Contracting Officer.

§ 6-302.06 Termination

(a) The Contracting Officer may, by written notice to the

Contractor, terminate this contract in whole or in part at any time, either for the Authority's convenience or because of the failure of the Contractor to fulfill its contract obligations. Upon receipt of such notice, the Contractor shall: (1) immediately discontinue all services affected (unless the notice directs otherwise), and (2) deliver to the Contracting Officer all data, drawings, specifications, reports, estimates, summaries, and such other information and materials as may have been accumulated by the Contractor in performing this contract, whether completed or in process.

(b) If the termination is for the convenience of the Authority and if this is a fixed price contract, an equitable adjustment in the contract price shall be made, but no amount shall be allowed for anticipated profit on unperformed services.

(c) If the termination is due to the failure of the Contractor to fulfill its contract obligations, the Authority may take over the work and prosecute the same to completion by contract or otherwise. In such case, the Contractor shall be liable to the Authority for any additional cost occasioned to the Authority thereby.

(d) If, after notice of termination for failure to fulfill contract obligations, it is determined that the Contractor had not so failed, the termination shall be deemed to have been effected for the convenience of the Authority. In such event, adjustment in the contract price shall be made as provided in paragraph (b) of this clause.

(e) The rights and remedies of the Authority provided in this clause are in addition to any other rights and remedies provided by law or under this contract. Time is of the essence for all delivery, performance, submittal, and completion dates in this contract.

§ 6-302.07 Disputes

Include the clause at § 6-202.11.

§ 6-302.08 Drawings and Other Data

All designs, drawings, specifications, notes and other works developed in the performance of this contract shall become the sole property of the Authority and may be used in any manner by the Authority and without additional compensation to the Contractor. The Authority shall be considered the "person for whom the work was prepared" for the purpose of authorship in any copyrightable work under Section 201(b) of Title 17, United States Code. With respect thereto, the Contractor agrees not to assert or authorize others to assert any rights or establish any claim under the design patent or copyright laws. The Contractor, for a period of three years after completion of the project, agrees to retain all works developed in the performance of the contract and to furnish all

retained works to the Authority on the request of the Contracting Officer. Unless otherwise provided in this contract, the Contractor shall have the right to retain copies of all works beyond such period.

§ 6-302.09 Standards of Performance

The Contractor shall perform all services required by this contract in accordance with high professional standards prevailing in the Contractor's field of work, except that with regard to construction or repair of an improvement to real property, the architectural or engineering services must be performed with the professional skill and care ordinarily provided by competent architects or engineers practicing under the same or similar circumstances and professional license.

§ 6-302.10 Compliance with Law

The Contractor shall perform all work hereunder in compliance with all applicable federal, state, and local laws and regulations. The Contractor shall use only licensed personnel to perform work required by law to be performed by such personnel.

§ 6-302.11 Payment of Interest on Contractor's Claims

Include the clause at § 6-202.12.

§ 6-302.12 Suspension of Work

(a) The Contracting Officer may order the Contractor in writing to suspend all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Authority.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended or delayed by an act of the Contracting Officer in the administration of this contract, or by his failure to act within the time specified in this contract (or, if no time is specified, within a reasonable time), an adjustment shall be made for any increase in cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension or delay, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension or delay to the extent (1) that performance would have been suspended or delayed by any other cause, including the fault or negligence of the Contractor, or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.

(c) No claim under this clause shall be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act

involved (but this requirement shall not apply to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension or delay, but not later than the date of final payment. No part of any claim based on the provisions of this clause shall be allowed if not supported by adequate evidence showing that the cost would not have been incurred but for a delay within the provisions of this clause.

§ 6-302.13 Interest of Public Officials

Include the clause at § 6-202.16.

§ 6-302.14 Equal Opportunity

Include the clause at § 6-202.15.

§ 6-302.15 Governing Law

Include the clause at § 6-202.18.

§ 6-302.16 Order of Precedence

Include the clause at § 3-802.10.

§ 6-302.17 Federal, State and Local Taxes

Include the clause at § 6-202.13.

§ 6-303 Clauses to Be Used When Applicable

The clauses in this § 6-303 may be used when applicable to the circumstances of the particular procurement.

§ 6-303.01 Option to Extend Services

The Authority may require continued performance of any services within the limits and at the rates stated in the Schedule. The Contracting Officer may exercise the option by written notice to the Contractor within the period specified in the contract.

§ 6-303.02 Option to Extend Term

(a) The Authority may extend the term of this contract by written notice to the Contractor within the time specified in the contract. If feasible, the Authority shall give the Contractor a preliminary written notice of its intent to extend at least 60 days before the contract expires. The preliminary notice does not commit the Authority to an extension, and any absence of notice shall not affect the validity of any exercise of

the option to extend the term of this contract.

(b) If the Authority exercises this option, the extended contract shall be considered to include this option provision.

(c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed _____ (months)(years).

§ 6-303.03 Notice of Labor Disputes

Include the clause at § 6-203.06.

§ 6-303.04 Insurance - Work on Authority Installation

Include the clause at § 6-203.07.

§ 6-303.05 Inspection

(a) “Services,” as used in this clause, includes services performed, workmanship, and material furnished or utilized in the performance of services.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Authority covering the services under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Authority during contract performance and for as long afterwards as the contract requires.

(c) The Authority has the right to inspect and test all services called for by the contract, to the extent practicable, at all times and places during the term of the contract. The Authority shall perform inspections and tests in a manner that will not unduly delay the work.

(d) If the Authority performs inspections or tests on the premises of the Contractor or a subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, at no increase in contract price, all reasonable facilities and assistance for the safe and convenient performance of these duties.

(e) If any of the services do not conform with contract requirements, the Authority may require the Contractor to perform the services again in conformity with contract requirements, at no increase in contract amount. When the defects in services cannot be corrected by reperformance, the Authority may (1) require the Contractor to take necessary action to ensure that future performance conforms to contract requirements and (2) reduce the contract price to reflect the reduced value of the services performed.

(f) If the Contractor fails promptly to perform the services again or to take the necessary action to ensure future performance in conformity with contract requirements, the Authority may (1) by contract or otherwise, perform the services and charge to the Contractor any cost incurred by the Authority that is directly related to the performance of such service or (2) terminate the contract for default.

§ 6-303.06 Interest on Contractor Indebtedness

Include the clause at § 6-203.10.

§ 6-303.07 Protection of Authority Property

Include the clause at § 6-203.11.

§ 6-303.08 Authority Property

Include the clause at § 6-203.12.

§ 6-303.09 Liquidated Damages

Include the clause at § 6-203.14 in accordance with the instructions in that section.

§ 6-303.10 Warranty of Services

(a) “Acceptance,” as used in this clause, means the act of an authorized representative of the Authority by which the Authority assumes for itself, or as an agent of another, ownership of existing and identified supplies, or approves specific services, as partial or complete performance of the contract. “Correction,” as used in this clause, means the elimination of a defect.

(b) Notwithstanding inspection and acceptance by the Authority or any provision concerning the conclusiveness thereof, the Contractor warrants that all services performed under this contract will, at the time of acceptance, be free from defects in workmanship and conform to the requirements of this contract. The Contracting Officer shall give written notice of any defect or nonconformance to the Contractor ____
[Contracting Officer shall insert the specific period of time in which notice shall be given to the Contractor; e.g., “within 30 days from the date of acceptance by the Authority,”; “within 1000 hours of use by the Authority,”; or other specified event whose occurrence will terminate the period of notice, or combination of any applicable events or period of time.] This notice shall state either (1) that the Contractor shall correct or reperform any defective or nonconforming services, or (2) that the Authority does not require correction or reperformance.

(c) If the Contractor is required to correct or reperform, it shall be at no cost to the Authority, and any services corrected or reperformed by the Contractor shall be subject to this clause to the same extent as work initially performed. If the Contractor fails or refuses to correct or reperform, the Contracting Officer may, by contract or otherwise, correct or replace with similar services and charge to the Contractor the cost occasioned to the Authority thereby, or make an equitable adjustment in the contract price.

(c) If the Authority does not require correction or reperformance, the Contracting Officer shall make an equitable adjustment in the contract price.

§ 6-303.11 Excusable Delay

(a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Authority in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions mandated by an authority having jurisdiction, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. "Default" includes failure to make progress in the work so as to endanger performance.

(b) If the failure to perform is caused by the failure of as subcontractor at any tier to perform or make progress, and if the cause of the failure was beyond the control of both the Contractor and subcontractor and without the fault or negligence of either, the Contractor shall not be deemed to be in default, unless-

(1) the subcontracted supplies or services were obtainable from other sources;

(2) the Contracting Officer ordered the Contractor in writing to purchase these supplies or services from the other source; and

(3) the Contractor failed to comply reasonably with this order.

(c) Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of the failure. If the Contracting Officer determines that any failure to perform results from one or more of the causes above, the delivery schedule shall be revised, subject to the rights of the Authority under the Termination Clause of this contract.

§ 6-303.12 Publicity Releases

Include the clause at § 6-203.16.

§ 6-303.13 Equal Opportunity Reporting

Include the clause at § 6-203.18 if the amount of the contract is in excess of \$5,000.

§ 6-303.14 Examination and Retention of Records

Include the clause at § 6-203.19 in accordance with the instructions in that section.

§ 6-303.15 Indemnification

For all services contract other than (1) contracts with architects or engineers or (2) contracts related to a construction contract governed by Chapter 151 of the Texas Insurance Code, insert the provision at § 6-203.22.

For all contracts governed by Chapter 151 of the Texas Insurance Code, insert the following provision, in bold font and all caps in at least the same size as the largest font used in the document.

For all professional service contracts involving an architect or engineer, insert the provision at Section 6-303.15 and the following provision, in bold font and all caps in at least the same size as the largest font used in the document.

§ 6-303.16 Retainage

For all public works projects as defined in Texas Government Code 2252.031(3), include the following provisions:

The Authority shall retain 5% of the contract price from each payment due the contractor until the work is substantially complete or is fully completed and accepted by the Authority. The Authority shall not withhold more than five percent for any item in a bid schedule or schedule of values for the project, including materials and equipment delivered on site to be installed.

§ 6-303.17 Substantial Completion

(a) General.

(1) For the purposes of Retainage, Commencement, Prosecution and Completion of Work, and Liquidated Damages-Construction, the work shall be deemed complete when it is “substantially complete.”

(2) There may be different completion dates required for different phases or portions of the work, as established in the contract. However, the work shall be deemed “substantially complete” if and only if the Contractor has completed the work and related contract obligations in accordance with the contract documents, such that the Authority may enjoy the intended access, occupancy, possession, and use of the entire work without impairment due to incomplete or deficient work, and without interference from the Contractor's completion of remaining work or correction of deficiencies in completed work.

(3) In no event shall the work be deemed “substantially complete” if all fire and life safety systems are not tested and accepted by the authority having jurisdiction, where such acceptance is required under the contract.

(4) Unless otherwise specifically noted, or otherwise clear from context, all references in the contract to “acceptance” shall refer to issuance of a written determination of substantial completion by the Contracting Officer.

(b) Notice of Substantial Completion.

(1) With reasonable advance notice, the Contractor shall submit to the Contracting Officer a written proposal recommending a substantial completion date.

(2) If the Contracting Officer takes exception to the notice of substantial completion, the Contractor shall be entitled to a written notice of conditions precluding determination of substantial completion. The

Contractor shall only be entitled to an extension of time to address such conditions if, and to the extent that, the Contracting Officer provides notice of such conditions more than 30 calendar days after receipt of the notice of substantial completion.

(c) Acceptance of Substantial Completion.

(1) The Contracting Officer shall conduct inspections and make a determination of substantial completion within a reasonable time.

(2) Substantial Completion shall be established by the Contracting Officer's issuance of a written determination specifying the date upon which the work is substantially complete.

(d) Contract Completion.

(1) The Contract is complete if and only if the Contractor has completed all work and related contract obligations, corrected all deficiencies and all punch list items, and complied with all conditions for final payment.

(2) The Contractor shall not be entitled to final payment or release of any retainage held by the Authority until after contract completion. If the Contractor does not achieve contract completion within the time required by this contract, the Authority shall be entitled, after providing notice to the Contractor, to complete any work remaining unfinished. The Contractor shall be liable to the Authority for all costs incurred by the Authority to complete such work.

§ 6-303.18 Drug-Free Workplace Program

Where applicable, include the clause at § 6.402.32.

Section 6-400 - Construction Contracts

§ 6-401 Applicability

This section sets forth uniform contract clauses for use in connection with the procurement of construction. The term "construction" means the erection, alteration, improvement, demolishing, or repair (including excavating and painting) of buildings, structures, or other real property (including, but not limited to, improvements of all types, plants, bridges, streets, tunnels, sewers, power lines, and railways). It does not include the routine repair or routine maintenance of existing structures, buildings, or real property.

§ 6-402 Required Clauses for Construction Contracts

The following clauses shall be inserted in all fixed price construction

contracts (with or without provisions for price redetermination, economic price adjustment, or other form of price revision).

§ 6-402.01 Definitions

Include the clause at § 6-202.01.

§ 6-402.02 Site Investigation and Conditions Affecting the Work

(a) The Contractor hereby represents and warrants that it has taken steps reasonably necessary to ascertain the nature and location of the work and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including, but not limited to, (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, flooding patterns and water drainage, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminarily to and during work performance. The Contractor acknowledges that its undertaking to complete the contract within the contract schedule includes an allowance for the normal number of days in which contract work may be partially or totally delayed because of weather during the season and at the location the contract will be performed and that the Contractor shall not be entitled to excusable delays or compensation for such delays. The Contractor also represents and warrants that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, access to the site, and territory surrounding the site, including all exploratory work done by the Authority as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work or for proceeding to perform the work successfully without additional expense to the Authority.

(b) The Authority assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Authority. Nor does the Authority assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

§ 6-402.03 Differing Site Conditions

(a) The Contractor shall promptly, and before the conditions

are disturbed, give written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed unless the Contractor has given the written notice required; provided, that the time prescribed in (a), above, for giving written notice may be extended by the Contracting Officer.

(d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.

§ 6-402.04 Permits and Responsibilities

The Contractor shall, without additional expense to the Authority, be responsible for obtaining any necessary licenses and permits and for complying with any federal, state, county, and municipal laws, codes, and regulations applicable to the performance of the work, including, but not limited to, any laws or regulations requiring the use of licensed contractors to perform parts of the work. The Contractor also shall be responsible for all damages to persons or property that occur as a result of the Contractor's fault or negligence and shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others. The Contractor also shall be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract.

§ 6-402.05 Specifications and Drawings

(a) The Contractor shall keep on the work site a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the

specifications shall govern. In case of a discrepancy in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted in writing to the Contracting Officer, who shall promptly make a determination in writing or shall submit to the engineer of record for a resolution. Any action or adjustment by the Contractor without such a determination shall be at its own risk and expense. The Contracting Officer shall furnish from time to time such detailed drawings and other information as considered necessary, unless otherwise provided.

(b) Wherever in the specifications or upon the drawings the words “directed”, “required”, “ordered”, “designated”, “prescribed”, or words of like import are used, it shall be understood that the “direction”, “requirement”, “order”, “designation”, or “prescription”, of the Contracting Officer is intended; and similarly the words “approved”, “acceptable”, “satisfactory”, or words of like import shall mean “approved by”, or “acceptable to”, or “satisfactory to” the Contracting Officer, unless otherwise expressly stated.

(c) Where “as shown”, “as indicated”, “as detailed”, or words of similar import are used, it shall be understood that the reference is made to the drawings accompanying this contract unless stated otherwise. The word “provided” as used herein shall be understood to mean “provide complete in place” (that is, “furnished and installed”).

(d) Shop drawings means drawings submitted to the Contracting Officer by the Contractor, subcontractor, or any lower tier subcontractor pursuant to a construction contract, showing in detail (1) the proposed fabrication and assembly of structural elements and (2) the installation (i.e., form, fit, and attachment details) of materials or equipment. It includes drawings, diagrams, layouts, schematics, descriptive literature, illustrations, schedules, performance and test data, and similar materials furnished by the Contractor to explain in detail specific portions of the work required by the contract. The Authority may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.

(e) If this contract requires shop drawings, the Contractor shall coordinate all such drawings and review them for accuracy, completeness, and compliance with contract requirements and shall indicate its approval thereon as evidence of such coordination and review. Shop drawings submitted to the Contracting Officer without evidence of the Contractor's approval may be returned for resubmission. The Contracting Officer will indicate an approval or disapproval of the shop drawings and, if not approved as submitted, shall indicate the Authority's reasons therefor. Any work done before such approval shall be at the Contractor's risk. Approval by the Contracting Officer shall not relieve the Contractor from responsibility for any errors or omissions in

such drawings or from responsibility for complying with the requirements of this contract, except with respect to variations described and approved in accordance with (f) below.

(f) If shop drawings show variations from the contract requirements, the Contractor shall describe such variations in writing, separate from the drawings, at the time of submission. If the Contracting Officer approves in writing any such variation, the Contracting Officer shall issue an appropriate contract modification, except that, if the variation is minor or does not involve a change in price or in time of performance, a modification need not be issued.

(g) The Contractor shall submit to the Contracting Officer for approval four copies (unless otherwise indicated) of all shop drawings as called for under the various headings of the specifications. Three sets (unless otherwise indicated) of all shop drawings will be retained by the Contracting Officer, and one set will be returned to the Contractor.

(h) This clause shall be included in all subcontracts at any tier.

§ 6-402.06 Other Contracts

The Authority may undertake, or award other contracts for, additional work at or near the site of the work under this contract. The Contractor shall fully cooperate with the other contractors and with employees of the Authority and shall carefully adapt scheduling and performing the work under this contract to accommodate the additional work, heeding any direction that may be provided by the Contracting Officer. The Contractor shall not commit or permit any act that will interfere with the performance of work by any other contractor or by employees of the Authority.

§ 6-402.07 Protection of Existing Site Conditions

(a) The Contractor shall preserve and protect all structures, equipment, and vegetation (such as trees, shrubs, and grass) on or adjacent to the work site which are not to be removed and which do not unreasonably interfere with the work required under this contract. The Contractor shall remove trees only when specifically authorized to do so and shall avoid damaging vegetation that will remain in place. If any limbs or branches of trees are broken during contract performance, or by the careless operation of equipment, or by workmen, the Contractor shall trim those limbs or branches with a clean cut and paint the cut with a tree-pruning compound as directed by the Contracting Officer.

(b) The Contractor shall protect from damage all existing improvements and utilities (1) at or near the work site and (2) on

adjacent property of a third party, the locations of which are made known to or should be known by the Contractor. The Contractor shall repair any damage to those facilities, including those that are the property of a third party, resulting from failure to comply with the requirements of this contract or failure to exercise reasonable care in performing the work. If the Contractor fails or refuses to repair the damage promptly, the Contracting Officer may have the necessary work performed and charge the cost to the Contractor.

§ 6-402.08 Operations and Storage Areas

(a) The Contractor shall confine all operations (including storage of materials) on Authority premises to areas authorized or approved by the Contracting Officer. The Contractor shall hold and save the Authority, and its officers and agents, free and harmless from liability of any nature occasioned by the Contractor's performance.

(b) Temporary buildings (e.g., storage sheds, shops, offices) and utilities may be erected by the Contractor only with the written approval of the Contracting Officer and shall be built with labor and materials furnished by the Contractor without expense to the Authority. The temporary buildings and utilities shall remain the property of the Contractor and shall be removed by the Contractor at its expense upon completion of the work. With the written consent of the Contracting Officer, the buildings and utilities may be abandoned and need not be removed.

(c) The Contractor shall, under regulations prescribed by the Contracting Officer, use only established roadways or use temporary roadways constructed by the Contractor when and as authorized by the Contracting Officer. When materials are transported in prosecuting the work, vehicles shall not be loaded beyond the loading capacity recommended by the manufacturer of the vehicle or prescribed by any federal, state, or local law or regulation. When it is necessary to cross curbs or sidewalks, the Contractor shall protect them from damage. The Contractor shall repair or pay for the repair of any damaged curbs, sidewalks, or roads.

§ 6-402.09 Superintendence by Contractor

At all times during performance of this contract and until the work is completed and accepted, the Contractor shall directly superintend the work or assign and have on the work a competent superintendent who is satisfactory to the Contracting Officer and has authority to act for the Contractor.

§ 6-402.10 Variation in Estimated Quantity

If the quantity of a unit-priced item in this contract is an estimated

quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contractor may request (in writing) an extension of time to be received by the Contracting Officer within 10 days from the beginning of the delay, or within such further period as may be granted by the Contracting Officer before the date of final settlement of the contract. Upon the receipt of a written request for an extension, the Contracting Officer shall ascertain the facts and make an adjustment for extending the completion date as, in the judgment of the Contracting Officer, is justified.

§ 6-402.11 Material and Workmanship

(a) All equipment, material, and articles incorporated into the work covered by this contract shall be new and of the most suitable grade for the purpose intended, unless otherwise specifically provided in this contract. References in the specifications to equipment, material, articles, or patented processes by trade name, make, or catalog number shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may, at its option, use any equipment, material, article, or process that, in the judgment and with the written approval of the Contracting Officer, is equal to that named in the specifications, unless otherwise specifically provided in this contract.

(b) The Contractor shall obtain the Contracting Officer's approval of the machinery and mechanical and other equipment to be incorporated into the work. When requesting approval, the Contractor shall furnish to the Contracting Officer the name of the manufacturer, the model number, and other information concerning the performance, capacity, nature, and rating of the machinery and mechanical and other equipment. When required by this contract or by the Contracting Officer, the Contractor also shall obtain the Contracting Officer's approval of the material or articles which the Contractor contemplates incorporating into the work. When requesting approval, the Contractor shall provide full information concerning the material or articles. When directed to do so, the Contractor shall submit samples for approval at the Contractor's expense, with all shipping charges prepaid. Machinery, equipment, material, and articles that do not have the required approval shall be installed or used at the risk of subsequent rejection.

(c) All work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may require, in writing, that the Contractor remove from the work any employee the Contracting Officer deems incompetent, careless, or otherwise

objectionable.

§ 6-402.12 Suspension of Work

Include the clause at § 6-302.12.

§ 6-402.13 Use and Possession Prior to Completion

(a) The Authority shall have the right to take possession of or use any completed or partially completed part of the work. Before taking possession of or using any work, the Contracting Officer shall furnish the Contractor a list of items of work remaining to be performed or corrected on those portions of the work that the Authority intends to take possession of or use. However, failure of the Contracting Officer to list any item of work shall not relieve the Contractor of responsibility for complying with the terms of the contract. The Authority's possession or use shall not be deemed an acceptance of any work under the contract.

(b) While the Authority has such possession or use, the Contractor shall be relieved of the responsibility for the loss of or damage to the work resulting from the Authority's possession or use, notwithstanding the terms of the Permits and Responsibilities Clause of this contract. If prior possession or use by the Authority delays the progress of the work or causes additional expense to the Contractor, an equitable adjustment shall be made in the contract price or the time of completion, and the contract shall be modified in writing accordingly.

§ 6-402.14 Inspection of Construction

(a) The word "work" includes, but is not limited to, materials, workmanship, and manufacture and fabrication of components.

(b) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work called for by this contract conforms to contract requirements. The Contractor shall maintain complete inspection records and make them available to the Authority. All work shall be conducted under the general direction of the Contracting Officer and is subject to inspection and testing by the Authority at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the contract. Notwithstanding the foregoing, the Contractor will have control of all means, methods, and safety measures, in connection with the performance of the Work under this contract.

(c) Inspections and tests by the Authority are for the sole benefit of the Authority and do not:

(1) relieve the Contractor of responsibility for

providing adequate quality control measures;

(2) relieve the Contractor of responsibility for damage to or loss of the material before acceptance;

(3) constitute or imply acceptance; or

(4) affect the continuing rights of the Authority after acceptance of the completed work under paragraph (i) below.

(d) The presence or absence of an inspector from the Authority does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any term or condition of the specifications without the Contracting Officer's written authorization.

(e) The Contractor shall promptly furnish, without additional charge, all facilities, labor, and material reasonably needed for performing such safe and convenient inspections and tests as may be required by the Contracting Officer. The Authority may charge to the Contractor any additional cost of inspection or test when work is not ready at the time specified by the Contractor for inspection or test, or when prior rejection makes reinspection or retest necessary. The Authority shall perform all inspections and tests in a manner that will not unnecessarily delay the work. Special, full size, and performance tests shall be performed as described in the contract.

(f) The Contractor shall, without charge, replace or correct work found by the Authority not to conform to contract requirements, unless in the public interest the Authority consents to accept the work with an appropriate downward adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.

(g) If the Contractor does not promptly replace or correct rejected work, the Authority may (1) by contract or otherwise, replace or correct the work and charge the cost to the Contractor or (2) terminate for default the Contractor's right to proceed.

(h) If, before acceptance of the entire work, the Authority decides to examine already completed work by removing it or tearing it out, the Contractor, on request, shall promptly furnish all necessary facilities, labor, and material. If the work is found to be defective or nonconforming in any material respect due to the fault of the Contractor or its subcontractors, the Contractor shall defray the expenses of the examination and of satisfactory reconstruction. However, if the work is found to meet contract requirements, the Contracting Officer shall make an equitable adjustment for the additional services involved in the examination and reconstruction, including, if completion of the work

was thereby delayed, an extension of time.

(i) Unless otherwise specified in the contract, the Authority shall accept, as promptly as practicable after completion and inspection, all work required by the contract or that portion of the work the Contracting Officer determines can be accepted separately. Subject to the provisions of the Warranty of Construction Clause hereof, acceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or the Authority's rights under any warranty or guarantee.

§ 6-402.15 Warranty of Construction

(a) In addition to any other warranties in this contract, the Contractor warrants, except as provided in paragraph (j) of this clause, that work performed under this contract conforms to the contract requirements and is free of any defect in equipment, material, or design furnished, or workmanship performed, by the Contractor or any subcontractor or supplier at any tier.

(b) This warranty shall continue for a period of one year from the date of final acceptance of the work. If the Authority takes possession of any part of the work before final acceptance, this warranty for such part of the work shall continue for a period of one year from the date the Authority takes possession.

(c) The Contractor shall remedy at the Contractor's expense (i) any failure to conform to the contract requirements or (ii) any defect. In addition, the Contractor shall remedy at the Contractor's expense any damage to real or personal property owned or controlled by the Authority, when the damage is the result of --

(1) the Contractor's failure to conform to contract requirements; or

(2) any defect of equipment, material, workmanship, or design furnished.

(d) The Contractor shall restore any work damaged in fulfilling the terms and conditions of this clause. The Contractor's warranty with respect to work repaired or replaced will run for one year from the date of repair or replacement.

(e) The Contracting Officer shall notify the Contractor, in writing, within a reasonable time after the discovery of any failure, defect, or damage.

(f) If the Contractor fails to remedy any failure, defect, or damage within a reasonable time after receipt of notice, the Authority

shall have the right to replace, remove, or otherwise remedy the failure, defect, or damage at the Contractor's expense.

(g) With respect to all warranties, express or implied, from subcontractors, manufacturers, or suppliers for work performed and materials furnished under this contract, the Contractor shall --

(1) obtain all warranties that would be given in normal commercial practice;

(2) require all warranties to be executed, in writing, for the benefit of the Authority, if directed by the Contracting Officer; and

(3) enforce all warranties for the benefit of the Authority, if directed by the Contracting Officer.

(h) In the event the Contractor's warranty under paragraph(b) of this clause has expired, the Authority may bring suit at its expense to enforce a subcontractor's, manufacturer's, or supplier's warranty.

(i) The Contractor shall not be liable for the repair of any defects of material or design furnished by the Authority or for the repair of any damage that results from any defect in material or designs furnished by the Authority, unless the Contractor knew or should have known of the defect and failed to disclose the defect to the Authority.

(j) This warranty shall not limit the Authority's rights under the Inspection of Construction Clause of this contract with respect to latent defects, gross mistakes, or fraud.

§ 6-402.16 Changes

(a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes --

(1) in the specifications (including drawings and designs);

(2) in the method or manner of performance of the work;

(3) in the facilities, equipment, materials, services, or site to be furnished by the Authority; or

(4) directing acceleration in the performance of the

work.

(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change in the Contractor's obligations shall be treated as a change order under this clause; provided, that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order.

(c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for a "proposal for adjustment" (hereafter referred to as proposal) based on defective specifications, no proposal for any change under paragraph (b), above, shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which the Authority is responsible, the equitable adjustment shall include the increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.

(e) The Contractor must submit any proposal under this clause within 30 days after (1) receipt of a written change order under paragraph (a), above, or (2) the furnishing of a written notice under paragraph (b), above, by submitting to the Contracting Officer a written statement describing the general nature and amount of the proposal, unless this period is extended by the Authority. The proposal may be included in the notice under paragraph (b), above.

(f) Agreement on any change order shall constitute a final settlement of all matters relating to the change in the work which is the subject of the change order, including, but not limited to, all direct and indirect costs associated with such change and any and all adjustments to the Contractor's cost and time. Accordingly, Contractor hereby waives any claim it may have to adjustments in the Contractor's cost and time arising out of the cumulative effect of any and all changes in the work, whether characterized by the Contractor as adjustments or damages and regardless of the legal or equitable theory on which they are based.

(g) No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this

contract.

§ 6-402.17 Termination for Convenience

The Contracting Officer may, whenever the interests of the Authority so require, terminate this contract, in whole or in part, for the convenience of the Authority. The Contracting Officer shall give written notice of the termination to the Contractor specifying the part of the contract terminated and when termination becomes effective.

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

(b) The Contracting Officer may require the Contractor to transfer title and deliver to the Authority in the manner and to the extent directed by the Contracting Officer: (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated; and (ii) the completed or partially completed plans, drawings, information, and other property that, if the contract had been completed, would be required to be furnished to the Authority. The Contractor shall, upon direction of the Contracting Officer, protect and preserve property in the possession of the Contractor in which the Authority has an interest. If the Contracting Officer does not exercise this right, the Contractor shall use its best efforts to sell such supplies and manufacturing materials.

(c) The Authority shall pay the Contractor the following amounts:

(1) For contract work properly performed before the effective date of termination, the total (without duplication of any items) of --

(i) the cost of this work; and

(ii) the cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subparagraph (i), above; and

(iii) a sum, as profit on (i), above, determined by the Contracting Officer to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subparagraph (iii) and shall reduce the settlement to reflect the indicated rate of loss.

(2) The reasonable costs of settlement of the work terminated, including --

(i) accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) the termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

(3) The total sum to be paid the Contractor under this subparagraph shall not exceed the total contract price plus the reasonable settlement costs of the Contractor reduced by the amount of payments otherwise made, the proceeds of any sales of construction, supplies, and construction materials under this subparagraph, and the contract price of work not terminated.

§ 6-402.18 Default

(a) If the Contractor refuses or fails (i) to commence the work within the time required by this contract, (ii) to prosecute the work or any separable part with the diligence that will ensure its completion within the time specified in this contract, including any extension, (iii) to provide sufficient and properly skilled workmen or proper materials or equipment to complete the work in an acceptable manner and without delay, (iv) to promptly pay its subcontractors, laborers, and materialmen, (v) to perform any of its other obligations under this contract, or (vi) to complete the work within the time specified in this contract (“events of default”), the Authority may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work). In this event, the Authority may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the Authority resulting from events of default, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Authority in completing the work.

(b) The Contractor's right to proceed shall not be terminated because of delays nor the Contractor charged with damages under this clause, if --

(1) the delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor (examples of such causes include (i) acts of God or of the public enemy, (ii) acts of the Authority in either its public or contractual capacity, (iii) acts of another Contractor in the performance of a contract with the Authority, (iv) fires, (v) floods, (vi) epidemics, (vii) quarantine restrictions mandated by authorities having jurisdiction, (viii) strikes, (ix) freight embargoes, (x) unusually severe weather, or (xi) delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers); and

(2) the Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of the delay. If, in the judgment of the Contracting Officer, the findings of fact warrant such action, the time for completing the work shall be extended. The findings of the Contracting Officer shall be final and conclusive on the parties but subject to appeal under the Disputes Clause.

(c) If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the Authority.

(d) The rights and remedies of the Authority in this clause are in addition to any other rights and remedies provided by law or under this contract. Time is of the essence for all delivery, performance, submittal, and completion dates in this contract.

§ 6-402.19 Authority's Right to Carry Out the Work

If the Contractor fails or refuses to carry out all or any part of the work in accordance with the contract requirements or within the contract schedule and fails or refuses to correct such deficiency within seven days of receipt of written notice thereof from the Authority, the Authority, in its sole discretion and without waiving any other rights it may have, may elect to correct such deficiencies and charge the Contractor the cost of such corrections. Nothing in this clause shall relieve the Contractor of its obligation to perform the remainder of the work in accordance with the contract.

§ 6-402.20 No Damages for Delay

Unless otherwise specifically provided for by the contract, the Contractor shall not be entitled to damages of any type resulting from hindrances, delays, or any other cause under this contract except when the work is stopped or suspended by a written order signed by the Contracting Officer or by intentional interference by the Authority.

§ 6-402.21 Disputes

Include the clause at § 6-202.11.

§ 6-402.22 Payments

(a) The Authority shall pay the Contractor the contract price as provided in this contract.

(b) The Authority shall make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates of work accomplished which meets the standards of quality established under the contract, as approved by the Contracting Officer. If requested by the Contracting Officer, the Contractor shall furnish a breakdown of the total contract price showing the amount included therein for each principal category of the work, in such detail as requested, to provide a basis for determining progress payments.

(c) In the preparation of estimates, the Contracting Officer may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the Contractor at locations other than the site may also be taken into consideration if consideration is specifically authorized by this contract and the Contractor furnishes satisfactory evidence that it has acquired title to such material and that the material will be used to perform this contract.

(d) Refund of Unearned Amount(s). If the Contractor, after making a certified request for progress payments, discovers that a portion or all of such request constitutes a payment for performance by the Contractor that fails to conform to the specifications, terms, and conditions of this contract (hereinafter referred to as the "Unearned amount"), the Contractor shall:

(1) Notify the Contracting Officer of such performance deficiency; and

(2) Be obligated to pay the Authority an amount equal to the interest on the Unearned Amount from the eighth day after the date of receipt of the unearned amount until (i) the date the Contractor

notifies the Contracting Officer that the performance deficiency has been corrected; or (ii) the date the Contractor reduces the amount of any subsequent certified request for progress payments and amount equal to the Unearned Amount.

(e) In making these progress payments, there shall be retained 10 percent of the estimated amount until final completion and acceptance of the contract work. However, if the Contracting Officer finds that satisfactory progress was achieved during any period for which a progress payment is to be made, the Contracting Officer may authorize payment to be made in full without retention of a percentage. When the work is substantially complete, the Contracting Officer shall retain an amount that the Contracting Officer considers adequate protection of the Authority and may release to the Contractor all or a portion of any excess amount. Also, on completion and acceptance of each separate building, public work, or other division of the contract for which the price is stated separately in the contract, payment may be made for the completed work without retention of a percentage.

(f) All materials and work covered by progress payments made shall, at the time of the payment, become the sole property of the Authority, but this shall not be construed as relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work, or waiving the right of the Authority to require the fulfillment of all of the terms of the contract.

(g) The Authority shall, upon request, reimburse the Contractor for the entire amount of premiums paid for performance and payment bonds (including coinsurance and reinsurance agreements, when applicable) after the Contractor furnishes evidence of full payment to the surety. Such reimbursement shall be part of, and not in addition to, the contract price.

(h) It is a condition precedent for payment that each progress payment application contain conditional bond release waivers for the amount of the monthly payment application from the Contractor and all of the Contractor's subcontractors, suppliers, and vendors of any tier. Furthermore, after the first monthly payment application, Contractor shall provide an unconditional bond release waiver for the amount paid on the previous monthly payment application from Contractor and Contractor's subcontractors, suppliers, and vendors of any tier.

(i) In the event any lien/bond notice, fund trapping notice, or claim is made against the Authority, surety or the project for payment for labor or materials furnished in connection with the work where payment has been made by the Authority as required pursuant to the Contract Documents, Contractor shall at its sole cost and expense promptly take

action to address any notice or claim. If Contractor fails to act or fails to properly address the notice or claim, upon the Authority's demand, Contractor shall promptly pay, which payment shall not be reimbursable or increase the Contract Sum, all costs incurred by the Authority in discharging such claim, including, without limitation, attorneys' fees.

(j) Final Payment. The Authority shall pay the amount due the Contractor under this contract after

- (1) completion and acceptance of all work;
- (2) presentation of a properly executed voucher; and
- (3) presentation of a release of all claims against the Authority arising by virtue of this contract, other than claims, in stated amounts, that the Contractor has specifically excepted from the operation of the release.

(k) Concurrently with the submission of each request for a progress payment under this contract, the Contractor shall certify that all due and payable bills with respect to the contract work either have been paid or will be paid with the proceeds of the current request for progress payment.

(l) The Authority may withhold all or part of any progress payment otherwise due the Contractor if any one or more of the following conditions exist:

- (1) the Contractor fails to prosecute the work to completion in a diligent, efficient, timely, and workman like manner and in strict accordance with the provisions of the contract;
- (2) the Contractor fails to use an adequate amount or quality of personnel or equipment to complete the work without undue delay;
- (3) the Contractor fails to make prompt payments to its subcontractors, suppliers, materialmen, or laborers;
- (4) any part of such payment to the Contractor is attributable to work which is defective or not performed in accordance with the contract requirements; provided, however, such payment shall be made as to the part thereof attributable to work which is performed in accordance with the contract requirements and is not defective; or
- (5) the Contractor is otherwise in default of any of its obligations under the contract.

§ 6-402.23 Royalties and Patents

Include the clause at § 6-203.17.

§ 6-402.24 Federal, State, and Local Taxes

Include the clause at § 6-202.13.

§ 6-402.25 Assignment

Include the clause at § 6-202.14.

§ 6-402.26 Equal Opportunity

Include the clause at § 6-202.15.

§ 6-402.27 Interest of Public Officials

Include the clause at § 6-202.16.

§ 6-402.28 Wage Rates

All persons employed in the performance of the work under this contract, or any subcontracts hereunder, shall be paid not less than the general rates of per diem, holiday, and overtime wages prevailing in the locality for work of a similar character (which wages are specified in an attachment to this contract). Failure to comply with this provision shall subject the Contractor to the penalties prescribed in the Texas Government Code, Chapter 2258, Prevailing Wage Rates, as amended.

§ 6-402.29 Additional Bond Security

Include the clause at § 6-202.08.

§ 6-402.30 Order of Precedence

Include the clause at § 3-802.10.

§ 6-402.31 Governing Law

Include the clause at § 6-202.18.

§ 6-402.32 Drug-Free Workplace Program

(a) As used in this clause:

(1) “Alcohol” means ethyl alcohol and any beverage containing ethyl alcohol.

(2) “Controlled substance(s)” means a substance, including a drug and an immediate precursor listed in Schedules I through V of Subchapter A of the Texas Controlled Substances Act, V.T.C.A., Health and Safety Code, Sections 481.032 - 481.036. These substances include, but are not limited to, marijuana, heroin, LSD, concentrated cannabis or cannabinoids, hashish or hash oil, morphine or its derivatives, mescaline, peyote, phencyclidine (PCP, Angel Dust), opium, opiates, methadone, cocaine, quaaludes, amphetamines, “exotic/designer” drugs, benzodiazepines, Seconal, codeine, barbiturates, phenobarbital, or Valium.

(3) “Safety sensitive task” means each category of work performed at a construction workplace which, if performed by a person impaired by the effects of alcohol or a controlled substance:

- (i) would pose a serious risk of death or personal injury to the employee or others in the vicinity; or
- (ii) could compromise the quality of the construction in such manner as would impose a significant public safety risk in the operation of the Authority's public transportation system.

(4) “Drug-free workplace” means a site for the performance of work done in connection with the Authority's construction contract at which employees are prohibited from using alcohol or from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

(5) “Employee” means an employee of a Contractor or subcontractor who may be directly engaged in the performance of work under the Authority's construction contract.

(6) “Reasonable suspicion” means the presence or absence of specific criteria identified in the Contractor's drug-free workplace program (indicating the possibility that a person is under the influence of alcohol or a controlled substance) as observed by the Contractor's supervisory personnel with reasonable training in the identification of such criteria.

(b) The program shall provide for mandatory drug testing of employees who are to perform safety sensitive tasks under the following circumstances:

(1) All employees will be tested prior to assignment to the Authority's construction project to ascertain the use of controlled substances if the employee will be performing safety sensitive tasks; and

(2) When there is a reasonable suspicion that an

employee is under the influence of alcohol or a controlled substance at the workplace; and

(3) When an employee has been involved in an accident or unsafe practice (as defined in the Contractor's safety program) at the workplace.

(c) The program may, at the Contractor's discretion, include mandatory employee drug testing under the following circumstances:

(1) As part of or as a follow-up to counseling or rehabilitation for controlled substance use; or

(2) As part of a voluntary employee drug testing program.

(d) A random testing procedure to detect the use of alcohol or a controlled substance by employees performing safety sensitive tasks is required as part of the Contractor's program for the purpose of preventing or deterring hazardous performance. The procedure shall require that, at a minimum, five percent (5%) of the Contractor's employees will be randomly tested within the contract period or within each year of the contract period, whichever period is shorter.

(e) All testing by or on behalf of the Contractor because of a requirement in the Authority's contract shall be conducted only for employees engaged (or to be engaged) in safety sensitive tasks and only for use of alcohol or a controlled substance and shall be conducted in a manner and under written policies that minimize the intrusion on the employee's privacy and personal dignity. This provision shall not preclude the Contractor from adding its own additional testing requirements.

(f) The Contractor shall publish a statement notifying employees that the use of alcohol at the workplace or the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance by employees at any time is prohibited and specifying the actions that will be taken against employees for violations of such prohibition.

(g) The program must require each employee who will perform a safety sensitive task, prior to working under the Authority's contract to:

(1) Acknowledge in writing the Contractor's drug-free workplace program; and

(2) Give advance written consent to any drug testing

that may be conducted under the Contractor's program and the use of test results for decisions related to employment, disciplinary action, or continued employment. The Contractor will agree, in connection with the employee's consent, that the results of testing for alcohol and controlled substances will not be voluntarily referred to any law enforcement agency. If the Contractor is subject to a collective bargaining agreement:

(i) the procedure for obtaining the individual employee's acknowledgment and consent must be consistent with the Contractor's obligations under the collective bargaining agreement; and

(ii) employees shall have the right to be accompanied by a union representative when any specimen is obtained for testing.

(h) The Contractor will establish a drug-free awareness program to inform its employees about:

(1) The dangers of drug abuse in the workplace;

(2) The Contractor's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees who refuse to submit to required testing and for other violations of the drug-free workplace program including, but not limited to, being unable to remain employed at the workplace until approval to return is obtained from the Authority.

(i) The Contractor's drug-free workplace program shall, at a minimum, include:

(1) Policies and procedures for specimen collection, chain of custody for specimens, laboratory qualification standards, laboratory analysis procedures, quality control requirements, and test result reporting procedures which substantially conform to the material requirements of the Mandatory Guidelines for Federal Workplace Drug Testing Programs promulgated by the U.S. Department of Health and Human Services in effect on the date of award of the Authority's construction contract.

(2) Procedures for the Contractor's employees to report their use of prescription drugs used in the course of medical treatment or which have been prescribed and authorized for use by a licensed medical practitioner.

(3) The criteria the Contractor will use for “reasonable suspicion” testing.

(4) The levels of alcohol or controlled substances which will be used in conjunction with a determination that an employee is “under the influence” or is “impaired by the effects of” alcohol or controlled substance(s).

(j) The Contractor shall display a notice, prominently placed near each entrance to the workplace, stating that, by entering the premises, persons are consenting to an inspection of themselves and their property including, but not limited to, their clothing, vehicles, briefcases, lunch boxes, toolboxes, purses, and packages.

(k) The Contractor agrees to use its best efforts to establish and maintain a work environment free of use by employees of alcohol or controlled substances through implementation of paragraphs (b) through (j) of this clause. The Contractor shall prepare and maintain records in sufficient detail to demonstrate compliance with the requirements of this clause including, but not limited to, certifications from subcontractors and records of drug or alcohol tests conducted during performance of the contract. Such records shall be subject to inspection and audit by the Authority, and the Contractor's noncompliance may authorize the Authority to withhold all or any portion of any payments due the Contractor until the Contractor demonstrates compliance.

(l) A Drug-Free Workplace Program clause identical to this clause (except for changes appropriate for designation of the parties), including this subparagraph (l), will be included in every subcontract entered into in connection with this contract.

(m) Contractor shall comply with all applicable local, state, and federal laws, standards, rules and regulations concerning Substance Abuse Programs, including, but not limited to Federal Acquisition Regulation (FAR) 52.226-7, “Drug-Free Workplace”, 49 CFR Part 655, “Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations” and 49 CFR Part 40, “Procedures for Transportation Workplace Drug and Alcohol Testing Programs.”

§ 6-403 Clauses to Be Used When Applicable

The clauses in this § 6-403 may be used when applicable to the circumstances of the particular procurement.

§ 6-403.01 Pricing of Adjustments

Include the clause at § 6-203.01.

§ 6-403.02 Notice of Labor Disputes

Include the clause at § 6-203.06.

§ 6-403.03 Interest on Contractor Indebtedness

Include the clause at § 6-203.10.

§ 6-403.04 Protection of Authority Property

Include the clause at § 6-203.11.

§ 6-403.05 Authority Property

Include the clause at § 6-203.12.

§ 6-403.06 Title to Submittals

All information, drawings, or other submittals required to be furnished by the Contractor to the Authority under this contract shall become the property of the Authority.

§ 6-403.07 Construction Schedule

(a) The Contractor shall, within five days after the work commences on the contract or another period of time determined by the Contracting Officer, prepare and submit to the Contracting Officer for approval three copies of a practicable schedule showing the order in which the Contractor proposes to perform the work and the dates on which the Contractor contemplates starting and completing the several salient features of the work (including acquiring materials, plant, and equipment). The schedule shall be in the form of a network analysis of suitable scale to indicate appropriately the percentage of the Contractor's work breakdown schedule which will be completed by any given date during the period. If the Contractor fails to submit a schedule within the time prescribed, the Contracting Officer may withhold approval of progress payments until the Contractor submits the required schedule.

(b) The Contractor shall enter the actual progress on the schedule as directed by the Contracting Officer and, upon doing so, immediately shall deliver a copy of the annotated schedule to the Contracting Officer. If, in the opinion of the Contracting Officer, the Contractor falls behind the approved schedule, the Contractor shall take steps necessary to improve its progress, including those that may be required by the Contracting Officer, without additional cost to the Authority. In this circumstance, the Contracting Officer may require the Contractor to increase the number of shifts, overtime operations, days of work, and/or the amount of construction plant, and to submit for

approval any supplementary schedule or schedules in chart form as the Contracting Officer deems necessary to demonstrate how the approved rate of progress will be regained.

(c) Failure of the Contractor to comply with the requirements of the Contracting Officer under this clause shall be grounds for a determination by the Contracting Officer that the Contractor is not prosecuting the work with sufficient diligence to ensure completion within the time specified in the contract. Upon making this determination, the Contracting Officer may terminate the Contractor's right to proceed with the work, or any separable part of it, in accordance with the terms of this contract.

§ 6-403.08 Examination of Bid Documents

The Authority shall have the right to examine and review the Contractor's original bid and estimating documents used in preparing its bid as a reference to aid in the Authority's evaluation of the Contractor's scheduling and construction progress. A certified copy of such documents shall be submitted to the Authority if requested by the Contracting Officer. The Authority shall maintain in confidence all information contained in such bid and estimating documents. It is the Authority's position that the Contractor's estimating documents in support of its original bid are exempt from mandatory release prior to award of contract under the Texas Open Records Act. After award, the documents would require individual review to determine whether or not an exemption from release under the Act is available.

§ 6-403.09 Commencement and Completion of Work

The Contractor shall (a) commence work under this contract within _____ [Contracting Officer insert number] calendar days after the date the Contractor receives the notice to proceed, (b) prosecute the work diligently, and (c) finally completes the entire work ready for use so that the Contracting Officer has issued a Notice of Final Acceptance not later than _____.*. The time stated for final completion shall include final cleanup of the premises.

After Contractor has satisfactorily completed the work, the Contracting Officer shall issue a "Notice of Final Acceptance" to the Contractor, and the Contractor may then submit an invoice for the payment of unpaid monies owed on the contract. Subject to the Authority's rights under the "Inspection of Construction" provision and the "Authority's Right to Carry Out the Work" provision, if the Authority determines that all contractual requirements have not been satisfied, it shall withhold issuance of the Notice of Final Acceptance until completion of all outstanding requirements to include the completion of all the work, closure of all deficiencies and resolution of all non-conformances. Before final payment, the Contractor shall execute and deliver to the

Contracting Officer all required releases, waivers of lien and other documentation required by the Contracting Officer.

* The Contracting Officer shall specify either a number of days after the date the Contractor receives the notice to proceed or a calendar date.

§ 6-403.10 Liquidated Damages - Construction

The following clause may be used under the criteria and requirements set forth in 6-203.14.

(a) If the Contractor fails to complete the work within the time specified in the contract, or any extension, the Contractor shall pay to the Authority, as liquidated damages, the sum of _____ [Contracting Officer insert amount] for each day of delay.

(b) If the Authority terminates the Contractor's right to proceed, the resulting damage will consist of liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Authority in completing the work.

(c) If the Authority does not terminate the Contractor's right to proceed, the resulting damage will consist of liquidated damages until the work is completed or accepted.

§ 6-403.11 Time Extensions

Notwithstanding any other provisions of this contract, the time extensions for changes in the work will depend upon the extent, if any, by which the changes cause delay in the completion of the various elements of construction. The contract modification granting the time extension may provide that the contract completion date will be extended only for those specific elements so delayed and that the remaining contract completion dates for all other portions of the work will not be altered and may further provide for an equitable readjustment of liquidated damages under the new completion schedule.

§ 6-403.12 Insurance - Work on Authority Installation

Include the clause at § 6-203.07.

§ 6-403.13 Identification of Authority-Furnished Property

(a) The Authority will furnish to the Contractor the property identified in the Schedule to be incorporated or installed into the work or used in performing the contract. The listed property will be furnished f.o.b. railroad cars at the place specified in the contract Schedule or f.o.b. truck at the project site. The Contractor is required to accept

delivery, pay any demurrage or detention charges, and unload and transport the property to the job site at its own expense. When the property is delivered, the Contractor shall verify its quantity and condition and acknowledge receipt in writing to the Contracting Officer. The Contractor also shall report in writing to the Contracting Officer (within 24 hours of delivery) any damage to or shortage of the property as received. All such property shall be installed or incorporated into the work at the expense of the Contractor, unless otherwise indicated in this contract.

(b) Each item of property to be furnished under this clause shall be identified in the contract by quantity, item, and description.

§ 6-403.14 Authority Property Furnished “As Is”

(a) The Authority makes no warranty whatsoever with respect to Authority property furnished “as is,” except that the property is in the same condition when placed at the f.o.b. point specified in the solicitation as when inspected by the Contractor pursuant to the solicitation or, if not inspected by the Contractor, as when last available for inspection under the solicitation.

(b) The Contractor may repair any property made available on an “as is” basis. Such repair will be at the Contractor's expense, except as otherwise provided in this clause. Such property may be modified at the Contractor's expense, but only with the written permission of the Contracting Officer. Any repair or modification of property furnished “as is” shall not affect the title of the Authority.

(c) If there is any change in the condition of Authority property furnished “as is” from the time inspected or last available for inspection under the solicitation to the time placed on board at the location specified in the solicitation, and such change will adversely affect the Contractor, the Contractor shall, upon receipt of the property, notify the Contracting Officer detailing the facts and, as directed by the Contracting Officer, either (1) return such property at the Authority's expense or otherwise dispose of the property or (2) effect repairs to return the property to its condition when inspected under the solicitation or, if not inspected, last available for inspection under the solicitation. After completing the directed action and upon written request of the Contractor, the Contracting Officer shall equitably adjust any contractual provisions affected by the return, disposition, or repair in accordance with the procedures provided for in the Changes Clause of this contract. The foregoing provisions for adjustment are the exclusive remedy available to the Contractor, and the Authority shall not be otherwise liable for any delivery of Authority property furnished “as is” in a condition other than that in which it was originally offered.

(d) Except as otherwise provided in this clause, Authority

property furnished “as is” shall be governed by the Authority Property Clause of this contract.

§ 6-403.15 Cleaning Up

The Contractor shall at all times keep the work area, including storage areas, free from accumulations of waste materials. Before completing the work, the Contractor shall remove from the work and premises any rubbish, tools, scaffolding, equipment, and materials that are not the property of the Authority. Upon completing the work, the Contractor shall Leave the work area in a clean, neat, and orderly condition satisfactory to the Contracting Officer.

§ 6-403.16 Accident Prevention

(a) In performing this contract, the Contractor shall provide for protecting the lives and health of employees and other persons; preventing damage to property, materials, supplies, and equipment; and avoiding work interruptions. For these purposes, the Contractor shall --

(1) provide appropriate safety barricades, signs, and signal lights;

(2) comply with all safety standards required by federal, state, or local law and any additional standards customarily employed in connection with the type of work being performed or the conditions at the site; and

(3) ensure that any additional measures the Contracting Officer determines to be reasonably necessary for this purpose are taken.

(b) The Contractor shall maintain an accurate record of exposure data on all accidents incident to work performed under this contract resulting in death, traumatic injury, occupational disease, or damage to property, materials, supplies, or equipment. The Contractor shall report this data in the manner prescribed by the Contracting Officer.

(c) The Contracting Officer shall notify the Contractor of any noncompliance with these requirements and of the corrective action required. This notice, when delivered to the Contractor or the Contractor's representative at the site of the work, shall be deemed sufficient notice of the noncompliance and corrective action required. After receiving the notice, the Contractor shall immediately take corrective action. If the Contractor fails or refuses to take corrective action promptly, the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action has been taken. The Contractor shall not base any claim or request for equitable

adjustment for additional time or money on any stop order issued under these circumstances.

(d) The Contractor shall be responsible for its subcontractors' compliance with this clause.

§ 6-403.17 Layout of Work

The Contractor shall lay out its work from Authority-established baselines and benchmarks indicated on the drawings and shall be responsible for all measurements in connection with the layout. The Contractor shall furnish, at its own expense, all stakes, templates, platforms, equipment, tools, materials, and labor required to lay out any part of the work. The Contractor shall be responsible for executing the work to the lines and grades that may be established or indicated by the Contracting Officer. The Contractor shall also be responsible for maintaining and preserving all stakes and other marks established by the Contracting Officer until authorized to remove them. If such marks are destroyed by the Contractor or through its negligence before their removal is authorized, the Contracting Officer may replace them and deduct the expense of the replacement from any amounts due or to become due to the Contractor.

§ 6-403.18 Publicity Releases

Include the clause at § 6-203.16.

§ 6-403.19 Equal Opportunity Reporting

Include the clause at § 6-203.18 if the amount of the contract exceeds \$5,000.

§ 6-403.20 Examination and Retention of Records

Include the clause at § 6-203.19 in accordance with the instructions in that section.

§ 6-403.21 Indemnification

Include the applicable clause(s) at § 6-303.15.

Section 6-500 - Architect-Engineer Contracts

§ 6-501 Applicability

This section sets forth uniform contract clauses for use in connection with the procurement of architect-engineer services for the production and delivery of designs, plans, drawings, and specifications, or for supervision and inspection of construction, or both.

§ 6-502 Required Clauses for Architect-Engineer Contracts

The following clauses shall be included in all contracts for architect-engineer services.

§ 6-502.01 Definitions

Include the clause at § 6-202.01.

§ 6-502.02 Responsibility of the Architect-Engineer

(a) The Architect-Engineer shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other services furnished by the Architect-Engineer under this contract. The Architect-Engineer shall, without additional compensation, correct or revise any errors or deficiencies in his designs, drawings, specifications, and other services.

(b) Neither the Authority's review, approval, or acceptance of, nor payment for, any of the services required under this contract shall be construed to operate as a waiver of any rights under this contract or of any cause of action arising out of the performance of this contract, and the Architect-Engineer shall be and remain liable to the Authority in accordance with applicable law for all damages to the Authority caused by the Architect-Engineer's negligent performance of any of the services furnished under this contract.

(c) The rights and remedies of the Authority provided for under this contract are in addition to any other rights and remedies provided by law.

§ 6-502.03 Composition of Architect-Engineer

If the Architect-Engineer hereunder is comprised of more than one legal entity, each such entity shall be jointly and severally liable hereunder.

§ 6-502.04 Subcontractors and Outside Consultants

Any subcontractors and outside associates or consultants required by the Architect-Engineer in connection with the services covered by the contract will be limited to such individuals or firms as were specifically identified and agreed to by the Authority in connection with the award of this contract. Any substitution in such subcontractors, associates, or consultants will be subject to the prior written approval of the Contracting Officer.

§ 6-502.05 Changes

(a) The Contracting Officer may, at any time, by written order, make changes within the general scope of the contract in the services to be performed. If such changes cause an increase or decrease in the Architect- Engineer's cost of, or time required for, performance of any services under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim of the Architect-Engineer for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the Architect-Engineer of the notification of change unless the Contracting Officer grants a further period of time before the date of final payment under the contract.

(b) No services for which an additional cost or fee will be charged by the Architect- Engineer shall be furnished without the prior written authorization of the Contracting Officer.

§ 6-502.06 Termination

(a) The Contracting Officer may, by written notice to the Architect-Engineer, terminate this contract in whole or in part at any time, either for the Authority's convenience or because of the failure of the Architect-Engineer to fulfill their contract obligations. Upon receipt of such notice, the Architect-Engineer shall: (1) immediately discontinue all services affected (unless the notice directs otherwise), and (2) deliver to the Contracting Officer all data, drawings, specifications, reports, estimates, summaries, and such other information and materials as may have been accumulated by the Architect- Engineer in performing this contract, whether completed or in process.

(b) If the termination is for the convenience of the Authority and if this is a fixed price contract, an equitable adjustment in the contract price shall be made, but no amount shall be allowed for anticipated profit on unperformed services.

(c) If the termination is due to the failure of the Architect-Engineer to fulfill his contract obligations, the Authority may take over the work and prosecute the same to completion by contract or otherwise. In such case, the Architect-Engineer shall be liable to the Authority for any additional cost occasioned to the Authority thereby.

(d) If, after notice of termination for failure to fulfill its contract obligations, it is determined that the Architect-Engineer had not so failed, the termination shall be deemed to have been effected for the convenience of the Authority. In such event, adjustment in the contract price shall be made as provided in paragraph (b) of this clause.

(e) The rights and remedies of the Authority provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

§ 6-502.07 Disputes

Include the clause at § 6-202.11 substituting “Architect-Engineer” for “Contractor”.

§ 6-502.08 Drawings and Other Data

All designs, drawings, specifications, notes and other works developed in the performance of this contract shall become the sole property of the Authority and may be used on any other design or construction without additional compensation to the Architect-Engineer. The Authority shall be considered the “person for whom the work was prepared” for the purpose of authorship in any copyrightable work under Section 201(b) of Title 17, United States Code. With respect thereto, the Architect-Engineer agrees not to assert or authorize others to assert any rights or establish any claim under the design patent or copyright laws. The Architect-Engineer, for a period of three years after completion of the project, agrees to furnish all retained works on the request of the Contracting Officer. Unless otherwise provided in this contract, the Architect-Engineer shall have the right to retain copies of all works beyond such period.

§ 6-502.09 Notice and Approval of Restricted Designs

In the performance of this contract, the Architect-Engineer shall, to the extent practicable, make maximum use of structures, machines, products, materials, construction methods, and equipment which are readily available through competitive commercial channels, or through standard or proven production techniques, methods, and processes. Unless approved by the Contracting Officer, the Architect-Engineer shall not, in the performance of the work called for by this contract, produce a design or specification such as to require in this construction work the use of structures, products, materials, construction equipment, or processes which are known by the Architect-Engineer to be available only from a sole source. As to any such design or specification, the Architect-Engineer shall report to the Contracting Officer giving the reason or reasons why it is considered necessary to so restrict the design or specification.

§ 6-502.10 Registration of Designers

The design of architectural, structural, mechanical, electrical, civil, or other engineering features of the work shall be accomplished or

reviewed and approved by architects or engineers registered to practice in the State of Texas in the particular professional field involved.

§ 6-502.11 Payment of Interest on Claims

(a) If an appeal is filed by the Architect-Engineer from a final decision of the Contracting Officer under the Disputes Clause of this contract, denying a claim arising under the contract, simple interest on the amount of the claim finally determined to be owed by the Authority shall be payable to the Architect-Engineer. Such interest shall be at the rate determined by the United States Secretary of the Treasury pursuant to Public Law 92-41, 85 Stat. 97, from the date the Architect-Engineer furnishes to the Contracting Officer his written appeal under the Disputes Clause of this contract, to the date of (1) a final judgment by a court of competent jurisdiction, or (2) mailing to the Architect-Engineer of a supplemental agreement for execution either confirming completed negotiations between the parties or carrying out a decision of the Authority or its duly authorized representative. In no event shall the interest payable hereunder exceed that allowable under Texas law.

(b) Notwithstanding (a), above, (1) interest shall be applied only from the date payment was due, if such date is later than the filing of appeal, and (2) interest shall not be paid for any period of time that the Contracting Officer determines the Architect-Engineer has unduly delayed in pursuing his remedies under this contract or before a court of competent jurisdiction.

§ 6-502.12 Suspension of Work

(a) The Contracting Officer may order the Architect-Engineer in writing to suspend all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Authority.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended or delayed by an act of the Contracting Officer in the administration of this contract, or by his failure to act within the time specified in this contract (or, if no time is specified, within a reasonable time), an adjustment shall be made for any increase in cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension or delay, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension or delay to the extent (1) that performance would have been suspended or delayed by any other cause, including the fault or negligence of the Architect-Engineer, or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.

(c) No claim under this clause shall be allowed (1) for any

costs incurred more than 20 days before the Architect-Engineer shall have notified the Contracting Officer in writing of the actor failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension or delay, but not later than the date of final payment. No part of any claim based on the provisions of this clause shall be allowed if not supported by adequate evidence showing that the cost would not have been incurred but for a delay within the provisions of this clause.

§ 6-502.13 Equal Opportunity

Include the clause at § 6-202.15 substituting” Architect-Engineer” for “Contractor”.

§ 6-502.14 Interest of Public Officials

Include the clause at § 6-202.16 substituting” Architect-Engineer” for “Contractor”.

§ 6-502.15 Governing Law

Include the clause at § 6-202.18.

§ 6-502.16 Indemnification

Include the applicable clause(s) at § 6-303.15.

§ 6-503 Clauses to Be Used When Applicable

The clauses in this § 6-503 may be used when applicable to the circumstances of the particular procurement. In addition, the clauses in **§ 6-303, appropriately modified, may be applicable to architect-engineer contracts.**

§ 6-503.01 Insurance

(a) In addition to all insurance required by federal, state, or local law or regulation, the Architect-Engineer shall obtain and maintain, from a company licensed to do business in Texas and acceptable to the Authority, comprehensive general liability insurance, with all extended coverages normally carried in the industry, protecting the Architect-Engineer and the Authority from claims which may arise out of or result from the Architect-Engineer's obligations under this contract. Such policy shall have limits no less than _____* per occurrence and in the aggregate. Evidence of such insurance, together with an endorsement in favor of the Authority, shall be furnished to the Contracting Officer within 10 days after the date of this contract.

(b) The Architect-Engineer shall secure and maintain during the performance of this contract errors and omissions (professional liability) insurance in an amount not less than _____.*. Evidence of such insurance shall be furnished to the Contracting Officer within 10 days after the date of this contract.

*Contracting Officer to insert amount.

§ 6-503.02 Construction Contract Administration

The Architect-Engineer's responsibilities in connection with administration of the construction contract contemplated by this contract shall not be an assumption of, or relieve the construction contractor of liability for, the construction contractor's obligations to the Authority for satisfactory performance and timely completion of the construction contract.

§ 6-503.03 Equal Opportunity Reporting

Include the clause at § 6-203.18 if the amount of the contract exceeds \$5,000.

Section 6-600 - Cost Reimbursement and Special Contract Clauses

§ 6-601 Applicability

The contract clauses in this section are prescribed for use in cost-reimbursement type contracts. All such contracts must be approved by legal counsel prior to issuance of the solicitation and prior to award.

§ 6-602 Allowable Cost and Payment

(a) Invoicing. The Authority shall make payments to the Contractor when requested as work progresses, but not more often than once every two weeks, in amounts determined to be allowable by the Contracting Officer in accordance with the cost principles and procedures in Chapter 7 (Cost Principles) of the Authority's Procurement Regulations in effect on the date of this contract. The Contractor may submit to the Contracting Officer, in such form and reasonable detail as the Contracting Officer may require, an invoice or voucher supported by a statement of the claimed allowable costs for performing this contract.

(b) Reimbursing Costs.

(1) For the purpose of reimbursing allowable costs (except as provided in subparagraph (2) below, with respect to pension, deferred profit sharing, and employee stock ownership plan contributions), the term "costs" includes only --

(i) those recorded costs that, at the time of the request for reimbursement, the Contractor has paid by cash, check, or other form of actual payment for items or services purchased directly for the contract;

(ii) when the Contractor is not delinquent in paying costs of contract performance in the ordinary course of business, costs incurred, which, in the ordinary course of business, will be paid prior to receipt of payment from the Authority, for --

(A) materials issued from the Contractor's inventory and placed in the production process for use on the contract;

(B) direct labor;

(C) direct travel;

(D) other direct in-house costs; and

(E) properly allocable and allowable indirect costs, as shown in the records maintained by the Contractor for purposes of obtaining reimbursement under contracts let by the Authority; and

(iii) the amount of progress payments that has been paid to the Contractor's subcontractors under similar cost standards.

(2) Any statements in specifications or other documents incorporated in this contract by reference designating performance of services or furnishing of materials at the Contractor's expense or at no cost to the Authority shall be disregarded for purposes of cost-reimbursement under this clause.

(c) Contract financing payments are not subject to the interest penalty provisions of the Prompt Payment Act. Interim payments made prior to the final payment under the contract are contract financing payments.

(d) The designated payment office will make interim payments for contract financing on the _____ *[Contracting Officer insert day as prescribed by agency head; if not prescribed, insert "30th"]* day after the designated billing office receives a proper payment request. In the event that the Authority requires an audit or other review of a specific payment request to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the specified due date.

(e) Audit. At any time or times before final payment, the Contracting Officer may have the Contractor's invoices or vouchers and statements of cost audited. Any payment may be (1) reduced by amounts found by the Contracting Officer not to constitute allowable costs or (2) adjusted for prior overpayments or under payments.

(f) Final Payment.

(1) The Contractor shall submit a completion invoice or voucher, designated as such, promptly upon completion of the work, but no later than 60 days (or longer, as the Contracting Officer may approve in writing) from the completion date. Upon approval of that invoice or voucher, and upon the Contractor's compliance with all terms of this contract, the Authority shall promptly pay any balance of allowable costs and that part of the fee (if any) not previously paid.

(2) The Contractor shall pay to the Authority any refunds, rebates, credits, or other amounts (including interest, if any) accruing to or received by the Contractor or any assignee under this contract, to the extent that those amounts are properly allocable to costs for which the Contractor has been reimbursed by the Authority. Reasonable expenses incurred by the Contractor for securing refunds, rebates, credits, or other amounts shall be allowable costs if approved by the Contracting Officer. Before final payment under this contract, the Contractor and each assignee whose assignment is in effect at the time of final payment shall execute and deliver --

(i) an assignment to the Authority, in form and substance satisfactory to the Contracting Officer, of refunds, rebates, credits, or other amounts (including interest, if any) properly allocable to costs for which the Contractor has been reimbursed by the Authority under this contract; and

(ii) a release discharging the Authority, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract, except --

(A) specified claims stated in exact amounts, or in estimated amounts when the exact amounts are not known;

(B) claims (including reasonable incidental expenses) based upon liabilities of the Contractor to third parties arising out of the performance of this contract; provided, that the claims are not known to the Contractor on the date of the execution of the release and that the Contractor gives notice of the claims in writing to the Contracting Officer within six years following the release date or notice of final payment date, whichever is earlier; and

(C) claims for reimbursement of costs, including reasonable incidental expenses, incurred by the Contractor under the patent clauses of this contract, excluding, however, any expenses arising from the Contractor's indemnification of the Authority against patent liability.

§ 6-603 Fixed Fee

(a) The Authority shall pay the Contractor for performing this contract the fixed fee specified in the contract.

(b) Insert the clause at § 6-303.16.

§ 6-604 Incentive Fee

(a) General. The Authority shall pay the Contractor for performing this contract a fee determined as provided in this contract.

(b) Target Cost and Target Fee. The target cost and target fee specified in the contract are subject to adjustment if the contract is modified in accordance with paragraph (d) below.

(1) "Target cost," as used in this contract, means the estimated cost of this contract as initially negotiated, adjusted in accordance with paragraph (d) below.

(2) "Target fee," as used in this contract, means the fee initially negotiated on the assumption that this contract would be performed for a cost equal to the target cost.

(c) Withholding of Payment. Normally, the Authority shall pay the fee to the Contractor as specified in the contract. However, when the Contracting Officer considers that performance or cost indicates that the Contractor will not achieve the target cost, the Authority shall pay on the basis of an appropriate lesser fee. When the Contractor demonstrates that performance or cost clearly indicates that the Contractor will earn a fee significantly above the target fee, the Authority may, at the sole discretion of the Contracting Officer, pay on the basis of an appropriate higher fee. After payment of 80 percent of the applicable fee, the Contracting Officer may withhold further payment of a fee until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Authority's interest. This reserve shall not exceed 20 percent of the applicable fee or \$100,000, whichever is less.

(d) Equitable Adjustments. When the work under this contract is increased or decreased by a modification to this contract or when any equitable adjustment in the target cost is authorized under any

other clause, equitable adjustments in the target cost, target fee, minimum fee, and maximum fee, as appropriate, shall be stated in a supplemental agreement to this contract.

(e) Fee Payable.

(1) The fee payable under this contract shall be the target fee increased by _____ [Contracting Officer insert Contractor's participation] cents for every dollar that the total allowable cost is less than the target cost or decreased by__ [Contracting Officer insert Contractor's participation] cents for every dollar that the total allowable cost exceeds the target cost. In no event shall the fee be greater than _____ [Contracting Officer insert percentage] percent or less than _____ [Contracting Officer insert percentage] percent of the target cost.

(2) The fee shall be subject to adjustment, to the extent provided in paragraph (d) above, and within the minimum and maximum fee limitations in subparagraph (1) above, when the total allowable cost is increased or decreased as a consequence of (i) payments made under assignments or (ii) claims excepted from the release as required by paragraph (d)(2) of the Allowable Cost and Payment Clause.

(3) If this contract is terminated in its entirety, the portion of the target fee payable shall not be subject to an increase or decrease as provided in this paragraph (e). The termination shall be accomplished in accordance with other applicable clauses of this contract.

(4) For the purpose of fee adjustment, "total allowable cost" shall not include allowable costs arising out of

(i) any of the causes covered by the Excusable Delays Clause to the extent that they are beyond the control and without the fault or negligence of the Contractor or any subcontractor;

(ii) the taking effect, after negotiating the target cost, of a statute, court decision, written ruling, or regulation that results in the Contractor's being required to pay or bear the burden of any tax or duty or rate increase in a tax or duty;

(iii) any direct cost attributed to the Contractor's involvement in litigation as required by the Contracting Officer pursuant to a clause of this contract;

(iv) the purchase and maintenance of additional insurance not in the target cost and required by the Contracting Officer, or claims for

reimbursement for liabilities to third persons pursuant to a clause of this contract; or

(v) any claim, loss, or damage resulting from a risk for which the Contractor has been relieved of liability by the Property of the Authority Clause.

(vi) Any claim, loss, or damage resulting from a risk defined in the contract as unusually hazardous and against which the Authority has expressly agreed to indemnify the Contractor.

(5) All other allowable costs are included in “total allowable cost” for fee adjustment in accordance with this paragraph (e), unless otherwise specifically provided in this contract.

(f) Contract Modification. The total allowable cost and the adjusted fee determined as provided in this clause shall be evidenced by a modification to this contract signed by the Contractor and Contracting Officer.

(g) Inconsistencies. In the event of any inconsistencies between this clause and provisioning documents or options under this contract, compensation for spare parts or other supplies and services ordered under such documents shall be determined in accordance with this clause.

§ 6-605 Cost Contract - No Fee

(a) The Authority shall not pay the Contractor a fee for performing this contract.

§ 6-606 Predetermined Indirect Cost Rates

(a) Notwithstanding the Allowable Cost and Payment Clause of this contract, the allowable indirect costs under this contract shall be obtained by applying predetermined indirect cost rates to bases agreed upon by the parties, as specified below.

(b) Not later than 90 days after the expiration of the Contractor's fiscal year, the Contractor shall submit to the Contracting Officer [and auditor] proposed predetermined indirect cost rates and supporting cost data. Reasonable extensions, for exceptional circumstances only, may be requested in writing by the Contractor and granted in writing by the Contracting Officer. The Contractor shall support its proposal with adequate supporting data. The proposed rate shall be based on the Contractor's actual cost experience during the fiscal year. Negotiations of predetermined indirect cost rates shall begin as soon as practical after receipt of the Contractor's proposal.

(c) Allowability of costs and acceptability of cost allocation methods shall be determined in accordance with Chapter 7 of the Authority's procurement regulations in effect on the date of this contract.

(d) Predetermined rate agreements in effect on the date of this contract shall be incorporated into the contract Schedule. The Contracting Officer and Contractor shall negotiate rates for subsequent periods and execute a written indirect cost rate agreement setting forth the results. The agreement shall specify (1) the agreed-upon predetermined indirect cost rates, (2) the bases to which the rates apply, (3) the fiscal year (unless the parties agree to a different period) for which the rates apply, and (4) the specific items treated as direct costs or any changes in the items previously agreed to be direct costs. The indirect cost rate agreement shall not change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in this contract. The agreement is incorporated into this contract upon execution.

(e) Pending establishment of predetermined indirect cost rates for any fiscal year (or other period agreed to by the parties), the Contractor shall be reimbursed either at the rates fixed for the previous fiscal year (or other period) or at billing rates acceptable to the Contracting Officer, subject to appropriate adjustment when the final rates for that period are established.

(f) Any failure by the parties to agree on any predetermined indirect cost rates under this clause shall not be considered a dispute within the meaning of the Disputes Clause. If for any fiscal year (or other period specified in the contract) the parties fail to agree to predetermined indirect cost rates, the allowable indirect costs shall be obtained by applying final indirect cost rates established in accordance with the Allowable Cost and Payment Clause.

(g) Allowable indirect costs for the period from the beginning of performance until the end of the Contractor's fiscal year shall be obtained using the predetermined indirect cost rates and the bases shown in the contract.

§ 6-607 Limitation of Liability

(a) In performing this contract, the Contractor is not authorized to make expenditures or incur obligations exceeding _____ dollars.

(b) The maximum amount for which the Authority shall be liable if this contract is terminated is _____ dollars.

§ 6-608 Limitation of Costs

(a) The parties estimate that performance of this contract, exclusive of any fee, will not cost the Authority more than (1) the estimated cost specified in the contract or, (2) if this is a cost-sharing contract, the Authority's share of the estimated cost specified in the contract. The Contractor agrees to use its best efforts to perform the work specified in the contract and all obligations under this contract within the estimated cost, which, if this is a cost-sharing contract, includes both the Authority's and the Contractor's share of the cost.

(b) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that--

(1) the costs the Contractor expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost specified in the contract; or

(2) the total cost for the performance of this contract, exclusive of any fee, will be either greater or substantially less than had been previously estimated.

(c) As part of the notification, the Contractor shall provide the Contracting Officer a revised estimate of the total cost of performing this contract.

(d) Except as required by other provisions of this contract specifically citing, and stated to be an exception to, this clause--

(1) the Authority is not obligated to reimburse the Contractor for costs incurred in excess of (i) the estimated cost specified in the contract or, (ii) if this is a cost-sharing contract, the estimated cost to the Authority specified in the contract; and

(2) the Contractor is not obligated to continue performance under this contract (including actions under the Termination Clause of this contract) or otherwise incur costs in excess of the estimated cost specified in the contract, until the Contracting Officer (i) notifies the Contractor in writing that the estimated cost has been increased and (ii) provides a revised estimated total cost of performing this contract.

(e) No notice, communication, or representation in any form other than that specified in subparagraph (d)(2) above, or from any person other than the Contracting Officer, shall affect this contract's estimated cost to the Authority. In the absence of the specified notice, the Authority is not obligated to reimburse the Contractor for any costs in excess of the estimated cost or, if this is a cost-sharing contract, for

any costs in excess of the estimated cost to the Authority specified in the contract, whether those excess costs were incurred during the course of the contractor as a result of termination.

(f) If the estimated cost specified in the contract is increased, any costs the Contractor incurs before the increase that are in excess of the previously estimated cost shall be allowable to the same extent as if they were incurred afterward, unless the Contracting Officer issues a termination or other notice directing that the increase is solely to cover termination or other specified expenses.

(g) Change orders shall not be considered an authorization to exceed the estimated cost to the Authority specified in the contract unless they contain a statement increasing the estimated cost.

(h) If this contract is terminated or the estimated cost is not increased, the Authority and the Contractor shall negotiate an equitable distribution of all property produced or purchased under the contract, based upon the share of costs incurred by each.

§ 6-609 Payment for Overtime Premiums

(a) The use of overtime is authorized under this contract if the overtime premium cost does not exceed * _____. In addition to this dollar ceiling, overtime is permitted only for work --

(1) necessary to cope with emergencies such as those resulting from accidents, natural disasters, breakdowns of production equipment, or occasional production bottlenecks of a sporadic nature;

(2) by indirect-labor employees such as those performing duties in connection with administration, protection, transportation, maintenance, standby plant protection, operation of utilities, or accounting;

(3) to perform tests, industrial processes, laboratory procedures, loading or unloading of transportation conveyances, and operations in flight or afloat that are continuous in nature and cannot reasonably be interrupted or completed otherwise; or

(4) that will result in lower overall costs to the Authority.

(b) Any request for estimated overtime premiums that exceeds the amount specified above shall include all estimated overtime for contract completion and shall --

(1) identify the work unit; e.g., department or section in which the requested overtime will be used, together with present workload, staffing, and other data of the affected unit sufficient to

permit the Contracting Officer to evaluate the necessity for the overtime;

(2) demonstrate the effect that denial of the request will have on the contract delivery or performance schedule;

(3) identify the extent to which approval of overtime would affect the performance or payments in connection with other Authority contracts, together with identification of each affected contract; and

(4) provide reasons why the required work cannot be performed by using multi shift operations or by employing additional personnel.

*Insert either “zero” or the dollar amount agreed to during negotiations.

§ 6-610 Availability of Funds

The Authority's obligation under this contract is contingent upon the availability of authorized funds from which payment for contract purposes can be made. No legal liability on the part of the Authority for any payment may arise until funds are made available to the Contracting Officer for this contract and until the Contractor receives notice of such availability, to be confirmed in writing by the Contracting Officer.

§ 6-611 Property of Authority

(a) Authority-Furnished Property.

(1) The term “Contractor's managerial personnel,” as used in paragraph (g) of this clause, means any of the Contractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of --

(i) all or substantially all of the Contractor's business;

(ii) all or substantially all of the Contractor's operation at any one plant, or separate location at which the contract is being performed; or

(iii) a separate and complete major industrial operation connected with performing this contract.

(2) The Authority shall deliver to the Contractor, for use in connection with and under the terms of this contract, the property described in the contract or specifications, together with such related data and information as the Contractor may request and as may be reasonably required for the intended use of the property (hereinafter

referred to as “Authority-furnished property”).

(3) The delivery or performance dates for this contract are based upon the expectation that Authority-furnished property suitable for use will be delivered to the Contractor at the times stated in the Schedule or, if not so stated, in sufficient time to enable the Contractor to meet the contract's delivery or performance dates.

(4) If Authority-furnished property is received by the Contractor in a condition not suitable for the intended use, the Contractor shall, upon receipt, notify the Contracting Officer, detailing the facts and, as directed by the Contracting Officer and at Authority expense, either effect repairs or modifications or return or otherwise dispose of the property. After completing the directed action and upon written request of the Contractor, the Contracting Officer shall make an equitable adjustment as provided in paragraph (h) of this clause.

(5) If Authority-furnished property is not delivered to the Contractor by the required time or times, the Contracting Officer shall, upon the Contractor's timely written request, make a determination of the delay, if any, caused the Contractor and shall make an equitable adjustment in accordance with paragraph (h) of this clause.

(b) Changes in Authority-Furnished Property.

(1) The Contracting Officer may, by written notice, (i) decrease the Authority-furnished property provided or to be provided under this contract or (ii) substitute other Authority-furnished property for the property to be provided by the Authority or to be acquired by the Contractor for the Authority under this contract. The Contractor shall promptly take such action as the Contracting Officer may direct regarding the removal, shipment, or disposal of the property covered by this notice.

(2) Upon the Contractor's written request, the Contracting Officer shall make an equitable adjustment to the contract in accordance with paragraph (h) of this clause, if the Authority has agreed in the Schedule to make such property available for performing this contract and there is any--

(i) decrease or substitution in this property pursuant to subparagraph (b)(1) above; or

(ii) withdrawal of authority to use property, if provided under any other contract or lease.

(c) Title.

(1) The Authority shall retain title to all Authority-furnished

property.

(2) Title to all property purchased by the Contractor for which the Contractor is entitled to be reimbursed as a direct item of cost under this contract shall pass to and vest in the Authority upon the vendor's delivery of such property.

(3) Title to all other property, the cost of which is reimbursable to the Contractor, shall pass to and vest in the Authority upon --

(i) issuance of the property for use in contract performance;

(ii) commencement of processing of the property or use in contract performance; or

(iii) reimbursement of the cost of the property by the Authority, whichever occurs first.

(4) All Authority-furnished property and all property acquired by the Contractor, title to which vests in the Authority under this paragraph (collectively referred to as "property of the Authority"), are subject to the provisions of this clause. Title to property of the Authority shall not be affected by its incorporation into or attachment to any property not owned by the Authority, nor shall property of the Authority become a fixture or lose its identity as personal property by being attached to any real property.

(d) Use of Property of the Authority. The property of the Authority shall be used only for performing this contract, unless otherwise provided in this contract or approved by the Contracting Officer.

(e) Property Administration.

(1) The Contractor shall be responsible and accountable for all property of the Authority provided under this contract.

(2) The Contractor shall establish and maintain a program for the use, maintenance, repair, protection, and preservation of property of the Authority in accordance with sound business practice.

(3) If damage occurs to property of the Authority, the risk of which has been assumed by the Authority under this contract, the Authority shall replace the items or the Contractor shall make such repairs as the Authority may require. However, if the Contractor cannot effect such repairs within the time required, the Contractor shall dispose

of the property as directed by the Contracting Officer. When any property for which the Authority is responsible is replaced or repaired, the Contracting Officer shall make an equitable adjustment in accordance with paragraph(h) of this clause.

(f) Access. The Authority and all its designees shall have access at all reasonable times to the premises in which any property of the Authority is located for the purpose of inspecting the property of the Authority.

(g) Limited Risk of Loss.

(1) The Contractor shall not be liable for loss or destruction of, or damage to, the property of the Authority provided under this contract or for expenses incidental to such loss, destruction, or damage, except as provided in subparagraphs(2) and (3), below.

(2) The Contractor shall be responsible for loss or destruction of, or damage to, the property of the Authority provided under this contract (including expenses incidental to such loss, destruction, or damage) --

(i) that results from a risk expressly required to be insured under this contract, but only to the extent of the insurance required to be purchased and maintained or to the extent of insurance actually purchased and maintained, whichever is greater;

(ii) that results from a risk that is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement;

(iii) for which the Contractor is otherwise responsible under the express terms of this contract;

(iv) that results from willful misconduct or lack of good faith on the part of the Contractor's managerial personnel; or

(v) that results from a failure on the part of the Contractor, due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel, to establish and administer a program or system for the control, use, protection, preservation, maintenance, and repair of property of the Authority as required by paragraph (e) of this clause.

(3) (i) If the Contractor fails to act as provided by subdivision (g)(2)(v), above, after being notified (by certified mail addressed to one of the Contractor's managerial personnel) of the Authority's disapproval, withdrawal of approval, or nonacceptance of the system or program, it shall be conclusively presumed that such failure was due to willful misconduct or lack of good faith on the part

of the Contractor's managerial personnel.

(ii) in such event, any loss or destruction of, or damage to, the property of the Authority shall be presumed to have resulted from such failure unless the Contractor can establish by clear and convincing evidence that such loss, destruction, or damage --

(A) did not result from the Contractor's failure to maintain an approved program or system; or

(B) occurred while an approved program or system was maintained by the Contractor.

(4) If the Contractor transfers property of the Authority to the possession and control of a subcontractor, the transfer shall not affect the liability of the Contractor for loss or destruction of, or damage to, the property as set forth above. However, the Contractor shall require the subcontractor to assume the risk of, and be responsible for, any loss or destruction of, or damage to, the property while in the subcontractor's possession or control, except to the extent that the subcontract, with the advance approval of the Contracting Officer, relieves the subcontractor from such liability. In the absence of such approval, the subcontract shall contain appropriate provisions requiring the return of all property of the Authority in as good condition as when received, except for reasonable wear and tear or for its use in accordance with the provisions of the prime contract.

(5) Upon loss or destruction of, or damage to, property of the Authority provided under this contract, the Contractor shall so notify the Contracting Officer and shall communicate with the loss and salvage organization, if any, designated by the Contracting Officer. With the assistance of any such organization, the Contractor shall take all reasonable action to protect the property of the Authority from further damage, separate the damaged and undamaged property of the Authority, put all the affected property of the Authority in the best possible order, and furnish to the Contracting Officer a statement of -

- (i) the lost, destroyed, or damaged property of the Authority;
- (ii) the time and origin of the loss, destruction, or damage;
- (iii) all known interests in commingled property of which the property of the Authority is a part; and
- (iv) the insurance, if any, covering any part of or interest in such commingled property.

(6) The Contractor shall repair, renovate, and take such other action with respect to damaged property of the Authority as

the Contracting Officer directs. If the property of the Authority is destroyed or damaged beyond practical repair or is damaged and so commingled or combined with property of others (including the Contractor's) that separation is impractical, the Contractor may, with the approval of and subject to any conditions imposed by the Contracting Officer, sell such property for the account of the Authority. Such sales may be made in order to minimize the loss to the Authority, to permit the resumption of business, or to accomplish a similar purpose. The Contractor shall be entitled to an equitable adjustment in the contract price for the expenditures made in performing the obligations under this subparagraph (g)(6) in accordance with paragraph (h) of this clause. However, the Authority may directly reimburse the loss and salvage organization for any of their charges. The Contracting Officer shall give due regard to the Contractor's liability under this paragraph (g) when making any such equitable adjustment.

(7) The Contractor shall not be reimbursed for, and shall not include as an item of overhead, the cost of insurance or of any reserve covering risk of loss or destruction of, or damage to, property of the Authority, except to the extent that the Authority may have expressly required the Contractor to carry such insurance under another provision of this contract.

(8) In the event the Contractor is reimbursed or otherwise compensated for any loss or destruction of, or damage to, property of the Authority, the Contractor shall use the proceeds to repair, renovate, or replace the lost, destroyed, or damaged property of the Authority or shall otherwise credit the proceeds to, or equitably reimburse, the Authority, as directed by the Contracting Officer.

(9) The Contractor shall do nothing to prejudice the Authority's rights to recover against third parties for any loss or destruction of, or damage to, property of the Authority. Upon the request of the Contracting Officer, the Contractor shall, at the Authority's expense, furnish to the Authority all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Authority) in obtaining recovery. In addition, where a subcontractor has not been relieved from liability for any loss or destruction of, or damage to, property of the Authority, the Contractor shall enforce for the benefit of the Authority the liability of the subcontractor for such loss, destruction, or damage.

(h) Equitable Adjustment. When this clause specifies an equitable adjustment, it shall be made to any affected contract provision in accordance with the procedures of the Changes Clause. When appropriate, the Contracting Officer may initiate an equitable adjustment in favor of the Authority. The right to an equitable adjustment shall be the Contractor's exclusive remedy. The Authority shall not be liable to suit for breach of contract for --

- (1) any delay in delivery of Authority-furnished property;
- (2) a decrease in or substitution of Authority-furnished property; or
- (3) failure to repair or replace property of the Authority for which the Authority is responsible.

(i) Final Accounting and Disposition of Property of the Authority. Upon completing this contract, or at such earlier dates as may be fixed by the Contracting Officer, the Contractor shall submit, in a form acceptable to the Contracting Officer, inventory schedules covering all items of property of the Authority not consumed in performing this contract or delivered to the Authority. The Contractor shall prepare for shipment, deliver f.o.b. origin, or dispose of the property of the Authority as may be directed or authorized by the Contracting Officer. The net proceeds of any such disposal shall be credited to the cost of the work covered by this contract or paid to the property of the Authority as may be directed by the Contracting Officer. The net proceeds of any such disposal shall be credited to the cost of the work covered by this contract or paid to the Authority as directed by the Contracting Officer. The foregoing provisions shall apply to scrap from property of the Authority; provided, however, that the Contracting Officer may authorize or direct the Contractor to omit from such inventory schedules any scrap consisting of faulty castings or forgings or of cutting and processing waste, such as chips, cuttings, borings, turnings, short ends, circles, trimmings, clippings, and remnants, and to dispose of such scrap in accordance with the Contractor's normal practice and account for it as a part of general overhead or other reimbursable costs in accordance with the Contractor's established accounting procedures.

(j) Abandonment and Restoration of Contractor Premises. Unless otherwise provided herein, the Authority --

(1) may abandon any property of the Authority in place, at which time all obligations of the Authority regarding such abandoned property shall cease; and

(2) has no obligation to restore or rehabilitate the Contractor's premises under any circumstances (e.g., abandonment, disposition upon completion of need, or contract completion). However, if the Authority-furnished property (listed in the Schedule or specifications) is withdrawn or is unsuitable for the intended use, or if other property of the Authority is substituted, then the equitable adjustment under paragraph (h) of this clause may properly include restoration or rehabilitation costs.

(k) Communications. All communications under this clause shall be in writing.

§ 6-612 Inspection of Supplies

(a) Definitions.

“Contractor's managerial personnel,” as used in this clause, means any of the Contractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of --

(1) all or substantially all of the Contractor's business;

(2) all or substantially all of the Contractor's operation at a plant or separate location at which the contract is being performed; or

(3) a separate and complete major industrial operation connected with performing this contract.

“Supplies,” as used in this clause, includes, but is not limited to, raw materials, components, intermediate assemblies, end products, lots of supplies, and, when the contract does not include the Warranty of Data Clause, data.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Authority covering the supplies, fabricating methods, and special tooling under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Authority during contract performance and for as long afterwards as the contract requires.

(c) The Authority has the right to inspect and test the contract supplies, to the extent practicable at all places and times, including the period of manufacture, and in any event before acceptance. The Authority may also inspect the plant or plants of the Contractor or any subcontractor engaged in the contract performance. The Authority shall perform inspections and tests in a manner that will not unduly delay the work.

(d) If the Authority performs inspection or tests on the premises of the Contractor or a subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, all reasonable facilities and assistance for the safe and convenient performance of these duties.

(e) Unless otherwise specified in the contract, the Authority

shall accept supplies as promptly as practicable after delivery, and supplies shall be deemed accepted 60 days after delivery, unless accepted earlier.

(f) At any time during contract performance, but no later than one year (or such other time as may be specified in the contract) after acceptance of the supplies to be delivered under the contract, the Authority may require the Contractor to replace or correct any supplies that are nonconforming at time of delivery. Supplies are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with contract requirements. Except as otherwise provided in paragraph (h) below, the cost of replacement or correction shall be included in allowable cost, determined as provided in the Allowable Cost and Payment Clause, but no additional fee shall be paid. The Contractor shall not tender for acceptance supplies required to be replaced or corrected without disclosing the former requirement for replacement or correction and, when required, shall disclose the corrective action taken.

(g) (1) If the Contractor fails to proceed with reasonable promptness to perform required replacement or correction, the Authority may --

(i) by contract or otherwise, perform their placement or correction and charge to the Contractor any increased cost or make an equitable reduction in any fixed fee paid or payable under the contract;

(ii) require delivery of undelivered supplies at an equitable reduction in any fixed fee paid or payable under the contract; or

(iii) terminate the contract for default.

(2) Failure to agree on the amount of increased cost to be charged to the Contractor or to the reduction in the fixed fee shall be a dispute within the meaning of the Disputes Clause.

(h) Notwithstanding paragraphs (f) and (g) above, the Authority may at any time require the Contractor to correct or replace, without cost to the Authority, nonconforming supplies, if the nonconformances are due to (1) fraud, lack of good faith, or willful misconduct on the part of the Contractor's managerial personnel or (2) the conduct of one or more of the Contractor's employees selected or retained by the Contractor after any of the Contractor's managerial personnel has reasonable grounds to believe that the employee is habitually careless or unqualified.

(i) This clause applies in the same manner to corrected or replacement supplies as to supplies originally delivered.

(j) The Contractor shall have no obligation or liability under this contract to replace supplies that were nonconforming at the time of delivery, except as provided in this clause or as may be otherwise provided in the contract.

(k) Except as otherwise specified in the contract, the Contractor's obligation to correct or replace Authority-furnished property shall be governed by the Property of the Authority Clause.

§ 6-613 Inspection of Services

(a) The word “services,” as used in this clause, includes services performed, workmanship, and material furnished or used in performing services.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Authority covering the services under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Authority during contract performance and for as long afterwards as the contract requires.

(c) The Authority has the right to inspect and test all services called for by the contract, to the extent practicable at all places and times during the term of the contract. The Authority shall perform inspections and tests in a manner that will not unduly delay the work.

(d) If the Authority performs inspections or tests on the premises of the Contractor or a subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, at no increase in contract price, all reasonable facilities and assistance for the safe and convenient performance of these duties.

(d) If any of the services performed do not conform with contract requirements, the Authority may require the Contractor to perform the services again in conformity with contract requirements, for no additional fee. When the defects in services cannot be corrected by reperformance, the Authority may (1) require the Contractor to take necessary action to ensure that future performance conforms to contract requirements and (2) reduce any fee payable under the contract to reflect the reduced value of the services performed.

(e) If the Contractor fails to promptly perform the services again or take the action necessary to ensure future performance in conformity with contract requirements, the Authority may (1) by contract or otherwise, perform the services and reduce any fee payable by an amount that is equitable under the circumstances or (2) terminate the contract for default.

§ 6-614 Termination

(a) The Authority may terminate performance of work under this contract in whole or, from time to time, in part, if --

(1) the Contracting Officer determines that a termination is in the Authority's interest; or

(2) the Contractor defaults in performing a material obligation of this contract and fails to cure the default within 10 days (unless extended by the Contracting Officer) after receiving a notice specifying the default. "Default" includes failure to make progress in the work so as to endanger timely completion of the contract.

(b) The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying whether termination is for default of the Contractor or for the convenience of the Authority, the extent of termination, and the effective date. If, after termination for default, it is determined that the Contractor was not in default or that the Contractor's failure to perform or to make progress in performance was due to causes beyond the control and without the fault or negligence of the Contractor as set forth in the Excusable Delays Clause, the rights and obligations of the parties will be the same as if the termination was for the convenience of the Authority.

(c) After receipt of a Notice of Termination, and except as directed by the Contracting Officer, the Contractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this clause.

(1) Stop work as specified in the notice.

(2) Place no further subcontracts or orders (referred to as subcontracts in this clause), except as necessary to complete the continued portion of the Contract.

(3) Terminate all subcontracts to the extent they relate to the work terminated.

(4) Assign to the Authority, as directed by the Contracting Officer, all right, title, and interest of the Contractor under the subcontracts terminated, in which case the Authority shall have the right to settle or to pay any termination settlement proposal arising out of those terminations or to continue performance of those subcontracts under terms acceptable to the Authority or Contracting Officer.

(5) With approval or ratification to the extent required by the Contracting Officer, settle all outstanding liabilities and

termination settlement proposals arising from the termination of subcontracts, the cost of which would be reimbursable in whole or in part, under this contract; approval or ratification will be final for purposes of this clause.

(6) Transfer title (if not already transferred) and, as directed by the Contracting Officer, deliver to the Authority (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated, (ii) the completed or partially completed plans, drawings, information, and other property that, if the contract had been completed, would be required to be furnished to the Authority, and (iii) the jigs, dies, fixtures, and other special tools and tooling acquired or manufactured for this contract, the cost of which the Contractor has been or will be reimbursed under this contract.

(7) Complete performance of the work not terminated.

(8) Take any action that may be necessary, or that the Contracting Officer may direct, for the protection and preservation of the property related to this contract that is in the possession of the Contractor and in which the Authority has or may acquire an interest.

(9) Use its best efforts to sell, as directed or authorized by the Contracting Officer, any property of the types referred to in subparagraph (6) above; provided, however, that the Contractor (i) is not required to extend credit to any purchaser and (ii) may acquire the property under the conditions prescribed by, and at prices approved by, the Contracting Officer. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Authority under this contract, credited to the price or cost of the work, or paid in any other manner directed by the Contracting Officer.

(d) The Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of termination inventory not previously disposed of, excluding items authorized for disposition by the Contracting Officer. The Contractor may request the Authority to remove those items or enter into an agreement for their storage. Within 15 days, the Authority will accept the items and remove them or enter into a storage agreement. The Contracting Officer may verify the list upon removal of the items, or if stored, within 45 days from submission of the list, and shall correct the list, as necessary, before final settlement.

(e) After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed by the Contracting Officer. The Contractor shall submit the proposal promptly, but no later than ninety days from the effective date of termination, unless this period is

extended in writing by the Contracting Officer upon written request of the Contractor within this one-year period. However, if the Contracting Officer determines that the facts justify it, a termination settlement proposal may be received and acted on after ninety days or any extension. If the Contractor fails to submit the proposal within the time allowed, the Contracting Officer may determine, on the basis of information available, the amount, if any, due the Contractor because of the termination and shall pay the amount determined.

(f) Subject to paragraph (e), above, the Contractor and the Contracting Officer may agree on the whole or any part of the amount to be paid (including an allowance for fee) because of the termination. The contract shall be amended, and the Contractor paid the agreed amount.

(g) If the Contractor and the Contracting Officer fail to agree in whole or in part on the amount of costs and/or fee to be paid because of the termination of work, the Contracting Officer shall determine, on the basis of information available, the amount, if any, due the Contractor, and shall pay that amount, which shall include the following:

(1) All costs reimbursable under this contract, not previously paid, for the performance of this contract before the effective date of the termination, and part of those costs that may continue for a reasonable time with the approval of or as directed by the Contracting Officer; however, the Contractor shall discontinue those costs as rapidly as practicable.

(2) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subparagraph (1) above.

(3) The reasonable costs of settlement of the work terminated, including --

(i) accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) the termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory. If the termination is for default, no amounts for the preparation of the Contractor's termination settlement proposal may be included.

(4) A portion of the fee payable under the contract, determined as follows:

(i) if the contract is terminated for the convenience of the Authority, the settlement shall include a percentage of the fee equal to the percentage of completion of work contemplated under the contract, but excluding subcontract effort included in subcontractors' termination proposals, less previous payments for fee; or

(ii) if the contract is terminated for default, the total fee payable shall be such proportionate part of the fee as the total number of articles (or amount of services) delivered to and accepted by the Authority is to the total number of articles (or amount of services) of a like kind required by the contract.

(5) If the settlement includes only fee, it will be determined under subparagraph (g)(4) above.

(h) The cost principles and procedures in Chapter 7 (Cost Principles) of the Authority's Procurement Regulations in effect on the date of this contract shall govern all costs claimed, agreed to, or determined under this clause.

(i) The Contractor shall have the right of appeal, under the Disputes Clause, from any determination made by the Contracting Officer under paragraph (e) or (g), above, or paragraph (k), below, except that if the Contractor failed to submit the termination settlement proposal within the time provided in paragraph (e) and failed to request a time extension, there is no right of appeal. If the Contracting Officer has made a determination of the amount due under paragraph (e), (g), or (k), the Authority shall pay the Contractor (1) the amount determined by the Contracting Officer if there is no right of appeal or if no timely appeal has been taken, or (2) the amount finally determined on an appeal.

(j) In arriving at the amount due the Contractor under this clause, there shall be deducted --

(1) all unliquidated advance or other payments to the Contractor under the terminated portion of this contract;

(2) any claim which the Authority has against the Contractor under this contract; and

(3) the agreed price for, or the proceeds of sale of materials, supplies, or other things acquired by the Contractor or sold under this clause and not recovered by or credited to the Authority.

(k) The Contractor and Contracting Officer must agree to any equitable adjustment in fee for the continued portion of the contract when there is a partial termination. The Contracting Officer shall amend the contract to reflect the agreement.

(l) The Authority may, under the terms and conditions it prescribes, make partial payments and payments against costs incurred by the Contractor for the terminated portion of the contract if the Contracting Officer believes the total of these payments will not exceed the amount to which the Contractor will be entitled. If the total payments exceed the amount finally determined to be due, the Contractor shall repay the excess to the Authority upon demand, together with interest computed at the rate established by the Secretary of the Treasury under 50 U.S.C. App. 1215(b)(2). Interest shall be computed for the period from the date the excess payment is received by the Contractor to the date the excess is repaid. Interest shall not be charged on any excess payment due to a reduction in the Contractor's termination settlement proposal because of retention or other disposition of termination inventory until 10 days after the date of the retention or disposition, or a later date determined by the Contracting Officer because of the circumstances. Interest charged or payable shall not exceed the amount payable under Texas law.

(m) The provisions of this clause relating to fee are inapplicable if this contract does not include a fee.

§ 6-615 Excusable Delays

(a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its term if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Authority in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions mandated by authorities having jurisdiction, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. "Default" includes failure to make progress in the work so as to endanger performance.

(b) If the failure to perform is caused by the failure of a subcontractor at any tier to perform or make progress, and if the cause of the failure was beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be deemed to be in default, unless --

(1) the subcontracted supplies or services were obtainable from other sources;

(2) the Contracting Officer ordered the Contractor in writing to purchase these supplies or services from the other source; and

(3) the Contractor failed to comply reasonably with this order.

(c) Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of the failure. If the Contracting Officer determines that any failure to perform results from one or more of the causes above, the delivery schedule shall be revised, subject to the rights of the Authority under the Termination Clause of this contract.

§ 6-616 Equal Opportunity Reporting

Include the clause at § 6-203.18 if the total estimated cost of the contract exceeds \$5,000.

§ 6-617 Examination and Retention of Records

Include the clause at § 6-203.19 in accordance with the instructions in that section.

§ 6-618 Other Applicable Provisions and Clauses.

(a) If required based on the project funding, the contracting officer shall include in each solicitation the provisions and certifications as required by FAR 25.1101, Acquisition of Supplies, FAR 25.1102, Acquisition of Construction, FAR 25.1103, Other Provisions and Clauses.

(b) The Contracting Officer shall include in each solicitation the provisions at FAR 52.222-54, Employment Eligibility Verification.

(c) The Contracting Officer shall include in each solicitation the provisions at FAR 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

(d) The Contracting Officer shall include in each solicitation a requirement that the Contractor provide all certifications required under applicable Federal or Texas law, including but not limited to the certifications required by: Texas Government Code §2271.002, §2276.002, and §2274.002.

CHAPTER 7 - COST PRINCIPLES

§ 7-101 Definitions

(1) "Actual Costs" are all direct and indirect costs which have been incurred for services rendered, property delivered, or construction built, as distinguished from allowable costs only.

(2) "Cost Objective" is any unit of work such as a function, an organizational subdivision, or a contract for which provision is made to accumulate and measure separately the cost of processes, products, jobs, capitalized projects, and similar items. A final cost objective is one that has allocated to it both direct and indirect costs and, in the contractor's accumulation system, is one of the final accumulation points.

§ 7-102 Applicability of Cost Principles

(1) The cost principles and procedures contained in this Chapter shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions which provide for the reimbursement of costs; provided, that any deviation from these cost principles may be made as provided in § 7-111 (Authority to Deviate from Cost Principles). The cost principles and procedures set forth in this Chapter may be used as guidance in:

(a) the establishment of contract cost estimates and prices under contracts awarded on the basis of competitive proposals where the award may not be based on adequate price competition (§ 3-203); sole source procurement (§ 3-205); statutory professional services (§ 3-207); and architect-engineer and land surveying services (§ 5-100);

(b) the establishment of price adjustments for contract changes, including contracts that have been let on the basis of competitive sealed bidding or otherwise based on adequate price competition;

(c) the pricing of termination for convenience settlements; and

(d) any other situation in which cost analysis is used.

(2) These cost principles regulations are not applicable to:

(a) the establishment of prices under contracts awarded on the basis of competitive sealed bidding or otherwise based on adequate price competition rather than the analysis of individual, specific cost elements, except that this Chapter does apply to the establishment of adjustments of price for changes made to such contracts;

(b) prices which are fixed by law or regulation; and

(c) prices which are based on established catalogue prices as defined in § 3-101(5) (Established Catalogue Price).

§ 7-103 Allowable Costs

(1) Any contract costs proposed for estimating purposes or invoiced for cost-reimbursement purposes are allowable to the extent provided in the contract, and costs inconsistent with these cost principles are allowable only if approved as a deviation under § 7-111 (Authority to Deviate from Cost Principles.). The contract shall provide that the total allowable cost of a contract is the sum of the allowable direct costs actually incurred in the performance of the contract in accordance with its terms, plus the properly allocable portion of the allowable indirect costs, less any applicable credits (such as discounts, rebates, refunds, and property disposal income).

(2) All costs shall be accounted for in accordance with generally accepted accounting principles and in a manner that is consistent with the contractor's usual accounting practices in charging costs to its other activities. In pricing a proposal, a contractor shall estimate costs in a manner consistent with its cost accounting practices used in accumulating and reporting costs.

(3) The contract shall provide that costs shall be allowed to the extent they are:

(a) reasonable, as defined in § 7-104 (Reasonable Costs);

(b) allocable, as defined in § 7-105 (Allocable Costs);

(c) lawful under any applicable law;

(d) not unallowable under § 7-106 (Treatment of Specific Costs) or § 7-107 (Costs Requiring Prior Approval); and

(e) in the case of costs invoiced for reimbursement, actually incurred or accrued and accounted for in accordance with generally accepted accounting principles.

§ 7-104 Reasonable Costs

Any cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by an ordinarily prudent person in the conduct of competitive business in that industry. In determining the reasonableness of a given cost, consideration shall be given to:

(1) requirements imposed by the contract terms and conditions;

(2) whether the cost is of a type generally recognized as ordinary and necessary for the conduct of the contractor's business or the performance of the contract;

(3) the restraints inherent in, and the requirements imposed by, such factors as generally accepted sound business practices, arms' length bargaining, and federal and state laws and regulations;

(4) the action that a prudent business manager would take under the circumstances, including general public policy and considering responsibilities to the owners of the business, employees, customers, and the Authority;

(5) significant deviations from the contractor's established practices which may

unjustifiably increase the contract costs; and

(6) any other relevant circumstances.

§ 7-105 Allocable Costs

(1) A cost is allocable if it is assignable or chargeable to one or more cost objectives in accordance with relative benefits received and if it:

(a) is incurred specifically for the contract;

(b) benefits both the contract and other work and can be distributed to both in reasonable proportion to the benefits received; or

(c) is necessary to the overall operation of the business, although a direct relationship to any particular cost objective may not be evident.

(2) Costs are allocable as direct or indirect costs. Similar costs (those incurred for the same purpose in like circumstances) shall be treated consistently either as direct costs or indirect costs except as provided by these regulations. When a cost is treated as a direct cost in respect to one cost objective, it and all similar costs shall be treated as a direct cost for all cost objectives. Further, all costs similar to those included in any indirect cost pool shall be treated as indirect costs. All distributions to cost objectives from a cost pool shall be on the same basis.

(3) A direct cost is any cost which can be identified specifically with a particular final cost objective. A direct cost shall be allocated only to its specific cost objective. To be allowable, a direct cost must be incurred in accordance with the terms of the contract.

(4) Indirect costs shall be determined in accordance with this subsection.

(a) An indirect cost is one identified with no specific final cost objective or with more than one final cost objective. Indirect costs are those remaining to be allocated to the several final cost objectives after direct costs have been determined and charged directly to the contract or other work as appropriate. Any direct costs of minor dollar amount may be treated as indirect costs; provided, that such treatment produces substantially the same results as treating the cost as a direct cost.

(b) Indirect costs shall be accumulated into logical cost groups (or pools), with consideration of the reasons for incurring the costs. Each group should be distributed to cost objectives benefiting from the costs in the group. Each indirect cost group shall be distributed to the cost objectives substantially in proportion to the benefits received by the cost objectives. The number and composition of the groups and the method of distribution should not unduly complicate indirect cost allocation where substantially the same results could be achieved through less precise methods.

(c) The contractor's method of distribution may require examination when:

(i) any substantial difference exists between the cost patterns of the work performed under the contract and the contractor's other work;

(ii) any significant change occurs in the nature of the business, the extent of subcontracting, fixed asset improvement programs, inventories, the volume of sales and production, manufacturing processes, the contractor's products, or other relevant circumstances; or

(iii) indirect cost groups developed for a contractor's primary location are applied to off-site locations. Separate cost groups for costs allocable to offsite locations may be necessary to distribute the contractor's costs on the basis of the benefits accruing to the appropriate cost objectives.

(d) The base period for indirect cost allocation is the one in which such costs are incurred and accumulated for distribution to work performed in that period. Normally, the base period is the contractor's fiscal year. A different base period may be appropriate under unusual circumstances. In such cases, an appropriate period should be agreed to in advance.

§ 7-106 Treatment of Specific Costs

The specific types of costs covered in this section shall be accorded the treatment provided herein.

§ 7-106.01 Advertising

(1) Advertising costs are those incurred in using any advertising media when the advertiser has control over the form and content of what will appear, the media in which it will appear, or when it will appear. Advertising media include newspapers, magazines, radio, television, direct mail, trade papers, billboards, window displays, conventions, exhibits, free samples, and the like. All advertising costs except those set forth in subsection (2) of this section are unallowable.

(2) The only allowable advertising costs are those for:

(a) the recruitment of personnel;

(b) the procurement of scarce items;

(c) the disposal of scrap or surplus materials; and

(d) the listing of a business name and location in a classified directory.

§ 7-106.02 Bad Debts

Bad debts include losses arising from uncollectible accounts and other claims, such as dishonored checks, uncollected employee advances, and related collection and legal costs. All bad debt costs are unallowable.

§ 7-106.03 Contingencies

(1) Contingency costs are contributions to a reserve account for unforeseen costs. Such contingency costs are unallowable except as provided in subsection (2) of this section.

(2) For the purpose of establishing a contract cost estimate or price in advance of performance of the contract, recognition of uncertainties within a reasonably anticipated range of costs may be required and is not prohibited by this subsection. However, where contract clauses are present which serve to remove risks from the contractor, there shall not be included in the contract price a contingency factor for such risks. Further, contributions to a reserve for self- insurance in lieu of, and not in excess of, commercially available liability insurance premiums are allowable as an indirect charge.

§ 7-106.04 Depreciation and Use Allowances

(1) Depreciation and use allowances (that is, the allowance made for fully depreciated assets) are allowable to compensate contractors for the use of buildings, capital improvements, and equipment or for the provision of such facilities on a standby basis for subsequent use when such facilities are temporarily idle because of suspensions or delays not caused by the contractor, not reasonably foreseeable, and not other wise avoidable when the contract was awarded. Depreciation is a method of allocating the acquisition cost of an asset to periods of its useful life. Useful life refers to the asset's period of economic usefulness in the particular contractor's operation as distinguished from its physical life. Use allowances provide compensation in lieu of depreciation or other equivalent costs. Consequently, these two methods may not be combined to compensate contractors for the use of any one type of property.

(2) The computation of depreciation or use allowances shall be based on acquisition costs. When the acquisition costs are unknown, reasonable estimates may be used.

(3) Depreciation shall be computed using any generally accepted method; provided that the method is consistently applied and results in equitable charges considering the use of the property. The straight-line method of depreciation is preferred unless the circumstances warrant some other method. However, the Authority will accept any method which is accepted by the Internal Revenue Service.

(4) In order to compensate the contractor for use of depreciated contractor-owned property which has been fully depreciated on the contractor's books and records and is being used in the performance of a contract, use allowances may be allowed as a cost of that contract. Use allowances are allowable; provided that they are computed in accordance with an established industry schedule or other method mutually agreed upon by the parties. If a schedule is not used, factors to consider in establishing the allowance are the original cost, remaining estimated useful life, the reasonable fair market value, and the effect of any increased maintenance or decreased efficiency.

§ 7-106.05 Entertainment

(1) Entertainment costs include costs of amusement, social activities, and incidental costs relating thereto, such as meals, beverages, lodging, transportation, and

gratuities. Entertainment costs are unallowable.

(2) Nothing herein shall make unallowable a legitimate expense for employee morale, health, welfare, food service, or lodging costs; except that, where a net profit is generated by such services, it shall be treated as a credit as provided in 7-108 (Applicable Credits). This section shall not make unallowable costs incurred for meetings or conferences, including, but not limited to, costs of food, rental facilities, and transportation where the primary purpose of incurring such cost is the dissemination of technical information or the stimulation of production.

§ 7-106.06 Fines and Penalties

Fines and penalties include all costs incurred as the result of violations of, or failure to comply with, federal, state, and local laws and regulations. Fines and penalties are unallowable costs unless incurred as a direct result of compliance with specific provisions of the contract or written instructions of the Contracting Officer.

§ 7-106.07 Gifts, Contributions, and Donations

A gift is property transferred to another person without the other person providing return consideration of equivalent value. Reasonable costs for employee morale, health, welfare, food services, or lodging are not gifts and are allowable. Contributions and donations are property transferred to a nonprofit institution which is not transferred in exchange for supplies or services of equivalent fair market value rendered by a nonprofit institution. Gifts, contributions, and donations are unallowable.

§ 7-106.08 Interest Costs

(1) Interest generally is an unallowable cost for purposes of determining the original contract price. Compensation for any interest expense incurred in connection with work originally contemplated under the contract will be deemed to be included in the fee or profit negotiated on the contract.

(2) Imputed interest on a contractor's expenditures made to pay allowable costs which are allocable to the performance of work required by change orders, suspension of work, or other acts of the Authority requiring additional work over and above that required by the original contract (hereinafter called "Additional Work") shall be an allowable cost. Imputed interest is an allowable cost in relation to such Additional Work in a negotiated settlement, if one can be agreed upon, or to the extent that it is determined administratively or judicially that the Authority is liable for such Additional Work. Such imputed interest shall be computed on expenditures from the date or dates on which the contractor made expenditures for the performance of such Additional Work until the date of payment therefore by the Authority. The rate of interest shall be the prevailing prime rate published in the Wall Street Journal at the time or times the contractor made such expenditures for Additional Work. Imputed interest on the costs of Additional Work shall not be allowable to the extent that it is otherwise recovered as profit, fee, or as interest on contractor claims.

§ 7-106.09 Losses Incurred Under Other Contracts

A loss is the excess of costs over income earned under a particular contract. Losses may include both direct and indirect costs. A loss incurred under one contract may not be charged to any other contract.

§ 7-106.10 Material Costs

(1) Material costs are the costs of all supplies, including raw materials, parts, and components (whether acquired by purchase from an outside source or acquired by transfer from any division, subsidiary, or affiliate under the common control of the contractor), which are acquired in order to perform the contract. Material costs are allowable, subject to subsection (2) and (3) of this section. In determining material costs, consideration shall be given to reasonable spoilage, reasonable inventory losses, and reasonable overages.

(2) Material costs shall include adjustments for all available discounts, refunds, rebates, and allowances which the contractor reasonably should take under the circumstances, and for credits for proceeds the contractor received or reasonably should receive from salvage and material returned to suppliers.

(3) Allowance for all materials transferred from any division (including the division performing the contract), subsidiary, or affiliate under the common control of the contractor shall be made on the basis of costs incurred by the transferor (determined in accordance with this Chapter), except that the transfer may be made at the established price; provided, that the price of materials is not determined to be unreasonable by the Contracting Officer, the price is not higher than the transferor's current sales price to its most favored customer for a like quantity under similar payment and delivery conditions, and the price is established either:

(a) by the established catalogue price, as defined in § 3-101(5);

or

(b) by the lowest price offer obtained as a result of competitive sealed bidding or competitive sealed proposals conducted with other businesses that normally produce the item in similar quantities.

§ 7-106.11 Taxes

(1) Except as limited in subsection (2) of this section, all allocable taxes which the contractor is required to pay and which are paid and accrued in accordance with generally accepted accounting principles are allowable.

(2) The following costs are unallowable:

(a) federal income taxes and federal excess profit taxes;

(b) all taxes from which the contractor could have obtained an exemption but failed to do so, except where the administrative cost of obtaining the exemption would have exceeded the tax savings realized from the exemption;

(c) any interest, fines, or penalties paid on delinquent taxes, unless incurred at the written direction of the Contracting Officer;

(d) income tax accruals designed to account for the tax effects of differences between taxable income and pretax income as reflected by the contractor's books of account and financial statements; and

(e) any tax imposed under 26 U.S.C. 5000C.¹

(3) Any refund of taxes which were allowed as a direct cost under the contract shall be credited to the contract. Any refund of taxes which were allowed as an indirect cost under a contract shall be credited to the indirect cost group applicable to any contracts being priced or costs being reimbursed during the period in which the refund is made.

(4) Direct government charges for services (such as water) or capital improvements (such as sidewalks) are not considered taxes and are allowable costs.

§ 7-107 Costs Requiring Prior Approval

The costs described in this § 7-107 are allowable as direct costs to cost-reimbursement type contracts to the extent that they have been approved in advance by the Contracting Officer. In other situations, the allowability of these costs shall be determined in accordance with general standards set out in these cost principles.

§ 7-107.01 Pre-Contract Costs

Pre-contract costs are those incurred in anticipation of, and prior to, the effective date of the contract. Such costs are allowable to the extent that they would have been allowable if incurred after the date of the contract; provided, that in the case of a cost-reimbursement type contract, a special provision is inserted in the contract setting forth the period of time and maximum amount of cost which will be covered as allowable pre-contract costs.

§ 7-107.02 Bid and Proposal Costs

Bid and proposal costs are the costs incurred in preparing, submitting, and supporting bids and proposals. Reasonable ordinary bid and proposal costs are allowable as indirect costs in accordance with these cost principles. Bid and proposal costs are allowable as direct costs only to the extent that they are specifically permitted by a provision of the contract or solicitation document. Where bid and proposal costs are allowable as direct costs, to avoid double accounting, the same bid and proposal costs shall not be charged as indirect costs.

§ 7-107.03 Insurance

(1) Ordinary and necessary insurance costs normally are allowable as indirect costs. Direct insurance costs are the costs of obtaining insurance in connection with performance of the contract or contributions to a reserve account for the purpose of self-insurance. Self-insurance contributions are allowable only to the extent of the cost to the contractor to obtain similar insurance.

(2) Insurance costs may be approved as a direct cost only if the insurance is specifically required for the performance of the contract.

(3) Actual losses which reasonably should have been covered by permissible insurance or were expressly covered by self-insurance are unallowable unless the parties expressly agree otherwise in the terms of the contract.

§ 7-107.04 Litigation Costs

¹ FAR 32.205-41(b)(8), added 2013.

Litigation costs include all filing fees, legal fees, expert witness fees, and all other costs involved in litigating claims in court or under administrative procedures. Litigation costs incident to the contract are allowable as indirect costs in accordance with these cost principles, except that costs incurred in litigation by or against the Authority are unallowable.

§ 7-108 Applicable Credits

(1) Applicable credits are receipts or price reductions which offset or reduce expenditures allocable to contracts as direct or indirect costs. Examples include purchase discounts, rebates, allowances, recoveries or indemnification for losses, sale of scrap and surplus equipment and materials, adjustments for overpayments or erroneous charges, and income from employee recreational or incidental services and food sales.

(2) Credits shall be applied to reduce related direct or in- direct costs.

(3) The Authority shall be entitled to a cash refund if the related expenditures have been paid to the contractor under a cost-reimbursement type contract.

§ 7-109 Advance Agreements

(1) Both the Authority and the contractor should seek to avoid disputes and litigation arising from potential problems by providing in the terms of the solicitation and the contract the treatment to be accorded special or unusual costs which are expected to be incurred.

(2) Advance agreements may be negotiated either before or after contract award (depending upon when the parties realize the cost may be incurred) but shall be negotiated before a significant portion of the cost covered by the agreement has been incurred. Advance agreements shall be in writing, executed by both contracting parties, and incorporated in the contract.

(3) An advance agreement shall not provide for any treatment of costs inconsistent with these cost principles unless a determination has been made pursuant to § 7-111 (Authority to Deviate from Cost Principles).

§ 7-110 Use of Federal Cost Principles

In dealing with contractors operating according to federal government cost principles, the Contracting Officer, after notifying the contractor, may use the federal cost principles as guidance in contract negotiations. In addition, the Contracting Officer may utilize applicable overhead and G&A rates determined by audit by any federal audit agency for the applicable period.

§ 7-111 Authority to Deviate from Cost Principles

When the best interest of the Authority would be served by a deviation, the Contracting Officer may deviate from the cost principles set forth in these regulations; provided, that a written determination shall be made by such officer specifying the reasons for the deviation. Such determination shall be effective only upon approval by the Vice President of Contracts and upon incorporation into the contract. However, all costs must be reasonable, lawful, allocable, and accounted for in accordance with generally accepted accounting principles to be reimbursed, and a deviation shall not contravene this principle.

CHAPTER 8 - CONTRACT ADMINISTRATION**§ 8-101 General**

Contract administration includes all activities involved with the Authority's supervision and, when necessary, direction of contract performance. The following are among the normal contract administration functions to be performed by the Authority:

- (1) reviewing the contractor's compensation structure;
- (2) reviewing the contractor's insurance plans;
- (3) conducting post award orientation conferences;
- (4) reviewing and evaluating the contractor's proposals for modifications;
- (5) negotiating forward pricing rate agreements;
- (6) negotiating advance agreements applicable to treatment of costs under contracts;
- (7) determining the allowability of costs suspended or disapproved as required, directing the suspension or disapproval of costs when there is reason to believe they should be suspended or disapproved, and approving final vouchers;
- (8) establishing billing and final indirect cost rates;
- (9) preparing findings of fact and issuing decisions under the Disputes Clause;
- (10) reviewing and approving or disapproving the contractor's requests for payments under the Progress Payments Clause;
- (11) making payments on contracts;
- (12) ensuring timely notification by the contractor of any anticipated overrun or under run of the estimated cost under cost-reimbursement contracts;
- (13) monitoring the contractor's financial condition and taking appropriate action when it jeopardizes contract performance;
- (14) analyzing quarterly limitation on payments statements and recovering overpayments from the contractor;

- (15) issuing tax exemption certificates;
- (16) negotiating and executing contractual documents for settlement of partial and total contract terminations for convenience;
- (17) negotiating and executing contractual documents settling cancellation charges under multi-year contracts;
- (18) processing and executing novation and change of name agreements;
- (19) performing property administration;
- (20) performing necessary screening, redistribution, and disposal of contractor inventory;
- (21) performing production support, surveillance, and status reporting, including timely reporting of potential and actual slippages in contract delivery schedules;
- (22) reviewing and evaluating preservation, packaging, and packing;
- (23) ensuring contractor compliance with contractual quality assurance requirements;
- (24) ensuring contractor compliance with applicable safety requirements;
- (25) surveying and assessing compliance with contractual terms for schedule, cost, and technical performance in the areas of design, development, and production;
- (26) evaluating for adequacy and surveying contractor engineering efforts and management systems that relate to design, development, production, engineering changes, subcontractors, tests, management of engineering resources, reliability and maintainability, data control systems, configuration management, and independent research and development;
- (27) reviewing and evaluating for technical adequacy the contractor's logistics support, maintenance, and modification programs;
- (28) performing engineering analyses of contractor cost proposals;
- (29) reviewing and analyzing contractor proposed engineering and design studies;

- (30) assisting in evaluating and making recommendations for acceptance or rejection of waivers and deviations;
- (31) evaluating and monitoring the contractor's procedures for complying with requirements regarding restrictive markings on data;
- (32) consenting to the placement of subcontracts;
- (33) ensuring timely submission of required reports; and
- (34) closing out the contract.

Section 8-200 - Post-award Orientations

§ 8-201 Scope of Section

This section prescribes policies and procedures for the post-award orientation of contractors and subcontractors through a conference or a letter or other form of written communication.

§ 8-202 General

- (1) A post-award orientation aids both Authority and contractor personnel to (a) achieve a clear and mutual understanding of all contract requirements and (b) identify and resolve potential problems. However, it is not a substitute for the contractor's full understanding of the work requirements at the time offers are submitted, nor is it to be used to alter the final agreement arrived at in any negotiations leading to contract award.
- (2) Post-award orientation, subject to any state law limitations, is encouraged to assist:
 - (a) Small business concerns;
 - (b) Small disadvantaged business concerns;
 - (c) Veteran-owned small business concerns;
 - (d) Service-disabled veteran-owned small business concerns; and
 - (e) Women-owned small business concerns (including economically disadvantaged women-owned small business concerns and women-owned small business concerns eligible under the Women-Owned Small Business Program).
- (3) While cognizant Authority or contractor personnel may request the Contracting Officer to arrange for an orientation, it is the Contracting Officer's decision whether a post-award orientation in any form is necessary.
- (4) Maximum benefits will be realized when an orientation is conducted promptly after award.

² FAR, Subpart 42.501.

§ 8-203 Selecting Contracts for Post-award Orientation

When deciding whether post-award orientation is necessary and, if so, what form it shall take, the Contracting Officer shall consider, as a minimum, the --

- (1) nature and extent of the preaward survey and any other prior discussions with the contractor;
- (2) type, value, and complexity of the contract;
- (3) complexity and acquisition history of the product or service;
- (4) requirements for spare parts and related equipment;
- (5) urgency of the delivery schedule and relationship of the product or service to critical programs;
- (6) length of the planned production cycle;
- (7) extent of subcontracting; and
- (8) contractor's performance history and experience with the product or service;
- (9) contractor's status, if any, as a small business, small disadvantaged, women-owned, veteran-owned, or service-disabled veteran-owned small business concern;
- (10) contractor's performance history with small, small disadvantaged, women-owned, veteran-owned, and service-disabled veteran-owned small business subcontracting programs;
- (11) Safety precautions required for hazardous materials or operations; and
- (12) Complex financing arrangements, such as progress payments, advance payments, or guaranteed loans.

§ 8-204 Post-award Conference Arrangements

When the Contracting Officer decides that a post-award conference is needed, the Contracting Officer is responsible for --

- (1) establishing the time and place of the conference;
- (2) preparing the agenda, when necessary;
- (3) notifying appropriate Authority representatives (~~e.g., contracting/contract administration office~~) and contractor personnel;

³ FAR, Subpart 42.502.

⁴ FAR, Subpart 42.503-1

- (4) designating or acting as the chair of the conference;
- (5) conducting a preliminary meeting of Authority personnel; and
- (6) preparing a summary report of the conference.

When the contracting officer initiates a conference, the arrangements may be made by that office ~~or, at its request, by the contract administration officer.~~

§ 8-205 Post-award Conference Procedure

The chair of the conference shall conduct the meeting. Unless a contract change is contemplated, the chair shall emphasize that it is not the purpose of the meeting to change the contract. The Contracting Officer may make commitments or give directions within the scope of the Contracting Officer's authority and shall put in writing and sign any commitment or direction, whether or not it changes the contract. Any change to the contract that results from the post-award conference shall be made only by a contract modification referencing the applicable terms of the contract. Participants without authorization to bind the Authority shall not take action that in any way alters the contract. The chair shall include in the summary report (see Section 8-206) all information and guidance provided to the contractor.

§ 8-206 Post-award Conference Report

The chair shall prepare and sign a report of the post-award conference. The report shall cover all items discussed, including areas requiring resolution, controversial matters, the names of the participants assigned responsibility for further actions, and the due dates for the actions. The chair shall furnish copies of the report to the contracting officer, ~~the contract administration office,~~ the contractor, and others who require the information.

§ 8-207 Post-award Letters

In some circumstances, a letter or other written form of communication to the contractor may be adequate post-award orientation (in lieu of a conference). The letter should identify the Authority representative responsible for administering the contract and cite any unusual or significant contract requirements. The rules on changes to the contract in Section 8-205 also apply here.

Section 8-300 - Contract Modifications

§ 8-301 Definitions

- (1) "Administrative change" means a unilateral (see Section 8-303(2)) contract change, in writing, that does not affect the substantive rights of the parties (e.g., a change in the paying office or the appropriation data).
- (2) "Change order" means a written order, signed by the Contracting Officer, directing the contractor to make a change that the Changes Clause authorizes the Contracting Officer to order without the contractor's consent up to 10% of the contract value. Any amount above that value requires negotiation prior to performance.
- (3) "Contract modification" means any written change in the terms of a contract.

⁵ FAR, Subpart 42.503-3.

⁶ FAR, Subpart 42.504.

⁷ FAR, Subpart 43.101.

(4) "Supplemental agreement" means a bilateral modification of the contract that is accomplished by the mutual action of the parties.

§ 8-302 Policy

(1) Only the Contracting Officer acting within the scope of his or her authority is empowered to execute contract modifications on behalf of the Authority. Other Authority personnel shall not --

- (a) execute contract modifications;
- (b) act in such a manner as to cause the contractor to believe that they can bind the Authority; or
- (c) direct or encourage the contractor to perform work that should be the subject of a contract modification.

(2) Contract modifications, including changes that could be issued unilaterally, shall be priced before their execution if this can be done without adversely affecting the interest of the Authority. If a significant cost increase could result from a contract modification and time does not permit negotiation of a price, at least a maximum price shall be negotiated unless impractical.

§ 8-303 Types of Contract Modifications

There are two types of contract modifications.

(1) A bilateral modification (supplemental agreement) is a contract modification that is signed by the contractor and the Contracting Officer. Bilateral modifications are used to --

- (a) make negotiated equitable adjustments resulting from the issuance of a change order;
- (b) modify the specifications or scope of work when both parties agree to both the modification and all other matters affected by the modification (including price and delivery or completion dates);
- (c) settle claims and disputes by mutual agreement; and
- (d) reflect other agreements of the parties modifying the terms of contracts.

(2) A unilateral modification is a contract modification that is signed only by the Contracting Officer. Unilateral modifications are used, for example, to

--

- (a) make administrative changes;
- (b) issue change orders;
- (c) make changes authorized by clauses other than the Changes

Clause (e.g., Authority Property Clause, Options Clause, Suspension of Work Clause, etc.); and

- (d) issue termination notices.

§ 8-304 Change Orders

(1) Generally, Authority contracts contain a Changes Clause that permits the Contracting Officer to make unilateral changes, in designated areas, within the general scope of the contract. These are accomplished by issuing written change orders.

(2) The contractor must continue performance of the contract as changed, except that in cost-reimbursement or incrementally-funded contracts, the contractor is not obligated to continue performance or incur costs beyond the limits established in the Limitation of Cost Clause.

(3) The Contracting Officer may issue a change order by electronic means [without a Standard Form 30] under unusual or urgent circumstances; provided, that --

- (a) copies of the message are furnished promptly to the same address that received the basic contract;

- (b) immediate action is taken to confirm the change by issuance of a written change order form;

- (c) the message contains substantially the information required by the written change order form, including in the body of the message the statement, "Signed by [Name], Contracting Officer"; and

- (d) the Contracting Officer manually signs the original copy of the message.

(4) Change orders shall be issued only by the Contracting Officer except when authority to issue such orders has been delegated in writing to another.

(5) Unless the parties previously have agreed concerning the equitable adjustment associated with a change order, the change order shall not contain a price or adjustment in the delivery schedule or require the contractor's signature. The equitable adjustment resulting from the change order shall be the subject of negotiation.

§ 8-305 Equitable Adjustments

(1) An equitable adjustment pursuant to the Changes Clause is designed to keep the contractor whole and to keep the parties to the contract in the same position relative to one another after the changed work as they were in before the change. Therefore, the measure of an equitable adjustment for increased work is the difference between the reasonable cost of the work originally required by the contract and the actual reasonable cost to the contractor of performing the changed work plus a reasonable amount for overhead and profit. For purposes of computing the amount of an equitable adjustment, a contractor's actual costs shall be documented to the satisfaction of the Authority for the increased work to be presumed reasonable, unless shown to be unreasonable. A downward equitable adjustment is required when work is deleted from the contract by

⁸ FAR, Subpart 43.201.

change order.

(2) The Contracting Officer shall negotiate an equitable adjustment resulting from change orders in the shortest practicable time.

(3) In determining the amount of an equitable adjustment, the Contracting Officer shall ensure that a cost analysis is made, if appropriate, and shall consider the contractor's segregable costs of the change, if available. If additional funds are required as a result of the change, the Contracting Officer shall secure the funds before making any adjustment to the contract.

(4) When the contracting officer requires a field pricing review of requests for equitable adjustment, the contracting officer shall provide a list of any significant contract events which may aid in the analysis of the request. This list should include-

(i) Date and dollar amount of contract award and/or modification;

(ii) Date of submission of initial contract proposal and dollar amount;

(iii) Date of alleged delays or disruptions;

(iv) Performance dates as scheduled at date of award and/or modification;

(v) Actual performance dates;

(vi) Date entitlement to an equitable adjustment was determined or contracting officer decision was rendered if applicable;

(vii) Date of certification of the request for adjustment if certification is required; and

(viii) Dates of any pertinent Authority actions or other key events during contract performance which may have an impact on the contractor's request for equitable adjustment.⁹

(5) To avoid subsequent controversies that may result from a supplemental agreement containing an equitable adjustment as the result of a change order, the Contracting Officer should --

(a) ensure that all elements of the equitable adjustment have been presented and resolved; and

(b) include, in the supplemental agreement, a release similar to the

following: CONTRACTOR'S STATEMENT OF RELEASE

In consideration of the modification(s) agreed to herein as complete equitable adjustments for the Contractor's _____ [describe the claim] proposal(s) for adjustment¹⁰, the Contractor hereby releases the Authority from any and all liability under this contract for further equitable adjustments, damages, or any other relief based on or attributable to such facts or circumstances giving

⁹ FAR 43.204(b)(5)(i-viii)

¹⁰ FAR 43.204(c)

rise to the "proposal(s) for adjustment" (except for _____).

§ 8-306 Reports

All supplemental agreements shall be reported quarterly by the Executive Director in a written report to the Board of Directors.

§ 8-307 Forms

(a) Bilateral modifications (supplemental agreements) shall be in writing and shall include at a minimum:

(1) the contract and supplemental agreement numbers, the effective dates, and the actual signature dates by the contractor and the Contracting Officer;

(2) the impact on dollar amounts and time, if any, citing the current data, the change(s), and the revised data;

(3) a description of the change; and

(4) a statement which reads, "Except as modified by this supplemental agreement, all other provisions of the contract (including, but not limited to, price and delivery and completion dates) shall remain unchanged."

(b) Unilateral change orders shall be in writing and shall include at a minimum:

(1) the contract and change order numbers, the effective dates of both, and the actual signature date by the Contracting Officer;

(2) a statement which reads, "Pursuant to the authority of the Changes Clause in the contract referenced above, the contract is changed as provided below"; and

(3) a description of the change.

Section 8-400 - Property Administration

§ 8-401 Scope of Section

(a) This Section prescribes policies and procedures for providing Authority property to contractors, contractors' use and management of Authority property, and reporting, redistributing, and disposing of contractor inventory. Contractor management of this property must be in accordance with this Section unless simplified procedures are authorized.

(b) It does not apply to:

(1) Authority property provided under any statutory leasing authority;

¹¹ FAR, Subpart 45.000(a).

- (2) Property to which the Authority has acquired a lien or title solely because of partial, advance, progress or performance based payments;
- (3) Disposal of real property; software and intellectual property; or
- (4) Authority property that is incidental to the place of performance, when the contract requires contractor personnel to be located on an Authority site or installation, and when the property used by the contractor within the location remains accountable to the Authority. Items considered to be incidental to the place of performance include, for example, office space, desks, chairs, telephones, and computers.¹²

§ 8-401.01 Simplified Property Management Procedures

Unless otherwise required by the Contracting Officer, contractors responsible for contractor-acquired (as defined in § 8-402(1)) or Authority-furnished property with a total cost not expected to exceed \$50,000 (single contract or aggregate) are not required to possess a formal property management system. However, contractors shall ensure this property is properly inventoried, controlled, maintained and safeguarded; and that the management procedures employed provide a clear audit trail. Contractor records must reflect the following:

- (1) item description,
- (2) date of acquisition,
- (3) asset cost,
- (4) DART contract number,
- (5) source,
- (6) asset location,
- (7) DART property tag number, and
- (8) serial number (if applicable).

§ 8-402 Definitions

(1) "Contractor-acquired property," as used in this section, means property acquired or otherwise provided by the contractor for performing a contract and to which the Authority has title.

(2) "Authority-furnished property," as used in this section, means property in the possession of, or directly acquired by, the Authority and subsequently made available to the contractor. Authority-furnished property includes, but is not limited to, spares and property furnished for repair, maintenance, overhaul, or modification. Authority-furnished property also includes contractor-acquired property if the contractor-acquired property is a deliverable under a cost contract when accepted by the Authority for continued use under the contract.¹³

(3) "Authority property" means all property owned by or leased to the Authority or acquired by the Authority under the terms of the contract. It includes Authority-furnished property. Authority property includes material, equipment, , special tooling, special test equipment, and real property. Authority property does not include

¹² FAR, Subpart 45.000(b).

¹³ FAR 45.101

intellectual property and software.¹⁴

(4) "Plant equipment," as used in this section, means personal property of a capital nature (including equipment, machine tools, test equipment, furniture, vehicles, and accessory and auxiliary items) for use in manufacturing supplies, in performing services, or for any administrative or general plant purpose. It does not include special tooling or special test equipment.

(5) "Property," as used in this section, means all property, both real and personal. It includes facilities, material, equipment, transportation vehicles, special tooling, and special test equipment.

(6) "Real property," as used in this section, means land and rights in land, ground improvements, utility distribution systems, and buildings and other structures. It does not include foundations and other work necessary for installing special tooling, special test equipment, or plant equipment.

(7) "Special test equipment," as used in this section, means either single or multipurpose integrated test units engineered, designed, fabricated, or modified to accomplish special purpose testing in performing a contract. It consists of items or assemblies of equipment that are interconnected and interdependent so as to become a new functional entity for special testing purposes. It does not include material, special tooling, facilities (except foundations and similar improvements necessary for installing special test equipment), and plant equipment items used for general plant testing purposes.

(8) "Special tooling," as used in this section, means jigs, dies, fixtures, molds, patterns, taps, gauges, other equipment and manufacturing aids, all components of these items, and replacement of these items, which are of such a specialized nature that, without substantial modification or alteration, their use is limited to the development or production of particular supplies or parts thereof or to the performance of particular services. It does not include material, special test equipment, facilities (except foundations and similar improvements necessary for installing similar tooling), general or special machine tools, or similar capital items.

(9) Additional definitions also applying throughout this section appear in those subsections where the terms are most frequently used.

§ 8-403 Policy

Contractors ordinarily are required to furnish all property necessary to perform Authority contracts. However, if contractors possess Authority property, the Authority shall --

- (1) eliminate to the maximum practical extent any competitive advantage that might arise from using such property;
- (2) require contractors to use Authority property to the maximum practical extent in performing Authority contracts;
- (3) require contractors to use Authority property already in their possession to the maximum extent practical in performing Authority contracts;

¹⁴ Id.

¹⁵ FAR, Subpart 45.102 – 103.

- (4) permit the property to be used only when authorized;
- (5) charge appropriate rentals when the property is authorized for use on other than a rent-free basis;
- (6) require contractors to be responsible and accountable for, and keep the Authority's official records of, Authority property in their possession or control;
- (7) require contractors to review and provide justification for retaining Authority property not currently in use, and to declare property as excess when no longer needed for contract performance; and
- (8) ensure maximum practical reutilization of contractor inventory within the Authority.

§ 8-404 Responsibility and Liability for Authority Property

- (1) Contractors are responsible and liable for Authority property in their possession, unless otherwise provided by the Contract. When justified by the circumstances, the contract may require the contractor to assume greater liability for loss of or damage to Authority property.
- (2) If the Authority provides Authority property directly to a subcontractor, the terms of paragraph (1) above shall apply to the subcontractor. A prime contractor that provides Authority property to a subcontractor shall not be relieved of any responsibility to the Authority that the prime contractor may have under the terms of the prime contract.

§ 8-405 Review and Correction of Contractor's Property Control Systems

- (1) The Contracting Officer shall review contractors' property control systems to assure compliance with the Authority Property Clause of the contract.
- (2) The Contracting Officer shall notify the contractor in writing when its property control system does not comply with contract requirements and shall request prompt correction of deficiencies. Specifically, the Contracting Officer shall --
 - (a) notify the contractor in writing of any required corrections and establish a schedule for completion of actions;
 - (b) caution the contractor that failure to take the required corrective actions within the time specified will result in withholding or withdrawing system approval; and
 - (c) advise the contractor that its liability for loss of or damage to Authority property may increase if approval is withheld or withdrawn.

§ 8-406 Records of Authority Property

- (1) Contractor records of Authority property established and maintained under the terms of the contract are the Authority's official property records. Duplicate
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¹⁶ See generally FAR 45.104.

official records shall not be furnished to or maintained by Authority personnel, except as provided in paragraph (2), below.

(2) Contracts may provide for the Contracting Officer to maintain the Authority's official property records when Authority property is furnished to a contractor (a) for repair or servicing and return to the shipping organization, (b) for use on an Authority installation, (c) under a contract with a short performance period or involving Authority property having an acquisition cost of \$25,000 or less, or (d) when otherwise determined by the Contracting Officer to be in the Authority's interest.

§ 8-407 Authority Property Clauses

This section prescribes the principal Authority property clauses.

(1) The Contracting Officer shall insert the Authority Property Clause (Fixed-Price Contracts), when appropriate in solicitations and contracts when a fixed-price contract is contemplated.

(2) The Contracting Officer shall insert the Authority Property Clause (Cost-Reimbursement, Time-and-Material, or Labor-Hour Contracts), when appropriate, in solicitations and contracts when a cost-reimbursement, time-and- material, or labor-hour contract is contemplated.

§ 8-408 Contractor Management of Authority Property

§ 8-408.01 Scope of Section

This section prescribes the minimum requirements contractors must meet in establishing and maintaining control over Authority property.

§ 8-408.02 Contractor Responsibility

(1) The contractor is directly responsible and accountable for all Authority property in accordance with the provisions of the contract. This includes Authority property in the possession or control of a subcontractor. The contractor shall establish and maintain a system in accordance with this section to control, protect, preserve, and maintain all Authority property. This property control system shall be in writing unless the Contracting Officer determines that maintaining a written system is unnecessary. The system shall be reviewed and, if satisfactory, approved in writing by the Contracting Officer.

(2) The contractor shall maintain and make available the records required by this section and account for all Authority property until relieved of that responsibility. The contractor shall furnish all necessary data to substantiate any request for relief from responsibility.

(3) The contractor shall require subcontractors who are furnished Authority property under the prime contract to comply with the requirements of this section. Procedures for assuring subcontractor compliance shall be included in the contractor's property control system.

(4) If the Contracting Officer finds any portion of the contractor's property control system to be inadequate, the contractor must take any necessary corrective action before the system can be approved.

(5) When Authority property is disclosed to be in the possession or control of the contractor but not provided under any contract, the contractor shall promptly (a) record such property according to the established property control procedure and (b) furnish to the Contracting Officer all known circumstances and data pertaining to its receipt and a statement as to whether there is a need for its retention.

(6) The contractor shall promptly report all Authority property in excess of the amounts needed to complete full performance of the contracts under which it was provided or its use was authorized.

(7) When unrecorded Authority property is found, both the cause of the discrepancy and actions taken or needed to prevent recurrence shall be determined and reported to the Contracting Officer.

§ 8-408.03 Discrepancies Incident to Shipment

(1) If overages, shortages, or damages are discovered upon receipt of Authority-furnished property, the contractor shall provide a statement of the condition and apparent causes to the Contracting Officer. Only that quantity of property actually received will be recorded on the official records.

(2) The contractor shall take all actions necessary in adjusting overages, shortages, or damages in shipment of contractor-acquired property from a vendor or supplier. However, when the shipment is moved by Authority bill of lading and carrier liability is indicated, the contractor shall report the discrepancy in accordance with paragraph (1), above.

§ 8-408.04 Relief from Responsibility

Unless the contract or Contracting Officer provides otherwise, the contractor shall be relieved of property control responsibility for Authority property by --

(1) reasonable and proper consumption of property in the performance of the contract as determined by the Contracting Officer;

(2) retention by the contractor, with the approval of the Contracting Officer, of property for which the Authority has received consideration;

(3) the authorized sale of property; provided, that the proceeds are received by or credited to the Authority;

(4) shipment from the contractor's plant, under Authority instructions, except when shipment is to a subcontractor or other location of the contractor; or

(5) a determination by the Contracting Officer of the contractor's liability for any property that is lost, damaged, destroyed, or consumed in excess of that normally anticipated in a manufacturing or processing operation, if --

- (a) the determination is furnished to the contractor in writing;
 - (b) the Authority is reimbursed where required by the determination;
- and
- (c) property rendered unserviceable by damage is properly disposed of, and the determination is cross-referenced to the shipping or other documents evidencing disposal.

§ 8-408.05 Contractor's Liability

(1) Subject to the terms of the contract and the circumstances surrounding the particular case, the contractor may be liable for shortages, loss, damages, or destruction of Authority property. The contractor also may be liable when the use or consumption of Authority property unreasonably exceeds the allowances provided for by the contract, the bill of material, or other appropriate criteria.

(2) The contractor shall investigate and report to the Contracting Officer all cases of loss, damage, or destruction of Authority property in its possession or control as soon as the facts become known or when requested by the Contracting Officer. A report also shall be furnished when completed and accepted products or end items are lost, damaged, or destroyed while in the contractor's possession or control.

(3) The contractor shall require any of its subcontractors possessing or controlling Authority property accountable under the contract to investigate and report all instances of loss, damage, or destruction of such property.

§ 8-408.06 Records and Reports of Authority Property

(1) The contractor's property control records shall constitute the Authority's official property records unless an exception has been authorized. The contractor shall establish and maintain adequate control records for all Authority property, including property provided to and in the possession or control of a subcontractor. The property control records specified in this section are the minimum required by the Authority. Unless the Contracting Officer directs otherwise, when a subcontractor has an approved property control system for Authority property provided under its own prime contracts, the contractor shall use the records created and maintained under that system.

(2) The contractor's property control system shall provide financial accounts for Authority-owned property in the contractor's possession or control. The system shall be subject to internal control standards and be supported by property records for such property.

(3) Official Authority property records must identify all Authority property and provide a complete, current, and auditable record of all transactions. The records shall be safeguarded from tampering or destruction. Records shall be accessible to authorized Authority personnel.

(4) Special tooling and special test equipment fabricated from materials that are the property of the Authority shall be recorded as Authority-owned immediately upon fabrication. Special tooling and special test equipment fabricated from materials that are the property of the contractor shall be recorded as Authority property at the time title passes to the Authority.

(5) Property records of the type established for components acquired separately shall be used for serviceable components permanently removed from items of Authority property as a result of modification.

(6) The contractor's property control system shall contain a system or technique to locate any item of Authority property within a reasonable period of time.

§ 8-408.07 Basic Information

Unless summary records are used as authorized, the contractor's property control records shall provide the following basic information for every item of Authority property in the contractor's possession, regardless of value:

- (1) the name and description;
- (2) quantity received (or fabricated), issued, and on hand;
- (3) unit price (and unit of measure);
- (4) contract number or equivalent code designation;
- (5) location;
- (6) disposition; and
- (7) posting reference and date of transaction.

§ 8-408.08 Records of Material

(1) "Material," as used in this § 8-408.08, means property that may be incorporated into or attached to a deliverable end item or that may be consumed in performing a contract.

(2) All Authority material furnished to the contractor, as well as other material to which title has passed to the Authority by reason of allocation from contractor-owned stores or purchase by the contractor for direct charge to an Authority contract or otherwise, shall be recorded in accordance with the contractor's property control system and the requirements of this section.

(3) The Contracting Officer may authorize the contractor to maintain, in lieu of stock records, a file of appropriately cross-referenced documents evidencing receipt, issue, and use of Authority-provided material that is issued for immediate consumption and is not entered in the inventory record as a matter of sound business practice. This method of control may be authorized for --

- (a) material charged through overhead;
- (b) material under research and development contracts;
- (c) subcontracted or outside production items;
- (d) nonstock or special items;

- (e) items that are produced for direct charge to a contract, or are acquired and issued for installation upon receipt, and involve no spoilage; and
- (f) items issued from contractor-owned inventory direct to production or maintenance, etc.

§ 8-408.09 Records of Special Tooling and Special Test Equipment

- (1) The contractor's property control system shall provide basic information regarding each item of Authority-owned special tooling and special test equipment, including any general purpose test equipment incorporated as components in such a manner that removal and reuse may be feasible and economical.
- (2) Records identifying special tooling and special test equipment shall include the identification number and item on which used.
- (3) The contractor shall, when specified by the contract, identify and report special tooling and special test equipment by retention category (e.g., assembly tooling or critical tooling for spares or replacements).

§ 8-408.10 Records of Related Data and Information

The contractor shall maintain property control and accountability, in accordance with sound business practice, of manufacturing or assembly drawings; installation, operation, repair, or maintenance instructions; and other similar information furnished to the contractor by the Authority or generated or acquired by the contractor under the contract and for which title vests in the Authority.

§ 8-408.11 Records of Completed Products

The contractor shall maintain a record of all completed products produced under a contract as provided in this section:

- (1) When there is no time lapse between Authority inspection and acceptance of the completed products and shipment from the plant site, the records shall, at a minimum, consist of a summary of quantities accepted and shipped. When end items are accepted by the Authority and stored with the contractor awaiting shipment, the record shall identify quantities stored, location, and disposition action.
- (2) On contracts that provide for the contractor to retain completed products for further use under the contract or other contracts, such items shall be considered "Authority-furnished property" upon acceptance and shall be recorded as required by this section.
- (3) When completed products are returned to a contractor under the terms of a warranty clause, the contractor shall maintain, by contract, a record containing a description of the items involved, quantities received and returned to the Authority, and other pertinent data necessary to determine that a proper accounting for all property has been made.

§ 8-408.12 Records of Property Returned for Rework

The contractor shall maintain quantitative records of property returned for processing to assure control from time of receipt through return of the items to the Authority. The contractor shall establish item

records under its property control system. The records shall specify the quantity of units returned to the Authority and the quantity otherwise disposed of with proper authority.

§ 8-408.13 Identification

The contractor shall identify, mark, and record all Authority property promptly upon receipt, unless the nature of the property makes marking impractical, and shall record assigned numbers on all applicable documents pertaining to the property control system.

§ 8-408.14 Segregation of Authority Property

Authority property generally shall be kept physically separate from contractor-owned property. However, when advantageous to the Authority and consistent with the contractor's right to use such property, the property may be commingled --

- (1) when the Authority property is special tooling, special test equipment, or plant equipment clearly identified and recorded as Authority property; or
- (2) when otherwise approved by the Contracting Officer.

§ 8-408.15 Physical Inventories

The contractor periodically shall physically inventory all Authority property (except materials issued from stock for manufacturing, research, design, or other services required by the contract) in its possession or control and shall cause subcontractors to do likewise. Physical inventories consist of sighting, tagging or marking, describing, recording, reporting, and reconciling the property with the records. The contractor, with the approval of the Contracting Officer, shall establish the type, frequency, and procedures for such inventories. Type and frequency of inventory should be based on the contractor's established practices, the type and use of the Authority property involved, or the amount of Authority property involved and its monetary value, and the reliability of the contractor's property control system. Type and frequency of physical inventories normally will not vary between contracts being performed by the contractor but may vary with the types of property being controlled. Personnel who perform the physical inventory shall not be the same individuals who maintain the property records or have custody of the property unless the contractor's operation is too small to do otherwise.

§ 8-408.16 Inventories Upon Termination or Completion

Immediately upon termination or completion of a contract, the contractor shall perform and cause each subcontractor to perform a physical inventory, adequate for disposal purposes, of all Authority property applicable to the contract.

§ 8-408.17 Reporting Results of Inventories

The contractor shall, as a minimum, submit the following to the Contracting Officer promptly after completing the physical inventory:

- (1) a listing that identifies all discrepancies disclosed by a physical inventory;
and
- (2) a signed statement that physical inventory of all or certain classes of Authority property was completed on a given date and that the official property records were found to be in agreement except for discrepancies reported.

§ 8-408.18 Care, Maintenance, and Use

The contractor shall be responsible for the proper care, maintenance, and use of Authority property in its possession or control from the time of receipt until properly relieved of responsibility, in accordance with sound industrial practice and the terms of the . The removal of Authority property to storage, or its contemplated transfer, does not relieve the contractor of these responsibilities.

§ 8-408.19 Contractor's Maintenance Program

(1) Consistent with the terms of the contract, the contractor's maintenance program shall provide for --

(a) disclosure of need for and the performance of preventive maintenance;

and (b) disclosure and reporting of need for capital rehabilitation;

(c) recording of work accomplished under the program.

(2) Preventive maintenance is maintenance performed on a regularly scheduled basis to prevent the occurrence of defects and to detect and correct minor defects before they result in serious consequences. An effective preventive maintenance program shall include at least --

(a) inspection of buildings at periodic intervals to assure detection of deterioration and the need for repairs;

(b) inspection of plant equipment at periodic intervals to ensure detection of maladjustment, wear, or impending breakdown;

(c) regular lubrication of bearings and moving parts in accordance with a lubrication plan;

(d) adjustments for wear, repair, or replacement of worn or damaged parts and the elimination of causes of deterioration;

(e) removal of sludge, chips, and cutting oils from equipment that will not be used for a period of time;

(f) taking necessary precautions to prevent deterioration caused by contamination, corrosion, and other substances; and

(g) proper storage and preservation of accessories and special tools furnished with an item of plant equipment but not regularly used with it.

(3) The contractor's maintenance program shall provide for disclosing and reporting the need for major repair, replacement, and other capital rehabilitation work for Authority property in its possession or control.

(4) The contractor shall keep records of maintenance actions performed and any deficiencies in the Authority property discovered as a result of inspections.

§ 8-408.20 Use of Authority Property

The contractor's procedures shall be in writing and adequate (1) to ensure that Authority property will be used only for those purposes authorized in the contract and that any required approvals will be obtained, and (2) to provide a basis for determining and allocating rental charges.

§ 8-408.21 Property in Possession of Subcontractors

The contractor shall require any of its subcontractors possessing or controlling Authority property to care for and maintain that property adequately and ensure that it is used only as authorized by the contract. The contractor's property control system shall include procedures necessary for accomplishing this responsibility.

§ 8-408.22 Audit of Property Control System

The Authority may audit the contractor's property control system as frequently as conditions warrant. These audits may take place at any time during contract performance, upon contract completion or termination, or at any time thereafter during the period the contractor is required to retain such records. The contractor shall make all such records and related correspondence available to the auditors.

§ 8-409 Contractor Inventory Procedures

§ 8-409.01 Scope of Section

This section establishes policies and procedures for the reporting, redistribution, and disposal of Authority property in excess of contract requirements and of property that forms the basis of a claim against the Authority (e.g., termination inventory under fixed-price contracts). This section does not apply to the disposal of real property or to property for which the Authority has a lien or title solely as a result of advance or progress payments that have been liquidated.

§ 8-409.02 Definitions

(1) "Common item," as used in this section, means material that is common to the applicable Authority contract and the contractor's other work.

(2) "Contractor inventory," as used in this section, means:

(a) any property acquired by and in the possession of a contractor or subcontractor under a contract for which title is vested in the Authority and which exceeds the amounts needed to complete full performance under the entire contract;

(b) any property that the Authority is obligated or has the option to take over under any type of contract as a result either of any changes in the specifications or plans there under or of the termination of the contract (or subcontract thereunder), before completion of the work, for the convenience or at the option of the Authority; and

(c) Authority-furnished property that exceeds the amounts needed to

¹⁷ FAR 45.600.

complete full performance under the entire contract.

(3) "Personal property," as used in this section, means property of any kind or interest in it except real property.

(4) "Plant clearance," as used in this section, means all actions relating to the screening, redistribution, and disposal of contractor inventory from a contractor's plant or work site. The term "contractor's plant" includes a contractor- operated Authority facility.

(5) "Plant clearance period," as used in this section, means the period beginning on the effective date of contract completion or termination and ending 90 days (or such longer period as may be agreed to) after receipt by the Contracting Officer of acceptable inventory schedules for each property classification. The final phase of the plant clearance period means that period after receipt of acceptable inventory schedules.

(6) "Reportable property," as used in this section, means contractor inventory that must be reported for screening in accordance with this section before disposition as surplus.

(7) "Serviceable or usable property," as used in this section, means property that has a reasonable prospect of use or sale either in its existing form or after minor repairs or alterations.

(8) "Surplus property," as used in this section, means contractor inventory not required by the Authority.

(9) "Termination inventory," as used in this section, means any property purchased, supplied, manufactured, furnished, or otherwise acquired for the performance of a contract subsequently terminated and properly allocable to the terminated portion of the contract. It includes Authority-furnished property. It does not include any facilities, material, special test equipment, or special tooling that are subject to a separate contract or to a special contract requirement governing their use or disposition.

§ 8-409.03 Disposal Methods

The Authority may exercise its rights to require delivery of any contractor inventory. If the Authority does not exercise these rights, the contractor inventory shall be disposed of by one of the following methods in the priority indicated:

(1) purchase or retention at cost by the contractor or subcontractor of contractor-acquired property;

(2) return of contractor-acquired property to suppliers;

(3) use within the Authority through the use of prescribed screening procedures;

(4) sale (including purchase or retention at less than cost by the prime contractor or subcontractor); or

(5) abandonment or destruction.

§ 8-409.04 Restrictions on Purchase or Retention of Contractor Inventory

A contractor's or subcontractor's authority to purchase, retain, or dispose of contractor inventory is subject to any contract provisions and to applicable Authority restrictions on the disposition of property that is dangerous to public health, safety, or welfare.

§ 8-410 Contractor-Acquired Property

§ 8-410.01 Purchase or Retention at Cost

(1) The Contracting Officer shall encourage contractors to purchase or retain contractor-acquired property at cost. However, the contractor shall not include any part of the cost of property purchased or retained in any claim for reimbursement against the Authority. Under cost-reimbursement contracts, appropriate adjustments shall be made for previously reimbursed costs. When the property is for use on a continuing Authority contract or commercial operation, handling and transportation charges may be considered an allowable cost (included in the contractor's settlement proposal as "other costs" in the case of a termination); provided, that the charges are reasonable.

(2) If a contractor purchases or retains contractor inventory for use on a continuing Authority contract that is subsequently terminated, the property shall be allocated to the continuing contract, even though its purchase would otherwise constitute undue anticipation of production schedules. If, as a result of the purchase or retention of property from a terminated contract for use on other Authority contracts, the contractor terminates subcontracts under the other Authority contracts, reasonable termination charges of the subcontracts may be included as an allocable cost under the contract that generated the excess property.

§ 8-410.02 Return to Suppliers

The Contracting Officer shall encourage contractors to return allocable quantities of contractor-acquired property to suppliers for full credit less either the supplier's normal restocking charge or 25 percent of the cost, whichever is less. Contractors may be reimbursed for reasonable transportation, handling, and restocking charges but not for the cost of the returned property. Under cost-reimbursement contracts, appropriate adjustments shall be made for costs previously reimbursed.

§ 8-410.03 Cost-Reimbursement Contracts

Under cost-reimbursement contracts, property purchased or retained by the contractor or returned to suppliers shall not be reported on inventory schedules. The Contracting Officer shall periodically review such transactions to protect the Authority's interests.

§ 8-411 Inventory Schedules

§ 8-411.01 Submission

(1) When property no longer is needed to perform the contract, the contractor shall prepare inventory schedules in accordance with the contract and instructions from the Contracting Officer and shall promptly submit the schedules to the Contracting Officer.

(2) The certificate on the inventory schedule (which tenders title to the property) must be executed when contractor inventory is reported. The prime contractor shall execute this certificate, except that for subcontractor termination inventory the

subcontractor shall execute the certificate.

§ 8-411.02 Common Items

The contractor's inventory schedules shall not include any items that the contractor reasonably can use on other work without financial loss. However, the schedules shall include common items specified by the Contracting Officer for delivery to the Authority or which are Authority-furnished property.

§ 8-411.03 Acceptance

(1) Within 15 days after receipt of inventory schedules, the Contracting Officer shall review them, determine their acceptability, and request the contractor to correct any inadequate listings. Inventory schedules should not be rejected if the information is adequate for disposal purposes, even if complete cost data on work-in-process are not available. Rejection shall be limited, when possible, to specific items and shall not necessarily render the entire schedule unacceptable.

(2) The Contracting Officer, with the assistance of other Authority personnel as necessary, shall verify that (a) the inventory is present at the location indicated, (b) the inventory is allocable to the contract, (c) the quantity and condition are correctly stated, and (d) the contractor has endeavored to divert items to other work or to return contractor-acquired property to the supplier for appropriate credit. The Contracting Officer shall require the contractor promptly to correct any discrepancies on the inventory schedule or resubmit the schedule as necessary.

§ 8-411.04 Withdrawals

If, before final disposition, the contractor becomes aware that any items of contractor-acquired property listed in the inventory schedules are usable on other work without financial loss, the contractor shall purchase the items or retain them at cost and amend the inventory schedules and claim accordingly. Upon notifying the Contracting Officer, the contractor may purchase or retain at cost any other items of property included in the inventory schedules. Withdrawal of any Authority-furnished property is subject to the written approval of the Contracting Officer.

§ 8-412 Scrap

(1) The Contracting Officer should, in coordination with the contractor, ensure that contractor scrap disposal processes, methods, and practices allow for effective, efficient, and proper disposition, are properly documented in the contractor's property management procedures.¹⁸

(2) The Contracting Officer should determine the extent to which separate disposal processing or physical segregation for different scrap types is or may be required. Such scrap may require physical segregation, unique disposal processing, or separate plant clearance reporting. For example, the scope of work may create scrap:¹⁹

- (a) consisting of sensitive items;
- (b) containing hazardous materials or wastes;

¹⁸ FAR, Subpart 45.606.

¹⁹ FAR, Subpart 45.606.

- (c) contaminated with hazardous materials or wasted;
- (d) that is classified or otherwise controlled;
- (e) containing precious or strategic metals; or
- (f) that is dangerous to public health or safety.

(3) The contractor need not itemize scrap on inventory schedules if (a) the material is physically segregated in the contractor's plant and (b) the contractor submits a statement describing the material, estimating its cost, and providing other information necessary for the Contracting Officer to verify whether the property is scrap. The contractor shall sort the scrap to the extent economically feasible to assure the highest sale proceeds.

(4) The Contracting Officer shall review the schedules of property reported as scrap and, if necessary, physically inspect the property involved. If the Contracting Officer determines that any of the property is serviceable, usable, or salvageable, the contractor shall resubmit it on appropriate inventory schedules.

(5) Absent contract terms and conditions to the contrary, the Authority may abandon parts removed and replaced from property as a result of normal maintenance actions or removed from property as a result of the repair, maintenance, overhaul, or modification process.²⁰

§ 8-413 Screening of Contractor Inventory

Serviceable or usable property included in the contractor's inventory schedules that is not purchased or retained by the prime contractor or subcontractor or returned to suppliers shall be screened for use by the Authority before disposition.

§ 8-414 Destruction or Abandonment

(1) Surplus property may be destroyed or abandoned only after every effort has been made to dispose of it by other authorized methods. Before authorizing destruction or abandonment, the Contracting Officer shall determine in writing that --

- (a) the property has no commercial value and no value to the Authority;
- (b) the estimated cost of care and handling is greater than the probable sale price; or
- (c) because of its nature, the property constitutes a danger to public health, safety, or welfare.

(2) Unless permitted by the contract, no contractor inventory shall be abandoned on the contractor's premises without the contractor's written consent.

§ 8-415 Removal and Storage

²⁰ FAR, Subpart 45.606.

§ 8-415.01 General

Contractor inventory shall be removed from the contractor's premises as soon as possible to preclude storage expenses.

§ 8-415.02 Special Storage at Contractor's Risk

When the contractor finds it necessary to remove property from its premises, the contractor may, with the concurrence of the Contracting Officer, store property in a warehouse or other storage location on or off the contractor's premises. Storage shall in no way modify the contractor's responsibility for the property. The expense of storage, including any cost incident to the transportation to and from the storage area, normally shall be borne by the contractor and shall not be charged directly or indirectly to Authority contracts unless the Contracting Officer determines that the storage is for the convenience of the Authority.

§ 8-415.03 Special Storage at the Authority's Expense

Contractor inventory may be stored at the Authority's expense only when the Contracting Officer determines that it should be retained in storage for anticipated use. When the Contracting Officer recommends that the Authority execute a storage agreement with the contractor, the request shall be accompanied with adequate data to justify the agreement (e.g., property to be stored, storage period, and cost to the Authority). If the contractor will not agree to storage on its premises, the Contracting Officer shall submit adequate information to permit a decision by the Authority for storage in an Authority or commercial facility (e.g., storage space required; necessary packing, crating, and shipping services; and information as to available Authority or commercial storage facilities in the local area).

§ 8-416 Property Disposal Determinations

Written determinations supporting abandonment, destruction, or other appropriate disposition shall be made by the Contracting Officer.

§ 8-417 Subcontractor Inventory

(1) The disposal policies and procedures in this section are applicable to contractor inventory in the possession of subcontractors, except inventory under terminated subcontracts for which the Contracting Officer has authorized the contractor to conclude settlements.

(2) Subcontractors in all tiers shall prepare inventory schedules in accordance with the requirements of this section. Forms prescribed for use by prime contractors may be used by subcontractors, but their use is not required if substantially equivalent information is provided. Subcontractor inventory and any disposal recommendations (including scrap recommendations) shall be reported through the next-higher-tier subcontractor to the contractor, who is responsible for reporting property to the Contracting Officer. The prime contractor and each subcontractor are responsible for review and approval of inventory schedules submitted by their respective next-lower-tier subcontractors.

(3) In the interest of expediting disposition of termination inventory, the Contracting Officer may authorize subcontractors to submit their next-lower-tier subcontractors' inventory schedules directly to the prime contractor for transmittal to the Contracting Officer for review and disposition instructions. Any rights which the prime contractor has or acquires in the inventory of first-tier or lower-tier subcontractors shall, to

the extent directed by the Contracting Officer, be exercised for the benefit of the Authority in accordance with the provisions of the prime contract.

§ 8-418 Accounting for Contractor Inventory

Following disposition of all contractor inventory, and after due application of proceeds, the Contracting Officer shall prepare an accounting for all property reported by the contractor and its disposition. The report shall indicate any inventory lost, damaged, destroyed, or otherwise unaccounted for, as well as any changes in quantity or value of inventory made by the contractor after submission of the initial schedules.

Section 8-500 - Quality Assurance

§ 8-501 Scope of Section

This section prescribes policies and procedures to ensure that supplies and services acquired under Authority contracts conform to the contract's quality and quantity requirements. Included are inspection, acceptance, warranty, and other measures associated with quality requirements.

§ 8-502 Definitions

(1) "Acceptance," as used in this section, means the act of an authorized representative of the Authority by which the Authority, for itself or as agent of another, assumes ownership of existing identified supplies tendered or approves specific services rendered as partial or complete performance of the contract.

(2) "Contract quality requirements" means the technical requirements in the contract relating to the quality of the product or service and those contract clauses prescribing inspection (and other quality controls incumbent on the contractor) to ensure that the product or service conforms to the contractual requirements.

(3) "Authority contract quality assurance" means the various functions, including inspection, performed by the Authority to determine whether a contractor has fulfilled the contract obligations pertaining to quality and quantity.

(4) "Inspection" means examining and testing supplies or services (including, when appropriate, raw materials, components, and intermediate assemblies) to determine whether they conform to contract requirements.

(5) "Off-the-shelf item" means an item produced and placed in stock by a contractor, or stocked by a distributor, before receiving orders or contracts for its sale. The item may be commercial or produced to military or Federal specifications or description.²¹

(6) "Testing" means that element of inspection that determines the properties or elements, including functional operation of supplies or their components, by the application of established objective principles and procedures.

§ 8-503 Policy

The Authority shall ensure that --

²¹ FAR, Subpart 46.101.

- (1) contracts include inspection and other quality requirements, including warranty clauses when appropriate, that are determined necessary to protect the Authority's interest;
- (2) supplies or services (including commercial services)²² tendered by contractors meet contract requirements;
- (3) Authority contract quality assurance is conducted before acceptance (except as otherwise provided in this section) by or under the direction of Authority personnel;
- (4) no contract precludes the Authority from performing inspection;
- (5) contracts for commercial products rely on a contractor's existing quality assurance system as a substitute for compliance with the Authority's inspection and testing before tender for acceptance unless customary market practices for the commercial product being acquired permit in-process inspection (per 41 U.S.C. 3307). Any in-process inspection by the Authority shall be conducted in a manner consistent with commercial practice;²³
- (6) nonconforming supplies or services are rejected, except as otherwise provided in these regulations; and
- (7) the quality assurance and acceptance services of other agencies are used when this will be effective, economical, or otherwise in the Authority's interest.

§ 8-504 Contracting Officer Responsibilities

Contracting Officers²⁴ are responsible for --

- (1) obtaining specifications for inspection, testing, and other contract quality requirements essential to ensure the integrity of the supplies or services;
 - (2) including in solicitations and contracts the appropriate requirements for the contractor's control of quality for the supplies or services to be acquired;
 - (3) verifying that the contractor fulfills the contract quality requirements; and
 - (4) ensuring that nonconformances are identified, and establishing the significance of a nonconformance when considering the acceptability of supplies or services which do not meet contract requirements.²⁵
- (5) developing and applying efficient procedures for performing Authority contract quality assurance actions under the contract in accordance with the written direction of the

²² FAR, Subpart 46.102(b).

²³ FAR, Subpart 46.102(f).

²⁴ FAR, Subpart 46.103 (titled "Contracting office responsibilities).

²⁵ FAR, Subpart 46.103(e).

contracting office;²⁶

(6) performing all actions necessary to verify whether the supplies or services conform to contract quality requirements;

(7) maintaining, as part of the performance records of the contract, suitable records reflecting --

a. the nature of Authority contract quality assurance actions, including, when appropriate, the number of observations made and the number and type of defects; and

b. decisions regarding the acceptability of the products, the processes, and the requirements, as well as action to correct defects;

(8) implement any specific written instructions from the contracting office;²⁷

(9) report to the contracting office²⁸ any defects observed in design or technical requirements, including contract quality requirements; and

(10) recommend any changes necessary to the contract, specifications, instructions, or other requirements that will provide more effective operations or eliminate unnecessary costs.

§ 8-505 Contractor Responsibilities

(1) The contractor is responsible for carrying out its obligations under the contact by --

(a) controlling the quality of supplies or services;

(b) tendering to the Authority for acceptance only those supplies or services that conform to contract requirements;

(c) ensuring that vendors or suppliers of raw materials, parts, components, subassemblies, etc., have an acceptance quality control system; and

(d) maintaining substantiating evidence, when required by the contract, that the supplies or services conform to contract quality requirements, and furnishing such information to the Authority as required.

(2) The contractor may be required to provide and maintain an inspection system or program for the control of quality that is acceptable to the Authority.

(3) The control of quality by the contractor may relate to, but is not limited to

--

(a) manufacturing processes, to ensure that the product is produced to, and meets, the contract's technical requirements;

²⁶ FAR, Subpart 46.104(a).

²⁷ FAR, Subpart 46.104(d).

²⁸ FAR, Subpart 46.104(e).

- (b) drawings, specifications, and engineering changes, to ensure that manufacturing methods and operations meet the contract's technical requirements;
 - (c) testing and examination, to ensure that practices and equipment provide the means for optimum evaluation of the characteristics subject to inspection;
 - (d) reliability and maintainability assessment (life, endurance, and continued readiness);
 - (e) fabrication and delivery of products, to ensure that only conforming products are tendered to the Authority;
 - (f) technical documentation, including drawings, specifications, handbooks, manuals, and other technical publications;
 - (g) preservation, packaging, packing, and marking; and
 - (h) procedures and processes for services to ensure that services meet contract performance requirements.
- (4) The contractor is responsible for performing all inspections and tests required by the contract except those specifically reserved for performance by the Authority.

§ 8-506 Contract Quality Requirements

- (1) The Contracting Officer shall include the appropriate quality requirements in the solicitation and contract. The type and extent of contract quality requirements needed depends on the particular acquisition and may range from inspection at time of acceptance to a requirement for the contractor's implementation of a comprehensive program for controlling quality.
- (2) When feasible, solicitations and contracts may provide for alternative, but substantially equivalent, inspection methods to obtain wide competition and low cost. The Contracting Officer also may authorize contractor-recommended alternatives when in the Authority's interest.
- (3) Although contracts generally make contractors responsible for performing inspection before tendering supplies to the Authority, there are circumstances in which contracts will provide for specialized inspections to be performed solely by the Authority. Among circumstances of this kind are --
- (a) tests that require use of specialized test equipment or facilities not ordinarily available in suppliers' plants or commercial laboratories (e.g., unusual environmental tests and simulated service tests); and
 - (b) contracts that require Authority testing for first article approval.
- (4) Except as otherwise specified by the contract, required contractor testing may be performed in the contractor's or subcontractor's laboratory or testing facility, or in any other laboratory or testing facility acceptable to the Authority.

§ 8-506.01 Types of Contract Quality Requirements

Contract quality requirements fall into the three general categories described in §8-506.02 through §8-506.04, depending on the extent of quality assurance needed by the Authority for the acquisition involved. To the extent the Authority enters contracts for commercial products and commercial services, see the fourth category of contract quality requirements in Federal Acquisition Regulation Subpart 46.202-1.²⁹

§ 8-506.02 Authority Reliance on Inspection by Contractor

(1) Except as specified in (2), below, the Authority shall rely on the contractor to accomplish all inspection and testing needed to ensure that supplies or services acquired at or below the simplified acquisition threshold conform to contract quality requirements before they are tendered to the Authority.

(2) The Authority shall not rely on inspection by the contractor if the Contracting Officer determines that the Authority has a need to test the supplies or services in advance of their tender for acceptance or to pass upon the adequacy of the contractor's internal work processes. In making the determination, the Contracting Officer shall consider --

- (a) the nature of the supplies and services being purchased and their intended use;
- (b) the potential losses in the event of defects;
- (c) the likelihood of uncontested replacement or correction of defective work; and
- (d) the cost of detailed Authority inspection.

§ 8-506.03 Standard Inspection Requirements

(1) Standard inspection requirements are contained in the clauses prescribed in Chapter 6 of these regulations and in the product and service specifications that are included in solicitations and contracts.

(2) The clauses referred to in (1) above --

- (a) require the contractor to provide and maintain an inspection system that is acceptable to the Authority;
- (b) give the Authority the right to make inspections and tests while work is in process; and
- (c) require the contractor to keep complete, and make available to the

²⁹ FAR, Subpart 46.201-1 (describing the fourth category of quality requirements for contracts for commercial products and commercial services).

³⁰ FAR, Subpart 46.202-2 (titled "Government reliance on inspection by contractor").

Authority, records of its inspection work.

§ 8-506.04 Higher-Level Contract Quality Requirements

(1) The Authority shall establish procedures for determining when higher-level contract quality requirements are necessary, for determining the risk (both the likelihood and the impact) of nonconformance, and for advising the Contracting Officer about which higher-level standards should be applied and included in the solicitation and contract.³¹

(2) Requiring compliance with higher-level contract quality standards is necessary in solicitations and contracts for complex and critical items or when the technical requirements of the contract require --³²

(a) control of such things as design, work operations, in-process controls, testing, and inspection;³³ or

(b) attention to such factors as organization, planning, work instructions, documentation control, and advanced metrology.³⁴

(3) If it is in the Authority's interest to require that higher-level contract quality requirements be maintained, the contract shall require the contractor to comply with an Authority-specified inspection system, quality control system, or quality program. The Contracting Officer shall consult technical personnel before including one of these specifications in a contract.

(4) Examples of higher-level quality standards are discussed in the Federal Acquisition Regulation, Subpart 46.202-4(b).

§ 8-506.05 Criteria for Use of Contract Quality Requirements

The extent of contract quality requirements, including contractor inspection, required under a contract usually shall be based upon the classification of the contract item (supply or service) as determined by its technical description, complexity, and the criticality of its application.

(1) Contract items may be technically classified as --

(a) commercial (described in commercial catalogs, drawings, or industrial standards);

(b) Authority-specified (described in Authority drawings and specifications); or

(c) off-the-shelf.

(2) Complex items have quality characteristics, not wholly visible in the end item, for which contractual conformance must be established progressively through precise measurements, tests, and controls applied during purchasing, manufacturing, performance, assembly, and functional operation either as an individual item or in conjunction with other

³¹ FAR, Subpart 46.202-4(a).

³² FAR, Subpart 46.202-4(a).

³³ FAR, Subpart 46.202-4(a)(1).

³⁴ FAR, Subpart 46.202-4(a)(2).

items. Noncomplex items have quality characteristics for which simple measurement and test of the end item are sufficient to determine conformance to contract requirements.

(3) A critical application of an item is one in which the failure of the item could injure personnel or jeopardize a vital program of the Authority. A critical item may be either peculiar (meaning it has only one application) or common (meaning it has multiple applications). A noncritical application is any other application. Noncritical items also may be either peculiar or common.

§ 8-507 Authority Contract Quality Assurance

(1) Authority contract quality assurance shall be performed at such times (including any stage of manufacture or performance of services) and places (including subcontractors' plants) as may be necessary to determine that the supplies or services conform to contract requirements. Quality assurance surveillance plans should be prepared in conjunction with the preparation of the statement of work. The plans should specify –

- (a) all work requiring surveillance; and
- (b) the method of surveillance.³⁵

(2) Each contract shall designate the place or places where the Authority reserves the right to perform quality assurance.³⁶

(3) If the contract provides for performance of Authority quality assurance at source, the place or places of performance may not be changed without the authorization of the Contracting Officer.³⁷

(4) If a contract provides for delivery and acceptance at destination and the Authority inspects the supplies at a place other than destination, the supplies shall not ordinarily be reinspected at destination but should be examined for quantity, damage in transit, and possible substitution or fraud.

(5) Authority inspection shall be performed by or under the direction or supervision of Authority personnel.³⁸

(6) Authority inspection shall be documented on an inspection or receiving report form or commercial shipping document/packing list, under Authority procedures.³⁹

(7) The Authority may prescribe the use of inspection approval or disapproval stamps to identify and control supplies and material that have been inspected for conformance with contract quality requirements.

§ 8-507.01 Quality Assurance at Source

The Authority shall perform contract quality assurance, including inspection, at source if --

- (1) performance at any other place would require uneconomical

³⁵ FAR, Subpart 46.401(a).

³⁶ FAR, Subpart 46.401(b).

³⁷ FAR, Subpart 46.401(c).

³⁸ FAR, Subpart 46.401(e).

³⁹ FAR, Subpart 46.401(f).

disassembly or destructive testing;

- (2) considerable loss would result from the manufacture and shipment of unacceptable supplies or from the delay in making necessary corrections;
- (3) special required instruments, gauges, or facilities are available only at source;
- (4) performance at any other place would destroy or require the replacement of costly special packing and packaging;
- (5) a higher-level contractor quality requirement is included in the contract;
- (6) Authority inspection during contract performance is essential; or
- (7) it is determined for other reasons to be in the Authority's interest.

§ 8-507.02 Quality Assurance at Destination

Authority contract quality assurance that can be performed at destination normally is limited to inspection of the supplies or services. Inspection shall be performed at destination under the following circumstances --

- (1) supplies are purchased off-the-shelf and require no technical inspection;
- (2) necessary testing equipment is located only at destination;
- (3)
- (4) the contract is for services performed at destination; or
- (5) it is determined for other reasons to be in the Authority's interest.

§ 8-507.03 Quality Assurance of Small Purchases (See DPR §3-204.1)

(1) In determining the type and extent of Authority contract quality assurance to be required for small purchases, the Contracting Officer shall consider the criticality of application of the supplies or services, the amount of possible losses, and the likelihood of uncontested replacement of defective work.

(2) When Section 8-506.02(2) of these regulations apply (“Authority Reliance on Inspection by Contractor”), the following policies shall govern:⁴⁰

- (a) Unless a special situation exists, the Authority shall inspect small purchases at destination and only for type and kind; quantity; damage; operability (if readily determinable); and preservation, packaging, packing, and marking, if applicable.

⁴⁰ FAR, Subpart 46.404(b).

(b) Special situations may require more detailed quality assurance and the use of a standard inspection or higher-level contract quality requirement. These situations include contracts for items having critical applications. Detailed Authority inspection may be limited to those characteristics that are special or likely to cause harm to personnel or property.

(c) If repetitive purchases of the same item are made from the same manufacturer with a history of defect-free work, Authority inspection may be reduced to a periodic check of occasional purchases.

§ 8-508.04 Subcontracts

(1) Authority contract quality assurance on subcontracted supplies or services shall be performed only when required in the Authority's interest. The primary purpose is to assist the Contracting Officer in determining the conformance of subcontracted supplies or services with contract requirements or to satisfy one or more of the factors included in (2), below. It does not relieve the prime contractor of any responsibilities under the contract. When appropriate, the prime contractor shall be requested to arrange for timely Authority access to the subcontractor facility .

(2) The Authority shall perform quality assurance at the subcontract level when --

(a) the item is to be shipped from the subcontractor's plant to the using activity and inspection at source is required;

(b) the conditions for quality assurance at source are applicable;

(c) the contract specifies that certain quality assurance functions, which can be performed only at the subcontractor's plant, are to be performed by the Authority; or

(d) it is otherwise required by the contract or determined to be in the Authority's interest.

(3) Supplies or services for which certificates, records, reports, or similar evidence of quality are available at the prime contractor's plant shall not be inspected at the subcontractor's plant, except occasionally to verify this evidence or when required under (2), above.

(4) All oral and written statements and contract terms and conditions relating to Authority quality assurance actions at the subcontract level shall be worded so as not to --

(a) affect the contractual relationship between the prime contractor and the Authority, or between the prime contractor and the subcontractor;

(b) establish a contractual relationship between the Authority and the subcontractor; or

(c) constitute a waiver of the Authority's right to accept or reject the supplies or services.

§ 8-507.05 Nonconforming Supplies or Services

(1) The Contracting Officer should reject supplies or services not conforming in all respects to contract requirements. In those instances where deviation from this policy is found to be in the Authority's interest, such supplies or services may be accepted only as authorized in this section.

(2) The Contracting Officer ordinarily shall give the contractor⁴¹ an opportunity to correct or replace nonconforming supplies or services when this can be accomplished within the required delivery schedule. Unless the contract specifies otherwise (as may be the case in some cost-reimbursement contracts), correction or replacement shall be without additional cost to the Authority. The Inspection Clause for fixed price contracts (6-202.05) reserves to the Authority the right to charge the contractor the cost of Authority reinspection and retests because of prior rejection.

(3) In circumstances not covered by (2), above, the Contracting Officer ordinarily shall reject supplies or services when the nonconformance is critical or major or the supplies or services are otherwise incomplete⁴²—such as when they adversely affect safety, health, reliability, durability, performance, interchangeability of parts or assemblies, weight or appearance (where a consideration), or any other basic objective of the specification. However, there may be circumstances (e.g., reasons of economy or urgency) when the Contracting Officer determines acceptance or conditional acceptance of such supplies or services is in the best interest of the Authority.⁴³ The Contracting Officer shall make this determination based upon --

(a) advice of the technical expert that the item⁴⁴ is safe to use and will perform its intended purpose;

(b) information regarding the nature and extent of the nonconformance or otherwise incomplete supplies or services;

(c) a request from the contractor for acceptance of the nonconforming or otherwise incomplete⁴⁵ supplies or services (if feasible);

(d) a recommendation for acceptance, conditional acceptance,⁴⁶ or rejection, with supporting rationale; and

(e) the contract adjustment considered appropriate, including any adjustment offered by the contractor.

(4) The Contractor or other Authority personnel directly involved, must furnish this data to the Contracting Officer in writing, except that in urgent cases it may be furnished orally and later confirmed in writing. Before making a decision to accept, the Contracting Officer must obtain the concurrence of the activity responsible for the technical requirements of the contract and, where health factors are involved, of the responsible health official of the Authority concerned.⁴⁷

(5) If the nonconformance is minor and not critical, the Contracting Officer

⁴¹ FAR, Subpart 46.407(a).

⁴² FAR, Subpart 46.407(c).

⁴³ FAR, Subpart 46.407(c).

⁴⁴ FAR, Subpart 46.407(c)(1)(i).

⁴⁵ FAR, Subpart 46.407(c)(1)(iii).

⁴⁶ FAR, Subpart 46.407(c)(1)(iv).

⁴⁷ FAR, Subpart 46.407(c)(2).

may make the determination to accept or reject, except where this authority is withheld by a state or federal entity with jurisdiction over the Authority.

(6) The Contracting Officer shall discourage the repeated tender of nonconforming supplies or services, including those with only minor nonconformances, by appropriate action, such as rejection and documenting the contractor's performance record.

(7) When supplies or services are accepted with critical or major nonconformance as authorized in (3) above, the Contracting Officer must modify the contract to provide for an equitable price reduction or other consideration. In the case of conditional acceptance, amounts withheld from payments generally should be at least sufficient to cover the estimated cost and related profit to correct deficiencies and complete unfinished work.⁴⁸

(a) The Contracting Officer must document in the contract file the basis of the amounts withheld.⁴⁹

(b) For services, the Contracting Officer can consider identifying the value of the individual work requirements or tasks (subdivisions) that may be subject to price or fee reduction. This value may be used to determine an equitable adjustment for nonconforming services. However, when supplies or services involving minor nonconformances are accepted, the contract may be modified if (a) it appears that the savings to the contractor in fabricating the nonconforming supplies or performing the nonconforming services will exceed the cost to the Authority of processing the modification, or (b) the Authority's interests otherwise require a contract modification.⁵⁰

(8) Notices of rejection shall include the reasons for rejection and be furnished promptly to the contractor. The notice shall be in writing if --

(a) the supplies or services have been rejected at a place other than the contractor's plant;

(b) the contractor persists in offering nonconforming supplies or services for acceptance; or

(c) delivery or performance was late without excusable cause.

(9) if applicable, comply with Chapter 2272.002 of the Texas Government Code.⁵¹

§ 8-508 Acceptance

Acceptance constitutes acknowledgment that the supplies or services conform with applicable contract quality and quantity requirements, except as provided in this section and subject to the terms and conditions of the contract. Acceptance may take place before delivery, at the time of delivery, or after delivery, depending on the provisions of the terms and conditions of the contract. Supplies or services

⁴⁸ FAR, Subpart 46.407(f).

⁴⁹ FAR, Subpart 46.407(f).

⁵⁰ FAR, Subpart 46.407(f).

⁵¹ Tex. Gov't Code 2272.001-009 (West 2023) (requires opportunity to inspect and correct, including issuance of report, prior to bringing claims for construction defects).

ordinarily shall not be accepted before completion of Authority contract quality assurance actions (however, see Section 8-509.03 below).⁵² Acceptance ordinarily shall be evidenced by execution of an acceptance certificate on an inspection or receiving report form or commercial shipping document/packing list.

§ 8-508.01 Responsibility for Acceptance

Acceptance of supplies or services is the responsibility of the Contracting Officer.

§ 8-508.02 Place of Acceptance

Each contract shall specify the place of acceptance. Contracts that provide for Authority contract quality assurance at source ordinarily shall provide for acceptance at source. Contracts that provide for Authority contract quality assurance at destination ordinarily shall provide for acceptance at destination. Supplies accepted at a place other than destination shall not be reinspected at destination for acceptance purposes but should be examined at destination for quantity, damage in transit, and possible substitution or fraud.

§ 8-508.03 Certificate of Conformance

A certificate of conformance may be used in certain instances instead of source inspection (whether the contract calls for acceptance at source or destination) at the discretion of the Contracting Officer if the following conditions apply:

- (a) acceptance on the basis of a contractor's certificate of conformance is in the Authority's interest;
- (b) small losses would be incurred in the event of a defect; or
- (c) because of the contractor's reputation or past performance, it is likely that the supplies or services furnished will be acceptable and any defective work would be replaced, corrected, or repaired without contest. In no case shall the Authority's right to inspect supplies under the inspection provisions of the contract be prejudiced.

§ 8-508.04 Transfer of Title and Risk of Loss

(1) Title to supplies shall pass to the Authority upon formal acceptance, regardless of when or where the Authority takes physical possession, unless the contract specifically provides for earlier passage of title.

(2) Unless the contract specifically provides otherwise, risk of loss of or damage to supplies shall remain with the contractor until, and shall pass to the Authority upon --

- (a) delivery of the supplies to a carrier if transportation is f.o.b. origin;
- or
- (b) acceptance by the Authority or delivery of the supplies to the Authority at the destination specified in the contract, whichever is later, if

⁵² FAR, Subpart 46.501.

transportation is f.o.b. destination.

(3) Paragraph (b), above, shall not apply to supplies that so fail to conform to contract requirements as to give a right of rejection. The risk of loss of or damage to such nonconforming supplies remains with the contractor until cure or acceptance. After cure or acceptance, paragraph (b), above, shall apply.

(4) Under paragraph (b), above, the contractor shall not be liable for loss of or damage to supplies caused by the negligence of officers, agents, or employees of the Authority acting within the scope of their employment.

Section 8-600 - Warranties

§ 8-601 Definitions

"Correction," as used in this section, means the elimination of a defect. "Warranty," as used in this section, means a promise or affirmation given by a contractor to the Authority regarding the nature, usefulness, or condition of the supplies or performance of services furnished under the contract.⁵³

§ 8-602 General.

(1) The principal purposes of a warranty in an Authority contract are (a) to delineate the rights and obligations of the contractor and the Authority for warranty claims relating to⁵⁵ defective items and services and (b) to foster quality performance.

(2) Generally, a warranty should provide --

(a) a contractual right for the correction of defects notwithstanding any other requirement of the contract pertaining to acceptance of the supplies or services by the Authority;

(b) a stated period of time or use, or the occurrence of a specified event, after acceptance by the Authority to assert a contractual right for the correction of defects; and

(c) if applicable, comply with Chapter 2272.002 of the Texas Government Code⁵⁶

(3) The benefits to be derived from a warranty must be commensurate with the cost of the warranty to the Authority

§ 8-603 Criteria for Use of Warranties

The use of warranties is not mandatory. In determining whether a warranty is appropriate for a specific acquisition, the Contracting Officer shall consider the factors described in this section:

(1) Nature and Use of the Supplies or Services. This includes such factors as --

⁵³ FAR, Subpart 2.101.

⁵⁴ FAR, Subpart 46.702.

⁵⁵ Clarification.

⁵⁶ Tex. Govt. Code § 2272.001-009

⁵⁷ FAR, Subpart 46.703.

- (a) complexity and function;
 - (b) degree of development;
 - (c) state of the art;
 - (d) end use;
 - (e) difficulty in detecting defects before acceptance; and
 - (f) potential harm to the Authority if the item is defective.
- (2) Cost. Warranty costs arise from --
- (a) the contractor's charge for accepting the deferred liability created by the warranty; and
 - (b) Authority administration and enforcement of the warranty (see paragraph (3), below).
- (3) Administration and Enforcement. The Authority's ability to enforce the warranty is essential to the effectiveness of any warranty. There must be some assurance that an adequate administrative system for reporting defects exists or can be established. The adequacy of a reporting system may depend upon such factors as the --
- (a) nature and complexity of the item;
 - (b) location and proposed use of the item;
 - (c) storage time for the item;
 - (d) distance from the source of the item;
 - (e) difficulty in establishing existence of defects; and
 - (f) difficulty in tracing responsibility for defects.
- (4) Trade Practice. In many instances, an item is customarily warranted in the trade, and, as a result of that practice, the cost of an item to the Authority will be the same whether or not a warranty is included. In those instances, it would be in the Authority's interest to include such a warranty.
- (5) Reduced Requirements. The contractor's charge for assumption of added liability may be partially or completely offset by reducing the Authority's contract quality assurance requirements where the warranty provides adequate assurance of a satisfactory product.

§ 8-604 Limitations

- (1) Warranty clauses shall not limit the Authority's rights under an inspection clause in relation to latent defects, fraud, or gross mistakes that amount to fraud.

⁵⁸ FAR, Subpart 46.705.

(2) Except for warranty clauses in construction contracts, warranty clauses shall provide that the warranty applies notwithstanding inspection and acceptance or other clauses or terms of the contract.

§ 8-605 Warranty Terms and Conditions

(1) To facilitate the pricing and enforcement of warranties, the Contracting Officer shall ensure that warranties clearly state the --

⁵⁹ FAR, Subpart 46.706.

- (a) exact nature of the item and its components and characteristics that the contractor warrants;
- (b) extent of the contractor's warranty, including all of the contractor's obligations to the Authority for breach of warranty;
- (c) specific remedies available to the Authority; and
- (d) scope and duration of the warranty.

(2) The Contracting Officer shall consider the following guidelines when preparing warranty terms and conditions.

(a) Extent of Contractor Obligations.

(i) Generally, the contractor's obligations under warranties extend to all defects discovered during the warranty period but do not include damage caused by the Authority. When a warranty for the entire item is not advisable, a warranty may be required for a particular aspect of the item that may require special protection (e.g., installation, components, accessories, subassemblies, preservation, packaging, and packing, etc.).

(ii) If the Authority specifies the design of the end item and its measurements, tolerances, materials, tests, or inspection requirements, the contractor's obligations for correction of defects usually shall be limited to defects in material and workmanship or failure to conform to specifications. If the Authority does not specify the design, the warranty extends also to the usefulness of the design.

(iii) If express warranties are included in a contract (except contracts for commercial items), all implied warranties of merchantability and fitness for a particular purpose shall be negated by the use of specific language in the clause.

(b) Remedies.

(i) Normally, a warranty shall provide as a minimum, that the Authority may (A) obtain an equitable adjustment of the contract, or (B) direct the contractor to repair or replace the defective items at the contractor's expense.

(ii) If it is not practical to direct the contractor to make the repair or replacement, or, because of the nature of the item the repair or replacement does not afford an appropriate remedy to the

Authority, the warranty should provide alternate remedies, such as authorizing the Authority to --

(A) retain the defective item and reduce the contract price by an amount equitable under the circumstances; or

(B) arrange for the repair or replacement of the defective item, by the Authority or by another source, at the contractor's expense.

(iii) If it can be foreseen that it will not be practical to return an item to the contractor for repair, to remove it to an alternate source for repair, or to replace the defective item, the warranty should provide that the Authority may repair, or require the contractor to repair, the item in place at the contractor's expense. The contract shall provide that, in the circumstance where the Authority is to accomplish the repair, the contractor will furnish at the place of delivery the material or parts and the installation instructions required to successfully accomplish the repair.

(iv) Unless provided otherwise in the warranty, the contractor's obligation to repair or replace the defective item, or to agree to an equitable adjustment of the contract, shall include responsibility for the costs of furnishing all labor and material to

(A) reinspect items that the Authority reasonably expected to be defective, (B) accomplish the required repair or replacement of defective items, and (C) test, inspect, package, pack, and mark repaired or replaced items.

(v) If repair or replacement of defective items is required, the contractor generally shall be required by the warranty to bear the expense of transportation for returning the defective item from the place of delivery specified in the contract (irrespective of the f.o.b. point or the point of acceptance) to the contractor's plant and subsequent return. When defective items are returned to the contractor from other than the place of delivery specified in the contract, or when the Authority exercises alternate remedies, the contractor's liability for transportation charges incurred shall not exceed an amount equal to the cost of transportation by the usual commercial method of shipment between the place of delivery specified in the contract and the contractor's plant and subsequent return.

(c) Duration of the Warranty. The time period or duration of

the warranty must be clearly specified and shall be established after consideration of such factors as (i) the estimated useful life of the item, (ii) the nature of the item, including storage or shelf-life, and (iii) trade practice. The period specified shall not extend the contractor's liability for patent defects beyond a reasonable time after acceptance by the Authority.

(d) Notice. The warranty shall specify a reasonable time for furnishing notice to the contractor regarding the discovery of defects. This notice period (which shall apply to all defects discovered during the warranty period) shall be long enough to ensure that the Authority has adequate time to give notice to the contractor. The Contracting Officer shall consider the following factors when establishing the notice period:

(i) the time necessary for the Authority to discover the defects;

(ii) the time reasonably required for the Authority to take necessary administrative steps and make a timely report of discovery of the defects to the contractor; and

(iii) the time required to discover and report defective replacements.

(e) Markings. The packaging and preservation requirements of the contract shall require the contractor to stamp or mark the supplies delivered or otherwise furnish notice with the supplies of the existence of the warranty. The purpose of the markings or notice is to inform Authority personnel who store, stock, or use the supplies that the supplies are under warranty. Markings may be brief but should include (i) a brief statement that a warranty exists, (ii) the substance of the warranty, (iii) its duration, and (iv) whom to notify if the supplies are found to be defective. For commercial items, the contractor's trade practice in warranty marking is acceptable if sufficient information is presented for supply personnel and users to identify warranted supplies.

(f) Consistency. The Contracting Officer shall ensure that the Warranty Clause and any other warranty conditions in the contract (e.g., in the specifications or in the Inspection Clause) are consistent. To the extent practicable, all of the warranties to be contained in the contract should be expressed in the warranty clause.⁶⁰

§ 8-606 Warranties of Commercial Items

The Contracting Officer should take advantage of commercial warranties, including extended warranties, where appropriate and in the Authority's best interests, offered by the Contractor for the repair and replacement of commercial products and commercial services.⁶¹

§ 8-607 Contract Clauses

The clauses and alternates prescribed in the appropriate sections of Chapter 6 may be used in solicitations and contracts in which inclusion of warranty coverage is appropriate. However, because of the many situations that may influence the warranty terms and conditions appropriate to a particular

⁶⁰ FAR, Subpart 46.706.

⁶¹ FAR, Subpart 46.709.

acquisition, the Contracting Officer may vary the terms and conditions of the clauses and alternates to the extent necessary. The alternates prescribed in this section address the clauses; however, the conditions pertaining to each alternate must be considered if the terms and conditions are varied to meet a particular need.⁶²

Section 8-700 - Termination of Contracts

§ 8-701 Scope of Section

This section establishes policies and procedures relating to the complete or partial termination of contracts for the convenience of the Authority or for default. It prescribes contract clauses relating to termination and excusable delay and includes instructions for using termination and settlement forms.

§ 8-702 Definitions

- (1) "Continued portion of the contract," as used in this section, means the portion of a partially terminated contract that the contractor must continue to perform.
- (2) "Effective date of termination" means the date on which the notice of termination requires the contractor to stop performance under the contract. If the termination notice is received by the contractor subsequent to the date fixed for termination, then the effective date of termination means the date the notice is received.
- (3) "Other work," as used in this section, means any current or scheduled work of the contractor, whether Authority or commercial, other than work related to the terminated contract.
- (4) "Partial termination" means the termination of a part, but not all, of the work that has not been completed and accepted under a contract.

⁶² FAR, Subpart 46.710.

⁶³ FAR, Subpart 49.000.

⁶⁴ FAR, Subpart 49.001.

(5) "Settlement agreement," as used in this section, means a written agreement in the form of an amendment to a contract settling all or a severable portion of a settlement proposal.

(6) "Settlement proposal," as used in this section, means a proposal for effecting settlement of a contract terminated in whole or in part submitted by a contractor or subcontractor in the form, and supported by the data, required by this section.

(7) "Terminated portion of the contract" means the portion of a terminated contract that relates to work or end items not completed and accepted before the effective date of termination that the contractor is not to continue to perform. For construction contracts that have been completely terminated for convenience, it means the entire contract, notwithstanding the completion of, and payment for, individual items of work before termination.

(8) "Unsettled contract change" means any contract change or contract term for which a definitive modification is required but has not been executed.

§ 8-703 Applicability

(1) This section applies to contracts that provide for termination for the convenience of the Authority or for the default of the contractor.

(2) Contractors shall use this section, unless inappropriate, to settle subcontracts terminated as a result of modification of prime contracts. The Contracting Officer shall use this section as a guide in evaluating settlements of subcontracts terminated for the convenience of a contractor whenever the settlement will be the basis of a proposal for reimbursement from the Authority under a cost-reimbursement contract.

(3) The Contracting Officer may use this section in determining an equitable adjustment resulting from a modification under the Changes Clause of any contract, except cost-reimbursement contracts.

(4) When action to be taken or authority to be exercised under this section depends upon the "amount" of the settlement proposal, that amount shall be determined by deducting from the gross settlement proposed the amounts payable for completed items or work at the contract price and amounts for the settlement of subcontractor settlement proposals. Credits for retention or other disposal of termination inventory and amounts for advance or partial payments shall not be deducted.

§ 8-704 Termination Procedures and Settlements

This section deals with --

(1) the authority and responsibility of the Contracting Officer to terminate contracts in whole or in part for the convenience of the Authority or for default;

⁶⁵ FAR, Subpart 49.002.

- (2) duties of the contractor and the Contracting Officer after issuance of the notice of termination;
- (3) general procedures for the settlement of terminated contracts; and
- (4) settlement agreements.

§ 8-704.01 Authorities and Responsibilities

(1) The termination clauses or other contract clauses authorize the Contracting Officer to terminate contracts for convenience, or for default, and to enter into settlement agreements under this regulation.

(2) The Contracting Officer shall terminate contracts, whether for default or convenience, only when it is in the Authority's interest. The Contracting Officer shall effect a no-cost settlement instead of issuing a termination notice when (a) it is known that the contractor will accept one, (b) Authority property was not furnished, and (c) there are no outstanding payments, debts due the Authority, or other contractor obligations.

(3) When the price of the undelivered balance of the contract is less than \$5,000⁶⁷, the contract normally should not be terminated for convenience but should be permitted to run to completion.

(4) After the Contracting Officer issues a notice of termination, the Contracting Officer is responsible for negotiating any settlement with the contractor, including a no-cost settlement if appropriate. The Contracting Officer shall promptly schedule and complete audit reviews and negotiations.

§ 8-704.02 Notice of Termination

(1) The Contracting Officer shall terminate contracts for convenience or default only by a written notice to the contractor. The notice of termination may be expedited by means of electronic communication capable of providing confirmation of receipt by the contractor. When the notice is mailed, it shall be sent by certified mail, return receipt requested. When the Contracting Officer arranges for hand delivery of the notice, a written acknowledgement shall be obtained from the contractor. The notice shall state --

- (a) that the contract is being terminated for the convenience of the Authority (or for default) under the contract clause authorizing the termination;
- (b) the effective date of termination;
- (c) the extent of termination;
- (d) any special instructions; and
- (e) the steps the contractor should take to minimize the impact on personnel if the termination, together with all other outstanding

⁶⁶ FAR, Subpart 49.101.

⁶⁷ FAR, Subpart 49.101(c).

⁶⁸ FAR, Subpart 49.102.

terminations, will result in a significant reduction in the contractor's work force. If the termination notice is by telegram, include these "steps" in the confirming letter or modification.

(2) The Contracting Officer simultaneously shall send the termination notice to the contractor and a copy to any known assignee, guarantor, or surety of the contractor.

(3) The Contracting Officer may amend a termination notice to--

(a) correct nonsubstantive mistakes in the notice;

(b) add supplemental data or instructions; or

(c) rescind the notice if it is determined that items terminated had been completed or shipped before the contractor's receipt of the notice.

(4) Upon written consent of the contractor, the Contracting Officer may reinstate the terminated portion of a contract in whole or in part by amending the notice of termination if it has been determined in writing that --

(a) circumstances clearly indicate a requirement for the terminated items; and

(b) reinstatement is advantageous to the Authority.

§ 8-704.03 Methods of Settlement

Settlement of terminated cost-reimbursement contracts and fixed-price contracts terminated for convenience may be effected by (1) negotiated agreement, (2) determination by the Contracting Officer, (3) costing-out under vouchers for cost-reimbursement contracts, or (4) a combination of these methods. When possible, the Contracting Officer should negotiate a fair and prompt settlement with the contractor. The Contracting Officer shall settle a settlement proposal by determination only when it cannot be settled by agreement.

⁶⁹ FAR, Subpart 49.103.

§ 8-704.04 Contracting Officer's Duties After Notice

(1) Consistent with the termination clause and the notice of termination, the Contracting Officer shall --

- (a) direct the action required of the prime contractor;
- (b) examine the settlement proposal of the prime contractor and, when appropriate, the settlement proposals of subcontractors;
- (c) promptly negotiate settlement with the contractor and enter into a settlement agreement; and
- (d) promptly settle the contractor's settlement proposal by determination for the elements that cannot be agreed on, if unable to negotiate a complete settlement.

(2) To expedite the settlement, the Contracting Officer may request specially qualified personnel to --

- (a) assist in dealings with the contractor;
- (b) advise on legal and contractual matters;
- (c) conduct accounting reviews and advise and assist on accounting matters; and
- (d) perform the following functions regarding termination inventory:
 - (i) verify its existence;
 - (ii) determine qualitative and quantitative allocability;
 - (iii) make recommendations concerning serviceability;
 - (iv) undertake necessary screening and redistribution;
- (v) assist the contractor in accomplishing other disposition.

and

(3) The Contracting Officer should promptly hold a conference with the contractor to develop a definite program for effecting the settlement. When appropriate in the judgment of the Contracting Officer, after consulting with the contractor, principal subcontractors should be requested to attend. Topics that

⁷⁰ FAR, Subpart 49.105.

should be discussed at the conference and documented include--

(a) general principles relating to the settlement of any settlement proposal, including obligations of the contractor under the termination clause of the contract;

(b) extent of the termination, point at which work is stopped, and status of any plans, drawings, and information that would have been delivered had the contract been completed;

(c) status of any continuing work;

(d) obligation of the contractor to terminate subcontracts and general principles to be followed in settling subcontractor settlement proposals;

(e) names of subcontractors involved and the dates termination notices were issued to them;

(f) contractor personnel handling review and settlement of subcontractor settlement proposals and the methods being used;

(g) arrangements for transfer of title and delivery to the Authority of any material required by the Authority;

(h) general principles and procedures to be followed in the protection, preservation, and disposition of the contractor's and subcontractors' termination inventories, including the preparation of termination inventory schedules;

(i) contractor accounting practices;

(j) form in which to submit settlement proposals;

(k) accounting review of settlement proposals;

(l) any requirement for interim financing in the nature of partial payments;

(m) tentative time schedule for negotiation of the settlement, including submission by the contractor and subcontractors of settlement proposals, termination inventory schedules, and accounting information schedules;

(n) actions taken by the contractor to minimize impact upon employees affected adversely by the termination; and

- (o) obligation of the contractor to furnish accurate, complete, and current cost or pricing data when the amount of a termination settlement agreement, or a partial termination settlement agreement plus the estimate to complete the continued portion of the contract exceeds the threshold in § 3- 502.

§ 8-704.05 Cleanup of Construction Site

In the case of terminated construction contracts, the Contracting Officer shall direct action to ensure the cleanup of the site, protection of serviceable materials, removal of hazards, and other action necessary to leave a safe and healthful site.

§ 8-704.06 Settlement of Subcontract Proposals

(1) A subcontractor has no contractual rights against the Authority upon the termination of a prime contract. A subcontractor may have rights against the prime contractor or intermediate subcontractor with whom it has contracted. Upon termination of a prime contract, the prime contractor and each subcontractor are responsible for the prompt settlement of the settlement proposals of their immediate subcontractors.⁷²

(2) Termination for convenience clauses provide that, after receipt of a termination notice, the prime contractor shall (unless directed otherwise by the Contracting Officer) terminate all subcontracts to the extent that they relate to the performance of prime work terminated. Therefore, prime contractors should include a termination clause in their subcontracts for their own protection.⁷³

(3) The failure of a prime contractor to include an appropriate termination clause in any subcontract, or to exercise the clause rights, shall not --

- (a) affect the Authority's right to require the termination of the subcontract; or

- (b) increase the obligation of the Authority beyond what it would have been if the subcontract had contained an appropriate clause.⁷⁴

§ 8-704.07 Settlement Agreements

(1) When a termination settlement has been negotiated and all required reviews have been obtained, the contractor and the Contracting Officer shall execute a settlement agreement. The settlement shall cover (a) any setoffs that the Authority has against the contractor that may be applied against the terminated contract and (b) all settlement proposals of subcontractors, except proposals that are specifically excepted from the agreement and reserved for separate settlement.⁷⁵

(2) The Contracting Officer shall, in the settlement agreement --

- (a) reserve any rights or demands of the parties that are excepted from the settlement;

⁷¹ FAR, Subpart 49.105-4.

⁷² FAR, Subpart 49.108-1.

⁷³ FAR, Subpart 49.108-2(a).

⁷⁴ FAR, Subpart 49.108-2(b).

⁷⁵ FAR, Subpart 49.109-1.

(b) ensure that the wording of the reservation does not create any rights for the parties beyond those in existence before execution of the settlement agreement;

(c) mark each applicable settlement agreement with "This settlement agreement contains a reservation" and retain the contract file until the reservation is removed;

(d) ensure that sufficient funds are retained to cover complete settlement of the reserved items; and

(e) at the appropriate time, prepare a separate settlement of reserved items and include it in a separate settlement agreement.⁷⁶

(3) Before execution of a settlement agreement, the Contracting Officer shall determine the accuracy of the Authority property account for the terminated contract. If there is property for which the contractor cannot account, the Contracting Officer shall reserve in the settlement agreement the rights of the Authority regarding that property or make an appropriate deduction from the amount otherwise due the contractor.⁷⁷

(4) The Contracting Officer shall execute a no-cost settlement agreement if (a) the contractor has not incurred costs for the terminated portion of the contract or the contractor is willing to waive the costs incurred, and (b) no amounts are due the Authority under the contract.⁷⁸

(5) The Contracting Officer should attempt to settle in one agreement all rights and liabilities of the parties under the contract except those arising from any continued portion of the contract. Generally, the Contracting Officer shall not attempt to make partial settlements covering particular items of the prime contractor's settlement proposal. However, when a Contracting Officer cannot promptly complete settlement under the terminated contract, a partial settlement may be entered into if (a) the issues on which agreement has been reached are clearly severable from other issues and (b) the partial settlement will not prejudice the Authority or the contractor's interests in disposing of the unsettled part of the settlement proposal.⁷⁹

(6) If the contractor and Contracting Officer cannot agree on a termination settlement, or if a settlement proposal is not submitted within the period required by the termination clause, the Contracting Officer shall issue a

determination of the amount due consistent with the termination clause, including any cost principles incorporated by reference. Before issuing a determination of the amount due the contractor, the Contracting Officer shall give the contractor at least 15 days notice by certified mail (return receipt requested) to submit written evidence, so as to reach the Contracting Officer on or before a stated date, substantiating the amount previously proposed. The contractor has the burden of establishing, by proof satisfactory to the Contracting Officer, the amount proposed. The contractor may submit vouchers, verified transcripts of books of account, affidavits, audit reports, and other documents as desired. The Contracting Officer may request the contractor to submit additional documents and data and may request appropriate accountings, investigations, and audits. The Contracting Officer may accept copies of

⁷⁶ FAR, Subpart 49.109-2.

⁷⁷ FAR, Subpart 49.109-3.

⁷⁸ FAR, Subpart 49.109-4.

⁷⁹ FAR, Subpart 49.109-5.

documents and records without requiring original documents, unless there is a question of authenticity. The Contracting Officer may hold any conferences considered appropriate to confer with the contractor, obtain additional information from Authority personnel or from independent experts, or to consult persons who have submitted affidavits or reports.⁸⁰

(7) After reviewing the information available, the Contracting Officer shall determine the amount due and shall transmit a copy of the determination to the contractor by certified mail (return receipt requested) or by any other method that provides evidence of receipt. The transmittal letter shall advise the contractor that the determination is a final decision from which the contractor may appeal under the Disputes Clause, except as shown in paragraph (9), below. The determination shall specify the amount due the contractor and will be supported by detailed schedules. The Contracting Officer shall explain each major item of disallowance. The Contracting Officer need not reconsider any other action relating to the terminated portion of the contract that was ratified or approved by the Contracting Officer or another contracting officer.⁸¹

(8) The Contracting Officer shall retain all written evidence and other data relied upon in making a determination, except that copies of original books of account need not be made. The Contracting Officer shall return books of account, together with other original papers and documents, to the contractor within a reasonable time.⁸²

(9) The contractor may appeal, under the Disputes Clause, any settlement by determination, except when the contractor has failed to submit the settlement proposal within the time provided in the contract and failed to request an extension of time. The pendency of an appeal shall not affect the right of the Contracting Officer to settle the settlement proposal or any part by negotiation with the contractor at any time before the appeal is decided.⁸³

(10) The Contracting Officer shall, at the conclusion of negotiations, prepare a memorandum containing the principal elements of the settlement for inclusion in the termination case file. If the settlement was negotiated on the basis of individual items, the Contracting Officer shall specify the factors considered for each item. If the settlement was negotiated on an overall lump-sum basis, the Contracting Officer need not evaluate each item or group of items individually but shall support the total amount of the recommended settlement in reasonable detail. The memorandum shall include explanations of matters involving differences and doubtful questions settled by agreement and the factors considered. The Contracting Officer should include any other matters that will assist in understanding the basis of the settlement.⁸⁴

§ 8-704.08 Partial Payments

(1) If the contract authorizes partial payments on settlement proposals before settlement, a prime contractor may request them at any time after submission of interim or final settlement proposals. The Authority will process applications for partial payments promptly. A subcontractor shall submit its application through the prime contractor which shall attach its own invoice and recommendations to the subcontractor's application. Partial payments to a subcontractor shall be made only through the prime contractor and only after

⁸⁰ FAR, Subpart 49.109-7(a)-(c).

⁸¹ FAR, Subpart 49.109-7(d).

⁸² FAR, Subpart 49.109-7(e).

⁸³ FAR, Subpart 49.109-7(f).

⁸⁴ FAR, Subpart 49.110 (b).

⁸⁵ FAR, Subpart 49.112-1.

the prime contractor has submitted its interim or final settlement proposal. Except for undelivered acceptable finished products, partial payments shall not be made for profit or fee claimed under the terminated portion of the contract. In exercising discretion on the extent of partial payments to be made, the Contracting Officer shall consider the diligence of the contractor in settling with subcontractors and in preparing its own settlement proposal.

(2) Before approving any partial payment, the Contracting Officer shall obtain any desired accounting, engineering, or other specialized reviews of the data submitted in support of the contractor's settlement proposal. If the reviews and the Contracting Officer's examination of the data indicate that the requested partial payment is proper, reasonable payments may be authorized in the discretion of the Contracting Officer up to --

(a) 100% of the contract price, adjusted for undelivered acceptable items completed before the termination date, or later completed with the approval of the Contracting Officer;

(b) 100% of the amount of any subcontract settlement paid by the prime contractor, if the settlement was approved or ratified by the Contracting Officer;

(c) 90% of the direct cost of termination inventory, including costs of raw materials, purchased parts, supplies, and direct labor;

(d) 90% of other allowable costs (including settlement expense and manufacturing and administrative indirect costs) allocable to the terminated portion of the contract and not included in subparagraphs (a), (b), and (c), above; and

(e) 100% of partial payments made to subcontractors under

this
section.

(3) When an assignment of claims has been made under the contract, the Contracting Officer shall not make partial payments other than to the assignee unless the parties to the assignment consent in writing.

(4) If any partial payment is made for completed end items or for costs of termination inventory, the Contracting Officer shall protect the Authority's interest. This shall be done by obtaining title to the completed end items or termination inventory, or by the creation of a lien in favor of the Authority paramount to all other liens, on the completed end items or termination inventory, or by other appropriate means.

(5) The Contracting Officer shall deduct from the gross amount of any partial payment otherwise payable under subparagraph (2), above:

(a) all unliquidated balances of progress and advance payments (including interest) made to the contractor and which are allocable to the terminated portion of the contract; and

(b) the amounts of all credits arising from the purchase, retention, or sale of property, the costs of which are included in the application for payment.

(6) The total amount of all partial payments shall not exceed the amount that will, in the opinion of the Contracting Officer, become due to the contractor because of the termination.

(7) If the total of partial payments exceeds the amount finally determined due on the settlement proposal, the contractor shall repay the excess to the Authority on demand, together with interest. However, interest will not be charged for any (a) excess payment attributable to a reduction in the settlement proposal because of retention or other disposition of termination inventory until 10 days after the date of the retention or disposition or a later date determined by the Contracting Officer, or (b) overpayment under cost-reimbursement research and development contracts without profit or fee if the overpayments are repaid to the Authority within 30 days after demand.

§ 8-704.09 Final Payment

(1) After execution of a settlement agreement, the contractor shall submit a voucher or invoice showing the amount agreed upon less any portion previously paid. The Contracting Officer shall attach a copy of the settlement agreement to the voucher or invoice and forward the documents for payment.

(2) If the settlement is by determination and --

(a) there is no appeal within the allowed time, the contractor shall submit a voucher or invoice showing the amount determined due, less any portion previously paid; or

(b) there is an appeal, the contractor shall submit a voucher or invoice showing the amount finally determined due on the appeal, less any portion previously paid. Pending de-termination of any appeal, the contractor may submit vouchers or invoices for charges that are not directly involved with the portion being appealed, without prejudice to the rights of either party on the appeal.

(3) In the case of construction contracts, before forwarding the final payment voucher, the Contracting Officer shall ascertain whether there are any outstanding labor violations. If so, the Contracting Officer shall determine the amount to be withheld from the final payment.

(4) The Authority shall not pay interest on the amount due under a settlement agreement or a settlement by determination. The Authority may, however, pay interest on a successful contractor appeal from a Contracting Officer's determination under the Disputes Clause.

§ 8-704.10 Cost Principles

The cost principles and procedures in Chapter 7 shall be used in asserting, negotiating, or determining costs relevant to termination settlements under contracts.⁸⁷

§ 8-705 Convenience Termination of Fixed-Price Contracts

⁸⁶ FAR, Subpart 49.112-2.

⁸⁷ FAR, Subpart 49.113(a).

⁸⁸ FAR, Subpart 49.201.

(1) A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. Fair compensation is a matter of judgment and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The use of business judgment, as distinguished from strict accounting principles, should be the basis for a settlement.

(2) The primary objective is to negotiate a settlement by agreement. The parties may agree upon a total amount to be paid the contractor without agreeing on or segregating the particular elements of costs or profit comprising this amount.

(3) Cost and accounting data may provide guides, but are not rigid measures, for ascertaining fair compensation. In appropriate cases, costs may be estimated, differences compromised, and doubtful questions settled by agreement. Other types of data, criteria, or standards may furnish equally reliable guides to fair compensation. The amount of record keeping, reporting, and accounting related to the settlement of terminated contracts should be kept to a minimum compatible with the reasonable protection of the public interest.

§ 8-705.01 Profit

(1) The Contracting Officer shall allow profit on preparations made and work done by the contractor for the terminated portion of the contract but not on the settlement expenses. Anticipatory profits and consequential damages shall not be allowed. Profit for the contractor's efforts in settling subcontractor proposals shall not be based on the dollar amount of the subcontract settlement agreements, but the contractor's efforts will be considered in determining the overall rate of profit allowed the contractor. Profit shall not be allowed the contractor for material or services that, as of the effective date of termination, have not been delivered by a subcontractor, regardless of the percentage of completion. The Contracting Officer may use any reasonable method to arrive at a fair profit.

(2) In negotiating or determining profit, factors to be considered include --

(a) extent and difficulty of the work done by the contractor as compared with the total work required by the contract (engineering estimates of the percentage of completion ordinarily should not be required but, if available, should be considered);

(b) engineering work, production scheduling, planning, technical study and supervision, and other necessary services;

(c) efficiency of the contractor, with particular regard to--

(i) attainment of quantity and quality production;

(ii) reduction of costs;

(iii) economic use of materials, facilities, and manpower; and

⁸⁹ FAR, Subpart 49.202.

- (iv) disposition of termination inventory;
- (d) amount and source of capital and extent of risk assumed;
- (e) inventive and developmental contributions and cooperation with the Authority and other contractors in supplying technical assistance;
- (f) character of the business, including the source and nature of materials and the complexity of manufacturing techniques;
- (g) the rate of profit that the contractor would have earned had the contract been completed;
- (h) the rate of profit both parties contemplated at the time the contract was negotiated; and
- (i) character and difficulty of subcontracting, including selection, placement, and management of subcontracts, and effort in negotiating settlements of terminated subcontracts.

(3) When computing profit on the terminated portion of a construction contract, the Contracting Officer shall --

- (a) comply with paragraphs (2)(a) and (b), above;
- (b) allow profit on the prime contractor's settlements with construction subcontractors for actual work in place at the jobsite; and
- (c) exclude profit on the prime contractor's settlements with construction subcontractors for materials on hand and for preparations made to complete the work.

§ 8-705.02 Adjustment for Loss

(a) In the negotiation or determination of any settlement, the Contracting Officer shall not allow profit if it appears that the contractor would have incurred a loss had the entire contract been completed. The Contracting Officer shall negotiate or determine the amount of loss and make an adjustment in the amount of settlement. In estimating the cost to complete, the Contracting Officer shall consider expected production efficiencies and other factors affecting the cost to complete.⁹⁰

(b) If the settlement is on an inventory basis, see FAR, Subpart 49.203(b).

(c) If the settlement is on a total cost basis, see FAR, Subpart 49.203 (c).

§ 8-706 Termination for Default

(1) Termination for default is generally the exercise of the Authority's contractual right to terminate a contract completely or partially because of the contractor's

⁹⁰ FAR, Subpart 49.203(a).

⁹¹ FAR, Subpart 49.401.

actual or anticipated failure to perform its contractual obligations.

(2) If the contractor can establish, or it is otherwise determined, that the contractor was not in default or that the failure to perform is excusable (i.e., arose out of causes beyond the control and without the fault or negligence of the contractor), the Default Clause provides that a termination for default will be considered to have been a termination for the convenience of the Authority and the rights and obligations of the parties governed accordingly.

(3) The Authority, in appropriate cases, pursuant to applicable law, may exercise termination or cancellation rights in addition to those in the contract clauses.⁹²

(4) The Contracting Officer may, with the written consent of the contractor, reinstate the terminated contract by amending the notice of termination after a written determination is made that the supplies or services are still required and reinstatement is advantageous to the Authority.

⁹² FAR, Subpart 49.401(c).

§ 8-706.01 The Authority's Right

Under fixed-price contracts, the Authority has the right, subject to the notice requirements of the clause, to terminate the contract completely or partially for default if the contractor fails to (1) make delivery of the supplies or perform the services within the time specified in the contract, (2) perform any other provision of the contract, or (3) make progress and that failure endangers performance of the contract.

§ 8-706.02 Effect of Termination for Default

(1) Under a termination for default, the Authority is not liable for the contractor's costs on undelivered work and is entitled to the repayment of advance and progress payments, if any, applicable to that work. The Authority may elect, under the Default Clause, to require the contractor to transfer title and deliver to the Authority completed supplies and manufacturing materials, as directed by the Contracting Officer.

(2) The Contracting Officer shall not use the Default Clause as authority to acquire any completed supplies or manufacturing materials unless it has been ascertained that the Authority does not already have title under some other provision of the contract. The Contracting Officer shall acquire manufacturing materials under the Default Clause for furnishing to another contractor only after considering the difficulties the other contractor may have in using the materials.

(3) Subject to paragraph (4), below, the Authority shall pay the contractor the contract price for any completed supplies and the amount agreed upon by the Contracting Officer and the contractor for any manufacturing materials acquired by the Authority under the Default Clause.

(4) The Authority must be protected from overpayment that might result from failure to provide for the Authority's potential liability to laborers and material suppliers for lien rights outstanding against the completed supplies or materials after the Authority has paid the contractor for them. To accomplish this, before paying for supplies or materials, the Contracting Officer shall take one or more of the following measures:

(a) ascertain whether the payment bonds, if any, furnished by the contractor are adequate to satisfy all lienors' claims or whether it is feasible to obtain similar bonds to cover outstanding liens;

(b) require the contractor to furnish appropriate statements from laborers and material suppliers disclaiming any lien rights they may have to the supplies and materials;

⁹³ FAR, Subpart 49.402-1.

⁹⁴ FAR, Subpart 49.402-2.

(c) obtain appropriate agreement by the Authority, the contractor, and lienors ensuring release of the Authority from any potential liability to the contractor or lienors;

(d) withhold from the amount due for the supplies or materials any amount the Contracting Officer determines necessary to protect the Authority's interest, but only if the measures in subparagraphs (4)(a), (b), and (c), above, cannot be accomplished or are considered inadequate; and

(e) take other appropriate action considering the circumstances and the degree of the contractor's solvency.

(5) The contractor is liable to the Authority for any excess costs incurred in acquiring supplies and services similar to those terminated for default and for any other damages, whether or not repurchase is effected.

§ 8-706.03 Procedure for Default

(1) When a default termination is being considered, the Authority shall decide which type of termination action to take (i.e., default, convenience, or no-cost cancellation) only after review by contracting and technical personnel and by legal counsel to ensure the propriety of the proposed action.

(2) The Contracting Officer shall not issue a show cause notice or cure notice without the prior approval of legal counsel.

(3) The Default Clause covers circumstances when the contractor has defaulted by failure to make delivery of the supplies or to perform the services within the specified time. In these situations, no notice of failure or of the possibility of termination for default is required to be sent to the contractor before the actual notice of termination. However, if the Authority has taken any action that might be construed as a waiver of the contract delivery or performance date, the Contracting Officer shall send a notice to the contractor setting a new date for the contractor to make delivery or complete performance. The notice shall reserve the Authority's rights under the Default Clause.

(4) The Default Clause also covers situations when the contractor fails to perform some of the other provisions of the contract (such as not furnishing a required performance bond) or so fails to make progress as to endanger performance of the contract. If the termination is predicated upon this type of failure, the Contracting Officer shall give the contractor written notice specifying the failure and providing a period of 10 days (or longer period as necessary) in which to cure the failure. When appropriate, this notice may be made a part of the notice described in paragraph (5) of this section. Upon expiration of the 10 days (or longer period), the Contracting Officer may issue a notice of termination for default unless it is determined that the failure to perform has been cured.

⁹⁵ FAR, Subpart 49.402-3.

(5) If termination for default appears appropriate, the Contracting Officer should, if practicable, notify the contractor and, if required by the bond, the surety in writing of the possibility of the termination. This notice shall call the contractor's attention to the contractual liabilities if the contract is terminated for default and request the contractor to show cause why the contract should not be terminated for default. The notice may further state that failure of the contractor to present an explanation may be taken as an admission that no valid explanation exists. When appropriate, the notice may invite the contractor to discuss the matter at a conference.

(a) When a termination for default appears imminent, the Contracting Officer may provide a written notification of that fact (not an actual notice of default) to the surety. If the contractor is subsequently terminated for default, a copy of the notice of default shall be sent to the surety.⁹⁶

(b) If requested by the surety, and agreed to by the contractor and any assignees, arrangements may be made to have future checks mailed to the contractor in care of the surety. In this case, the contractor must forward a written request to the Contracting Officer specifically directing a change in address for mailing checks.

(c) Prior to the Authority issuing any cure notice or show cause notice, the Authority shall provide a copy of the cure notice to the Authority's business specialist or vendor management specialist. The contracting officer should, whenever practicable, consult with the business specialist or vendor management specialist before proceeding with a default termination.⁹⁷

(6) The Contracting Officer shall consider the following factors in determining whether to terminate a contract for default:

- (a) the terms of the contract and applicable laws and regulations;
- (b) the specific failure of the contractor and the excuses for the failure;
- (c) the availability of the supplies or services from other sources;
- (d) the urgency of the need for the supplies or services and the period of time required to obtain them from other sources (as compared with the time delivery could be obtained from the delinquent contractor);
- (e) the degree of essentiality of the contractor in the Authority's acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts;
- (f) the effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advanced payments; and
- (g) any other pertinent facts and circumstances.

⁹⁶ FAR, Subpart 49.402.3(d)(2).

⁹⁷ FAR, Subpart 49.402-3(e)(4) (generally).

(7) If, after compliance with the procedures in subparagraph (6), above, the Contracting Officer determines that a termination for default is proper, the Contracting Officer shall issue a notice of termination stating --

- (a) the contract number and date;
- (b) the acts or omissions constituting the default;
- (c) that the contractor's right to proceed further under the contract (or a specified portion of the contract) is terminated;
- (d) that the supplies or services terminated may be purchased against the contractor's account and that the contractor will be held liable for any excess costs;
- (e) if the Contracting Officer has determined that the failure to perform is not excusable, that the notice of termination constitutes such decision and that the contractor has the right to appeal such decision under the Disputes Clause;
- (f) that the Authority reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs; and
- (g) that the notice constitutes a decision that the contractor is in default as specified and that the contractor has the right to appeal under the Disputes Clause.

(8) The Contracting Officer shall make the same distribution of the termination notice as was made of the contract. A copy shall also be furnished to the contractor's surety, if any, when the notice is furnished to the contractor. In addition, the Contracting Officer shall notify the disbursing officer to withhold further payments under the terminated contract, pending further advice, which should be furnished at the earliest practicable time.⁹⁸

(9) In the case of a construction contract, promptly after issuance of the termination notice, the Contracting Officer shall determine the manner in which the work is to be completed and whether the materials, appliances, and plant that are on the site will be needed.⁹⁹

(10) If the Contracting Officer determines before issuing the termination notice that the failure to perform is excusable, the contract shall not be terminated for default. If termination is in the Authority's interest, the Contracting Officer may terminate the contract for the convenience of the Authority.

(11) If the Contracting Officer has not been able to determine, before issuance of the notice of termination, whether the contractor's failure to perform is excusable, the Contracting Officer shall make a written decision on that point as soon as practicable after issuance of the notice of termination. The decision shall be delivered promptly to the contractor with a notification that the contractor has the right to appeal as specified in the Disputes Clause.

§ 8-706.04 Procedure in Lieu of Termination for Default

⁹⁸ FAR, Subpart 49.402-3(h).

⁹⁹ FAR, Subpart 49.402-3(i).

¹⁰⁰ FAR, Subpart 49.402-4.

The following courses of action, among others, are available to the Contracting Officer in lieu of termination for default when in the Authority's interest:

- (1) permit the contractor, the surety, or the guarantor to continue performance of the contract under a revised delivery schedule;
- (2) permit the contractor to continue performance of the contract by means of a subcontract or other business arrangement with an acceptable third party, provided the rights of the Authority are adequately preserved; and
- (3) if the requirement for the supplies and services in the contract no longer exists and the contractor is not liable to the Authority for damages, execute a no-cost termination settlement agreement.

§ 8-706.05 Documentation of Termination

When a contract is terminated the Contracting Officer shall prepare a memorandum for the contract file explaining the reasons for the action taken.

§ 8-706.06 Repurchase Against Contractor's Account

(1) When the supplies or services are still required after termination, the Contracting Officer shall repurchase the same or similar supplies or services against the contractor's account as soon as practicable. The Contracting Officer shall repurchase at a reasonable price as practicable, considering the quality and delivery requirements. The Contracting Officer may repurchase a quantity in excess of the undelivered quantity terminated for default when the excess quantity is needed, but excess cost may not be charged against the defaulting contractor for more than the undelivered quantity terminated for default (including variations in quantity permitted by the terminated contract). Generally, the Contracting Officer will make a decision whether or not to repurchase before issuing the termination notice.

(2) If the repurchase is for a quantity not over the undelivered quantity terminated for default, the statutory requirements for competitive bidding are inapplicable. However, the Contracting Officer shall use competitive bidding procedures unless there is a good reason to negotiate. The Contracting Officer shall cite the Default Clause as the authority. If the repurchase is for a quantity over the undelivered quantity terminated for default, the Contracting Officer shall treat the entire quantity as a new acquisition.

(3) If repurchase is made at a price over the price of the supplies or services terminated, the Contracting Officer shall, after completion and final payment of the repurchase contract, make a written demand on the contractor for the total amount of the excess, giving consideration to any increases or decreases in other costs such as transportation, discounts, etc.

§ 8-706.07 Other Damages

(1) If a contract is terminated for default or if a course of action in lieu of termination for default is followed, the Contracting Officer shall promptly ascertain and

¹⁰¹FAR, Subpart 49.402-5.

¹⁰² FAR, Subpart 49.402-6.

¹⁰³ FAR, Subpart 49.402-7.

make demand for any liquidated damages to which the Authority is entitled under the contract. Under the contract clauses for liquidated damages, these damages are in addition to any excess repurchase costs.

(2) If the Authority has suffered any other ascertainable damages, including administrative costs as a result of the contractor's default, the Contracting Officer shall, on the basis of legal advice, take appropriate action to assert the Authority's demand for the damages.

§ 8-706.08 Cost-Reimbursement Contracts

(1) The right to terminate a cost-reimbursement contract for default is provided for in the Termination for Default or for Convenience of the Authority Clause. A 10-day notice to the contractor before termination for default is required in every case by the clause.

(2) Settlement of a cost-reimbursement contract terminated for default is subject to the same principles as when a contract is terminated for convenience, except that --

(a) the costs of preparing the contractor's settlement proposal are not allowable;

(b) the contractor is reimbursed the allowable costs, and an appropriate reduction is made in the total fee, if any; and

(c) the Contracting Officer shall use the procedures in § 8-706.03(6) to the extent appropriate in considering the termination for default of a cost-reimbursement contract. However, a cost-reimbursement contract does not contain any provision for recovery of excess repurchase costs after termination for default.

§ 8-706.09 Surety-Takeover Agreements

(1) The procedures in this section apply primarily, but not solely, to fixed-price construction contracts terminated for default.

(2) Because of the surety's liability for damages resulting from the contractor's default, the surety has certain rights and interests in the completion of the contract work and application of any undisbursed funds. Accordingly, the Contracting Officer shall consider carefully proposals by the surety concerning completion of the work. The Contracting Officer shall take action on the basis of the Authority's interest, including the possible effect of the action upon the Authority's rights against the surety.

(3) If the surety offers to complete the contract work, this should normally be permitted unless the Contracting Officer has reason to believe that the persons or firms proposed by the surety to complete the work are not competent and qualified and the interests of the Authority would be substantially prejudiced.

(4) Because of the possibility of conflicting demands for unpaid prior earnings (retained percentages and unpaid progress estimates) of the defaulting contractor, the surety

¹⁰⁴ FAR, Subpart 49.403.

¹⁰⁵ FAR, Subpart 49.404.

may condition its offer of completion upon the execution by the Authority of a "takeover" agreement fixing the surety's rights to payment from those funds. In that event, the Contracting Officer may (but not before the effective date of termination) enter into a written agreement with the surety. The Contracting Officer should consider including in the agreement both the surety and the defaulting contractor in order to eliminate any disagreement concerning the contractor's residual rights, including assertions to unpaid prior earnings.

(5) The agreement shall provide for the surety to complete the work according to all the terms and conditions of the contract and for the Authority to pay the surety the balance of the contract price unpaid at the time of default but not in excess of the surety's costs and expenses, in the manner provided by the contract subject to the following conditions:

(a) any unpaid earnings of the defaulting contractor, including retained percentages and progress estimates for work accomplished before termination, shall be subject to debts due the Authority by the contractor, except to the extent that such unpaid earnings may be required to permit payment to the completing surety of its actual costs and expenses incurred in the completion of the work, exclusive of its payments and obligations under the payment bond given in connection with the contract;

(b) the agreement shall not waive or release the Authority's right to liquidated damages for delays in completion of the work, except to the extent that they are excusable under the contract;

(c) if the contract proceeds have been assigned to a financing institution, the surety may not be paid from unpaid earnings, unless the assignee consents to the payment in writing; and

(d) the surety shall not be paid any amount in excess of its total expenditures necessarily made in completing the work and discharging its liabilities under the payment bond of the defaulting contractor; furthermore, payments to the surety to reimburse it for discharging its liabilities under the payment bond of the defaulting contractor shall be only on authority of –

(i) mutual agreement between the Authority, the defaulting contractor, and the surety; or

(ii) order of a court of competent jurisdiction.

§ 8-706.10 Completion by Another Contractor

If the surety does not arrange for completion of the contract, the Contracting Officer normally will arrange for completion of the work by awarding a new contract based on the same plans and specifications. The new contract may be the result of competitive bidding or negotiation, as appropriate under the circumstances. The Contracting Officer shall exercise reasonable diligence to obtain the lowest price available for completion.

§ 8-706.11 Liquidation of Liability

¹⁰⁶ FAR, Subpart 49.405.

¹⁰⁷ FAR, Subpart 49.406.

The contract provides that the contractor and the surety are liable to the Authority for resultant damages. The Contracting Officer shall use all retained percentages of progress payments previously made to the contractor and any progress payments due for work completed before the termination to liquidate the contractor's and the surety's liability to the Authority. If the retained and unpaid amounts are insufficient, the Contracting Officer shall take steps to recover the additional sum from the contractor and the surety.

- (a) appropriate identification of the procurement and, if a contract has been awarded, its number;
 - (b) a statement of the legal and factual grounds for the protest including the description of the resulting prejudice to the protester;
 - (c) request for a ruling by the Authority;
 - (d) statement as to the form of relief requested;
 - (e) all information establishing the timeliness of the protest; and
 - (f) supporting exhibits, evidence, or documents establishing that the protestor is an interested party and¹⁰⁸ to substantiate any claims unless not available within the filing time, in which case the expected availability date shall be indicated.
- (2) Any additional information requested by any of the parties should be submitted within the time periods established by the Vice President of Contracts in order to expedite consideration of the protest. Failure of any party to comply expeditiously with a request for information may result in resolution of the protest without consideration of any information which is not timely filed.
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¹⁰⁸ See generally FAR 33.103(d).

CHAPTER 9 - SUPPLY MANAGEMENT

Section 9-100 - General Provisions

§ 9-101 Definitions of Terms

(1) "Excess Supplies" means any supplies, other than expendable supplies, under the control of the Authority which the Authority determines is not required for its needs or for the discharge of its responsibilities.

(2) "Expendable Supplies" means all tangible supplies other than nonexpendable supplies.

(3) "Nonexpendable Supplies" means all tangible supplies having an original acquisition cost of over \$100 per unit or a probable useful life of more than one year.

(4) "Supplies" means, for purposes of this section, tangible personal property owned by the Authority

(5) "Surplus Supplies" means any excess supplies, other than expendable supplies, not required by the Authority. This includes obsolete supplies, scrap materials, and nonexpendable supplies that have completed their useful life cycle.

§ 9-102 Purpose

Objectives of supply management include preventing waste, continuing utilization of supplies, and obtaining a fair return of value upon disposal of supplies. In order to achieve these objectives, sound inspection, testing, warehousing, and inventory practices are called for, and effective means of transferring and disposing of property must be employed.

§ 9-103 Inventory Management

The President & Chief Executive Officer or their designee shall have general supervision of all inventories of tangible personal property, whether warehoused or in use, belonging to the Authority. Any warehouses and similar storage areas shall be inventoried at least annually.

§ 9-104 Warehousing and Storage

The President & Chief Executive Officer or their designee shall exercise general supervision of any receiving, storage, and distribution facilities and services.

Section 9-200 - Surplus Supplies

§ 9-201 Disposition

Surplus supplies shall be offered through competitive sealed bids, public auction, or posted prices. It is recognized, however, that some types and classes of items can be sold or disposed of more readily and advantageously by other means, including barter. In such cases, and also where the nature of the supply or unusual circumstances call for its sale to be restricted or controlled, the President & Chief Executive Officer or their designee may employ such other means, including appraisal, provided a written determination is made that such procedure is advantageous to the Authority. The Authority shall attempt to realize the maximum benefit in selling or disposing of surplus supplies. Only United States Postal Money Orders, certified checks, wire transfers from any U.S. bank, or cashiers' checks shall be accepted for sales of surplus property (except that cash or a personal check may be accepted for petty cash sales of less than \$100).

§ 9-202 Competitive Sealed Bidding

(1) When making sales by competitive sealed bidding, notice of the sale should be given at least 10 days before the date set for opening bids. Notice shall be given by mailing a Request for Sale Bids to prospective bidders, including those bidders on lists maintained for this purpose, and by making the Request for Sale Bids publicly available. Newspaper advertisement also may be used. The Request for Sale Bids shall list the supplies offered for sale, designate their location and how they may be inspected, and state the terms and conditions of sale and instructions to bidders including the place, date, and time set for bid opening. Bids shall be opened publicly.

(2) Award shall be made in accordance with the provisions of the Request for Sale Bids to the highest responsive and responsible bidder; provided, that the price offered by such bidder is acceptable to the Contracting Officer. Where such price is not acceptable, the Contracting Officer may reject the bids in whole or in part and negotiate the sale; provided, that the negotiated sale price is higher than the highest responsive and responsible bidder's price, or such officer may resolicit bids.

§ 9-203 Auctions

Supplies may be sold at auction. When appropriate, an experienced auctioneer should be used to cry the sale and assist in preparation of the sale. The solicitation to bidders should stipulate, at a minimum, all the terms and conditions of any sale; that a deposit may be required in order to participate in the bidding; that the purchaser must remove within a stated time all surplus supplies purchased; and that the Authority retains the right to reject any and all bids.

§ 9-204 Fixed Prices

If the President & Chief Executive Officer or their designee determines that selling the property by competitive bid or auction would not maximize the resale value of the property to the Authority, the President & Chief Executive Officer or their designee may set a fixed price for the surplus supplies when such prices are based on fair market value.

§ 9-205 Trade-In

Surplus supplies may be traded-in only when the Vice President of Procurement or their designee determines that the trade-in value is expected to exceed the value estimated to be obtained through the sale or other disposition of such supplies.

§ 9-206 Proceeds

Net proceeds from the disposition of excess or surplus supplies shall be credited to the appropriate account from which funds were originally used to acquire the supplies.

CHAPTER 10 - ADMINISTRATIVE REMEDIES

Section 10-100 - General Provisions

§ 10-101 Scope of Coverage

This chapter provides for administrative remedies for protests against solicitations and awards, suspensions and debarments, and contractual disputes. The remedies are intended to foster public confidence in the integrity of the Authority's procurement system and provide for fair and impartial resolution of controversies in an expeditious and cost-efficient manner.

§ 10-102 Solicitation Provision

All solicitations for Authority contracts shall contain the following provision:

By submission of a bid, proposal, offer, or quotation in response to this solicitation, the bidder or offeror agrees to exhaust its administrative remedies under Chapter 10 of the Authority's Procurement Regulations or the Disputes Clause of any resulting contract prior to seeking judicial relief of any type in connection with any matter related to this solicitation, the award of any contract, and any dispute under any resulting contract.

Section 10-200 - Protests of Solicitations and Awards

§ 10-201 Right to Protest

Any interested party in connection with the solicitation or award of a contract may protest to the Authority and appeal any adverse decision in accordance with the provisions of this section. Interested parties are encouraged to seek resolution of their complaint initially with the Contracting Officer who issued the solicitation. Any such complaint must be made in writing.

§ 10-202 Definitions

- (1) "Interested Party" for the purpose of filing a protest means an actual or prospective bidder, offeror, or contractor whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. .
- (2) "Protest" means a written objection by an interested party to any of the following:
 - (a) A solicitation or other request by an agency for offers for a contract for the procurement of property, goods, or services;
 - (b) The cancellation of the solicitation or other request;
 - (c) An award or proposed award of the contract; or
 - (d) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.
- (3) "Protester" means any interested party who files a protest.
- (4) "Filed" means the complete receipt of any document by the Vice President of Procurement before 4:00 p.m. (CST). Documents received after close of business are considered filed as of the next day.

§ 10-203 Filing of Protest to the Authority

(3) Protests based on alleged apparent improprieties in a solicitation shall be filed before bid opening or the closing date for the receipt of proposals. In all other cases, protest shall be filed no later than 10 days after the basis of protest is known, or should have been known, whichever is earlier. Protests shall be made in writing to the Vice President of Procurement. Protests filed after the 10-day period shall not be considered.

(4) Protesters may file a protest on any phase of solicitation or award including, but not limited to, specifications preparation, bid or proposal solicitation, award, or disclosure of information marked confidential in the bid or offer.

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

- (a) the name, address, and telephone numbers of the protester;
- (b) appropriate identification of the procurement or solicitation and, if a contract has been awarded, its number;
- (c) a detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protestor;
- (d) supporting exhibits, evidence, or documents to substantiate any claims unless not available within the filing time, in which case the expected availability date shall be indicated;
- (e) request for a ruling by the Authority;
- (f) statement as to the form of relief requested;
- (g) all information establishing that the protestor is an interested party for the purpose of filing a protest; and
- (h) all information establishing the timeliness of the protest.

(6) Failure to substantially comply with any of the requirements in part (3) above may be grounds for dismissal of the protest.

(7) Any additional information requested by any of the parties should be submitted within the time periods established by the Vice President of Procurement in order to expedite consideration of the protest. Failure of any party to comply expeditiously with a request for information may result in resolution of the protest without consideration of any information which is not timely filed.

To the extent permitted by law and regulation, the parties may exchange relevant information.

§ 10-204 Stay of Procurements

When a protest has been filed within 10 days and before an award has been made, the Authority may not award the contract until the protest has been settled, unless the President & Chief Executive Officer makes a written determination that the award of the contract without delay either (a) is justified and for urgent and compelling reasons, or (b) is in the best interests of the Authority.

§ 10-205 Availability of Information

The Authority shall, upon written request, make available to any interested party information submitted that bears on the substance of the protest except where information is proprietary, confidential, or otherwise permitted or required to be withheld by law or regulation. Persons who wish to keep such information submitted by them confidential should so request by specifically identifying such information within documents submitted and indicating on the front page of each document that it contains proprietary or confidential information.

§ 10-206 Protest Decision

- (1) The Authority shall make reasonable efforts to resolve protests within 35 days after the protest is filed.
- (2) Protest decisions shall be well-reasoned and explain the Authority's position. The protest decision shall be provided to the protestor using a method that provides evidence of receipt.
- (3) If a protest is sustained, the available remedies include, but are not limited to, amendment to the solicitation, resolicitation, cancellation of the solicitation, and termination of the contract.
- (4) In addition to any other relief, a recommendation may be made to the Board of Directors that the protesting bidder or offeror be awarded the reasonable costs incurred in connection with the solicitation, including bid preparation costs other than attorney's fees, when a protest is sustained and the protesting bidder or offeror should have been, but was not, awarded the contract under the solicitation. such recommendations shall confer no rights on the protester and shall not be binding on the Authority.

§ 10-207 Request for Reconsideration

- (1) Reconsideration of a decision of the Vice President of Procurement may be requested by the protester, appellant, or any interested party who submitted comments during consideration of the protest. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.
- (2) Requests for reconsideration of the decision by the Vice President of Procurement shall be filed with the President & Chief Executive Officer not later than five days after receipt of such decision. A request for reconsideration shall be acted upon as expeditiously as possible. The President & Chief Executive Officer may uphold the previous decision or reopen the case as such officer deems appropriate.

§ 10-208 Appeal of Reconsideration Decision

The protestor or any interested party who submitted comments during the consideration of the protest may appeal the decision of the President & Chief Executive Officer not later than five days after the receipt of such decision, and the appeal shall be sent to the Office of Board Support. An administrative law judge shall then prescribe hearing procedures appropriate under the circumstances in accordance with applicable due process requirements.

§ 10-209 Finality of Decision

After receipt of the decision, it shall be final and conclusive, unless found to be fraudulent.

Section 10-300 - Debarment or Suspension

§ 10-301 Scope of Coverage

This section applies to all debarments or suspensions of persons or entities from consideration for award of contracts imposed by the President & Chief Executive Officer, which is the debarring official.

Debarment and suspension may be based on the preponderance of the evidence of fraudulent, criminal, or other serious improper conduct.

- (a) The conduct of any officer, director, shareholder, partner, employee, or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.
- (b) The conduct of a contractor may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct.
- (c) The conduct of one contractor participating in a joint venture or similar arrangement may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

§ 10-302 Authority to Debar or Suspend

(1) After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the President & Chief Executive Officer shall have authority to debar a person for cause from consideration for award of contracts. Debarment shall be for a period commensurate with the seriousness of the cause(s). Generally, debarment should not exceed three years.

(a) If suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(b) The President & Chief Executive Officer may extend the debarment for an additional period if the President & Chief Executive Officer determines that an extension is necessary to protect the Authority's interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based.

(2) The President & Chief Executive Officer shall have authority to suspend a person from consideration for award of contracts if there is probable cause for debarment. The suspension shall not be for a period exceeding three months.

(3) The causes for contractor debarment or suspension include the following:

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

(b) conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating any

criminal tax laws, receiving stolen property;

(c) commission of any other offense indicating a lack of business integrity or business honesty which seriously and directly affects the present responsibility as a contractor or subcontractor;

(d) conviction under state or federal antitrust statutes arising out of the submission of bids, proposals, or offers;

(e) violation of contract provisions, as set forth below, of a character which is regarded by the President & Chief Executive Officer to be so serious as to justify debarment action:

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

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

(iii) any other cause the **President & Chief Executive Officer** determines to be so serious and compelling as to affect responsibility as a contractor with the Authority, including debarment by another government entity.

(f) any other reason, based upon a preponderance of the evidence, set forth in Federal Acquisition Regulation 9.406-2(b).

(4) The **President & Chief Executive Officer** may reduce the period or extent of debarment, upon the contractor's request, supported by documentation, for reasons such as –

(a) Newly discovered material evidence;

(b) reversal of the conviction of civil judgment upon which debarment was based;

(c) bona fide change in ownership or management;

(d) elimination of other causes for which the debarment was imposed; or

(e) other reasons the President & Chief Executive Officer deems appropriate.

§ 10-303 Suspension

(1) Suspension is a serious action to be imposed on the basis of adequate evidence, pending the completion of investigation or legal proceedings, when it has been determined that immediate action is necessary to protect the Authority's interest. The existence of a cause for suspension does not necessarily require that the contractor be suspended.

(2) Suspension constitutes suspension of all divisions or other organizational elements of the contractor, unless the suspension decision is limited by its terms to specific divisions, organizational elements, or commodities.

(3) Upon written determination by the President & Chief Executive Officer that probable cause exists for suspension as set forth in § 10-302, a contractor or prospective contractor shall be suspended. A notice of suspension, including a copy of such determination, shall be sent to the suspended contractor or prospective contractor by certified mail, return receipt requested. Such notice shall state:

- (a) That they have been suspended and that the suspension is based on an indictment or other adequate evidence that the contractor has committed irregularities –
 - (i) of a serious nature in business dealings with the Authority, or
 - (ii) seriously reflecting on the propriety of further Authority dealings with the contractor (any such irregularities shall be described in terms sufficient to place the contractor on notice without disclosing the Authority's evidence);
- (b) that the suspension is for a temporary period pending the completion of an investigation and such legal proceedings as may ensue;
- (c) the cause(s) relied upon for imposing suspension;
- (d) the effect of the suspension;
- (e) that, within 30 days after receipt of the notice, the contractor may submit, in writing, or through a representative, information and argument in opposition to the suspension, including any additional specific information that raises a genuine dispute over the material facts;
- (f) that additional proceedings to determine disputed material facts will be conducted unless (1) the action is based on an indictment, or (2) a determination is made, on the basis of the Department of Justice's advice, that the substantial interests of the Authority in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced;
- (g) bids or proposals will not be solicited from the suspended person, and, if they are received, they will not be considered during the period of suspension; and
- (h) if a hearing has not been held, the suspended person may request a hearing in accordance with these regulations.

(4) A contractor or prospective contractor is suspended upon issuance of the notice of suspension. Suspension shall be for a temporary period pending the completion of an investigation and any ensuing legal proceedings, unless sooner terminated by the President & Chief Executive Officer as otherwise provided in these Regulations.

(5) If legal proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless state or federal agency official requests its extension, in which case it may be extended for an additional 6 months. In no event may a suspension extend beyond 18 months, unless legal proceedings have been initiated within that period.

(a) The President & Chief Executive Officer shall notify a state or federal agency official who has knowledge of the suspension of the proposed termination of the suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

(6) The suspension shall remain in effect during any appeals. The suspension may be ended by the President & Chief Executive Officer or the Board of Directors of the Authority but, otherwise, shall only be ended when the suspension has been in effect for three months or a debarment decision takes effect.

§ 10-304 Initiation of Debarment Action

A notice of proposed debarment shall be issued by the President & Chief Executive Officer advising the contractor and any specifically named affiliates, by certified mail, return receipt requested--

- (1) that debarment is being considered;
- (2) of the reasons for the proposed debarment in terms sufficient to put the contractor on notice of the conduct or transaction(s) upon which it is based;
- (3) of the cause(s) relied upon for proposing debarment;
- (4) that, within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment, including any additional specific information that raises a genuine dispute over the material facts;
- (5) of the Authority's procedures governing debarment decision making;
- (6) of the effect of the issuance of the notice of proposed debarment;
- (7) of the potential effect of actual debarment;
- (8) state that the contractor or prospective contractor may be represented by counsel.

§ 10-305 Request for Hearing

A contractor or prospective contractor that has been notified of a proposed debarment action may request in writing that a hearing be held. Such request must be received by the President & Chief Executive Officer within 10 days of receipt of notice of the proposed action. If no request is received within the 10-day period, a final determination may be made as set forth in § 10-309.

§ 10-306 Notice of Hearing

If a hearing is requested, the President & Chief Executive Officer may appoint a hearing officer to conduct the hearing and recommend a final decision. Otherwise, the President & Chief Executive Officer shall act as the hearing officer. The hearing officer shall send a written notice of the time and place of the hearing. Such notice shall be sent by certified mail, return receipt requested, and shall state the nature and purpose of the proceedings.

§ 10-307 Authority of Hearing Officer

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

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

- (2) require parties to state their positions with respect to the various issues in the proceeding;
- (3) require parties to produce for examination those relevant witnesses and documents under their control;
- (4) rule on motions and other procedural items on matters pending before such officer;
- (5) regulate the course of the hearing and conduct of participants therein;
- (6) receive, rule on, exclude or limit evidence, and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;
- (7) fix time limits for submission of written documents in matters before such officer;
- (8) impose appropriate sanctions against any party or person failing to obey an order under these procedures, which sanctions may include:
 - (a) refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
 - (b) excluding all testimony of an unresponsive or evasive witness; and
 - (c) expelling any party or person from further participation in the hearing; and
- (9) take official notice of any material fact not appearing in evidence in the record, if such fact is among the traditional matters of judicial notice.

§ 10-308 Hearings

- (1) Hearings shall be as informal as may be reasonable and appropriate under the circumstances and in accordance with applicable due process requirements. The Authority will be represented in hearings by legal counsel. The weight to be attached to evidence presented in any particular form will be within the discretion of the hearing officer. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The hearing officer may require evidence in addition to that offered by the parties.
- (2) A hearing may be recorded but need not be transcribed except at the request and expense of the person making such request. A record of those present, identification of any written evidence presented, copies of all written statements, and a summary of the hearing shall be sufficient record.
- (3) Opening statements may be made unless a party waives this right.
- (4) Witnesses shall testify under oath or affirmation. All witnesses may be cross-examined.

§ 10-309 Debarment Decision

- (1) The hearing officer shall prepare a written determination recommending a course of action. Such determination shall be given to the President & Chief Executive Officer. Copies shall also be sent to the contractor or prospective contractor. The contractor or prospective contractor shall have 10 days to file comments upon the hearing officer's determination. The President & Chief Executive Officer may request

oral argument. The President & Chief Executive Officer shall issue a final decision. Both the hearing officer's determination and the final decision shall recite the evidence relied upon. When debarment is recommended or ordered, the length of the debarment (not to exceed three years), the reasons for such action, and to what extent affiliates are affected shall be set forth. In addition, the final determination shall inform the debarred person of his rights to administrative review under these regulations.

(2) In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the President & Chief Executive Officer shall make a decision on the basis of all the information in the administrative record, including any submission made by the contractor. If no suspension is in effect, the decision shall be made within 30 working days after receipt of any information and argument submitted by the contractor, unless the debarring official extends this period for good cause.

(3) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact shall be prepared. The President & Chief Executive Officer shall base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(4) In any action in which the proposed debarment is not based upon a conviction or civil judgment, the cause for debarment must be established by a preponderance of the evidence.

§ 10-310 Effect of Debarment Decision

A debarment decision will take effect upon issuance and receipt by the contractor or prospective contractor. After the debarment decision takes effect, the contractor shall remain debarred until a court, the Board of Directors, or the President & Chief Executive Officer orders otherwise or until the debarment period specified in the decision expires.

§ 10-311 Appeal of Decision

A contractor may appeal administratively any debarment decision to the Board of Directors within ten days after receipt of the decision.

Section 10-400 - Contract Disputes Procedures

§ 10-401 Scope of Coverage

(1) This section contains the procedures for resolving contract disputes pursuant to the Disputes Clause required by these regulations to be included in Authority contracts. It is the Authority's policy to try to resolve all controversies by mutual agreement without litigation. In appropriate circumstances, informal discussions between the parties can aid in the resolution of differences by mutual agreements and are encouraged. If such informal discussions do not resolve the controversy, individuals who have not participated substantially in the matter in controversy may be brought in to conduct discussions if this is feasible.

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

§ 10-402 Delegation of Authority

(1) Subject to subsection (2), below, unless a provision of the contract specifies that the authority to settle and resolve controversies and to issue decisions is reserved to the President & Chief Executive Officer, such authority is hereby delegated to the Contracting Officer. Within these regulations, therefore, "Contracting Officer" denotes the person with such authority whether that is the Contracting Officer or a designee of such officer.

(2) The settlement or resolution of controversies involving claims in excess of \$25,000 is subject to the prior written approval of the President & Chief Executive Officer. In such cases, the Contracting Officer shall prepare a recommended decision for the President & Chief Executive Officer.

§ 10-403 Contracting Officer's Decision

(1) When a controversy cannot be resolved by mutual agreement and a decision on the claim is necessary, the Contracting Officer shall:

- (a) review the facts pertinent to the controversy;
- (b) secure any necessary assistance from legal, finance, and other relevant advisors;
- (c) prepare a written decision that shall include the items in part (2) below.

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

- (a) a description of the controversy;
- (b) a reference to pertinent contract provisions;
- (c) a statement of the factual areas of agreement or disagreement;
- (d) a statement of the Contracting Officer's decision, with supporting rationale; and
- (e) paragraphs substantially as follows:

"This is the final decision of the Contracting Officer. This decision may be appealed to the Board of Directors of the Authority. If you decide to make such an appeal, you must mail or otherwise furnish written notice of appeal to the Board on or before the 90th day from the date you receive this decision. A copy of the notice of appeal shall be furnished to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference the decision from which the appeal is being taken, and identify the contract involved by number."

- (f) demand for payment in all cases where the decision results in a finding that the contractor is indebted to the Authority.

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

- (4) The Contracting Officer shall issue a decision within a reasonable time, taking into account the size and complexity of the claim; the adequacy of the contractor's supporting data; and any other relevant factors.
- (5) If the Contracting Officer does not issue a written decision within 180 days after written request by the contractor for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.
- (6) The amount determined payable under the decision, less any portion already paid, should be paid, if otherwise proper, without awaiting contractor action concerning appeal. Such payment shall be without prejudice to the rights of either party.

§ 10-404 Claims by the Authority

All controversies involving claims asserted by the Authority against a contractor which cannot be resolved by mutual agreement shall be the subject of a decision by the Contracting Officer.

Section 10-500 - Administrative Appeals

§ 10-501 Scope of Coverage

This section provides for the administrative appeal to the Board of Directors of the Authority or its duly authorized representative.

§ 10-502 Authorized Representative

The Board may, by resolution evidenced by an appointment signed by the Chairman, designate a duly authorized representative to decide administrative appeals fairly and impartially pursuant to this section and according to the facts, these procurement regulations, contract provisions, and the applicable law. Such authorized representative may be an administrative judge, a hearing officer, or an administrative board of appeals.

§ 10-503 Hearings

Any person appealing a decision administratively under this chapter or the Disputes Clause of an Authority contract shall be entitled to a hearing in accordance with this section. All proceedings in an administrative appeal shall be de novo. The Board or its duly authorized representative shall have all authority of a hearing officer under § 10-307 of these regulations. If not previously established by the Board, the duly authorized representative shall prescribe hearing procedures appropriate under the circumstances and in accordance with applicable due process requirements. A transcript of the hearings shall be taken by a notary public authorized by law to administer oaths. Witnesses shall testify under oath or affirmation.

§ 10-504 Finality of Decision

The decision of the Authority or its duly authorized representative in an administrative appeal shall be final and conclusive as to questions of fact unless determined by a court of competent jurisdiction to have been fraudulent, capricious, arbitrary, so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. The decision of the Authority or its duly authorized representative shall not be final and conclusive as to questions of law. No action challenging such decision shall be brought more than two years from the date of the contractor's receipt of such decision.

CHAPTER 11 – CONFLICTS OF INTEREST**Section 11-100 - General Provisions****§ 11-101 Scope**

This chapter prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving conflicts of interest. It also provides examples to assist the Contracting Officer in applying these rules and procedures to individual contracting situations.

§ 11-102 Definitions

(1) An "organizational conflict of interest" exists when the nature of the work to be performed under a proposed instant Authority contract may, without some restriction on future activities, (a) result in an actual or potential unfair competitive advantage to the contractor or (b) impair the contractor's objectivity in performing the contract work. An organizational conflict of interest also may exist when the instant contract creates an actual or potential conflict of interest on a future procurement.

(2) A "marketing consultant" refers to any independent contractor who furnishes advice, information, direction, or assistance to an offeror or any other contractor in support of the preparation or submissions of an offer for an Authority contract by that offeror. An independent contractor is not a marketing consultant when rendering:

(a) advisory and assistance services, as described in Subpart 37.2 of the Federal Acquisition Regulation;

(b) routine engineering and technical services (such as installation, operation, or maintenance of systems, equipment, software, components, or facilities);

(c) routine legal, actuarial, auditing, and accounting services; and

(d) training services.

(3) A "financial interest in a person" is:

(a) When the contract for the purchase of goods or services solicited through a purchase order exceeds \$25,000, an Authority employee or official has a financial interest in a person who either: (1) owns or controls, directly or indirectly, an ownership interest of at least one percent in the person, including the right to share in profits, proceeds, or capital gains; or (2) could reasonably foresee that a contract with the person could result in a financial benefit to the Authority employee or official.

(b) When the contract for the purchase of goods or services solicited through a purchase order exceeds \$25,000, a retirement plan, a blind trust, insurance coverage, or an ownership interest of less than one percent in a corporation is not considered a financial interest.

(c) When a DART contractor or any member of the contractor's immediate family is considering an offer of employment, or is actively seeking employment, with any entity

that does business with DART or seeks to do business with DART now or in the foreseeable future (sometimes referred to as a “potential conflict of interest”).

(d) When a DART contractor is a member of the board of directors or other governing board of DART or serves as an elected officer of an entity that does business with DART or seeks to do business with DART now or in the foreseeable future.

§ 11-103 Applicability

(1) This chapter applies to contracts with either profit or nonprofit organizations, including organizations created largely or wholly with Authority funds.

(2) The applicability of this chapter is not limited to any particular kind of procurement. However, organizational conflicts of interest are more likely to occur in contracts involving --

(a) management support services;

(b) consultant or other professional services;

(c) contractor performance of, or assistance in, technical evaluations; or

(d) systems engineering and technical direction work performed by a contractor that does not have overall contractual responsibility for development or production.

(3) DART contractors must comply with Chapter 7.0 of the DART Administrative Employment Manual (Standards of Conduct and Ethical Behavior). Any DART contractor, who acts on behalf of or represents DART found to have engaged in any activity or conduct which constitutes a conflict of interest, or who fails to timely notify his/her supervisor of a potential conflict in writing, is subject to removal from contract work and billing or other adverse contract actions. Specifically:

(a) no DART contractor shall engage in any activity which constitutes a conflict of interest or which a reasonable person would interpret as creating the appearance of a conflict of interest.

(b) a DART contractor with a potential conflict, prior to the existence of a situation that could constitute a conflict of interest, must notify DART and their supervisor of the potential conflict in writing.

(c) all DART procurement staff and DART contractors directly or indirectly engaged in procurement activities must promote policies, procedures, and practices for identifying and preventing actual, apparent, and organizational conflicts of interest.

(4) In addition to the specifications contained in § 11-103(3), each DART employee or official involved in procurement or contract management for the Authority shall disclose to the Authority any potential conflict of interest otherwise specified by Texas law (with regard to any contract exceeding \$25,000 with a private vendor or bid for the purchase of goods or services from a private vendor by the Authority).

(a) The potential conflict of interest known to the DART employee involved with procurement or contract management must disclose the conflict when it becomes known at any time during:

(i) the procurement process, from the initial request for bids for the purchase of goods or services from a private vendor until the completed final delivery of the goods or services; or

(ii) the term of a contract with a private vendor.

§ 11-104 Waiver

(1) The President & Chief Executive Officer or their designee may waive any general rule or procedure of this chapter by determining that its application in a particular situation would not be in the Authority's best interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the President & Chief Executive Officer. The President & Chief Executive Officer shall not delegate waiver authority below the level of head of a contracting authority.

(2) If the Contracting Officer finds that it is in the best interest of the Authority to award the contract notwithstanding a conflict of interest, a request for waiver shall be submitted in accordance with this section. The waiver request and decision shall be included in the contract file.

(3) The Authority may not enter into a contract for the purchase of goods or services with a person with whom any of the following Authority employees or officials have a financial interest:

(a) a member of the Authority's governing body;

(b) the Authority's governing official, executive director, general counsel, chief procurement officer, or procurement director;

(c) a family member related within the second degree affinity or consanguinity to an Authority employee who falls within §11-104(3)(a-b).

§ 11-105 Contracting Officer's Responsibilities

(1) Using the general rules, procedures, and examples in this chapter, the Contracting Officer shall analyze planned procurements in order to-

(a) identify and evaluate potential organizational conflicts of interest as early in the procurement process as possible;

(b) avoid, neutralize, or mitigate significant potential conflicts before contract award; and

(c) follow the highest standards of honesty, integrity, and fairness when engaging in activity concerning DART, per Chapter 7.0 of the DART Administrative Employment Manual.

(2) The Contracting Officer should obtain the advice of legal counsel and the assistance of appropriate technical specialists in evaluating potential conflicts and in developing any necessary solicitation provisions and contract clauses (see § 11-300).

(3) Before issuing a solicitation for a contract that may involve a significant potential conflict, the Contracting Officer shall recommend to the President & Chief Executive Officer a course of action for resolving the conflict (see § 11-207).

(4) In fulfilling their responsibilities for identifying and resolving potential conflicts, the Contracting Officer should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation. The Contracting Officer's judgment need be formally documented only when a substantive issue concerning potential organizational conflict of interest exists.

(5) The Contracting Officer, after Board approval of the contract as applicable, shall award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided or mitigated. Before determining to withhold award of a contract based on conflict of interest considerations, the Contracting Officer shall notify the contractor, provide reasons therefor, and allow the contractor a reasonable opportunity to respond.

Section 11-200 - Rules and Application

§ 11-201 Introduction

The general rules in § 11-202 through § 11-205 prescribe limitations on contracting as the means of avoiding, neutralizing, or mitigating organizational conflicts of interest that might otherwise exist in the stated situations. Some illustrative examples are provided in § 11-208. An organizational conflict of interest exists when the nature of the work performed under a proposed instant contract may, without some restrictions on future activities, result in an unfair competitive advantage to the contractor or impair the contractor's objectivity in performing the contract work. Conflicts may arise in situations not expressly covered in this section or in the examples in § 11-208. Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it. The two underlying principles are --

(1) preventing the existence of conflicting roles that might bias a contractor's judgment;
and

(2) preventing unfair competitive advantage. An unfair competitive advantage exists where a contractor competing for award possesses:

(a) Proprietary information that was obtained from a Government or Authority official without proper authorization; or

(b) Source selection information that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the

contract.

§ 11-202 Providing Systems Engineering and Technical Direction

(1) A contractor that provides systems engineering and technical direction for a procurement but does not have overall contractual responsibility for its development, integration, assembly, checkout, testing, or production shall not (1) be awarded a contract to supply the system or any of its major components or (2) be a subcontractor or consultant to a supplier of the system or any of its major components.

(2) Systems engineering includes a combination of substantially all of the following activities: determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design. Technical direction includes a combination of substantially all of the following activities: developing work statements, determining parameters, directing other contractors' operations, and resolving technical controversies. In performing these activities, a contractor occupies a highly influential and responsible position in determining a system's basic concepts and supervising their execution by other contractors. Therefore, this contractor should not be in a position to make decisions favoring its own products or capabilities.

§ 11-203 Preparing Specifications or Work Statements

(1) (a) If a contractor prepares and furnishes complete specifications covering nondevelopmental items to be used in a competitive procurement, that contractor shall not be allowed to furnish these items, either as a prime contractor or as a subcontractor, for a reasonable period of time including, at least, the duration of the initial production contract. This restriction shall not apply to --

(i) contractors that furnish, at the Authority's request, specifications or data regarding a product they provide, even though the specifications or data may have been paid for separately or in the price of the product; or

(ii) situations in which contractors, acting as industry representatives, help the Authority prepare, refine, or coordinate specifications, regardless of source, provided this assistance is supervised and controlled by Authority representatives.

(b) If a single contractor drafts complete specifications for non-developmental equipment, it should be eliminated for a reasonable time from competition for production based on the specifications. This should be done in order to avoid a situation in which the contractor could draft specifications favoring its own products or capabilities. In this way, the Authority can be assured of getting unbiased advice as to the content of the specifications and can avoid allegations of favoritism in the award of production contracts.

(c) In development work, it is normal to select firms that have done the most advanced work in the field. These firms can be expected to design and develop around their own prior knowledge. Development contractors frequently can start production earlier and more knowledgeably than firms that did not participate in the development, and this can affect the time and quality of production, both of which are important to the Authority. In some instances, the Authority may have financed the development. Thus, while the development contractor has a

competitive advantage, it is an unavoidable one that is not considered unfair; hence, no prohibition should be imposed.

(2) (a) If a contractor prepares, or assists in preparing, a work statement to be used in competitively procuring a system or services—or provides material leading directly, predictably, and without delay to such a work statement—that contractor may not supply the system, major components of the system, or the services unless --

- (i) it is the sole source;
- (ii) it has participated in the development and design work; or
- (iii) more than one contractor has been involved in preparing the work

statement.

(b) The Authority normally should prepare its own work statements. When contractor assistance is necessary, the contractor might often be in a position to favor its own products or capabilities. To overcome the possibility of bias, contractors are prohibited from supplying a system or services acquired on the basis of work statements growing out of their services, unless excepted in subparagraph (a) above.

(c) For the reason given in § 11-203(1)(c), no prohibitions are imposed on development and design contractors.

§ 11-204 Providing Technical Evaluation or Consulting Services

Contracts involving (1) technical evaluations of other contractors' offers or products or (2) consulting services generally shall not be awarded to a contractor that would evaluate, or advise the Authority concerning, its own products or activities or those of a competitor without proper safeguards to ensure objectivity and protect the Authority's interests.

§ 11-205 Obtaining Access to Proprietary Information

(1) A contractor that gains access to proprietary information of other companies in performing advisory services for the Authority must agree with the other companies to (a) protect their information from unauthorized use or disclosure for as long as it remains proprietary and (b) refrain from using the information for any purpose other than that for which it was furnished. The Contracting Officer shall obtain copies of these agreements and ensure that they are properly executed.

(2) Proprietary information is information considered so valuable by its owners that it is held secret by them and their licensees. When a contractor requires such information from others to perform an Authority contract and can use the leverage of the contract to obtain it, the contractor may gain an unfair competitive advantage unless restrictions are imposed. These restrictions protect the information and encourage companies to provide it when necessary for contract performance. They are not intended to protect information (a) furnished voluntarily without limitations on its use or (b) available to the Authority or contractor from other sources without restriction.

(3) Contractors also obtain proprietary and source selection information by procuring the services of marketing consultants [defined in § 11-102(2)] which, if used in connection with a procurement, may give the contractor an unfair competitive advantage. Contractors should make inquiries of marketing consultants to ensure that the marketing consultant has provided no unfair competitive advantage.

§ 11-206 Information Sources

When information concerning prospective contractors is necessary to identify and evaluate potential organizational conflicts of interest or to develop recommended actions, the Contracting Officer should first seek it from within the Authority or from other readily available sources. Authority sources include the files and the knowledge of personnel within the contracting office, other contracting offices, the cognizant contract administration and audit activities concerned with contract financing. Non-Authority sources include publications and commercial services, such as credit rating services, trade and financial journals, and business directories and registers.

§ 11-207 Procedures

(1) If the Contracting Officer decides that a particular procurement involves a significant potential conflict of interest, the Contracting Officer shall, before issuing the solicitation, submit to the President & Chief Executive Officer for approval-

(a) a written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict, based on the general rules in § 11-200 or on another basis not expressly stated in that section;

(b) a draft solicitation provision (see § 11-301); and

(c) if appropriate, a proposed contract clause (see § 11-302).

(2) The President & Chief Executive Officer shall-

(a) review the Contracting Officer's analysis and recommended course of action, including the draft provision and any proposed clause;

(b) consider the benefits and detriments to the Authority and prospective contractors; and

(c) approve, modify, or reject the recommendation in writing.

(3) The Contracting Officer shall --

(a) include the approved provision(s) and any approved clause(s) in the solicitation or the contract, or both;

(b) consider additional information provided by prospective contractors in response to the solicitation or during negotiations; and

(c) before awarding the contract, resolve the conflict or potential conflict in a

manner consistent with the approval or other direction by the President & Chief Executive Officer; or

(4) If, during the effective period of any restriction (see § 11-300 through 11-302) the contracting officer transfers procurement responsibility for the item or system involved, they shall notify the successor contracting officer of the restriction, and send a copy of the contract under which the restriction was imposed.

(5) If the prospective contractor disagrees and requests higher level review, provide the decision and the contractor's position to the President & Chief Executive Officer or their designee for review and final decision.

§ 11-208 Examples

The examples in paragraphs (1) through (8), below, illustrate situations in which questions concerning organizational conflicts of interest may arise. They are not all-inclusive, but are intended to help the Contracting Officer apply the general rules in § 11- 200 to individual contract situations.

(1) Company A agrees to provide systems engineering and technical direction for the Authority on a powerplant (i.e., turbines, drive shafts, etc.). Company A should not be allowed to supply any powerplant components. Company A can, however, supply items unrelated to the powerplant. In this example, the system is the powerplant, and the ban on supplying components is limited to those for that system only.

(2) Company A is the systems engineering and technical direction contractor for system X. After some progress, but before completion, the system is cancelled. Later, system Y is developed to achieve the same purposes as system X but in a fundamentally different fashion. Company B is the systems engineering and technical direction contractor for system Y. Company A may supply system Y or its components.

(3) Company A develops new electronic equipment and, as a result of this development, prepares specifications. Company A may supply the equipment.

(4) XYZ Tool Company and PQR Machinery Company, representing the American Tool Institute, work under Authority supervision and control to refine specifications or to clarify the requirements of a specific procurement. These companies may supply the item.

(5) Before a procurement for information technology is conducted, Company A is awarded a contract to prepare data system specifications and equipment performance criteria to be used as the basis for the equipment competition. Since the specifications are the basis for selection of commercial hardware, a potential conflict of interest exists. Company A should be excluded from the initial follow-on computer technology hardware procurement.

(6) Company A receives a contract to define the detailed performance characteristics the Authority will require for purchasing transportation fuel(s). Company A has not developed the particular fuels. When the definition contract is awarded, it is clear to both parties that the Authority will use the performance characteristics arrived at to choose competitively a contractor to develop or produce the fuels. Company A may not be awarded this follow-on contract.

(7) Company A receives a contract to prepare a detailed plan for technical training of Authority personnel. It suggests a curriculum that the Authority endorses and incorporates in its request for proposals to institutions to establish and conduct the training. Company A may not be awarded a contract to conduct the training.

(8) Company A is selected to study something specific for the Authority. The Authority intends to ask that firms doing research in the field make proprietary information available to Company A. The contract must require Company A to:

(a) Enter into agreements with these firms to protect any proprietary information they provide; and

(b) Refrain from using the information in supplying the specific thing to the Authority or for any purpose other than that for which it was intended.

Section 11 - 300 - Solicitation Provision and Contract Clause

§ 11-301 Solicitation Provision

As indicated in the general rules in § 11-200, significant potential organizational conflicts of interest normally are resolved by imposing some restraint, appropriate to the nature of the conflict, upon the contractor's eligibility for future contracts or subcontracts. Therefore, affected solicitations shall contain a provision that-

(1) invites offerors' attention to these regulations and Subpart 9.507-1 of the Federal Acquisition Regulation;

(2) states the nature of the potential conflict as seen by the Contracting Officer;

(3) states the nature of the proposed restraint upon future contractor activities; and

(4) depending on the nature of the procurement, states whether or not the terms of any proposed clause and the application of this chapter to the contract are subject to negotiation.

§ 11-302 Contract Clause

(1) If, as a condition of award, the contractor's eligibility for future prime contract or subcontract awards will be restricted or the contractor must agree to some other restraint, the solicitation shall contain a proposed clause that specifies both the nature and duration of the proposed restraint. The Contracting Officer shall include the clause in the contract, first negotiating the clause's final terms with the successful offeror if it is appropriate to do so [see § 11-207(3)].

(2) The restraint imposed by a clause shall be limited to a fixed term of reasonable duration, sufficient to avoid the circumstance of unfair competitive advantage or potential bias. This period varies. It might end, for example, when the first production contract using the contractor's specifications or work statement is awarded, or it might extend through the entire life of a system for which the contractor has performed systems engineering and technical direction. In every case, the restriction shall specify termination by a specific date or upon the occurrence of

an identifiable event.

Section 11 - 400 – Disclosure of Interested Parties by Contracting Business Entities

§ 11-401 Disclosure of Interested Parties

(1) The Authority may not enter into a contract with a business entity for an amount exceeding a value of \$1 million unless the business entity submits a disclosure of interested parties to the Authority at the time the business entity submits the signed contract to the Authority.

(2) A contract with the Authority is voidable for failure to provide the disclosure of interest parties only if:

(a) the Authority submits written notice to the business entity regarding their failure to provide the required disclosure; and

(b) the business entity fails to submit the required disclosure to the Authority on or before the 10th business day after the business entity receives the Authority’s written notice of noncompliance.

(3) Not later than the 30th day after the Authority receives a disclosure of interested parties, the Authority shall submit a copy of the disclosure to the Texas Ethics Commission.

§ 11-402 Disclosure Format

(1) The disclosure of interested parties must be submitted on a form prescribed by the Texas Ethics Commission, including:

(a) a list of each interested party for the contract of which the contracting business is aware; and

(b) a written, unsworn declaration subscribed by the authorized agent of the contracting business entity as true under penalty of perjury that is in substantially the following form:

“My name is _____, my date of birth is __, and my address is __, __, __, __ (Street) (City) (State) (Zip Code). I declare under penalty of (Country) perjury that the foregoing is true and correct. Executed in _____ County, State of _____, on the _____ day of __, _____(Month) (Year).

Declarant.”