

**SUBCHAPTER 70-30.3
PROCUREMENT REGULATIONS**

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Part 001 - General Provisions

Subpart A - General

§ 70-30.3-001 Purposes

(a) Interpretation. The regulations in this subchapter shall be construed and applied to promote their underlying purposes and policies.

(b) Purposes and Policies. The underlying purposes and policies of the regulations in this subchapter are:

- (1) To simplify, clarify, and modernize the procurement policies and practices of the Commonwealth and its agencies;
- (2) To make as consistent as possible the procurement policies and practices among the various agencies of the Commonwealth;
- (3) To provide for increased public confidence in the procedures followed in public procurement;
- (4) To insure the fair and equitable treatment of persons who deal with the procurement system of the Commonwealth;
- (5) To provide increased economy in Commonwealth procurement activities and to maximize to the fullest extent practicable the purchasing value of public funds;
- (6) To foster effective broad-based competition within the free enterprise system; and
- (7) To provide safeguards for the maintenance of a procurement system of quality and integrity.

§ 70-30.3-005 Authority

The regulations in this subchapter are promulgated under the authority of 1 CMC § 2553(j) which gives the Secretary of Finance the duty to be in control of and be responsible for procurement and supply in the Commonwealth.

§ 70-30.3-010 Supplementary General Principles of Law Applicability

Unless displaced by the particular provisions of this subchapter, the principles of law and equity including, but not limited to, the Uniform Commercial Code of the Commonwealth and common law of fraud, conflicts of interest, waste, false pretenses, and public purpose shall supplement the regulations in this subchapter.

§ 70-30.3-015 Requirement of Good Faith

The regulations in this subchapter require all parties, including Government employees, contractors, and suppliers, involved in the negotiation, bidding, performance, or administration of Government contracts to act in good faith.

§ 70-30.3-020 Application of Regulations

(a) The regulations in this subchapter apply to every expenditure of public funds irrespective of source, including federal assistance monies and Covenant funds. These regulations apply to all agencies, departments, political subdivisions, public corporations, and agencies of local Government, all collectively, referred to herein as “public agencies.” Any public agency which adopts the regulations in this subchapter or identical regulations may be authorized by the Department of Finance to administer procurement functions pursuant to the provisions of § 70-30.3-101 of this subchapter.

(b) These regulations do not apply to contracts between the Government and its political subdivisions or other governments, nor do they apply to a public corporation or autonomous agency of the Commonwealth which has been authorized to conduct its own procurement by enabling statute or other law. Nothing in this subchapter shall be construed to prevent any governmental body or political subdivision from complying with the terms and conditions of any grant, cooperative agreement, or memoranda. The regulations in this subchapter do not apply to employment contracts or contracts for personal services under an excepted service.

§ 70-30.3-025 Severability

If any provision of the regulations in this subchapter or any application thereof to any person or circumstances is held invalid by a court of competent jurisdiction, such invalidity shall not affect other provisions or application of the regulations in this subchapter which can be given effect without the invalid provision or application, and to this end, the provisions of this subchapter are declared to be severable.

§ 70-30.3-030 Validity of Contract

No contract shall be valid unless it complies with the regulations in this subchapter.

§ 70-30.3-035 Remedy Against Employee

Any procurement action of an employee of the Government or its agencies or political subdivisions in violation of the regulations in this subchapter is an action outside the scope of their employment. The Government will seek to have any liability asserted against it by a contractor which directly results from these improper acts to be determined judicially to be the individual liability of the employee who committed the wrongful act.

Subpart B - Definitions

§ 70-30.3-040 Definitions

As used in the regulations in this subchapter, unless the context otherwise requires, the following meanings apply:

- (a) **“Acquisition”** means the acquiring by contract with appropriated funds of

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supplies or services (including construction) by and for the use of the Government through purchase or lease, whether the supplies or services are already in existence or shall be created, developed, demonstrated, and evaluated. Acquisition begins at the point when needs are established and includes the description of requirements to satisfy Government 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 Government needs by contract.

(b) **“Attorney General”** means the Attorney General of the Commonwealth of the Northern Mariana Islands.

(c) **“Bid”** means a response to an invitation for bids in the form of an offer. “Bid” and “sealed bid” may be used interchangeably.

(d) **“Bid Package”** means the collection of documents that are necessary to participate in an invitation for bids and submit a sealed bid.

(e) **“Blanket purchase order”** means a purchase order that is used for the acquisition of assorted commodities or services from a known vendor.

(f) **“Commonwealth”** means the Commonwealth of the Northern Mariana Islands.

(g) **“Construction”** means the process of building, altering, repairing, improving, or demolishing of a public structure or building or public improvements commonly known as “capital improvements.” It does not include the routine maintenance of existing structures, buildings, or public real property.

(h) **“Contract”** means all types of agreements, including purchase orders, regardless of what they may be called for the procurement of goods, services, or construction.

(i) **“Contract action”** means an action resulting in a contract, including actions for additional supplies or services outside the existing contract scope, but not including actions that are within the scope and under the terms of the existing contract, such as contract modifications issued pursuant to the change order regulation.

(j) **“Cost-plus-a-percentage-of-cost contract”** is a prohibited-contract form in which, prior to completion of the work, the parties agree that the fee will be a pre-determined percentage of the total cost of the work.

(k) **“Cost-reimbursement contract”** means a contract under which a contractor is reimbursed for costs which are allowable and in accordance with the contract

terms and the regulations in this subchapter, and a fee, if any.

- (l) **“Days”** mean calendar days unless otherwise specified.
- (m) **“Definite-quantity contract”** means a contract that provides for delivery of a definite quantity of specific supplies or services for a fixed period. This type of contract may be used when it can be determined in advance that a definite quantity of supplies or services will be required during the contract period.
- (n) **“Director”** means the Director of Procurement Services.
- (o) **“Dispute”** means a disagreement concerning the legal rights and obligations of contracting parties, which, if not settled by mutual agreement, shall be referred to a neutral third party for resolution.
- (p) **“Employee”** means an individual receiving a salary from the Government, including appointive and elective officials and non-salaried individuals performing personal services for the Government. This definition extends to the Governor, Lt. Governor, and members of their staff. Consultants, independent contractors, and part-time workers shall be considered employees only with respect to the ethics in public contracting provisions in part 700.
- (q) **“Firm-fixed-price contract”** means a contract which provides for a price that is not subject to any subsequent adjustment because of the contractor’s cost experience in performing the contract. This type of contract places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss.
- (r) **“Full and open competition”** means a contract action where all responsible sources are permitted to compete.
- (s) **“Goods”** means all property, including but not limited to equipment, materials, supplies, and other tangible personal property of any kind or nature, printing, insurance, and leases of real and personal property.
- (t) **“Government”** means the Government of the Commonwealth of the Northern Mariana Islands which includes the executive and legislative branches. It also includes Government agencies, political subdivisions, public corporations, and agencies of local Government, all collectively referred to herein as “public agencies.”
- (u) **“Government-wide point of entry”** means the single point where Government business opportunities that use full and open competition procedures, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public.

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(v) **“Governor”** means the Governor of the Commonwealth of the Northern Mariana Islands.

(w) **“Invitation for bids”** means all documents, whether attached or incorporated by reference, utilized for soliciting sealed bids under the competitive sealed bidding procedure. An invitation for bids is used to describe the Government’s requirements. The invitation may include a bid package, whether attached or incorporated by reference, which is a collection of documents necessary to participate in the solicitation and submit a sealed bid containing an offer. Sealed bids are opened publicly and, with limited exceptions, are evaluated without discussions.

(x) **“Offer”** means a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract.

(y) **“Offeror”** means any person that has submitted an offer.

(z) **“Solicitation”** means any request to submit offers or quotations to the Government. Solicitations under sealed bid procedures are called "invitations for bids." Solicitations under negotiated procedures are called "requests for proposals."

(aa) **“Official with expenditure authority”** means that public official who may expend, obligate, encumber, or otherwise commit public funds under the Planning and Budgeting Act or under any annual appropriation act.

(bb) **“Person”** means an individual, sole proprietorship, partnership, joint venture, corporation, other unincorporated association, or a private legal entity.

(cc) **“Policy consultant”** means someone with expertise in a particular field or industry that provides intermittent services to the Government in the form of high-level policy advice on outcomes of a governmental program and makes recommendations based on those findings.

(dd) **“Purchase description”** means the words used in a solicitation to describe the goods, services, or construction to be purchased and includes specifications attached to, or made part of, the solicitation.

(ee) **“Quote”** or **“Quotation”** means a response to a request for quotation which provides a statement of current prices. It is informational and, unlike an offer, cannot be accepted by the Government to form a binding contract. However, a quotation may be used as a basis for a Government offer in the form of a purchase order.

(ff) **“Request for information”** is a solicitation used for planning purposes and may be used when the Government does not intend to award a contract based on the solicitation or to otherwise pay for the information solicited.

(gg) **“Request for proposals”** is a solicitation document used to communicate the

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Government's requirements and solicit proposals.

(hh) **"Requirements contract"** means a contract which provides for filling all actual purchase requirements of designated Government activities for supplies or services during a specified contract period, with deliveries or performance to be scheduled with the contractor.

(ii) **"Responsible"** in reference to an offeror means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.

(jj) **"Responsive"** in reference to a bidder means a person who has submitted a bid which conforms in all material respects to the invitation for bids.

(kk) **"Secretary"** means the Secretary of Finance.

(ll) **"Services"** means the furnishing of time, labor, or effort by a person other than an employee, and not involving the delivery of a specific product other than reports, plans, and incidental documents.

(mm) **"Signature"** refers to the signing of a written document with one's own hand or by an electronic method approved by the Director.

(nn) **"Software-as-a-service"** is a software distribution model in which third-party providers host applications and makes them available to customers over the Internet, and which are considered "Goods" for the purposes of these regulations.

(oo) **"Solicitation"** means a Government document that requests the submission of offers, quotations, or information.

(pp) **"Vendor"** means a potential supplier of goods or services to the Government.

Subpart C - Public Access

§ 70-30.3-050 Public Access to Procurement Information

(a) Procurement information shall be a matter of public record and shall be available for public inspection. Procurement information may be kept confidential when necessary to insure proper procurement procedures. This decision shall be made only by the Director.

(b) Requests for records shall be handled in a manner that complies with the Open Government Act, 1 CMC §§ 9901 – 9918.

Part 100 - Procurement Organization

Subpart A - Director of Procurement Services

§ 70-30.3-101 Creation of Procurement Services Division

There is created in the Department of Finance a Division of Procurement Services to assist the Secretary of Finance in the execution of those duties authorized under 1 CMC § 2553(j) and 1 CMC §§ 2581-2590.

§ 70-30.3-105 Director of Procurement Services

The Secretary of Finance shall appoint a Director of Procurement Services to administer and supervise the day-to-day activities of the Division of Procurement Services. The Director shall be assisted in carrying out his functions and duties by employees of the Division.

§ 70-30.3-110 Duties and Responsibilities of the Director of Procurement Services

The duties and responsibilities of the Director include, but are not limited to, the following:

- (a) Ensure that the regulations in this subchapter are observed in all Government procurement;
- (b) Provide advance planning for the centralized purchase of Government supplies;
- (c) Procure or supervise the procurement of all supplies, goods, and services needed by the government;
- (d) Conduct bidding, procurement, negotiation, or administration of Government contracts upon request of the official with expenditure authority;
- (e) Sell, trade, or otherwise dispose of surplus property belonging to and no longer needed by the Government;
- (f) Exercise general supervision and control over all inventories of supplies belonging to the Government;
- (g) Exercise general oversight and control on the use of physical assets and other capital equipment to prevent waste or abuse or other unauthorized use;
- (h) Establish and maintain programs for the inspection, testing, and acceptance of supplies;
- (i) Hear all protests and disputes; and
- (j) Oversee the administration of Government contracts.

§ 70-30.3-115 Contract Review, Processing and Oversight

- (a) All contracts must first be prepared by the official with expenditure authority who shall certify that he has complied with the Procurement Regulations codified in this subchapter, and that

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the proposed contract is for a public purpose, and does not constitute a waste or abuse of public funds. All contract documents must be complete including attachments and exhibits, if they are incorporated into the contract by reference. The contract documents prepared by the official with expenditure authority shall be submitted to the Director.

(b) The next step in the contract process is the review by the Director. Upon his own initiative or upon the request of the Attorney General, the Director may refer any contract to the Attorney General for a recommendation before he approves or disapproves of the contract. The Director shall cause such review to occur in a prompt and timely manner.

(c) The contract shall next be approved by the Secretary of Finance or his designee who shall certify the availability of funds. If the Secretary finds any aspect of the contract to be deficient or defective in any respect, he shall return the contract to the Director for appropriate resolution with the official with expenditure authority.

(d) The fourth review is that of the Attorney General or his designee who shall certify the contract as to form and legal capacity.

(e) The contract shall then be approved by the Governor.

(f) After the Governor's approval, the Director shall forward the contract to the contractor for his approval and signature.

(g) After the signature of the contractor, the Director shall review the contract documents for completeness. If he is satisfied, he shall sign in the appropriate space and shall:

(1) Inform in writing the official with expenditure authority that the contract has been signed by all parties and that he may proceed with contract implementation according to the terms contained therein; and

(2) Provide copies of said contract to the:

- (i) Secretary of Finance;
- (ii) Attorney General; and
- (iii) Contractor.

(h) A contract may be referred back to the Director by the Secretary of Finance or the Attorney General for further review based on additional evidence that it may not comply with this subchapter. If the Director withdraws approval or refuses to approve a contract, he shall state in writing the basis for his determination.

(i) It is the responsibility of the official with expenditure authority to ensure that the contractor does not sign the contract or incur any expenses under it until all necessary Government signatures have been obtained. The supervision, inspection, and administration of a Government contract is the primary responsibility of the official with expenditure authority. However, the supervision, inspection, and administration of construction contracts (including architect-engineer services) shall be performed by the Secretary of the Department of Public Works or his designee unless the Secretary certifies that the expenditure authority has the capability to handle his own construction and architect-engineer contracts.

(j) For purchases that use small purchases procedures (§ 70-30.3-220), authorization to proceed with a purchase is established when the Director signs a purchase order authorizing the purchase.

§ 70-30.3-120 Split Contracts

If the Director determines that a proposed contract has been split into two or more proposed contracts for the purpose of avoiding full and open competition, then the Director shall disapprove the contract and may instruct the expenditure authority on the appropriate competitive procedure that shall be followed.

§ 70-30.3-125 Acceptance of Gratuities by the Director of Procurement Services and Division Employees

In addition to the restrictions found in § 70-30.3-725, the Director and the employees of the Division of Procurement Services shall not accept from any person any gift of value given to them with the intent to influence their business judgment.

Subpart B - Procurement Function

§ 70-30.3-130 Decentralized Procurement

(a) All purchases under § 70-30.3-225, § 70-30.3-230, and § 70-30.3-235 shall be centralized through the Director. However, upon approval by the Secretary, the Director may delegate, in writing, other procurement functions and responsibilities upon satisfying the following requirements:

- (1) The procurement regulations in this subchapter have been duly adopted pursuant to the procedures required for adopting official business of such agencies;
- (2) The agency has adequate and capable staff to carry out the functions of the Director; and
- (3) The agency certifies in writing to the Director that it is in compliance with subsections (a)(1) and (a)(2) above.

(b) Where the Director has delegated procurement functions responsibilities under this section, the official with expenditure authority may conduct bidding, procurement, negotiation, and the administration of contracts involving funds appropriated to their own office, department, or agency. All such activity shall be shown to the reasonable satisfaction of the Director to follow the regulations in this subchapter. This delegation of authority shall be reviewed and renewed every five years.

(c) The Director may revoke the delegation of authority provided for in § 70-30.3-130 (a) at any time by submitting advanced written notice.

§ 70-30.3-135 Procurement Services

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Notwithstanding the decentralized procurement authority of any agency, upon request by the official with expenditure authority, the Director shall provide assistance or conduct the bidding, procurement, negotiation, or administration of a particular contract.

§ 70-30.3-140 Centralized Purchasing of Supplies

The Director may, with the approval of the Secretary of Finance, purchase office supplies in large quantities to be relied upon by all departments, agencies, and offices. No separate contract or purchase order for these supplies will be approved, unless otherwise waived by the Director.

Part 200 Source Selection and Contract Formation

Subpart A - Source Selection

§ 70-30.3-201 Requirements for Competition

(a) Officials with expenditure authority shall provide for full and open competition through use of the competitive procedure that is best suited to the circumstances of the procurement action. The competitive procedures for full and open competition are:

- (1) Competitive Sealed Bidding (§ 70-30.3-205);
- (2) Two-Step Sealed Bidding (§ 70-30.3-206);
- (3) Competitive Sealed Proposals (§ 70-30.3-210);
- (4) Architect-Engineer Services (§ 70-30.3-305); and
- (5) Competitive Selection Procedures for Professional Services (§ 70-30.3-310).

(b) Public Notice.

(1) The Director shall provide public notice of a proposed procurement that will use any of the procedures identified in subsection (a) of this section.

(2) Public notice shall include the following information:

- (i) A brief description of the goods, services, or construction required;
- (ii) Information on how vendors may obtain a copy of the solicitation and a phone number or e-mail address that vendors may use to contact the Division of Procurement Services;
- (iii) The deadline for offers or responses to the solicitation; and
- (iv) The time, date, and location of any conference that is to be held.

(3) Public notice shall be provided by advertisement of the proposed procurement on the Division of Procurement Services website or in a newspaper of general circulation in the Commonwealth.

(4) An advertisement period of at least 30 days shall be provided unless the Director determines that a shorter time is reasonable and necessary. A shorter advertisement period shall afford vendors a reasonable opportunity to respond considering the circumstances of the procurement, such as its complexity and urgency. The advertisement period shall never be less than 7 days.

(5) The Director may extend the 30-day advertisement period, by not more than 60 additional days, considering factors such as:

- (i) Degree of urgency;
- (ii) Complexity of requirements;

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- (iii) Expected increase in vendor participation;
 - (iv) Anticipated extent of subcontracting; and
 - (v) Geographic distribution of vendors.
- (c) Amendments.
- (1) When the Government changes its requirements, the Director shall amend the solicitation in accordance with the following:
- (i) Amendments issued before the date and time for receipt of offers shall either be issued to all vendors known to have obtained a copy of the solicitation; or posted on the Division of Procurement Services website at least one day prior to the date and time for receipt of offers.
 - (ii) Amendments issued after the date and time for receipt of offers shall be issued to all parties that have not been eliminated from the competition (i.e., parties that timely submitted a bid).
 - (iii) If, in the judgment of the Director, based on market research or otherwise, an amendment proposed for issuance after offers have been received is so substantial as to exceed what prospective contractors reasonably could have anticipated, so that additional sources likely would have submitted offers had the substance of the amendment been known to them, the Director shall cancel the original solicitation and issue a new one, regardless of the stage of procurement.
 - (2) Amendments may be sent by email, facsimile, postal service, or other appropriate means.
 - (3) Amendments shall be made available for public inspection.
 - (4) An amendment shall be sent in sufficient time to permit prospective offerors to consider it in submitting their offers. When an amendment is issued near the due date for submission of offers, the Director shall decide whether an extension of the due date is necessary, based upon the extent of changes made by the amendment. If an extension is deemed necessary, the Director shall extend the due date for submission of offers.
- (d) Public Availability. A copy of the solicitation shall be made available for public inspection at the Division of Procurement Services.

§ 70-30.3-202 Electronic Commerce

- (a) Electronic Commerce.
- (1) The use of terms commonly associated with paper transactions (*e.g.*, “copy,” “document,” “page,” “printed,” “sealed envelope,” and “stamped”) shall not be interpreted to restrict the use of electronic commerce. Contracting officers may supplement electronic transactions by using other media to meet the requirements of any contract action (*e.g.*, transmit hard copy of drawings).
- (2) The Director of Procurement Services may exercise broad discretion in selecting the hardware and software that will be used in conducting electronic commerce. However, the Director shall ensure that systems, technologies, procedures, and processes used by the Division of Procurement Services or any agency to conduct electronic commerce:
- (i) Are implemented uniformly throughout the agency, to the maximum extent practicable;
 - (ii) Include a single means of providing widespread public notice of acquisition opportunities, that use full and open competition procedures, through the Government wide point of entry and a means of responding to notices or solicitations electronically; and

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(iii) Comply with nationally and internationally recognized standards that broaden interoperability and ease the electronic interchange of information, such as standards established by the National Institute of Standards and Technology.

(3) Before using electronic commerce, the Director or the public agency head shall ensure that the systems are capable of ensuring authentication and confidentiality commensurate with the risk and magnitude of the harm from loss, misuse, or unauthorized access to or modification of the information.

(4) The Division of Procurement Services or public agency may accept electronic signatures and records in connection with Government contracts.

§ 70-30.3-205 Competitive Sealed Bidding

(a) All Government procurement shall be awarded by competitive sealed bidding under this section, except as provided in:

- (1) § 70-30.3-206 (Two-Step Sealed Bidding);
- (2) § 70-30.3-210 (Competitive Sealed Proposals);
- (3) § 70-30.3-220 (Small Purchases);
- (4) § 70-30.3-225 (Sole Source Procurement);
- (5) § 70-30.3-230 (Emergency Procurement);
- (6) § 70-30.3-235 (Expedited Purchasing in Special Circumstances);
- (7) § 70-30.3-305 (Architect-Engineer Services); and
- (8) § 70-30.3-310 (Competitive Selection Procedures for Professional Services).

(b) Invitation for Bids. An invitation for bids shall contain a clear, accurate, and complete purchase description of the required construction, goods, or services that the contractor is expected to perform or deliver to allow potential bidders to properly respond and to allow evaluations to be made on a uniform basis. This description shall include the essential physical and functional characteristics necessary to fulfill the Government's minimum or specified requirements and shall provide the following:

- (1) An invitation for bids number;
- (2) Date of issuance;
- (3) Name, address, and location of the issuing office;
- (4) Specific location where bids shall be submitted;
- (5) Date, hour, and place of bid opening;
- (6) The exact quantities to be furnished;
- (7) Time, place, and method of delivery or performance requirements;
- (8) Essential contractual terms and conditions; and
- (9) Any bonding requirements.

(c) Application for Brand Name Descriptions. A solicitation that uses a brand name description or other purchase description to specify a particular brand name, product, or feature of a product peculiar to one manufacturer is normally not allowed regardless of the number of sources solicited. It will be allowed only when justified and approved in accordance with the procedures for sole-source procurement, § 70-30.3-225. Specifically, the justification shall indicate that the use of such descriptions in the acquisition is essential to the Government's requirements, thereby precluding consideration of other similar products. "Brand-name or equal" descriptions, and other purchase

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descriptions that permit vendors to offer products other than those specifically referenced by brand name, provide for full and open competition, and do not require justification and approval to support its use.

(d) Public Notice shall be provided for in the manner prescribed by § 70-30.3-201.

(e) Bid Submissions; Bid Receipt.

(1) Bids shall be received at the Division of Procurement Services by the submission due date and time and shall be maintained sealed in a locked receptacle at the office of the Director until publicly opened. If a bid is opened by mistake, it shall be resealed and the person who opened the bid shall write his signature and print his title on the envelope and deliver it to the Director. No information contained in the bid shall be disclosed prior to the bid opening. The Director shall cause the opened bid to be placed into the sealed receptacle.

(2) Bids from Outside the Commonwealth. When the Director determines there is inadequate competition (i.e. evidence of less than two local vendors), bids from outside the Commonwealth may be accepted by mail. Bids submitted from vendors outside the Commonwealth must be postmarked by the date set in the invitation for bids and must be received within ten calendar days of that date.

(3) Bidders outside the Commonwealth shall notify the Director in writing of their intent to bid in order to receive the additional time for the receipt of bids. When the Director determines there is inadequate competition, the solicitation shall contain instructions that vendors shall follow in order to notify the Director in writing of their intent to bid and to receive the additional time for the receipt of bids.

(4) Bids submitted by electronic commerce shall be considered only if specifically permitted by the solicitation.

(f) Bid Opening.

(1) The Director shall conduct the bid opening at the Division of Procurement Services.

(2) Bids shall be opened publicly in the presence of one or more witnesses at the place and time designated in the invitation for bids.

(3) The total price of each bid and the name of each bidder shall be recorded.

(4) Bid submissions shall be open to public inspection.

(5) The Division of Procurement Services shall prepare a written summary of each bid opening.

(g) Bid Acceptance; Bid Evaluation.

(1) Bids shall be unconditionally accepted without alteration or correction, except as authorized in this subchapter. Bids shall be evaluated based on the requirements set forth in the invitation, which may include criteria as is necessary to reasonably permit a determination as to the acceptability of the bid for the particular purpose intended.

(h) Responsiveness of Bids.

(1) To be considered for award, a bid shall comply in all material respects with the invitation for bids. Bids shall be filled out, executed, and submitted in accordance with the bid instructions.

(2) A bid may be considered only if:

(i) The bidder accepts all material terms and conditions of the invitation; and

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(ii) Any future award based upon the bid would result in a binding contract with terms and conditions that do not vary from the requirements of the invitation.

(i) Bid Rejection.

(1) A bid may be rejected for any of the following reasons:

(i) Failure to conform to essential requirements of the invitation for bids such as specifications or time of delivery;

(ii) Imposition of conditions or restrictions in the bid which modify requirements of the invitation or limit the bidder's liability to the Government. For example, bids shall be rejected in which the bidder protects against future changes in conditions, such as increased costs, fails to state a price and indicates that price shall be the price in effect at the time of delivery or states a price but qualifies it as subject to price in effect at time of delivery;

(iii) Limits the rights of the Government.

(iv) Unreasonableness as to price; or

(v) A bid from a non-responsible bidder as defined in § 70-30.3-245.

(j) Correction of Bids.

(1) The Director's authority to permit the correction of bids is limited to bids that, as submitted, are responsive to the invitation. The authority to correct bids is not permitted when used to permit correction of bids to make them responsive or to correct a bid mistake resulting from an error in judgment. Whenever a bid mistake is suspected, the Director shall request confirmation of the bid prior to award. In such an instance, if the bidder alleges an error, the Director may permit the correction of the bid when:

(i) The mistake is an obvious clerical error that is clearly evident from an examination of the bid document. Examples of such mistakes are errors in addition or the obvious misplacement of a decimal point; or

(ii) The bidder alleges a mistake, and the intended bid is clearly evident from the bid document or is otherwise supported by clear and convincing evidence; however, if the correction would displace a lower bid, the correction may be permitted only when the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself.

(k) Withdrawal of Bids.

(1) If a bidder requests permission to withdraw a bid rather than correct it and the evidence reasonably supports the existence of a mistake but is not clear and convincing or there is clear and convincing evidence only as to the mistake but not as to the intended bid, the Secretary of Finance or another official above the Director of Procurement Services may permit the bidder to withdraw the bid.

(2) If a bidder requests permission to withdraw a bid rather than correct it and there is clear and convincing evidence both as to the existence of a mistake and as to the bid actually intended; and the bid, both as uncorrected and as corrected, is the lowest received, the Director may make a determination to correct the bid and not permit its withdrawal.

(l) Cancellation of Award.

(1) Cancellation of an award or contract is permitted only when:

(i) Evidence as to the existence of the mistake is not discovered until after the award;

(ii) There exists no clear and convincing evidence to support the bid intended; and

(iii) Performance of the contract at the award price would be unconscionable.

(m) Award.

(1) A contract shall be awarded with reasonable promptness by written notice to the responsible bidder who submitted the lowest-responsive bid.

(2) A notice of award is made only by the presentation of a contract to the successful bidder that contains all required signatures. No other notice of award may be made. No acceptance of an offer may occur nor may any contract be formed until a Government contract is written and approved by all the officials required by law and regulation.

(3) The Director's signature shall be the last in time to be affixed to a contract. Contracts shall contain a clause stating that the signature of the Director shall be the last in time to be affixed and that no contract can be formed before the approval of all required Government officials.

(n) Negotiating a Bid-Price Adjustment. If all bids exceed available funds and the lowest-responsive bid submitted by a responsible bidder does not exceed those funds by more than five percent, the Director of Procurement Services may authorize the official with expenditure authority to negotiate a bid-price adjustment. Changes to the Government's requirements, in order to bring the bid price within the amount of available funds, may be made. These negotiations shall be documented in writing and placed into the contract file.

(o) Notice to Unsuccessful Bidders. The Director of Procurement Services shall promptly notify unsuccessful bidders in writing. Notification shall include the name of the successful bidder and the total price offered in the successful bid.

§ 70-30.3-206 Two-Step Competitive Sealed Bidding

(a) Two-Step Sealed Bidding. Two-step sealed bidding is a combination of competitive procedures designed to obtain the benefits of sealed bidding when adequate specifications are not available. An objective is to permit the development of a sufficiently descriptive and not unduly restrictive statement of the Government's requirements, including an adequate technical data package, so that subsequent acquisitions may be made by competitive sealed bidding. Two-step sealed bidding is conducted in two steps:

(i) Step one consists of the request for, submission, evaluation, and (if necessary) discussion of a technical proposal. No pricing is involved. The objective is to determine the acceptability of the supplies or services offered. As used in this context, the word "technical" has a broad connotation and includes, among other things, the engineering approach, special manufacturing processes, and special testing techniques. Step one is the proper step for clarification of questions relating to technical requirements. Conformity to the technical requirements is resolved in this step, but not responsibility.

(ii) Step two consists of the submission of sealed priced bids, by those who submitted acceptable technical proposals in step one, and the evaluation of such bids. Bids submitted in step two are evaluated and the awards made in accordance with competitive sealed bidding procedures (§ 70-30.3-205).

(b) Conditions for Use. Two-step sealed bidding may be used in preference to the request for proposals method when all the following conditions are present:

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- (1) Available specifications or purchase descriptions are not definite or complete or may be too restrictive without technical evaluation, and any necessary discussion, of the technical aspects of the requirement to ensure mutual understanding between each source and the Government;
 - (2) Definite criteria exist for evaluating technical proposals;
 - (3) More than one technically qualified source is expected to be available;
 - (4) Sufficient time will be available for use of the two-step method; and
 - (5) A firm-fixed-price contract will be used.
- (c) Request for Technical Proposals. The request for technical proposals in step one shall include, as a minimum, the following:
- (1) A description of the supplies or services required;
 - (2) A statement of intent to use the two-step method;
 - (3) The requirements of the technical proposal;
 - (4) The evaluation criteria, to include all factors and any significant subfactors;
 - (5) A statement that the technical proposals shall not include prices or pricing information;
 - (6) The date, or date and time, by which the proposal shall be received;
 - (7) A statement that, in the second step, only bids based on technical proposals determined to be acceptable, either initially or as a result of discussions, will be considered for awards;
 - (8) A statement that each bid in the second step shall be based on the bidder's own technical proposals;
 - (9) A statement that offerors should submit proposals that are acceptable without additional explanation or information;
 - (10) A statement that the Government may make a final determination regarding a proposal's acceptability solely on the basis of the proposal as submitted;
 - (11) A statement that the Government may proceed with the second step without requesting additional information from any offeror; however, the Government may request additional information from offerors of proposals that it considers reasonably susceptible of being made acceptable, and may discuss proposals with their offerors;
 - (12) A statement that a notice of unacceptability will be forwarded to the offeror upon completion of the proposal evaluation and final determination of unacceptability; and
 - (13) A statement either that only one technical proposal may be submitted by each offeror or that multiple technical proposals may be submitted. If multiple technical proposals may be submitted, each technical proposal submitted shall be separately evaluated and the submitter will be notified as to its acceptability.
- (d) Information on delivery or performance requirements may be of assistance to bidders in determining whether to submit a proposal and may be included in the request. The request shall also indicate that the information is not binding on the Government and that the actual delivery or performance requirements will be contained in the invitation issued under step two.
- (e) Receipt of Technical Proposals. Upon receipt of technical proposals, the Director of Procurement Services shall:
- (1) Safeguard proposals against disclosure to unauthorized persons; and
 - (2) Remove any reference to price or cost.
- (f) Evaluation Period. The Director shall establish a time for evaluating technical proposals. The period may vary with the complexity and number of proposals involved.

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(g) Categorization of Proposals. Evaluations shall be based on the criteria in the request for technical proposals. Proposals shall be categorized as:

- (1) Acceptable;
- (2) Reasonably susceptible of being made acceptable; or
- (3) Unacceptable.

(h) Non-Responsive Proposal. Any proposal which modifies or fails to conform to the essential requirements or specifications of the request for technical proposals shall be considered nonresponsive and categorized as unacceptable.

(i) Proceeding Directly to Step Two. The Director may proceed directly with step two if there are sufficient acceptable proposals to ensure adequate price competition under step two, and if further time, effort, and delay to make additional proposals acceptable and thereby increase competition would not be in the Government's interest. If this is not the case, the Director shall request from those offerors whose proposals may be made acceptable additional clarifying or supplementing information. The Director shall identify the nature of the deficiencies in the proposal, or the nature of the additional information required. The Director may also arrange discussions for this purpose. No proposal shall be discussed with any offeror other than the submitter.

(j) Requests for Additional Information. In initiating requests for additional information, the Director shall fix an appropriate time for proposers to conclude discussions, if any, submit all additional information, and incorporate such additional information as part of their proposals submitted. Such time may be extended at the discretion of the Director. If the additional information incorporated as part of a proposal within the final time fixed by the Director establishes that the proposal is acceptable, it shall be so categorized. Otherwise, it shall be categorized as unacceptable.

(k) Notification of Unacceptable Proposal. When a technical proposal is found unacceptable (either initially or after clarification), the Director shall promptly notify the offeror of the basis of the determination and that a revision of the proposal will not be considered. Upon written request, the Director shall debrief unsuccessful proposers.

(l) Late technical proposals shall not be accepted.

(m) Discontinuation of Step Two. If it is necessary to discontinue two-step sealed bidding, the Director shall include a statement of the facts and circumstances in the contract file. Each offeror shall be notified in writing. When step one results in no acceptable technical proposal or only one acceptable technical proposal, the solicitation may be continued by negotiation if the Director determines that doing so would be in the Government's best interest, considering the following factors:

- (i) Degree of urgency
- (ii) Availability of alternative sources of the construction, goods, or supplies.

(n) Sealed Bid Submissions. Sealed bids submitted under step two shall follow competitive sealed bidding procedures (§ 70-30.3-205) except that an invitation for bids under step two shall:

- (1) Be issued only to those offerors who submitted acceptable proposals in step one;

- (2) Not be advertised to comply with public notice requirements;
- (3) State that the bidder shall comply with the specifications and the bidder's technical proposal; and
- (4) Reference the step-one request for technical proposal and state that the Government will consider only bids received from bidders that have submitted acceptable technical proposals.

§ 70-30.3-210 Competitive Sealed Proposals

(a) **Competitive Sealed Proposals.** The competitive sealed proposal procedure is used to communicate the Government's requirements and solicit proposals using a request for proposals. The request for proposals shall describe:

- (1) The Government's requirements;
- (2) Anticipated terms and conditions that will apply to the contract;
- (3) Information required to be in the offeror's proposal; and
- (4) Factors and significant subfactors that will be used to evaluate the proposal and their relative importance.

(b) **Conditions for Use.** The competitive sealed proposal procedure is used as an alternative to the competitive sealed bidding procedure. When the official with expenditure authority determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the Government and receives the approval of the Director, a contract may be entered into by a request for proposals.

(c) **Public Notice** shall be provided for in the manner provided in § 70-30.3-201.

(d) **Copy Costs.** The Director may determine the printing costs, if any, that potential offerors shall pay to obtain a copy of a request for proposals. Alternatively, when the Director determine that it is not practicable for the Government to provide copies of the solicitation, the Director may require that copies be obtained at a location other than a Government office (i.e., copy services vendor) with associated copy costs to be paid by the interested vendor.

(e) **Receipt of Proposals.** Proposals shall be opened to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals shall be prepared and opened for public inspection after contract award.

(f) **Evaluation of Proposals.**

(1) Proposal evaluation is an assessment of the proposal and the offeror's ability to perform the prospective contract successfully. An agency shall evaluate competitive proposals and then assess their relative qualities solely on the factors and subfactors specified in the solicitation. Evaluations may be conducted using any rating method or combination of methods, including adjectival ratings, numerical weights, and ordinal rankings. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file. The request for proposals shall state the relative importance of price and other evaluation factors. Price or cost to the Government shall be included as an evaluation factor in every solicitation of proposals.

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(2) The Director shall ensure that all evaluation factors stated in the solicitation is considered in determining proposals in the competitive range (i.e., those allowed to participate further in the selection process), and any subsequent evaluations.

(3) Technical evaluations. If any technical evaluation is necessary beyond ensuring that the proposal meets the minimum requirements in the solicitation, the evaluator or evaluation team shall document the technical evaluation which shall include:

- (i) A basis for the evaluation;
- (ii) An assessment of each offeror's ability to accomplish the technical requirements;
- (iii) A summary, matrix, or quantitative ranking of each technical proposal in relation to the best rating possible; and

(iv) Supporting documentation prepared for the selection decision that shows the proposals' comparative strengths, weaknesses, and risks in terms of the evaluation factors.

(v) When technical criteria (generally, criteria other than price) are involved, the Director shall determine in writing that appropriate qualified personnel are assigned to conduct a technical evaluation of the proposals. In forming an evaluation team, the Director shall insure that:

(i) The evaluators, including any other personnel responsible for the selection of competitive range offerors or final selection of an offeror, are formally designated to exercise such responsibility by the official with expenditure authority in consultation with the Director; and

(ii) Before conducting any evaluation, the official with expenditure authority in consultation with the Director, approves an evaluation plan which as a minimum shall include:

(A) A statement of the evaluation factors and any significant subfactors and their relative importance; and

(B) A description of the evaluation process, methodology, and techniques to be used.

(4) The Director shall promptly notify offerors when they are excluded from the competitive range or otherwise excluded from further consideration. The notice shall state the basis for the exclusion.

(g) Competitive Range.

(1) Before the conduct of written or oral discussions or negotiations, the official with expenditure authority shall determine which proposals are in the competitive range, based on the recommendations of the evaluator or evaluation team, and shall include all proposals that have a reasonable chance of being selected for award.

(2) When there is doubt as to whether a proposal is in the competitive range, the proposal shall be included. Proposals determined to have no reasonable chance of being selected for contract award shall no longer be considered for selection. A proposal is not reasonably susceptible of being selected for award and can be excluded from the competitive range if it is clear that:

(i) Its contents are so unacceptable that a revision of the proposal in the negotiation stage would be equivalent to accepting a new proposal; or

(ii) In comparison with other proposals, such proposal clearly has no chance of being selected for award.

(h) Exchanges with Offerors and Revisions to Proposals.

(1) Clarification. Clarifications are limited exchanges between the Government and offerors that occur when award without discussions is contemplated. Clarifications may be used to give offerors the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's

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past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor clerical errors.

(2) Communications. Communications are exchanges between the Government and offerors, after receipt of proposals that are conducted for the purpose of establishing a competitive range. Communications may be conducted to enhance Government understanding of proposals; allow reasonable interpretation of proposals; or facilitate the Government's evaluation process. Such communications shall not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal, but may address ambiguities in a proposal or other concerns (i.e. perceived deficiencies, weaknesses, errors, omissions, or mistakes and be considered in rating proposals for the purpose of establishing the competitive range. Communications shall address adverse past performance information to which an offeror has not had a prior opportunity to respond and when it is uncertain whether such offeror should be excluded or included in the competitive range.

(3) Negotiations. Negotiations are exchanges between the Government and offerors that are undertaken with the intent of allowing the offeror to revise its proposal. These negotiations may include bargaining. Bargaining may include persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract. When negotiations are conducted in a competitive procurement, such as in competitive sealed proposals, they takes place after the establishment of the competitive range and are called discussions. Discussions should be tailored to each offer and shall be conducted with each offeror in the competitive range.

(4) Discussions shall provide each offeror still being considered for award an opportunity to respond to deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. The Director or designee may discuss other aspects of a proposal that in the opinion of the Director or designee could be altered or explained to enhance materially the offer's potential for award.

(5) The Director or designee is not required to discuss every area where an offer could be improved. The scope and extent of discussions are a matter of judgment for the Director or designee to exercise

(6) The Government may, when the solicitation stated that evaluation credit would be given for technical solutions exceeding any mandatory minimums, negotiate with offerors for increased performance beyond any mandatory minimums, and the Government may suggest to offerors that have exceeded any mandatory minimums (in ways that are not integral to the design), that their offers would be more competitive if the excesses were removed, and the offered price decreased.

(7) If, after discussions have begun, an offeror originally in the competitive range is no longer considered to be among the most highly rated offerors being considered for award, that offeror may be eliminated from the competitive range whether all material aspects of the offer have been discussed, or whether or not the offeror has been afforded an opportunity to submit a revision.

(i) Limits on Exchanges.

(1) In conducting discussions, Government personnel shall not engage in conduct that:

(i) Reveals an offeror's technical solution, including any information that would compromise an offeror's intellectual property to another offeror;

(ii) Reveals the names of individuals providing reference information about an offeror's past performance; or

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(iii) Reveals an offeror's price without that offeror's permission. However, the Director may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion. It is permissible, at the Government's discretion, to indicate to all offerors the cost or price that the Government's price analysis, market research, and other reviews have identified as reasonable.

(j) Award.

(1) Award may be made without discussion or negotiation. However, offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion or negotiation.

(2) Award shall be made to the responsible offeror whose proposal is determined in writing to be most advantageous to the Government taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria may be used in the evaluation and the contract file shall contain the basis on which the award is made. Within three working days after the date of contract award, the Director shall provide written notification to each unsuccessful offeror (unless pre-award notice was given under § 70-30.3-210(f)). The notice shall include, as applicable:

(i) The number of offerors solicited;

(ii) The number of proposals received;

(iii) The name and address of each offeror receiving an award;

(iv) The items, quantities, and unit prices of each award (if the number of items or other factors makes listing unit prices impracticable, only the total contract price need be furnished); and

(v) In general terms, the reason the offeror's proposal was not accepted. In no event may an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.

(k) Mistakes Discovered After Award. Mistakes shall not be corrected after award of the contract except where the Director or expenditure authority finds it would be unconscionable not to allow the mistake to be corrected, and such determination is reviewed and approved by the Attorney General.

§ 70-30.3-215 Circumstances Permitting Other than Full and Open Competition

(a) The following procurement may be made without the use of full and open competition:

(1) Small Purchases (§ 70-30.3-220);

(2) Sole Source Procurement (§ 70-30.3-225);

(3) Emergency Procurement (§ 70-30.3-230);

(4) Expedited Purchasing in Special Circumstances (§ 70-30.3-235);

(5) Software Purchases (§ 70-30.3-320); and

(6) Purchases from the United States General Services Administration (GSA).

(b) Use of the methods in (a)(2), (a)(3), and (a)(4) above is subject to the following requirements.

(1) Officials with expenditure authority, before executing the contract, shall justify to the Director in writing the following:

(i) The need for contracting, the purpose of the contract, how the expected outcome would help the agency achieve its objectives, and that the services do not unnecessarily duplicate any previously performed work or services.

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- (ii) The non-availability of resources within and without the agency;
 - (iii) Vendor qualifications. The official with expenditure authority shall review any contractor evaluation on file with the Director. For professional services contract, a completed resume for each contractor participant who will exercise a major role in the completion of the contract will be required; and
 - (iv) Reasonableness of price. No presumption of reasonableness shall be attached to the incurring of costs by a contractor. The following factors will be used in determining whether costs are justified: cost information in sufficient detail to support and justify the contract; cost information for similar services, with differences noted and explained; and special factors affecting the costs under the contract. For contract amendments, the agency shall examine price considerations in the same manner as one would examine them for a basic contract. If the independent Government estimate appears to be defective, other means of comparison, such as a history of contracts with similar requirements, or current market prices, shall be used.
 - (v) Documentation of the above should be contained in a form prescribed by the Director.
- (2) If the Director determines the request for contract execution was not justified based on an analysis of items in subsection (b)(1) above, then the Director shall promptly notify the official with the expenditure authority the grounds for denial.

§ 70-30.3-220 Small Purchases

- (a) Purchases that use Government-sourced funds (local funds), or any combination of both local and federal funds, may be made according to the small purchase procedures of this subsection:
- (1) For purchases that do not exceed \$10,000, at least one price quote shall be obtained. However, the Director may require the expenditure authority to obtain more than one price quote.
 - (2) A blanket purchase order may be used to make purchases without securing a price quote when the purchases do not exceed \$5000. The goods or services that may be purchased under a blanket purchase order must be defined (i.e. office supplies) and shall not be used for equipment. The expenditure authority shall promptly submit to the Director copies of receipts for all purchases made under a blanket-purchase order. The Director may instruct the expenditure authority to explain the need for the goods or services and how the prices paid were reasonable.
 - (3) For purchases that exceed \$10,000, but which are less than or equal to \$50,000, a minimum of three vendors shall be solicited to submit written or electronic quotations. The quotations shall be recorded and placed in the procurement file. If fewer than three vendors submit quotations, the expenditure authority shall certify, in writing, to the Director that fewer than three vendors responded and shall provide written proof of the request. If fewer than three of the solicited vendors submit quotes, the Director may either approve the request or instruct the expenditure authority to solicit additional quotes.
 - (4) The Director shall limit to \$50,000 per fiscal year the total amount of purchase orders, made in accordance with the small purchase procedures of this subsection (a), that the Division of Procurement Services issues to any non-governmental vendor on behalf of a particular agency or department, unless the Secretary of Finance and the Attorney General approves of the proposed expenditures that would exceed the limit.
- (b) Purchases that use only federal funds may be made according to the small purchase procedures of this subsection:

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- (1) For purchases that do not exceed \$10,000, at least one price quote shall be obtained. However, the Director may require the expenditure authority to obtain more than one price quote.
- (2) For purchases that exceed \$10,000, but which are less than or equal to \$250,000, a minimum of three vendors shall be solicited to submit written or electronic quotations. The quotations shall be recorded and placed in the procurement file. If fewer than three vendors submit quotations, the expenditure authority shall certify, in writing, to the Director that fewer than three vendors responded and shall provide written proof of the request. If fewer than three of the solicited vendors submit quotes, the Director may either approve the quote or instruct the expenditure authority to solicit additional quotes.
- (c) Purchases from the United States General Services Administration (GSA) may be made according to the small purchase procedures of this subsection:
 - (1) At least one quote shall be obtained when making purchases, including purchases that exceed \$250,000.
- (d) A purchase order may be used as authorization for any of the small purchase procedures of this section.
- (e) Procurement requirements shall not be artificially divided so as to constitute a small purchase.

§ 70-30.3-225 Sole-Source Procurement

- (a) A contract may be awarded for a supply, service, or construction without competition when:
 - (1) The Director determines in writing, after reviewing the expenditure authority's written justification pursuant to § 70-30.3-215(b), that there is only one source for the required supply, service, or construction;
 - (2) The purpose is to obtain equipment or services identified as interoperable for the use of enhancing and protecting the Commonwealth homeland security from suppliers determined capable to deliver such equipment or services for the purpose specified or for purposes relating to the needs of agencies designated as homeland providers;
 - (3) Professional services are needed to facilitate the process of obtaining needed critical infrastructure funding to harden and enhance the capability of protecting critical infrastructure of the Commonwealth;
 - (4) Professional services are needed for the purpose of facilitating the establishment of a unit authorized in a federal defense appropriation act;
 - (5) The purpose is to obtain expert witnesses for litigation;
 - (6) The purposes is to obtain legal services;
 - (7) The purpose is to procure policy consultants of the Governor, Lt. Governor, or presiding officers of the Legislature;
 - (8) The purpose is to obtain the services provided by lecturers, speakers, trainers, or facilitators when the vendor uses specialized training methods or techniques or has expertise in the subject matter; or
 - (9) The purpose is to purchase registration or workshop fees for conferences or training.

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(b) For any sole-source procurement pursuant to subsection (a)(1), a written justification for sole-source procurement shall be prepared by the official with expenditure authority and submitted to the Director. This written justification shall contain the specific unique capabilities required; the specific unique capabilities of the contractor; the efforts made to obtain competition; and the specific considerations given to alternative sources and specific reasons why alternative sources were not selected.

(c) For any sole source procurement pursuant to subsections (a)(2), (a)(3) or (a)(4), the official with expenditure authority shall provide a written copy of the applicable federal grant or act under which the services are authorized or required.

§ 70-30.3-230 Emergency Procurement

(a) Notwithstanding any other provision of the regulations in this subchapter, the Director may make or authorize an emergency procurement when there exists a threat to public health, safety, or welfare under emergency conditions. An emergency procurement shall be as competitive as practicable under the circumstances.

(b) The official with expenditure authority shall provide the Director with a written justification for emergency procurement and justify the selection of the contractor on the basis of price and quality. If the Director is not satisfied with the justification, the Director shall disapprove the request and promptly notify the expenditure authority of the basis for the determination.

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

§ 70-30.3-235 Expedited Purchasing in Special Circumstances

(a) When special circumstances require the expedited procurement of goods or services, including professional services for the purpose of facilitating the process of obtaining needed critical infrastructure funding in order to harden and enhance the capability of protecting critical infrastructures of the Commonwealth, the official with expenditure authority may submit a request to the Director that explains the need for expedited procurement without the use of full and open completion.

(b) The factors to be considered by the Director in approving or disapproving the request are:

- (1) The urgency of the Government's need for the good or services;
- (2) The comparative costs of procuring the goods or service from a sole source as evidenced through the submission of price quotes or through the competitive process;
- (3) The availability of the goods or service in the Commonwealth and the timeliness in acquiring it; and
- (4) Any other consideration that establishes the proposed expedited procurement to be in the Government's best interest.

(c) Upon the Director's written determination that the factors in (b) above justify an expedited purchase, the Division of Procurement Services shall process the necessary documents and assist

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the official with the expenditure authority in procuring the required goods or services in the most efficient manner.

(d) If the Director determines that a request for expedited procurement does not meet the criteria in (b) above, then the Director shall promptly notify, in writing, the official with expenditure authority the basis for such determination.

(e) The expedited procurement shall be as competitive as practicable under the circumstances.

(f) The total amount of goods or service that may be approved under this section shall not exceed \$50,000, except when such goods or services are procured for the purpose of facilitating the process of obtaining needed critical infrastructure funding in order to harden and enhance the capability of protecting critical infrastructures of the Commonwealth including procuring vehicles and equipment specifically designed for chemical, biological, nuclear exposure and bomb detection and critically needed emergency medical supplies as described by the Office of Domestic Preparedness.

§ 70-30.3-236 Request for Information

(a) A request for information is a solicitation used for planning purposes. The use of a request for information is appropriate when the Government does not intend to award a contract based on the solicitation or to otherwise pay for the information solicited.

(b) The request for information shall state that responses will be treated as information only and that no contract award will be made based on the solicitation.

Subpart B - Cancellation of Solicitation

§ 70-30.3-240 Cancellation

(a) A solicitation may be canceled, and any and all offers or proposals may be rejected, when such action is determined in writing by the Director to be in the best interest of the Government based on:

- (1) Inadequate or ambiguous specifications contained in the solicitation;
- (2) Specifications which have been revised;
- (3) Goods or services being procured which are no longer required;
- (4) Inadequate consideration given to all factors of cost to the Government in the solicitation;
- (5) Bids or proposals received that indicate that the needs of the Government can be satisfied by means of a less expensive good or service;
- (6) Prices that exceed available funds;
- (7) Evidence that prices offered were collusive; or
- (8) Cancellation is determined to be in the best interest of the Government.

Subpart C Qualifications and Duties

§ 70-30.3-245 Responsibility

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- (a) Awards shall be made only to responsible contractors. To be determined responsible, a contractor shall:
- (1) Have adequate financial resources to perform the contract or the ability to obtain them;
 - (2) Be able to comply with the required delivery or performance schedule;
 - (3) Have a satisfactory performance record;
 - (4) Have a satisfactory record of integrity and business ethics;
 - (5) Have the necessary organization, experience, and skills (or the ability to obtain them) required to successfully perform the contract;
 - (6) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and
 - (7) Be otherwise eligible to receive an award under applicable laws and regulations.
- (b) Obtaining information. Prior to award, the Director shall obtain relevant information from the contractor necessary to make a responsibility determination using the factors in subsection (a) above. The unreasonable failure of a contractor to promptly supply information in connection with an inquiry with respect to responsibility is grounds for a non-responsible determination.
- (c) Right of non-disclosure. Information furnished by a contractor pursuant to subsection (b) shall not be disclosed outside of the Division of Procurement Services and shall not be disclosed by any Division employee without the contractor's prior consent.
- (d) Non-responsibility determination. When a bid or proposal on which a contract award would otherwise be made is rejected because the prospective contractor is found to be non-responsible, a written determination shall be signed by the Director stating the basis for the determination and this shall be placed in the contract file. A copy of the Director's non-responsibility determination letter shall be provided to the contractor.

§ 70-30.3-250 Prequalification of Sources

- (a) Prequalification of sources may be used when the Director determines in writing that the proposed procurement is of an urgency or complexity that requires prequalification to ensure timely and efficient acquisition of goods or services, including construction, and architect-engineer services.
- (b) Prequalification shall be solicited as an invitation for prequalification and shall follow competitive sealed proposal (§ 70-30.3-210) procedures. The invitation shall contain evaluation criteria that are essential to the proposed procurement and shall describe the prequalification program (i.e., description of projects for which participation of prequalified contractors will be solicited) in sufficient detail to allow participation by potential contractors. In no event may a contractor be allowed to prequalify after the due date and time for prequalification has expired.
- (c) Except as provided in this section, goods or services from prequalified sources shall be solicited using competitive sealed bidding procedures (§ 70-30.3-205) or competitive sealed proposal procedures (§ 70-30.3-210). However, advertisement requirements are inapplicable (i.e. the invitation for bids shall be sent only to the prequalified contractors).

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- (d) When soliciting architect-engineer services from prequalified sources, the Director shall ensure that evaluations, discussions, and negotiations are conducted in accordance with § 70-30.3-305.
- (e) Prequalification status will result in the prequalified contractor to be determined responsible under § 70-30.3-245.
- (f) The Director shall certify the prequalified source list for acquisitions not to exceed a duration of eighteen months from the date of prequalification inclusive of change orders.
- (g) Prequalified sources shall be filed with the Division of Procurement Services no more than fourteen days after selection and shall be made available for public inspection.

Subpart D Types of Contracts

§ 70-30.3-255 Permissible Types of Contracts

Government contracts shall utilize a firm fixed price unless the use of a cost reimbursement contract is justified under § 70-30.3-260. Government contracts shall also use definite-quantity contracts unless a requirements contract is justified under § 70-30.3-265. Use of cost-plus-a-percentage-of-cost or percentage of construction cost methods of contracting are prohibited.

§ 70-30.3-260 Cost-Reimbursement Contracts

- (a) Policy. Cost-reimbursement contracts shall contain a ceiling which the contractor shall not exceed without the recommendation of the official with expenditure authority and Director's approval.
- (b) Application. A cost-reimbursement contract may be used when the Director attaches to the contract a written determination that:
 - (1) Uncertainties in the work to be performed make the cost of performance too difficult to estimate with the degree of accuracy required for a firm fixed price contract; and
 - (2) Use of a cost reimbursement contract is likely to be less costly to the Government than any other type due to the nature of the work to be performed under the contract.
- (c) Limitations.
 - (1) A cost-reimbursement contract may be used only when the Director determines that the contractor's accounting system is adequate for determining costs applicable to the contract and Government surveillance in the form of a construction management contract will be obtained to ensure the use of efficient methods and effective cost controls in the performance of the contract.
 - (2) The use of cost-reimbursement contracts is prohibited for the acquisition of commercially available items.
- (d) Cost-Plus-Fixed-Fee Contracts.
 - (1) Description. A cost-plus-fixed-fee contract is a cost-reimbursement contract that provides for payment to the contractor of a negotiated fee that is fixed at the inception of the contract. The

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fixed fee does not vary with actual cost but may be adjusted because of changes in the work to be performed under the contract, authorized pursuant to § 70-30.3-410(a).

(2) Application.

(i) A cost-plus-fixed-fee contract is suitable for use when the conditions of § 70-30.3-260(b) are present and the contract is for the performance of research or preliminary exploration or study, and the level of effort required is unknown.

(ii) A cost-plus-fixed-fee contract normally shall not be used in development of major systems once preliminary exploration, studies, and risk reduction have indicated a high degree of probability that the development is achievable and the Government has established reasonably firm performance objectives and schedules.

(3) Limitations. No cost-plus-fixed-fee contract can be awarded unless the official with expenditure authority complies with all limitations in § 70-30.3-260(c).

(1) Before any payment is released on a cost-reimbursement contract as defined in this section, the contractor shall provide detailed billing justification including cost paid for materials, rents, and labor.

§ 70-30.3-265 Requirements Contracts

(a) A requirements contract may be appropriate for acquiring supplies or services when the Government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated Government activities will need during a definite period.

(b) For the information of contractors, the official with expenditure authority shall state a realistic estimated total quantity in the solicitation and resulting contract. This estimate is not a representation to a contractor that the estimated quantity will be required or ordered, or that conditions affecting requirements will be stable or normal. The official with expenditure authority may obtain the estimate from records of previous requirements and consumption, or by other means, and shall base the estimate on the most current information available.

(c) The contract shall state, if feasible, the maximum limit of the contractor's obligation to deliver and the Government's obligation to order. The contract may also specify maximum or minimum quantities that the Government may order under each individual order and the maximum that it may order during a specified period. The contract shall specify that failure of the Government to order such estimated minimum or maximum quantities will not entitle the contractor to any equitable adjustment in unit price.

(d) Duration. A requirements contract shall not be permitted for a term that is longer than two years, inclusive of change orders.

Subpart E - Inspection and Audit

§ 70-30.3-270 Right to Inspect Place of Business and Records

(a) The Director or designee may, at a reasonable time, inspect the place of business of a contractor or any subcontractor which is related to the performance of any contract awarded or to be awarded by the Government.

(b) The contractor shall provide the Director with access to and the right to examine and copy any records, data, or papers relevant to a Government contract for a period of three years after the final payment under the contract.

§ 70-30.3-275 Right to Audit Records

As required by § 404 of Public Law No. 3-91 (1 CMC § 7845), the contractor and subcontractor or grantee and subgrantee at all levels shall provide the Public Auditor of the Commonwealth with access to and the right to examine and copy any records, data, or papers relevant to a Government contract or grant for a period of three years after the final payment under the contract or grant. A clause to this effect shall appear in all Government contracts and obligations.

Subpart F - Reports and Records

§ 70-30.3-280 Report of Anti-Competitive or Deceptive Practices

(a) When for any reason a person suspects the following practices (which are more fully defined by 4 CMC § 5101 to § 5206) are occurring among bidders, offerors, contractors, or subcontractors, the Director shall transmit a notice of the relevant facts to the Attorney General without delay:

- (1) Unfair methods of competition;
- (2) Deceptive acts;
- (3) Unfair business practices.

§ 70-30.3-285 Retention of Procurement Records

(a) The Director shall retain all procurement records for a period of 5 years after the completion of construction, or full delivery of goods or services under a contract. The official with expenditure authority shall also retain copies of all procurement records for their respective agency.

(b) The Director shall maintain a record listing all contracts for a minimum of five years. The record shall contain:

- (1) Each contractor's name;
- (2) The amount and type of each contract;
- (3) A listing of the supplies, services, or construction procured under each contract; and
- (4) A listing of contracts per agency and by fiscal year.

(c) All procurement records, except those designated herein as not subject to disclosure, shall be available to public inspection in accordance with the Open Government Act.

Part 300 - Specialized Procurement

§ 70-30.3-301 Construction Procurement

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(a) Invitation for bids. An invitation for bids shall be used in construction procurement unless the Director determines in writing that it is in the best interest of the Commonwealth to use the competitive sealed proposal procedure (§ 70-30.3-210).

(1) Contents. The invitation for bids shall be prepared in accordance with § 70-30.3-205. In addition, the following shall be included in the invitation for bids:

- (i) General information regarding the project;
- (ii) Instructions and information on the preparation of bids, bid security requirements and forms and certifications that shall be submitted with the bid;
- (iii) Standard contract clauses governing the performance of work;
- (iv) Special contract clauses, depending on the nature and dollar amount of the work to be performed; and
- (v) Technical specifications governing the technical aspects of the work to be performed.

(b) Bid Security.

(1) Bid security is required for all competitive sealed bidding construction contracts where the price is estimated by the Director to exceed \$25,000.00 or when the Director determines that the requirement is in the best interest of the Government. Bid security shall be on a bid bond, in cash, by certified check, cashier's check or other form acceptable to the Government. A surety company shall hold the certificate of authority from the U.S. Secretary of the Treasury as an acceptable surety or other surety authorized by the CNMI Department of Commerce.

(2) Bid security shall be in an amount equal to at least fifteen percent of the total bid price or amount that is specified in the invitation for bids.

(3) Failure to furnish bid security, when required by the invitation, will result in rejection of the bid as non-responsive.

(c) Contract Performance and Payment Bonds.

(1) When a construction contract is awarded in excess of \$25,000.00, the following bonds or security shall be delivered to the Government and will become binding on the parties upon the execution of the contract:

(i) A performance bond satisfactory to the Government pursuant to subsection (c)(2) below, executed by a surety company authorized to do business in the Commonwealth or otherwise secured in a manner satisfactory to the Government, in an amount equal to one hundred percent of the price specified in the contract; and

(ii) A payment bond satisfactory to the Government pursuant to subsection (c)(2) below, executed by a surety company authorized to do business in the Commonwealth or otherwise secured in a manner satisfactory to the Government, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract. The bond shall be in an amount equal to one hundred percent of the price specified in the contract.

(2) Acceptability of payment and performance bonds. The Director shall ensure that the bonding company's pledged assets are sufficient to cover the bond obligation. Prior to the execution of the contract, the Director shall require the selected contractor to submit:

(i) A current license from the bonding company showing that it has authority to issue bonds; and

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(ii) A certification from the bonding company that the unencumbered value of its assets (exclusive of all outstanding commitments on other bond obligations) exceed the penal amount of each bond.

(3) A contractor that submits an unacceptable payment or performance bond may be permitted a reasonable time, as determined by the Director, to substitute an acceptable bond prior to executing a contract. When evaluating payment and performance bonds, the Director shall confirm the acceptability of the bonding company from other Government agencies, such as the Insurance Office under the Department of Commerce.

(d) Suits on Payment Bonds; Right to Institute. Every person who has furnished labor or material to the contractor or its subcontractors for the work provided in the contract, in respect of which a payment bond is furnished under this section, and who has not been paid in full before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by such person or material was furnished or supplied by such person for which such claim is made, shall have the right to sue on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action for the sum(s) due; provided that:

(1) Any person having a direct contractual relationship with a subcontractor, but no contractual relationship express or implied with the contractor furnishing said payment bond, shall have a right of action upon the payment bond upon giving written notice to the contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material upon which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed.

(2) Such notice shall be served personally or by registered or certified mail in an envelope addressed to the contractor at any place the contractor maintains an office or conducts its business.

(3) Where and When Brought. Every suit instituted upon a payment bond shall be brought in a court of competent jurisdiction for the Commonwealth. The obligee named in the bond need not be joined as a party in any such suit.

(e) Fiscal Responsibility. Every contract modification, change order, or contract price adjustment under a construction contract is subject to prior written certification by The Secretary of Finance as to the availability of funds that will be used for any increase in total contract amount.

§ 70-30.3-305 Architect-Engineer Services

(a) Procurement Method. Architect-engineer services shall be procured as provided in this section except when authorized as a small purchase, expedited, emergency procurement or prequalification of sources.

(b) Selection.

(1) The Director and the Technical Services Division of the Department of Public Works shall jointly maintain files of current statements of qualifications of architect-engineer firms. Firms may submit statements of qualifications to the office of the Director of Procurement Services. These statements may be amended by submitting a new statement.

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(2) After public announcement of requirements for architect-engineer services, current statements shall be reviewed together with those that other firms submit in response to the announcement.

(3) Evaluations shall be conducted to determine the most highly qualified architect-engineer firms. Firms shall be evaluated in terms of the following criteria:

(i) The professional qualifications necessary for the satisfactory performance of the required services;

(ii) Specialized experience and technical competence in the type of work required, including, where appropriate, experience in energy conservation, pollution prevention, waste reduction, and the use of recovered materials;

(iii) Capacity to accomplish the work in the required time;

(iv) Past performance on contracts with Government agencies and private industry in terms of cost control, quality of work, and compliance with performance schedules;

(v) Location in the general geographical area of the project and knowledge of the locality of the project; provided, that application of this criterion leaves an appropriate number of qualified firms, given the nature and size of the project; and

(vi) Any other evaluation criteria that the Director deems appropriate.

(c) Firms shall be ranked from highest qualified to least qualified. In the event that qualifications statements are received from less than three firms, the Director shall consider whether a reannouncement would be prudent. If the Director determines that a reannouncement is unlikely to result in additional statements of qualifications or is not in the Government's best interest, then less than three firms may be considered for award.

(d) Discussions shall be conducted with the most highly qualified firms (i.e. the top three firms) regarding contract requirements, concepts, technical approach, the relative utility of alternative methods, and feasible ways to achieve waste reduction and energy-efficiency in design. Fee proposals may be solicited upon public announcement; however, this information shall not be considered in the selection of the most highly qualified firms. Such fee proposals may be used to determine a fair and reasonable contract price.

(e) Negotiation.

(1) The Director or designee shall negotiate a contract beginning with the highest qualified firm until a mutually satisfactory contract is negotiated at a price determined to be fair and reasonable to the Government. The Director or designee shall request a proposal from the firm at the negotiation stage. If a contract cannot be negotiated with the highest-ranking firm, negotiations shall continue with the next highest-ranking firm and so on until a mutually satisfactory contract is negotiated. If negotiations fail with all selected firms, additional firms may be considered (i.e. five of the most highly qualified firms).

(2) During negotiations, the Director or designee should seek advance agreement on any charges for computer-assisted design. When the firm's proposal does not cover appropriate modern and cost-effective design methods (e.g., computer-assisted design), the Director or designee should discuss the topic with the firm.

(3) Because the selection of firms is based on qualifications, the Director or designee shall consider the extent of any subcontracting.

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(4) If a mutually satisfactory contract cannot be negotiated, the Director or designee shall terminate negotiations and shall notify the firm of the termination. The Director or designee shall then initiate negotiations with the next firm on the selection list. This procedure shall be continued until a mutually satisfactory contract is negotiated or until negotiations are terminated.

§ 70-30.3-310 Competitive Selection Procedures for Professional Services

(a) Procurement Method. The services of accountants, physicians, or lawyers shall be procured through a request for proposals using the procedures provided by § 70-30.3-210 except when authorized as a small purchase, emergency procurement, expedited procurement, or sole-source procurement. The request for proposals shall describe the services required, list the type of information and data required of each offeror, and state the relative importance of qualifications.

(b) Award. Award shall be made to the offeror determined in writing by the expenditure authority and approved by the Director to be the best qualified based on the evaluation factors set forth in the request for proposals, and where compensation is determined to be fair and reasonable.

(c) Exchanges with offerors such as discussions and negotiations provided under the request for proposals procedures (§ 70-30.3-210) are permissible. All offerors will be accorded fair and equal treatment with respect to any opportunity for discussion or negotiation. However, the Commonwealth is not required to conduct discussions or negotiate with any or all qualified offerors and may award a contract to the highest ranked offeror without conducting discussions or negotiations.

§ 70-30.3-315 Lease or Purchase of Vehicles

(a) Policy. Any lease or purchase of Government vehicles shall be governed by this section. It applies to both the initial acquisition of vehicles and the renewal or extension of vehicle leases. The lease or purchase of vehicles shall be procured using an invitation for bids unless it qualifies for other procurement methods. The Director shall establish standard vehicle specifications which shall be updated on a regular basis (not less frequently than every 2 years). All vehicles leased or purchased shall be procured in the name of the Government, and shall conform to CNMI and federal laws, including the CNMI Government Vehicle Act (1 CMC § 7406), and associated rules and regulations.

(b) Whether to Lease or Purchase. Agencies shall consider whether to lease or purchase vehicles based on a case-by-case evaluation of comparative costs and other factors. The following factors are the minimum that shall be considered, and a record reflecting the application of these factors shall be provided in a form prescribed by the Director and shall be included in the file:

- (1) Estimated length of the period in which the vehicle is to be used and the extent of use within that period.
- (2) Financial and operating advantages of alternative types and makes of vehicles.
- (3) Cumulative rental payments for the estimated period of use.
- (4) Net purchase price.
- (5) Maintenance and other service costs.
- (6) The following additional factors shall be considered, as appropriate:

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- (i) Availability of purchase options;
 - (ii) Potential for use of the vehicle by other agencies after its use by the acquiring agency is ended;
 - (iii) Trade-in or salvage value;
 - (iv) Imputed interest; and
 - (v) Availability of a servicing capability; e.g., can the vehicles be serviced by the Government or other sources if it is purchased?
- (c) Purchase method. The purchase method is appropriate if the vehicles will be used beyond the point in time when cumulative leasing costs exceed the purchase costs.
- (d) Lease Method. The lease method is appropriate if it is to the Government's advantage under the circumstances. The lease method may also serve as an interim measure when the circumstances require immediate use of vehicles to meet program or system goals; but do not currently support acquisition by purchase.
- (e) Lease with Option to Purchase. If a lease is justified, a lease with option to purchase is preferable. Generally, a long-term lease shall be avoided but may be appropriate if an option to purchase or other favorable terms are included. If a lease with option to purchase is used, the contract shall state the purchase price or provide a formula which shows how the purchase price will be established at the time of purchase. The option to purchase may only be exercised by a Government entity. The expenditure authority shall notify the Director 30 days in advance if it does not intend to exercise the purchase option.

§ 70-30.3-320 Computer Software

- (a) Notwithstanding any other provision of these regulations, commercial computer software, including documentation, warranties, subscriptions, and related component may be procured pursuant to this part.
- (b) Commercial computer software, including commercial computer software documentation and cloud computing services, may be acquired under a license customarily provided to the public to the extent such license is lawful and satisfies the Government's needs.
- (c) In acquiring commercial software, the Government shall not generally require contractors to:
- (1) Furnish technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public;
 - (2) Transfer intellectual property rights or otherwise relinquish to, or otherwise provide, the Government the rights to use, modify, reproduce, release, perform, display, or disclose commercial computer software or commercial computer software documentation, except as mutually agreed to by the parties. With regard to commercial computer software and commercial software documentation, the Government shall have only those rights specified in the license therefor.
- (d) Competitive bidding, or competitive procurement is not required for commercial software, including Software-as-a-Service, upon a showing that:

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- (1) The software is advertised for sale to the public at prices which are readily determinable from public sources, including but not limited to, sources on the internet;
 - (2) Proof of contemporaneous pricing which is available to CNMI purchasers is supplied in the contract package; and
 - (3) The prices being compared are within 10% of the pricing selected, or the selected vendor will provide support for the software of a value which compensates for the difference in price.
- (e) Competitive bidding or competitive procurement is not required with respect to software for the following:
- (1) Software purchased is an updated version of software previously purchased;
 - (2) An extension of the license for previously purchased software;
 - (3) An extension of maintenance services for previously purchased software; and
 - (4) Computer hardware maintenance agreements for existing equipment.
- (f) Contracts for extensions of maintenance service agreements, license renewals, or updates to previously purchased software as provided for in § 70-30.3-320 (e) may proceed as a new sole source contract, § 70-30.3-225 (a)(1), or small purchase, as provided for in § 70-30.3-220.
- (g) The purchase of computer hardware, software, and/or related services, which is/are purchased pursuant to a US General Services Administration (GSA) blanket contract that was negotiated by the federal government, is presumptively concluded to follow the competitive procurement requirements of these Regulations. This presumption applies not only to commercially available products, but also to products which are designed, manufactured and/or assembled according to GSA specifications.

§ 70-30.3-325 Lease of Real Property

- (a) Description. This section defines the procedures by which the Commonwealth secures property for Government use, such as office space, from private property.
- (b) Procedure. An invitation for bids should be used to solicit a lease for real property unless the expenditure authority determines in writing that it is in the best interest of the Commonwealth to use the Competitive Sealed Proposals procedure under § 70-30.3-210.
- (c) Six months prior to the expiration of a lease for real property, the expenditure authority shall prepare the appropriate solicitation documents.
- (d) Lease term. A lease of real property pursuant to a particular solicitation shall not exceed 10 years, inclusive of options for extension or renewal.
- (e) Certification of Funds. Leases governed by this section shall clearly list both the value of the lease over its full term, and the amount to be appropriated each fiscal year.
- (f) Holdover Tenancy. If a lease expires prior to the Government entity renewing or vacating the leased property, rent shall be due on a month-to-month basis.

Part 400 Contract Terms and Administration of Contracts

§ 70-30.3-401 Price and Payment Terms

(a) Price. In executing contracts, agencies shall set the maximum amount that can be charged under the contract and disallow open-ended contracts, i.e., contracts which do not specify the maximum contract price. Whatever contract type is selected, agencies shall limit contracts to a fixed price or a ceiling price, and the contractor shall not exceed the price set unless a change order is approved (See § 70-30.3-410, change order). Provided, however, in the case of contracts for legal or lobbying services obtained pursuant to a contingency fee agreement, the agency shall put a fixed price on any costs to be borne by the agency out of the general fund, including but not limited to any price to be charged by the contractor in lieu of a percentage of an award obtained because of the contractor's services.

(b) Payment Terms. Payments shall be made only upon submission of evidence of work performed and adherence to contract terms and specifications. Generally, a one-time payment shall be made after the official with expenditure authority has certified completion of work or delivery of goods or services. Other types of payments are as follows:

(1) Advance Payments. Advance payments shall be authorized only in certain circumstances as provided in (b)(1)(i), in (b)(1)(ii), or in (b)(1)(iii) below.

(i) The contractor fails to qualify as a responsible contractor due solely to the absence of financial capability, and it is justified under § 70-30.3-225 that the contractor is the only available source, subject to the following conditions:

(A) General requirements - the contractor pledges adequate security, and the official with expenditure authority determines, based on written findings, that the advance payment is in the public interest.

(B) The standards for advance payment determination are:

(I) The advance payments will not exceed the contractor's interim cash needs based on an analysis of the cash flow required for contract performance, consideration of the reimbursement or other payment cycle, and employment of the contractor's own working capital;

(II) The advance payments are necessary to supplement other funds or credit available for the contract;

(III) The recipient is otherwise qualified as a responsible contractor in all areas other than financial capability; and

(IV) Paying the contractor in advance will result in specific advantages to the Government.

(C) Advance payments shall be limited to not more than 25 percent of the contract price or an amount equivalent to a 60-day working capital requirement, whichever is lower.

(ii) The official with expenditure authority demonstrates in writing that the common business practice of a particular industry requires buyers to pay on an advance payment basis. Such advance payment shall be limited to not more than 50 percent of the contract price. Pertinent documents supporting such business practice shall be attached to the written justification.

(iii) The official with expenditure authority demonstrates in writing that the advance payment is made pursuant to procurement of goods and services as provided in § 70-30.3-225(a)(2), (a)(3), or (a)(4), or § 70-30.3-235.

(2) Progress Payments. Contracts may provide for progress payments to contractors for work performed or costs incurred in the performance of the contract. Not less than 10 percent of the contract amount shall be withheld pending final completion of the contract and an evaluation of

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the contractor's performance. However, if the contract consists of the performance of separate and distinct tasks, then any funds so withheld with regard to a particular task may be paid upon completion of that task and an evaluation of the contractor's performance. No official with expenditure authority shall make progress payments on a contract unless it has first been established that the covered work or service has been delivered in accordance with the contract. Payments shall be allowed on stored materials only upon arrival of materials in the CNMI, not prior to shipment, and only after inspection by the official with expenditure authority.

(c) The contract shall accurately reflect the actual Government requirement, stating adequately what is to be done or to be delivered to the Government. For instance, definite quantities shall be stated in the statement of deliverables, unless use of a requirements contract was justified under § 70-30.3-265. Contracts with general requirements shall be disallowed.

§ 70-30.3-405 Administration of Contracts

(a) The primary responsibility for ensuring compliance with these regulations and applicable laws during the life of a contract rests with the official with expenditure authority. The official with expenditure authority is also primary responsible for drafting solicitations, evaluating bids or proposals, obtaining appropriate approvals, approving contractor invoices, and evaluating contractors upon the completion of contracts.

(b) The oversight responsibility for the Government's administration and enforcement of its contracts rests primarily with the Director. The Director shall be responsible for developing standard contract administration procedures, maintaining a central depository of contractor evaluations, and making the evaluations available to other agencies upon request.

(c) Contract Monitoring.

(1) Contract monitoring shall be accomplished through production surveillance and reporting. Production surveillance is a function which the official with expenditure authority uses to determine contractor progress and to identify any factors that may delay performance. It shall involve Government review and analysis of:

- (i) Contractor performance plans, schedules, controls, and industrial processes; and
- (ii) The contractor's actual performance under them.

(2) When information on contract performance status is needed, officials with expenditure authority shall require contractors to submit production progress reports. The official with expenditure authority shall review and verify the accuracy of contractor reports and advise the Director of any actions planned as a result of any potential or actual delay in performance, including the withholding of payments.

(3) The Director shall verify, whenever necessary and practicable, the results of monitoring by the official with expenditure authority. The Director shall determine the extent of surveillance based on several factors such as the contractor's history of contract performance, the contractor's experience with the contract supplies or services, and the contractor's financial capability. For construction contracts (including architect-engineer services), contract monitoring is performed by the Secretary of the Department of Public Works or designee pursuant to § 70-30.3-115(i).

(d) Evaluating Results.

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(1) Officials with expenditure authority shall complete, within 15 days of the end of the contract, a post-evaluation of the contractor, which shall be kept on file for 36 months. The official with expenditure authority shall report at least the following information to the Director on a prescribed form:

- (i) Whether the contracted work or service was completed as specified in the contract, and the reasons for and amount of any cost overruns or delayed completions;
- (ii) Whether the contracted work or services met the quality standards specified in the contract;
- (iii) Whether the contractor fulfilled all the requirements of the contract, and if not, in what ways the contractor did not fulfill the contract;
- (iv) Factors outside the control of the contractor that caused difficulties in contractor performance; and
- (v) How the contract results and findings will be utilized to meet the goals of the official with expenditure authority.

(2) The post evaluation of each contractor shall be submitted before final payment and close-out of the contract is done.

(3) Final payment shall not be made unless the contractor has submitted a tax clearance verifying the filing of all required Commonwealth employment, excise, gross revenue, and income tax returns and payment of all amounts owing on such returns.

(4) The Director shall establish and maintain a central depository of all contract administration documents, which should include, but not be limited to, progress performance and post-evaluation documents. These documents shall be made available to any expenditure authority upon request to the Director.

§ 70-30.3-409 Annual Reauthorization of Multi-Year Contracts

(a) **Applicability.** This section applies to otherwise validly executed contracts governed by these regulations.

(b) **Reauthorization Procedure.** Sixty (60) days prior to the end of the fiscal year, the Expenditure Authority shall route a duly executed Annual Reauthorization Request, as established by the Department of Finance, requesting Department of Finance to continue the draw down in the new fiscal year.

(c) For annual reauthorization of payment or change of account, no change order is needed.

§ 70-30.3-410 Change Orders

(a) Execution of a change order shall only be allowed if an increase, decrease, or change in the scope of work is required which was not reasonably foreseeable at the time of the formation of the contract.

(1) **Change in Account Number.** When a change in account number is necessary, the expenditure authority shall execute a writing as prescribed by the Department of Finance to change the account number for an otherwise valid contract for the Director's approval. No change order is drafted for internal accounting purposes.

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(2) For-Cost Change Order. The sum of all change orders cannot exceed 25 percent of the original contract amount.

(3) No change order resulting in an increase in contract cost or time is allowed when it is a direct result of the contractor's inexperience, inefficiency, or incompetence.

(b) Before adding significant new work to existing contracts, the expenditure authority shall provide a thorough written assessment explaining why it is or is not more advantageous to seek competition. Change orders on construction and architect-engineer contracts which exceed 25 percent of the cumulative contract price shall automatically be procured through the appropriate competitive procedure that uses full and open competition, except when the procurement of the additional work is authorized without using full and open competition.

(c) Contractors shall not be allowed to continue working beyond the expiration term of an original contract or change order in the absence of an approved new contract or change order. The expenditure authority shall circulate change orders not less than 30 days prior to expiration using the procedures for processing new contracts in § 70-30.3-115. Changes orders placed into circulation after the stated date of expiration of the underlying contract shall be denied.

(d) Extension of Services. Award of contracts for recurring and continuing service requirements are often delayed due to circumstances beyond the control of contracting offices. To avoid negotiation of short extensions to existing contracts, the Director may include an option clause in solicitations and contracts which will enable the Government to require continued performance of any services within the limits and at the rates specified in the contract. The option provision may be exercised more than once, but the total extension of performance thereunder shall not exceed 6 months.

§ 70-30.3-415 Ratification of Unauthorized Commitments

(a) Definitions.

(1) Ratification, as used in this section, means the act of approving an unauthorized commitment by the expenditure authority who has the authority to do so.

(2) Unauthorized commitment, as used in this section, means an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into that agreement on behalf of the Government.

(b) Policy. Agencies shall take positive action to preclude, to the maximum extent possible, the need for ratification actions. Although procedures are provided in this section for use in those cases where the ratification of an unauthorized commitment is necessary, these procedures shall not be used in a manner that encourages such unauthorized commitments to be made.

(1) Subject to the limitations in paragraph (c) of this section, the expenditure authority may request the Director to ratify an unauthorized commitment.

(2) Limitations. The authority in paragraph (b) of this section may be exercised only when:

(i) Supplies or services have been provided to and accepted by the Government, or the Government otherwise has obtained or will obtain a benefit resulting from performance of the unauthorized commitment;

(ii) The expenditure authority had the authority to enter a contractual commitment;

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- (iii) The resulting contract would otherwise have been proper if made in a manner approved by these regulations;
 - (iv) The Director determines the price to be fair and reasonable;
 - (v) The Director recommends payment, and the Attorney General concurs in the recommendation;
 - (vi) Funds are available; and
 - (vii) The ratification is in accordance with other limitations prescribed under these procedures.
- (c) Ratification Requests. The expenditure authority shall submit a ratification request to both the Director and the Attorney General.
- (d) Criminal investigation. Generally, the Government is not bound by commitments made by persons with no contracting authority. Unauthorized commitments may violate laws or regulations. They constitute serious employee misconduct and may warrant disciplinary action. If unauthorized commitments involve any type of misconduct that might be punishable as a criminal offense, either the contracting officer or the employee's supervisor shall report the matter immediately to the Office of the Attorney General.
- (e) Documentation Required for Ratification. When submitting a ratification request, the expenditure authority shall give the Director all records and documents concerning the commitment, including a complete written statement of facts that explains:
- (1) Why normal acquisition procedures were not followed;
 - (2) Why the contractor was selected;
 - (3) Identifies other sources/vendors considered;
 - (4) Description of work or products;
 - (5) Estimated or agreed-upon contract price; and
 - (6) Status of contract performance.
- (f) Processing a Ratification. The Director shall process the request for ratification by preparing a summary statement of facts, and a recommendation to the Attorney General whether the procurement should be ratified. The Director shall include a recommendation for other disposition if advising against ratification and provide recommendation for corrective action to prevent recurrence.
- (1) If other than the full amount requested by the expenditure authority is approved, the Director may request payment based on a showing of either of the following:
 - (i) The reasonable value of work or labor provided to the Government; or
 - (ii) The reasonable value of goods sold and delivered to the Government.
 - (2) The Director shall either:
 - (i) Approve the ratification request in writing and send the approval to the Attorney General. If the Attorney General concurs, the Director shall send a written request to the expenditure authority for issuance of the necessary contractual documents; or
 - (ii) Return an unjustified request or recommendation to the Expenditure Authority with a written explanation on why the request or recommendation was denied.
 - (3) Files. The Division of Procurement Services will maintain a separate file containing a copy of each request to ratify an unauthorized contractual commitment and the response.

Part 500 Protests; Appeals; and Disputes

Subpart A - Protests and Appeals

§ 70-30.3-501 Protests to the Director of Procurement Services

(a) General.

(1) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with a solicitation or award of a contract may protest to the Director. The Director shall receive the protest in writing and within ten (10) calendar days after such aggrieved person knows or should have known of the facts giving rise thereto. The protest shall state fully the factual and legal grounds for the protest. The Director shall consider only protests that are written, whether submitted before or after award. Oral protests shall not be considered.

(2) Protest Bond. A protest bond executed by a surety company authorized to do business in the Commonwealth in an amount equal to at least fifteen percent of the protestor's bid price or offer, in a form and substance that is acceptable to the Government, shall be delivered to the Director at the time of filing a protest. The protest bond shall be immediately payable to the CNMI Treasury upon a decision by the Director or Secretary of Finance that a protest has been brought or pursued in bad faith; or does not state on its face a valid basis for protest. The Division of Procurement Services shall hold a protest bond for at least thirty (30) days after the date of the final determination by the Government.

(b) Protest Before Award.

(1) When a proper protest the making of an award is received, the award shall be withheld pending disposition of the protest. The parties involved in or affected by the protest, including bidders whose bids might become eligible for award, shall be informed of the protest. These persons shall be advised that they may submit their views and relevant information to the Director within seven (7) calendar days. The Director may extend the period to submit views and relevant information if the Director determines that the complexity of the matter requires a longer period of time.

(2) The Director shall decide the protest within thirty (30) calendar days after all interested parties have submitted their views unless the Director certifies that the complexity of the matter requires more time, in which event the Director shall specify the appropriate time, which shall not exceed sixty (60) calendar days.

(3) Prior to the expiration time for the acceptance of offers or proposals, the Director shall request the parties involved in or affected by the protest to extend the time for acceptance to avoid the need for re-advertisement.

(4) When a written protest is received, award shall not be made until the matter is resolved, unless the Director determines in writing that urgent and compelling circumstances, which significantly affect the interests of the Government, require proceeding with the award.

(5) If award is made under subsection (b)(4) above, the Director shall document the file to explain the need for an immediate award. The Director shall also give written notice to the protester and others involved in or affected by the decision to proceed with the award.

(6) The Director is authorized to make the determination in subsection (b)(4) above after receiving the recommendation of the expenditure authority. The determination of the urgent and compelling situation shall be submitted to the Attorney General for review, and absent objection

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from the Attorney General within five working days of such submittal, the Director's determination becomes final. The Director shall notify the Secretary of Finance that award is to proceed under the determination in subsection (b)(4) above. The Director shall also give written notice to the protester and other parties involved in or affected by the decision to proceed with the award.

(c) **Protests After Award.** If a protest is received after an award, the Director shall furnish the contractor with notice of the protest and its basis in accordance with subsection (b) above. The protest shall be decided in accordance with the procedures set forth in subsection (b) above.

(d) **Computation of Time**

(1) Except as otherwise specified, all "days" referred to in this part are deemed to be working days of the Commonwealth. The term "file" or "submit" except as otherwise provided refers to the date of transmission.

(2) In computing any period prescribed or allowed by these procedures, the day of the act or event from which the designated period of time begins to run shall not be included.

§ 70-30.3-505 Appeals of Director's Decisions to the Secretary of Finance

(a) **Jurisdiction; Exhaustion of Remedies.** A written appeal to the Secretary of Finance from a decision by the Director may be taken provided that the party taking the appeal has first submitted a written protest to the Director as provided in section § 70-30.3-501 of these procedures, and the Director has denied the protest or has failed to act on the protest within the time provided for in § 70-30.3-501 above.

(b) **Form of Appeal.** No form of pleading is required for filing an appeal to the Secretary of Finance. The appeal shall, however:

- (1) Include the name and address of the appellant;
- (2) Identify the contracting agency and the number of the solicitation or contract;
- (3) Contain a concise, logically arranged, and direct statement of the grounds for appeal; and
- (4) Specifically request a ruling by the Secretary of Finance.

(c) **Time for Filing Appeal.** An appeal from the Director's decision shall be received by the Office of the Secretary of Finance not later than ten (10) calendar days after the appellant receives the decision of the Director, or, in the event that the Director has not decided the protest, within ten (10) calendar days from the date that the protest should have decided pursuant to § 70-30.3-501 above. Any appeal received after these time limits shall not be considered by the Secretary of Finance unless good cause is shown or unless the Secretary of Finance determines that the appeal presents issues significant to procurement practices that are not outweighed by the detriment to the Commonwealth should the appeal be considered.

(d) **Notice of Appeal, Submission of Director's Report, and Time for Filing Comments.**

(1) The Secretary of Finance shall notify the Director by telephone and in writing within one day of the receipt of an appeal, requesting the Director to give notice of the appeal to the contractor if award has been made or, if no award has been made, to all bidders or proposers who appear to have a substantial and reasonable prospect of receiving an award if the appeal is denied. The

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Director shall be requested to furnish in accordance with § 70-30.3-501 of these procedures, copies of the protest and appeal documents to such parties with instructions to communicate further directly with the Secretary of Finance.

(2) Material submitted by an appellant will not be withheld from any Commonwealth or federal agency which may be involved in the appeal except to the extent that the withholding of information is required by law or regulation. If the appellant considers that the protest contains material which should be withheld because it is confidential under applicable law or regulation, a statement advising of this fact shall be affixed to the front page of the appeal document and the allegedly confidential information shall be so identified wherever it appears.

(3) The Secretary of Finance shall request the Director to submit a complete report on the appeal to the Secretary of Finance as expeditiously as possible (generally within 10 working days) in accordance with § 70-30.3-501 of these procedures and to furnish a copy of the report to the appellant and other interested parties.

(4) Comments on the agency report shall be filed with the Secretary of Finance within ten days after the Secretary of Finance's receipt of the report, with a copy to the agency which furnished the report and to other interested parties. Any rebuttal an appellant or interested party may make shall be filed with the Secretary of Finance within five days after receipt of the comments to which rebuttal is directed, with a copy to the agency office which furnished the report, the appellant, and interested parties. Unsolicited agency rebuttals shall be considered if filed within five days after receipt by the agency of the comments to which rebuttal is directed.

(5) The failure of an appellant or any interested party to comply with the time limits stated in this section may result in resolution of the appeal without consideration of the comments untimely filed.

(e) Withholding of Award. When an appeal has been filed before award, the Director, shall not make an award prior to the resolution of the protest except as provided in § 70-30.3-501. In the event the Director determines that award is to be made during the pendency of an appeal, the Director will notify the Attorney General.

(f) Furnishing of Information on Protests. The Secretary of Finance shall, upon request, make available to any interested party, information bearing on the substance of the appeal which has been submitted by interested parties or agencies, except to the extent that withholding of information is permitted or required by law or regulation. Any comments thereon shall be submitted within a maximum of ten days.

(g) Time for Submission of Additional Information. Any additional information requested by the Secretary of Finance from the appellant or interested parties shall be submitted no later than five days after the receipt of such request.

(h) Conference.

(1) A conference on the merits of the appeal with the Secretary of Finance may be held at the request of the appellant, any other interested party, or Director. A request for a conference should be made prior to the expiration of the time allowed for filing comments on the agency report. Except in unusual circumstances, requests for a conference received after such time will not be honored.

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(2) Conferences normally will be held prior to expiration of the period allowed for filing comments on the agency report. All interested parties shall be invited to attend the conference. Ordinarily, only one conference will be held on an appeal.

(3) Any written comments to be submitted and as deemed appropriately by the Secretary of Finance as a result of the conference shall be received at the Office of the Secretary of Finance within five days of the date on which the conference was held.

(4) Notice of Decision. The Secretary of Finance shall, if possible, issue a decision on the appeal within thirty calendar days after all information necessary for the resolution of the appeal has been received. A copy of the decision shall immediately be mailed or otherwise transmitted to the appellant, other participating parties, and the Director.

(i) Request for Reconsideration.

(1) Reconsideration of a decision of the Secretary of Finance may be requested by the appellant, any interested party who submitted comments during consideration of the protest, the Director, and any agency involved in the protest. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

(2) Request for reconsideration of a decision of the Secretary of Finance shall be filed not later than ten (10) calendar days after the basis for reconsideration is known or should have been known, whichever is earlier. The term "filed" as used in this section means receipt in the Office of the Secretary of Finance.

(3) A request for reconsideration shall be subject to these protest procedures consistent with the need for prompt resolution of the matter.

§ 70-30.3-510 Remedies

(a) Remedies Prior to Award.

(1) If prior to award the Director or the Secretary of Finance determines that a solicitation or proposed award of a contract is in violation of law or regulation, then the Director or Secretary of Finance shall have the solicitation or proposed award:

- (i) Canceled; or
- (ii) Revised to comply with law or regulation.

(b) Remedies After an Award. If after an award the Director or the Secretary of Finance determines that a solicitation or award of a contract is in violation of law or regulation, then the Director or the Secretary of Finance may:

(1) If the person awarded the contract has not acted fraudulently or in bad faith:

(i) Ratify or affirm the contract provided it is determined that doing so is in the best interest of the Commonwealth; or

(ii) Terminate the contract and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to termination;

(2) If the person awarded the contract has acted fraudulently or in bad faith:

(i) Declare the contract null and void; or

(ii) Ratify or affirm the contract if such action is in the best interests of the Commonwealth, without prejudice to the Commonwealth's rights to such damages as may be appropriate.

§ 70-30.3-515 Effective Date

All protests as to the manner of procurement, the failure to properly award a contract, the failure of Government to contract with a business after bidding, or the cancellation of a solicitation which may or may not be subject of lawsuit but have not reached final judgment as of the effective date of the regulations in this subchapter shall be heard in accordance with this subpart upon the request of the actual or prospective bidder, offeror, or contractor who is aggrieved.

Subpart B - Disputes Based on Contract

§ 70-30.3-520 Disputes

(a) Any dispute between the Government and a contractor relating to the performance, interpretation of or compensation due under a contract, which is the subject of the regulations in this subchapter, shall be filed in writing with the Director and the official with the expenditure authority within ten (10) calendar days after knowledge of the facts surrounding the dispute.

(b) The official with expenditure authority shall attempt to resolve the dispute by mutual agreement within the terms and conditions of the contract. If the dispute cannot be settled either party may request a decision on the dispute from the Director. The Director shall review the facts pertinent to the dispute, secure necessary legal assistance, and prepare a decision that shall include:

- (i) A description of the dispute;
- (ii) References to pertinent contract terms and conditions;
- (iii) A statement on the factual areas of disagreement or agreement; and
- (iv) A statement as to the factual areas of disagreement, conclusion of the dispute, and the rationale used to support the dispute.

(c) The Director may require a hearing or that information be submitted on the record.

(d) Duty to Continue Performance. A contractor that has a dispute pending before the official with expenditure authority or the Director shall continue to perform according to the terms of the contract. Failure to so continue will be deemed to be a material breach of the contract unless a waiver of this provision is obtained from the official with the expenditure authority.

Part 600 Socio-Economic Programs

[Reserved.]

Part 700 Ethics in Public Contracting

Subpart A Definitions

§ 70-30.3-701 Definitions of Terms

(a) “Confidential information” means any information which is available to an employee only because of the employee’s status as an employee of this Government and is not a matter of public knowledge or available to the public on request.

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(b) “Conspicuously” means written in such special or distinctive form, print, or manner that a reasonable person against whom it is to operate ought to have noticed it.

(c) “Direct or indirect participation” means involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing or in any other advisory capacity.

(d) “Financial interest” means:

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

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

(e) “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. A gratuity may include any tangible and intangible benefit in the nature of gifts favors, entertainment, discounts, passes, transportation, accommodation, hospitality or offers of employment.

(f) “Immediate family” means spouse, children, parents, brothers, and sisters.

Subpart B Standards of Conduct

§ 70-30.3-705 Policy

(a) Public employment is a public trust. In governmental contracting, public employees shall discharge their duties impartially so as to:

(i) Ensure fair competitive access to governmental procurement by reasonable contractors; and

(ii) Conduct themselves in a manner as to foster public confidence in the integrity of the Government procurement process.

§ 70-30.3-710 General Standards

(a) Employees. Any attempt to realize personal gain through public employment by conduct inconsistent with the proper discharge of the employee’s duties is a breach of a public trust. In order to fulfill this ethical standard, employees shall meet the requirements of the regulations in this subchapter.

(b) Contractors. Any effort to influence any public employee to breach the standards of ethical conduct set forth in this subchapter is a breach of ethical standards.

§ 70-30.3-715 Employee Disclosure Requirements

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(a) Disclosure of Benefit Received From Contract. Any employee who has, or obtains any benefit from, any Government contract with a business in which the employee has a financial interest, shall report such benefit in writing to the Director.

(b) Failure to Disclose Benefit Received. Any employee who knows or should have known of such benefit and fails to report such benefit is in breach of these ethical standards.

§ 70-30.3-720 Employee Conflict of Interest

(a) Conflict of interest. It is a breach of ethical standards for any employee to participate directly or indirectly in a procurement when the employee knows that:

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

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

(b) Discovery of Actual or Potential Conflict of Interest, Disqualification and Waiver. Upon discovery of an actual or potential conflict of interest, an employee shall promptly file with the Director a written statement of disqualification and shall withdraw from further participation in the transaction involved. The employee may, at the same time, apply to the Public Auditor, who shall consult with the Attorney General, for an advisory opinion as to what further participation, if any, the employee may have in the transaction.

§ 70-30.3-725 Gratuities and Kickbacks

(a) Gratuities. It is a breach of ethical standards for any person to offer, give or agree to give any employee or former employee, or for any employee or former employee to solicit, demand, accept or agree to accept from another person, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, preparation of any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter, pertaining to any program requirement or a contract or subcontract or to any solicitation or proposal therefor.

(b) Kickbacks. It is a breach of ethical standards for any payment, gratuity, or offer of employment to be made by or on behalf of a subcontractor under a contract to the prime contractor or higher tier subcontractor or any person associated therewith as an inducement for the award of a subcontractor or order.

§ 70-30.3-730 Prohibition Against Contingent Fees

(a) Contingent Fees. It is a breach of ethical standards for a person to be retained or to retain a person to solicit or secure Government contracts upon an agreement or understanding for a

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commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies for the purpose of securing business.

(b) Representation of Contractor. Every person, before being awarded a Government contract, shall represent, in writing, that such person has not retained anyone in violation of this section. Failure to do so constitutes a breach of ethical standards.

§ 70-30.3-735 Required Ethics Clauses

The prohibitions against gratuities, kickbacks, and contingent fees under § 70-30.3-725 and § 70-30.3-730 shall be conspicuously set forth in every contract and solicitation therefor.

§ 70-30.3-740 Restrictions on Employment of Present and Former Employees

(a) Present Employees. It is a breach of ethical standards for any employee, per the definition provided for in §70-30.3-040, who is participating directly or indirectly in the procurement process to become or be, while such an employee, the employee of any person contracting with the governmental body by whom the employee is employed.

(b) Restrictions on Former Employees.

(1) Permanent Disqualification of Former Employee Personally Involved in a Particular Matter. It is be a breach of ethical standards for any former employee, as defined by §70-30.3-040, to knowingly act as a principal or as an agent for anyone other than the Commonwealth, in connection with any judicial or other proceeding, application, request for ruling or other determination, contract, claim, charge, or controversy, in which the employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise while an employee, where the Commonwealth is a party or has a direct and substantial interest.

(2) One Year Representation Restriction Regarding Matters for Which a Former Employee Was Officially Responsible. It is be a breach of ethical standards for any former employee, as defined by §70-30.3-040, within one year after cessation of the former employee's official responsibility, to knowingly to act as a principal, or as an agent for anyone other than the Commonwealth, in connection with any judicial or other proceeding, application, request for ruling or other determination, contract, claim, charge, or controversy, in matters which were within the former employee's official responsibility, where the Commonwealth is a party or has a direct or substantial interest.

(3) Subsection (b) applies only with regard to those same particular matters in which the former Commonwealth employee participated personally and substantially while a Commonwealth employee. In determining whether two particular matters are the same, the following factors shall be considered:

- (i) The factual basis of the matters;
- (ii) The relationship of the issues involved in each matter;
- (iii) The identity of the parties involved in each matter; and
- (iv) The continued existence of an important Commonwealth interest.

(c) Disqualification of Business When an Employee Has a Financial Interest.

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(1) It is a breach of ethical standards for a business, in which an employee has a financial interest, to knowingly act as a principal or as an agent for anyone other than the Commonwealth, in connection with any judicial or other proceeding, application, request for ruling or other determination, contract, claim, charge, or controversy, in which the employee either participates personally and substantially through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of the employee's official responsibility, where the Commonwealth is a party or has a direct and substantial interest.

(2) In determining whether a business knows that a Commonwealth employee has a financial interest in that business for the purpose of applying the prohibition in subsection (c)(1), the factors to be considered should include the following:

- (i) The size of the business;
- (ii) The percentage of ownership in the business by the Commonwealth employee;
- (iii) The nature of the dealings of the Commonwealth employee with the business regarding such employee's financial interest; and
- (iv) Such other evidence as may be relevant and material.

(3) It is a breach of ethical standards for an employee of the Commonwealth to direct purchases or contracts to a company in which the employee or their immediate family has a financial interest in the real property from which the business operates.

(d) Selling to the Commonwealth After Termination of Employment

(1) It is a breach of ethical standards for any former employee, as defined by 70-30.3-040, to engage in selling or attempting to sell supplies, services, or construction to the Commonwealth agency that employed the former employee, for one year following the date employment ceased.

(2) The term "sell" as used herein means signing a bid, proposal, or contract; negotiating a contract; contacting any employee for the purpose of obtaining, negotiating, or discussing changes in specifications, price, cost allowances, or other terms of a contract; settling disputes concerning performance of a contract; or engaging in any other liaison activity with a view toward the ultimate consummation of a sale, although the actual contract therefor is subsequently negotiated by another person; provided, however, that this section is not intended to preclude a former employee from accepting employment with private industry solely because the former employee's employer is a contractor with the Commonwealth, nor may a former employee be precluded from serving as a consultant to the Commonwealth.

§ 70-30.3-745 Use of Confidential Information

It is a breach of ethical standards for any employee or former employee to knowingly use confidential information for actual or anticipated personal gain or the actual or anticipated personal gain of any other person. To the extent that violations of the ethical standards of conduct set forth in this Part constitute violations of Commonwealth law, they are punishable as provided therein.

§ 70-30.3-750 Collusion

Collusion or secret agreements between offerors for the purpose of securing an advantage over other offerors is prohibited. The official with the expenditure authority, in consultation with the Attorney General, shall declare the contract void if sufficient evidence is found that shows an

offeror obtained a contract by reason of collusive or secret agreement among the offerors to the disadvantage of the Government.

§ 70-30.3-755 Civil, Criminal and Administrative Remedies

- (a) A Government employee is any person whether appointed, elected, excepted service or civil service. An employee who violates the provisions of the rules and regulations in this chapter is subject to adverse action as may be appropriate in his or her particular circumstances.
- (b) In addition to existing remedies provided by law, any person who violates any of the provisions of the regulations in this subchapter may be subject to reprimand, suspension without pay, termination of employment in accordance with the rules set forth in NMIAC § 10-20.2-257 (Adverse Actions), civil injunction, civil suit for damages, return of Government money, and/or criminal prosecution.
- (c) Contractors. A contractor who violates a provision of the rules and regulations in this subchapter will be subject to a written warning of reprimand, the termination of the contract, or suspension from being a contractor or subcontractor under a Government contract, in addition to other penalties prescribed by law.
- (d) All proceedings under this section shall be in accordance with due process requirements.

§ 70-30.3-760 Debarment and Suspension

- (a) The official with expenditure authority may file a dispute with the Director against an existing contractor for any failures of performance related to a contract governed by this subchapter.
- (b) Within fifteen calendar days of receipt of the dispute, the Director shall notify the contractor of the nature of the grievance. The Contractor shall be given fifteen calendar days to file a response, unless an extension of time, not to exceed thirty days, is authorized by the Director.
- (c) The Director, after consultation with the official with expenditure authority and the Attorney General, is authorized to debar a person for cause from consideration for award of contracts. The debarment shall not exceed a period of three years.
- (d) Causes for debarment or suspension. The causes for debarment or suspension include, but are not limited to, the following:
 - (1) Violation of contract provisions of a character which is regarded by the Director to be so serious as to justify debarment, such as:
 - (i) Failure without good cause to perform in accordance with the specifications or time limits provided in the contract;
 - (ii) A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance

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caused by acts beyond the control of the contractor shall not be considered a basis for debarment;
or

(iii) Any other cause that the Director determines to be so serious and compelling as to affect responsibility as a Government contractor, including debarment by another governmental entity.

(2) For violation of any of the ethical standards set forth in part 700 of these regulations.

(3) Conviction for commission of a criminal offense incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.

(4) Conviction under Commonwealth or federal statutes for embezzlement, theft, forgery, bribery, falsification, or destruction of records, receiving stolen property, violation of the Consumer Protection Act (4 CMC §§ 5101, et seq.), violation of any unfair business practices as prescribed by 4 CMC § 5202, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects its responsibility as a contractor.

(5) Conviction under Commonwealth or federal antitrust statutes arising out of the submission of bids or proposals such as in chapter 2 of division 5 of title 4 of the Commonwealth Code.

(f) Decision. The Director shall issue a written decision to debar or suspend. The decision shall state the reasons for the action taken.

(g) Notice of Decision. A copy of the decision shall be mailed or otherwise furnished immediately to the debarred or suspended person. A copy of the decision shall also be provided to other Commonwealth procurement offices.

§ 70-30.3-765 Remedies Against Employees Who Breach Ethical Standards

(a) Existing Remedies Not Impaired. Civil and administrative remedies against employees that are in existence on the effective date of this subchapter are in addition to the remedies provided by these regulations and shall not be impaired.

(b) Right to Recovery from Employee Value Received in Breach of Ethical Standards. The Commonwealth may recover anything received by an employee in breach of the ethical standards provided in this subchapter.

(c) Due Process. All procedures under this part shall be in accordance with due process requirements and existing law.

§ 70-30.3-770 Remedies Against Non-Employees Who Breach Ethical Standards

(a) Existing Remedies Not Impaired. Civil and administrative remedies against non-employees that are in existence on the effective date of this subchapter are in addition to the remedies provided by these regulations and shall not be impaired.

(b) Supplemental Remedies. In addition to existing remedies for breach of the ethical standards of this part, the Director may impose any one or more of the following:

(1) Written warnings or reprimands;

(2) Termination of transactions; and

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(3) Debarment or suspension from being a contractor or subcontractor under Commonwealth contracts in accordance with this subchapter.

(c) Right to Recovery from Non-Employee Value Transferred in Breach of Ethical Standards. The value of anything transferred in breach of the ethical standards of this part by a non-employee is recoverable by the Commonwealth as provided by law.

(d) Right of the Commonwealth to Debar or Suspend. Debarment or suspension may be imposed by the Director of Procurement Services for breach of the ethical standards as provided in this subchapter, provided that such action may not be taken without the concurrence of the Attorney General.

(e) Due Process. All procedures under this section shall be in accordance with due process requirements, including, but not limited to, a right to notice and an opportunity for a hearing prior to imposition of any termination, debarment, or suspension from being a contractor or subcontractor under a Commonwealth contract.

§ 70-30.3-775 Recovery of Value Transferred or Received in Breach of Ethical Standards

(a) General Provisions. The value of anything transferred or received in breach of the ethical standards of this Article or regulations promulgated hereunder by an employee or a non-employee may be recovered from both the employee and non-employee. The Commonwealth will be entitled to costs and attorney fees incurred.

(b) Recovery of Kickbacks by the Commonwealth. Upon a showing that a subcontractor made a kickback to a prime contractor or a higher tier subcontractor in connection with the award of a subcontract or order thereunder, it will be conclusively presumed that the amount thereof was included in the price of the subcontract or order and ultimately borne by the Commonwealth and will be recoverable hereunder from the recipient. In addition, said value may also be recovered from the subcontractor making such kickbacks. Recovery from one offending party shall not preclude recovery from other offending parties. The Commonwealth will be entitled to costs and attorney fees incurred.