

American Bar Association

2007 Model Code
for
Public Infrastructure Procurement
(MC PIP)

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Section of Public Contract Law

and

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The 2007 Model Code
For
Public Infrastructure Procurement

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On August 10 and 11, 2007, during the American Bar Association's 2007 Annual Meeting, the Council of the Section of Public Contract Law and the Council of the Section of State and Local Government Law approved the *2007 Model Code for Public Infrastructure Procurement (2007 MC PIP)* and urged its consideration by units of state and local government that have responsibility for the provision of infrastructure services and facilities.

The *2007 Model Code for Public Infrastructure Procurement (2007 MC PIP)* is a condensation of the *ABA 2000 Model Procurement Code for State and Local Governments*, like its predecessor, the *1982 Model Procurement Ordinance*, which was a condensation of the 1979 version of the *ABA Model Procurement Code*. While both the 1979 and 2000 versions of the Code were considered and approved by the ABA House of Delegates, the Association's policymaking body, the streamlined text in each condensation does not necessarily represent the official policy of the American Bar Association.

Acknowledgements

The *2007 Model Code for Public Infrastructure Procurement (2007 MC PIP)* is a condensation of the *2000 ABA Model Procurement Code for State and Local Governments* (the “2000 MPC”).

The project that created the 2000 ABA Model Procurement Code was made possible through seed funding provided by the Sections of Public Contract Law and State and Local Government Law. Lockheed Martin, the Civil and Environmental Engineering Department of the Massachusetts Institute of Technology, Public Technology, Inc., and the National Institute of Governmental Purchasing (NIGP) provided major grant funding in support of the project. The American Consulting Engineers Council (ACEC), the Engineers Joint Contract Documents Committee (EJCDC), and the Council on Federal Procurement of Architectural & Engineering Services (COFPAES) also provided generous financial support. The Sections accomplished the 2000 ABA Model Procurement Code revisions in cooperation with the National Association of State Procurement Officials – the national organization of the senior procurement officials in the various states.

The *2007 Model Code for Public Infrastructure Procurement (2007 MC PIP)* was developed by the Reporters for the 2000 ABA Model Procurement Code, Dr. John B. Miller and Margaret E. McConnell, and edited by Larry C. Ethridge and Norman R. Thorpe, in cooperation with the Section of State and Local Government Law and the Section of Public Contract Law. In addition to changes intended to conform the Code to advancing standards of best practices in government procurement, the 2000 ABA MPC added new materials to guide state and local jurisdictions wishing to use new methods of public and private collaboration in infrastructure development to do so safely and efficiently. These new materials were approved by the ABA through its House of Delegates, and they are available to interested parties through the ABA Webstore. The *2007 MC PIP* is a condensation of that full code suitable for more specific use by subunits of state and local government with long-term

responsibility for delivery and operation of infrastructure services and facilities.

In 1982, following the initial release of the 1979 version of the *ABA Model Procurement Code for State and Local Governments* (and in 1980 companion Model Regulations), the Code was condensed by the sponsoring Sections of the ABA to create the *1982 Model Procurement Ordinance*. This was accomplished with the financial support and assistance of the US Environmental Protection Agency for the purpose of building procurement capacity within the more than 3000 local governments receiving construction grant assistance for the design and construction of wastewater treatment plants, collectors, and interceptors under the Clean Water Act. US EPA's goal was to improve the procurement practices of municipal grantees. The Ordinance provides transparency, fairness, and competitiveness to procurement processes and incorporates key elements of sound procurement policy. Although not mandatory, the Model Procurement Ordinance was adopted by hundreds of local grantee jurisdictions, which permitted streamlined federal review of procurements where federal interests were involved.

The *2007 Model Code for Public Infrastructure Procurement (2007 MC PIP)* has been produced for a similar purpose. State and local governments have been experimenting with the private sector – through “Public Private Partnerships” – to find durable mechanisms for procuring public infrastructure. “One off” procurement processes have driven up transaction costs to all parties and have generated substantial public policy questions. The *2007 MC PIP*, like the Code and Ordinance upon which it is based, protects the public interest; provides transparency; encourages maximum practicable competition; keeps the costs of participating low; and maintains both the appearance and the fact of fairness for all participants. These principles have been at the core of ABA projects relating to the Model Procurement Code project since 1979.

It is hoped that the *2007 MC PIP* will provide a mechanism for local jurisdictions, which have not already adopted the ABA 2000 MPC and which may be unable or unwilling to undertake a major revision of their overall procurement procedures at this time,

nevertheless to benefit from use of the Code's best practices for risk allocation, competition, public oversight, disputes, and other basic principles of good public procurement, without limiting their ability to use the best of innovative new methods for infrastructure design, finance, construction, and maintenance.

An Overview of the Model Code for Public Infrastructure Procurement

Articles 1 through 10 cover basic policies for the procurement of supplies, services, and construction; disposal of supplies; and legal remedies. Article 11 provides socioeconomic policies that a State may wish to amplify or tailor to local needs. Article 12 establishes ethical standards for public officials and contractors in connection with governmental procurement. The following is a synopsis of the scope of each Article.

General Provisions

Article 1 describes the general purposes of the Code, specifies its applicability, provides guidance for interpretations and contains definitions of terms.

Chief Procurement Officer

Article 2 establishes the Office of the Chief Procurement Officer and sets forth the basic organizational concepts for establishing procurement policy and conducting procurement operations.

Source Selection and Contract Formation

Article 3 describes the source selection and contract formation methods authorized by the Code and authorizes procurement officials to select and apply these methods. These source selection methods include: competitive sealed bidding, competitive sealed proposals, small purchase procedures, sole source procurement, emergency and special procurements. There is no statutory preference for competitive sealed bidding, although Section 3-202 makes competitive sealed bidding a default source selection method. The Article contains

requirements for contracting by each method, and contracts not awarded by competitive sealed bidding generally require a written justification, which will be a matter of public record. The Article permits the use of any type of contract although it prohibits cost-plus-a-percentage-of-cost contracts.

Section 3-103 (b) and (c) adds flexibility in the extent to which Competitive Sealed Proposals may be used as a source selection method and requires the use of this method in the award of contracts for design-build, design-build-operate-maintain, and design-build-finance-operate-maintain services. Section 3-103(5), Evaluation Factors, requires that RFP's state the relative importance of price and other factors and subfactors that will be separately evaluated and scored by the procuring agency. Section 3-103(8) authorizes the Procurement Officer to conduct debriefings after source selection decision and contract award. Section 3-107 authorizes the Chief Procurement Officer or the Head of a Purchasing Agency to initiate Special Procurements in limited circumstances, with public disclosure of the reasons therefor both in advance and after such procurements where the application of all requirements of competitive sealed bidding or competitive sealed proposals is deemed to be contrary to the public interest. Section 3-303, "Substantiation of Offered Prices," changes the 1979 Code's requirement to submit certified cost or pricing data to a less burdensome standard appropriate to the commercial supplies and services that state and local governments buy.

Specifications

Article 4 contains requirements for developing, monitoring, and using specifications. It requires that specifications be written in a manner to maximize competition to the extent possible.

Procurement of Infrastructure Facilities and Services (New Title)

Article 5 authorizes five different project delivery and finance methods for use by agencies in managing the infrastructure facilities and services in their infrastructure collection. Delivery methods are structured so that an agency can select from among any of the project delivery methods based on the circumstances of

each project and its impact on the overall portfolio of projects and services. (Section 5-103, Choice of Project Delivery Methods). These five delivery methods are Design-Bid-Build (including Construction Management At-Risk as a permitted variation), Design-Build, Design-Build-Operate-Maintain, Design-Build-Finance-Operate-Maintain, and Operations and Maintenance. The starting gate for these competitions is the statement of “design requirements” in the RFP, which establishes a common minimum threshold of owner requirements in these competitions. The finish gate is the submission of “proposal development documents” by offerors in response to the RFP.

Article 5 covers the use of bid, performance and payment bonds; and contract clauses for change orders, differing site conditions, variations in estimated quantities, suspension of work, and termination. It also establishes criteria for making price adjustments due to changes and variations in estimated quantities. The Article includes provisions for the competitive award of contracts for architect and engineer professional services. Section 5-205 authorizes additional forms of security to assure the timely, faithful, and uninterrupted provision of operations and maintenance services procured separately, or as one element of design-build-operate-maintain or design-build-finance-operate-maintain services.

Modification and Termination of Contracts for Supplies and Services

Article 6 has been reserved.

Cost Principles

Article 7 has been reserved. Should an enacting jurisdiction wish to include in its Model Code a comprehensive set of contract cost principles, the text of Chapter 7, Cost Principles, of the Recommended Regulations to the *ABA 2000 Model Procurement Code for State and Local Governments* may be considered.

Supply Management

Article 8 has been reserved. Should an enacting jurisdiction wish to include in its Model Code coverage of such topics as quality control, inventory management, excess property transfer,

and the disposition of surplus property, the text of Chapter 8, Supply Management, of the Recommended Regulations to the *ABA 2000 Model Procurement Code for State and Local Governments* may be considered.

Legal and Contractual Remedies

Article 9 provides mechanisms for the resolution of disputes relating to solicitations and awards, bid protests, contract performance, and debarment or suspension determinations. In addition, this Article provides procedures for handling contracts awarded in violation of law.

Cooperative Purchasing

Article 10 contains provisions designed to facilitate cooperative procurement among units of government. Public Procurement Units are freely authorized and encouraged to enter into cooperative purchasing arrangements with one another. The definition of Public Procurement Unit includes local governments, other state governments, local governments in other states, federal agencies of the United States, and any not-for-profit entity comprised of more than one such Unit or Activity. The intent is to broaden the opportunity for state and local governments to work together in the provision of infrastructure facilities and services.

Assistance to Small and Disadvantaged Businesses; Federal Assistance or Contract Procurement Requirements

Article 11 provides administrative procedures for assisting small and disadvantaged businesses in learning how to do business with the enacting jurisdiction. This Article also can be used to incorporate additional state socioeconomic policies that are to be implemented through the procurement process. Article 11 requires compliance with federal law and regulations not presently reflected in the Code to the extent required by the terms of Federal grants or other funding arrangements applicable to the project.

Ethics in Public Contracting

Article 12 contains ethical standards with accompanying sanctions that are applicable to all participants in the public procurement process. The proposed ethical standards cover

conflicts of interest, gratuities and kickbacks, contingent fees, and misuse of confidential information. Additionally, this Article authorizes establishment of an Ethics Commission with authority to render advisory opinions to participants in the procurement process.

Dedication

In Memory of Craig Othmer of Santa Fe, New Mexico, a long-time supporter of all of the ABA's Model Procurement Code projects and a member of the Steering Committee for the 2000 ABA Model Procurement Code for State and Local Governments.

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ARTICLE 1 - GENERAL PROVISIONS

Part A - Purposes, Construction, and Application

§1-101 Purposes, Rules of Construction.

(1) *Interpretation.*

This Code shall be construed and applied to promote its underlying purposes and policies.

(2) *Purposes and Policies.*

The purpose of this Code is to provide for the fair and equitable treatment of all persons involved in public infrastructure procurement by the [Enacting Jurisdiction]; to maximize the purchasing value of public funds in procuring infrastructure facilities and related services and to provide safeguards for maintaining a procurement system of quality and integrity.

COMMENTARY:

These broad policies outline the general rationale for the promulgation of this Code but are in no way to be interpreted as limiting either its provisions or application. This Code is intended to simplify, clarify, and modernize procurement, as well as to increase the confidence of both the persons who deal with the procurement system and the general public in the procurement activities of the [Purchasing Agency].

(3) *Singular-Plural and Gender Rules.*

In this Code, unless the context requires otherwise:

- (a) words in the singular number include the plural, and those in the plural include the singular; and
- (b) words of a particular gender include any gender and the neuter, and when the sense so indicates, words of the neuter gender may refer to any gender.

§1-102 Supplementary General Principles of Law Applicable.

Unless displaced by the particular provisions of this Code, the principles of law and equity, including the Uniform Commercial

Code of this State, the law merchant, and law relative to capacity to contract, agency, fraud, misrepresentation, duress, coercion, mistake, or bankruptcy shall supplement the provisions of this Code.

§1-103 Requirement of Good Faith.

This Code requires all parties involved in the negotiation, performance, or administration of [Purchasing Agency] contracts to act in good faith.

§1-104 Application.

This Code applies only to contracts for the design, construction, routine operation, routine repair, and routine maintenance of Infrastructure Facilities solicited or entered into after the effective date of this Code unless the parties agree to its application to a contract solicited or entered into prior to the effective date. It shall apply irrespective of the source of funds, and shall also apply to the disposal of [the Enacting Jurisdiction's] Infrastructure Facilities. Nothing in this Code or in regulations [operational procedures] promulgated hereunder shall prevent any governmental body or political subdivision from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement.

COMMENTARY:

This Code would not retroactively affect rights and remedies under existing contracts.

§1-105 Effective Date.

This Code shall become effective at 12:01 A.M. on [____], 20[____].

COMMENTARY:

The effective date of this Code should be set at least six months after enactment to allow adequate time for development of regulations [operational procedures] and the other administrative matters necessitated by its enactment.

Part B - Determinations

§1-201 Determinations.

Written determinations required by this Code shall be retained in the appropriate official contract file of the Chief Procurement Officer or the Purchasing Agency.

COMMENTARY:

The definition of "written or in writing" in Section 1-301(26) permits determinations to be issued electronically. As procurement processes involve more electronic transmissions, the [Chief Procurement Officer] may issue regulations [operational procedures] concerning the retention and form of procurement and contract files.

Part C - Definitions of Terms Used in this Code

§1-301 Definitions.

The words defined in Appendix A shall have the meanings set forth below whenever they appear in this Code, unless:

- (a) the context in which they are used clearly requires a different meaning; or
- (b) a different definition is prescribed for a particular Article or provision.

Part D - Public Access

§1-401 Public Access to Procurement Information.

Procurement information shall be a [public record] to the extent provided in [cite appropriate statute] and shall be available to the public as provided in such statute.

COMMENTARY:

(1) The purpose of this provision is to achieve maximum public access to procurement information consistent with appropriate consideration of safeguards for contractors and employees.

(2) The appropriate statute to cite in this Section is the State Freedom of Information Act or similar open records law. The words "public record" have been bracketed to connote that, where the cited public access statute uses a term other than "public record," that term should be substituted. This provision does not define "public record" or "public access" but rather incorporates the standards set forth in the State's public access statute. Therefore, this Section is not appropriate in jurisdictions without such statutes.

§1-501 Authorization for the Use of Electronic Transmissions.

The use of electronic media, including acceptance of electronic signatures, is authorized consistent with the [State's] applicable statutory, regulatory or other guidance for use of such media, so long as such guidance provides for:

- (a) appropriate security to prevent unauthorized access to the bidding, approval, and award processes; and
- (b) accurate retrieval or conversion of electronic forms of such information into a medium which permits inspection and copying.

ARTICLE 2 - OFFICE OF CHIEF PROCUREMENT OFFICER

§2-101 Establishment, Appointment and Qualifications, Tenure, Compensation.

- (1) There is hereby created an Office of the Chief Procurement Officer, headed by the Chief Procurement Officer.
- (2) *Appointment and Qualifications.* The [Head of the Enacting Jurisdiction] shall appoint the Chief Procurement Officer. The Chief Procurement Officer shall have relevant, recent experience in public procurement and in the large-scale procurement of Infrastructure Facilities, including supplies, services, and construction, and shall be a person with demonstrated executive and organizational ability.
- (3) *Tenure and Removal.* The Chief Procurement Officer shall be a full-time public official of the [Purchasing Agency] [appointed to serve a term of [ten] years] and may be removed from office by the [head of the Purchasing Agency] only upon a showing of just cause.
- (4) *Compensation.* The Chief Procurement Officer shall be compensated as provided by law.

COMMENTARY:

(1) As the principal official responsible for all procurement actions and for the handling of large sums of the taxpayers' monies, the Chief Procurement Officer should be compensated by a salary sufficient to attract and retain a person with the requisite technical skills and professional ability.

(2) In some jurisdictions, the Chief Procurement Officer is a classified employee. In those cases, the language under this Section, and under Section 2-202, should be altered to properly recognize that status.

§2-102 Authority and Duties of the Chief Procurement Officer.

- (1) *Principal Contracting Officer of the [Purchasing Agency].*

The Chief Procurement Officer shall serve as the principal procurement officer of the [Purchasing Agency] for the award of contracts for the design, construction, routine operation, routine repair, and routine maintenance of Infrastructure Facilities, including, without limitation, the contracts using the project delivery methods authorized in Section 5-101. [The Chief Procurement Officer shall also serve as the principal procurement officer of the [Purchasing Agency] for the award of contracts for supplies and services in connection with the operation, maintenance, and repair, by the [Purchasing Agency], of existing Infrastructure Facilities with the Jurisdiction's own employees.]

(2) *Power to Adopt Operational Procedures.*

Consistent with the provisions of this Code, the Chief Procurement Officer may adopt operational procedures governing the internal functions of the Office of the Chief Procurement Officer.

(3) *Duties.*

In accordance with this Code, and subject to the supervision of the [head of the Purchasing Agency], the Chief Procurement Officer shall:

- (a) procure or supervise the procurement of all services, supplies, and construction for Infrastructure Facilities needed by the [Purchasing Agency];
- (b) ensure compliance with this Code [and implementing regulations or operational procedures] by reviewing and monitoring procurements conducted by any designee, department, agency or official delegated authority.

(4) *Regulations [optional]*

[The Chief Procurement Officer is authorized to adopt regulations [operational procedures], consistent with the Code, governing the functions of the Office of the Chief Procurement Officer.]

**§2-103 Delegation of Authority by the Chief
Procurement Officer**

With the approval of the [head of the Purchasing Agency], and subject to regulations [operational procedures], the Chief Procurement Officer may delegate authority to designees or to any department, agency, or official.

ARTICLE 3 - SOURCE SELECTION AND CONTRACT FORMATION

Part A - Methods of Source Selection

§3-101 Methods of Source Selection.

Unless otherwise authorized by law, all [Purchasing Agency] contracts shall be awarded by one of the following methods:

- (a) Section 3-102 (Competitive Sealed Bidding);
- (b) Section 3-103 (Competitive Sealed Proposals);
- (c) Section 3-104 (Small Purchases);
- (d) Section 3-105 (Sole Source Procurement);
- (e) Section 3-106 (Emergency Procurements);
- (f) Section 3-107 (Special Procurements);
- (g) Section 5-104 (Architectural and Engineering Services).

COMMENTARY:

(1) With competitive sealed bidding as a starting point (Section 3-102), procurement officials are able to choose an appropriate source selection method to meet the circumstances of each procurement. Procurement officials should be able to freely select an appropriate source selection method, based on that official's discretion. Procurement officials should recognize the flexibility that the Code offers them when using the competitive sealed bidding method, such as product acceptability and multi-step processes.

(2) The purpose of this Part is to provide procurement officials with adequate authority to conduct procurement transactions by fair and open competition under varying market conditions in order to satisfy public needs for supplies, services, and construction at the most economical prices.

(3) Fair and open competition is a basic tenet of public procurement. Such competition reduces the opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically. Since the marketplace is different for various supplies, services, and construction, this Code authorizes a variety of source selection techniques designed to provide the best competition for all types of procurements. It also permits less formal competitive procedures where the amount of the contract does not warrant the expense and time otherwise involved. Competitive sealed bidding (Section 3-102), competitive sealed proposals (Section 3-103), simplified, small purchase procedures (Section 3-104), and special procurement procedures (Section 3-107), therefore, are recognized as valid competitive procurement methods when used in accordance with the criteria and conditions set forth in this Article.

(4) Subsection (d) lists sole source procurements (Section 3-105) as an exception to other methods only when it is determined in writing that there is only one source for the required supply, service, or construction item.

(5) The statutory authorization in Section 3-101 to use competitive sealed bidding and competitive sealed proposals applies to four new project delivery methods identified in Article 5: design-build, design-build-operate-maintain, design-build-finance-operate-maintain, and operations and maintenance. These four new delivery methods, when added to the design-bid-build project delivery already authorized in the 1979 version of the Code, provide procurement officials with increased flexibility in the procurement of the design, construction, operation, maintenance, and finance of public infrastructure facilities. Article 5 continues to rely on the source selection methods of Article 3, while providing maximum flexibility to procurement officials to separate or integrate the design, construction, operation, maintenance, and finance functions.

§3-102 Competitive Sealed Bidding.

- (1) *Conditions for Use.* Contracts shall be awarded by competitive sealed bidding except as otherwise provided in Section 3-101 (Methods of Source Selection) or in Section 5-102 (Source Selection Methods Assigned to Project Delivery Methods).

COMMENTARY:

Competitive sealed bidding does not include negotiations with bidders after the receipt and opening of bids. Award is to be made based strictly on the criteria set forth in the Invitation for Bids.

- (2) *Invitation for Bids.* An Invitation for Bids shall be issued and shall include a purchase description, and all contractual terms and conditions applicable to the procurement.
- (3) *Public Notice.* Adequate public notice of the Invitation for Bids shall be given a reasonable time prior to the date set forth therein for the opening of bids, in accordance with regulations [operational procedures].

COMMENTARY:

Public notice required by this subsection should be given sufficiently in advance of bid opening to permit potential bidders to prepare and submit their bids in a timely manner. Because the adequacy of notice will, as a practical matter, vary from locality to locality and procurement to procurement, no attempt is made in Subsection (3) to define statutorily either a prescribed method of notice or the duration of its publication. However, the regulations [operational procedures] should provide criteria and general guidelines for the method and duration of public notice.

- (4) *Bid Opening.* Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the Invitation for Bids. The amount of each bid, and such other relevant information as may be specified by regulation, together with the name of each

bidder shall be recorded; the record and each bid shall be open to public inspection.

- (5) *Bid Acceptance and Bid Evaluation.* Bids shall be unconditionally accepted without alteration or correction, except as authorized in this Code. Bids shall be evaluated based on the requirements set forth in the Invitation for Bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The Invitation for Bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the Invitation for Bids.

COMMENTARY:

(1) The only provisions of this Code that allow alteration or correction of bids are found in Subsection (6) of this Section and Section 5-201(3) (Bid Security, Rejection of Bids for Noncompliance with Bid Security Requirements).

(2) This subsection makes clear that judgmental evaluations of products, particularly where bid samples or product descriptions are submitted, may properly be used in determining whether a product proffered by a bidder meets the acceptability standards of the specification requirements for the procurement. Such judgmental evaluations as appearance, workmanship, finish, taste, and feel all may be taken into consideration under this Subsection. Additionally, the ability to make such determinations, and to reject as nonresponsive any bid which does not meet the purchase description is inherent in the definition of responsive bidder in Section 3-101(7) (Definitions, Responsive Bidder).

(3) The bid evaluation may take into account not only acquisition costs of supplies, but the cost if their ownership which relates to the quality of the product, including life cycle factors such as maintainability and reliability. Any such criteria must be set forth in the Invitation for Bids to enable bidders to calculate how such criteria will affect their bid price.

(4) This Subsection does not permit a contract to be awarded to a bidder submitting a higher quality item than the minimum required by the purchase description unless that bidder also has the bid price evaluated lowest in accordance with the objective criteria set forth in the Invitation for Bids. Furthermore, this procedure does not permit discussions or negotiations with bidders after receipt and opening of bids.

- (6) *Correction or Withdrawal of Bids; Cancellation of Awards.* Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such bid mistakes, shall be permitted in accordance with regulations [operational procedures]. After bid opening, no changes in bid prices or other

provisions of bids prejudicial to the interest of the [Purchasing Agency] or fair competition shall be permitted. Except as otherwise provided by regulation, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, shall be supported by a written determination made by the Chief Procurement Officer or head of a Purchasing Agency.

COMMENTARY:

(1) Correction or withdrawal of bids before or after contract award requires careful consideration to maintain the integrity of the competitive bidding system, to assure fairness, and to avoid delays or poor contract performance. While bidders should be expected to be bound by their bids, circumstances frequently arise where correction or withdrawal of bids is proper and should be permitted.

(2) To maintain the integrity of the competitive sealed bidding system, a bidder should not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid unless the mistake is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition.

(3) An otherwise low bidder should be permitted to correct a material mistake of fact in its bid, including price, when the intended bid is obvious from the bid document or is otherwise supported by proof that has evidentiary value. A low bidder should not be permitted to correct a bid for mistakes or errors in judgment.

(4) In lieu of bid correction, the [Purchasing Agency] should permit a low bidder alleging a material mistake of fact to withdraw its bid when there is reasonable proof that a mistake was made and the intended bid cannot be ascertained with reasonable certainty.

(5) After bid opening an otherwise low bidder should not be permitted to delete exceptions to the bid conditions or specifications which affect price or substantive obligations; however, such bidder should be permitted the opportunity to furnish other information called for by the Invitation for Bids and not supplied due to oversight, so long as it does not affect responsiveness.

(6) A suspected bid mistake can give rise to a duty on the part of the [Purchasing Agency] to request confirmation of a bid, and failure to do so can result in a nonbinding award, where there is an appearance of mistake. Therefore, the bidder should be asked to reconfirm the bid before award. In such instances, a bidder should be permitted to correct the bid or to withdraw it when the bidder acknowledges that a mistake was made.

(7) Correction of bid mistakes after award should be subject to the same proof as corrections before award with a further requirement that no correction be permitted that would cause the contract price to exceed the next low bid.

(8) Nothing in this Section is intended to prohibit the [Purchasing Agency] from accepting a voluntary reduction in price from a low bidder after bid opening; provided that such reduction is not conditioned on, or results in, the modification or deletion of any conditions contained in the Invitation for Bids.

(7) *Award.* The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids. In the event all bids for a construction project exceed available

funds as certified by the appropriate fiscal officer, and the low responsive and responsible bid does not exceed such funds by more than [five] percent, the Chief Procurement Officer, or the head of a Purchasing Agency, is authorized in situations where time or economic considerations preclude resolicitation of work of a reduced scope to negotiate an adjustment of the bid price, including changes in the bid requirements, with the low responsive and responsible bidder, in order to bring the bid within the amount of available funds.

COMMENTARY:

(1) The successful bidder must be responsive as defined in Section 1-301(51) and responsible as defined in Section 1-301(50), and the bid must be the lowest bid determined under criteria set forth in the Invitation for Bids.

(2) This subsection also provides authority to negotiate changes in construction project bid requirements with a low bidder in order to arrive at a price not in excess of available funds. This authority would be limited to situations where the excess is less than a stated percentage over the available funds. It should be noted that even where the bids exceed the percentage limitation on the discretionary authority to negotiate with the low bidder, if circumstances warrant an emergency determination, the procurement can proceed under Section 3-106 (Emergency Procurements).

(3) When all bids are determined to be unreasonable or the lowest bid on a construction project exceeds the amount specified in this subsection, and the public need does not permit the time required to resolicit bids, then a contract may be awarded pursuant to the emergency authority in Section 3-106 (Emergency Procurements) in accordance with regulations [operational procedures].

(4) Note that the new definition of "written or in writing" in Section 1-301(60) permits awards to be issued electronically.

(8) *Multi-Step Sealed Bidding.* When it is considered impractical to initially prepare a purchase description to support an award based on price, an Invitation for Bids may be issued requesting the submission of unpriced offers to be followed by an Invitation for Bids limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.

COMMENTARY:

To provide additional flexibility in meeting the designated public need, multi-step competitive sealed bidding is authorized.

§3-103 Competitive Sealed Proposals.

(1) *Conditions for Use.*

(a) A contract may be entered into by competitive sealed proposals when the Chief Procurement Officer, the

head of a Purchasing Agency, or a designee of either officer above the level of the Procurement Officer determines in writing, pursuant to regulations [operational procedures], that the use of competitive sealed bidding is either not practicable or not advantageous to the [Purchasing Agency].

- (b) Regulations [Operational procedures] may provide that it is either not practicable or not advantageous to the [Purchasing Agency] to procure specified types of supplies, services, or construction by competitive sealed bidding.
- (c) Contracts for the design-build, design-build-operate-maintain, or design-build-finance-operate-maintain project delivery methods specified in Article 5 shall be entered into by competitive sealed proposals, except as otherwise provided in subsections (c), (d), (e), and (f) of Section 3-101 (Methods of Source Selection).

COMMENTARY:

(1) The competitive sealed proposal method (similar to competitive negotiation) is available for use when competitive sealed bidding is either not practicable or not advantageous. The competitive sealed proposal method is mandated for the project delivery methods described in Article 5: design-build, design-build-operate-maintain, and design-build-finance-operate-maintain.

(2) The competitive sealed bidding and competitive sealed proposal methods assure price and product competition. The use of functional or performance specifications is allowed under both methods to facilitate consideration of alternative means of meeting [Purchasing Agency] needs, with evaluation, where appropriate, on the basis of total or life cycle costs. The criteria to be used in the evaluation process under either method must be fully disclosed in the solicitation. Only criteria disclosed in the solicitation may be used to evaluate the items bid or proposed.

(3) These two methods of source selection differ in the following ways:

(a) Under competitive sealed bidding, judgmental factors may be used only to determine if the supply, service, or construction item bid meets the purchase description. Under competitive sealed proposals, judgmental factors may be used to determine not only if the items being offered meet the purchase description but may also be used to evaluate the relative merits of competing proposals. The effect of this different use of judgmental evaluation factors is that under competitive sealed bidding, once the judgmental evaluation is completed, award is made on a purely objective basis to the lowest responsive and responsible bidder. Under competitive sealed proposals, the quality of competing products or services may be compared and trade-offs made between price and quality of the products or services offered (all as set forth in the solicitation). Award under competitive sealed proposals is then made to the responsible offeror whose proposal is most advantageous to the [Purchasing Agency].

(b) Competitive sealed bidding and competitive sealed proposals also differ in that, under competitive sealed bidding, no change in bids is allowed once they have been opened, except for correction of errors in limited circumstances. The competitive sealed proposal method, on the other hand, permits discussions after proposals have been opened to allow clarification and changes in proposals provided that adequate precautions are taken to treat each offeror fairly and to ensure that information gleaned from competing proposals is not disclosed to other offerors.

(4) The words "practicable" and "advantageous" are to be given ordinary dictionary meanings. In general, "practicable" denotes a situation which justifies a determination that a given factual result can occur. A typical determination would be whether there is sufficient time or information to prepare a specification suitable for competitive sealed bidding. "Advantageous" connotes a judgmental assessment of what is in the [Purchasing Agency's] best interest. Illustrations include determining:

(a) whether to utilize a fixed-price or cost-type contract under the circumstances;

(b) whether quality, availability, or capability is overriding in relation to price in procurements for research and development, technical supplies, or services (for example, developing a traffic management system);

(c) whether the initial installation needs to be evaluated together with subsequent maintenance and service capabilities and what priority should be given these requirements in the best interests of the [Purchasing Agency]; or

(d) whether the marketplace will respond better to a solicitation permitting not only a range of alternative proposals but evaluation and discussion of them before making the award (for example, computer software programs).

What is practicable (that is possible) may not necessarily be beneficial to the [Purchasing Agency]. Consequently, both terms are used in this Section to avoid a possibly restrictive interpretation of the authority to use competitive sealed proposals. If local conditions require an enacting jurisdiction to reduce the proposed flexibility in choosing between competitive sealed bidding and competitive sealed proposals, the statutory determination under Subsection (1)(b) to use competitive sealed proposals should be confined to a determination that use of competitive sealed bidding is "not practicable".

(5) Whenever it is determined that it is practicable but not advantageous to use competitive sealed bidding, the basis for the determination should be specified with particularity.

(2) Request for Proposals. Proposals shall be solicited through a Request for Proposals. Each Request for Proposals for design-build (Section 5-102(4)), design-build-operate-maintain (Section 5-102(5)), and design-build-finance-operate-maintain (Section 5-102(6)):

(a) shall include design requirements;

(b) shall solicit proposal development documents; and

(c) may, when the [Purchasing Agency] determines that the cost of preparing proposals is high in view of the size, estimated price, and complexity of the procurement:

- (i) prequalify offerors by issuing a Request for Qualifications in advance of the Request for Proposals; and
- (ii) select a short list of responsible offerors prior to discussions and evaluations under subsection 3-103(6), provided that the number of proposals that will be short-listed is stated in the Request for Proposals and prompt public notice is given to all offerors as to which proposals have been short-listed; or
- (iii) pay stipends to unsuccessful offerors, provided that the amount of such stipends and the terms under which stipends will be paid are stated in the Request for Proposals.

COMMENTARY:

Subsection (2) establishes two requirements when the competitive sealed proposal process is applied to infrastructure projects: (1) that government clearly set forth the functional requirements of each project through design requirements, and (2) that government require qualified offerors to submit proposal development documents for evaluation. The terms "design requirements" and "proposal development documents" are defined in Section 1-301 (19) and 1-301 (42), respectively. Subsection (2)(c) adds pre-qualification, short-listing, and stipends as options. Procurement mechanisms must be sensitive to the relatively high cost of preparing "priced" offers for design-build, design-build-operate-maintain, and design-build-finance-operate-maintain. The Code allows procurement officials to flexibly approach and resolve this issue, since it is in both parties' interests to keep proposal costs within reasonable limits.

- (3) *Public Notice.* Adequate public notice of the Request for Proposals shall be given in the same manner as provided in Section 3-102(3) (Competitive Sealed Bidding, Public Notice).
- (4) *Receipt of Proposals.* Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A Register of Proposals shall be prepared in accordance with regulations [operational procedures], and shall be open for public inspection after contract award.
- (5) *Evaluation Factors.*

- (a) *General.* The Request for Proposals shall state the relative importance of price and other factors and subfactors, if any.

COMMENTARY:

Subsection (5) requires that the Request for Proposals ("RFP") set forth the relative importance of the factors and any subfactors, in addition to price, that will be considered in awarding the contract. A statement in the RFP of the specific weighting to be used by the jurisdiction for each factor and subfactor, while not required, is recommended so that all offerors will have sufficient guidance to prepare their proposals. This subsection serves two purposes. First, a fair competition necessitates an understanding on the part of all competitors of the basis upon which award will be made. Second, a statement of the basis for award is also essential to assure that the proposals will be as responsive as possible so that the jurisdiction can obtain the optimum benefits of the competitive solicitation. The requirement for disclosure of the relative importance of all evaluation factors and subfactors applies to the areas or items that will be separately evaluated and scored, e.g., the items listed on evaluation score sheets. The requirement does not extend to advance disclosure of the separate items or emphasis that are considered in the mental process of the evaluators in formulating their scores for the factors and subfactors that are described in the solicitation.

- (b) *Additional Requirements.* Each Request for Proposals for design-build (Section 5-102(4)), design-build-operate-maintain (Section 5-102(5)), and design-build-finance-operate-maintain (Section 5-102(6)):
 - (i) shall state the relative importance of (1) demonstrated compliance with the design requirements, (2) offeror qualifications, (3) financial capacity, (4) project schedule, (5) price (or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements), and (6) other factors, if any; and
 - (ii) shall require each offeror, when the contract price is estimated to exceed \$10,000,000, when the contract period of operations and maintenance is ten years or longer, or in circumstances established by regulation, to identify an Independent Peer Reviewer whose competence and qualifications to provide such services shall be an additional evaluation factor in the award of the contract.

COMMENTARY:

Subsection (5)(b) applies to design-build, design-build-operate-maintain, and design-build-finance-operate-maintain procurements only. Complex numerical analysis of numerous factors is likely to diffuse, rather than focus, competition among potential offerors. Competitive proposals can be sought through the simple statement of five or six evaluation factors: e.g., (1) demonstrated compliance with the design requirements, (2) offeror qualifications, (3) financial capacity, (4) project schedule, (5) price (or life-cycle price in appropriate circumstances), and (6) other factors. See, the Commentary to §3-103(5)(a) for a discussion of the underlying requirements for disclosure of factors and subfactors. The qualifications of the Independent Peer Reviewer may be an additional evaluation factor in design-build-operate-maintain and design-build-finance-operate-maintain procurements. The design requirements establish the key performance requirements of the project. The Code requires proposals to be submitted at the end of design development, which provides the Jurisdiction with ready comparisons of each proposal as to functional compliance, quality, price, and schedule. Proposals provide independent confirmation of the Jurisdiction's pre-solicitation assessment of price, time, and quality. Subsection (b) requires the use of an Independent Peer Reviewer on design-build-operate-maintain and design-build-finance-operate-maintain contracts above a threshold dollar value. The Independent Peer Reviewer provides an independent professional peer review of key elements of the design of major public facilities. The Independent Peer Reviewer's function is not to conduct a second design alongside the designers of record. The Independent Peer Reviewer's purpose is to provide the government with independent professional advice and assurance that key design elements of the project are consistent with the functional description in the Request for Proposals and with the common law standard of professional care. The Independent Peer Reviewer's contractual relationship and professional obligation is to the Jurisdiction. By requiring that the offeror recommend an appropriate Independent Peer Reviewer (upon which the offeror is evaluated), the professional quality of the Independent Peer Reviewer is assured to be high.

- (6) *Discussion with Responsible Offerors and Revisions to Proposals.* As provided in the Request for Proposals, and under regulations [operational procedures], discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

COMMENTARY:

(1) Subsection (6) provides the procurement official an opportunity to make certain that offerors fully understand the solicitation requirements and provides offerors an opportunity to clarify proposals where necessary so as to assure responsiveness to the solicitation.

Price discussions can best be conducted when there is a mutual understanding of the contractual requirements. Clarifications are intended to promote exchanges between the [Purchasing Agency] and an offeror that may occur when an award is contemplated without discussions, for example, to resolve minor or clerical errors or ambiguities in proposals.

(2) When discussions or negotiations are contemplated after the receipt of proposals which are expected to lead to the revision of proposals or to best and final offers, fair and equitable treatment of competitors dictates that negotiations be conducted in accordance with ethical business standards. Auction techniques shall be prohibited in discussions with offerors under the competitive sealed proposal method. There must be a cut-off for the submission of revised proposals and final offers. Both Subsection (4) and Subsection (6) are intended to provide that prices; technical solutions; unique technologies; innovative use of commercial items, design, construction, or operating techniques; or other aspects of proposals submitted by one offeror must not be disclosed to competing offerors. Safeguards against abuse in the conduct of negotiations must be strictly observed to maintain the essential integrity of the process. Procedures should be specified in regulations [operational procedures] in order to achieve these objectives.

(7) *Award.* Award shall be made to the responsible offeror whose proposal conforms to the solicitation and is determined in writing to be the most advantageous to the [Purchasing Agency] taking into consideration price and the evaluation factors set forth in the Request for Proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made. Written notice of the award of a contract to the successful offeror shall be promptly given to all offerors.

COMMENTARY:

The file should show with particularity how the pertinent factors and criteria were applied in determining that the successful proposal is most advantageous to the [Purchasing Agency] to assure offerors that their proposals were evaluated fairly and to minimize protests or litigation.

(8) *Debriefings.* The Procurement Officer is authorized to provide debriefings that furnish the basis for the source selection decision and contract award.

COMMENTARY:

Debriefings may be given orally, in writing, or by any other method acceptable to the Procurement Official. A post-award debriefing may include: (a) the [Purchasing Agency's] evaluation of significant weaknesses or deficiencies in the proposal, if applicable; (b) the overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror; (c) the overall ranking of all proposals, when any such ranking was developed during the source selection; (d) a summary of the rationale for award; (e) reasonable responses to relevant questions about whether source selection procedures contained in the Request for Proposals and applicable law were followed. Post-award debriefings should not include point-by-point comparisons of the debriefed proposal with those of other offerors. Any debriefing should not reveal any information prohibited from disclosure by law, or exempt from release under the [applicable

public records laws], including trade secrets, or privileged or confidential commercial or manufacturing information. A summary of any debriefing should be included in the contract file.

§3-104 Small Purchases.

Any procurement not exceeding the amount established by regulation may be made in accordance with small purchase procedures, provided, however, that procurement requirements shall not be artificially divided so as to constitute a small purchase under this Section.

COMMENTARY:

This Section recognizes that certain public purchases do not justify the administrative time and expense necessary for the conduct of competitive sealed bidding. Streamlined procedures, to be set forth in regulations [operational procedures], will make small purchases administratively simpler to complete and yet ensure competition. The appropriate dollar limitations for the use of these procedures are left to regulation within each enacting jurisdiction. Care must be taken to ensure that purchase requirements are not fragmented in order to fall within the authority contained in this Section, thus circumventing the source selection procedures required by either Section 3-102 (Competitive Sealed Bidding), or Section 3-103 (Competitive Sealed Proposals).

§3-105 Sole Source Procurement.

A contract may be awarded for a supply, service, or construction item without competition when, under regulations [operational procedures], the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer above the level of the Procurement Officer determines in writing that there is only one source for the required supply, service, or construction item.

COMMENTARY:

(1) This method of procurement involves no competition and should be utilized only when justified and necessary to serve [Purchasing Agency] needs. This Code contemplates that the [Chief Procurement Officer] will promulgate regulations [operational procedures] which establish standards applicable to procurement needs that may warrant award on a sole source basis.

(2) The power to authorize a sole source award is limited to the Chief Procurement Officer and the head of an agency with purchasing authority, or their designees above the level of Procurement Officer. The purpose in specifying these officials is to reflect an intent that such determinations will be made at a high level. The permission for these officials to authorize a designee to act for them should be subject to regulations [operational procedures].

§3-106 Emergency Procurements.

Notwithstanding any other provision of this Code, the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer may make or authorize others to make emergency procurements when there exists a threat to public health, welfare, or safety under emergency conditions as defined in regulations [operational procedures]; provided that such emergency procurements shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.

COMMENTARY:

(1) This Section authorizes the procurement of supplies, services, or construction where the urgency of the need does not permit the delay involved in utilizing more formal competitive methods. This Code contemplates that the [Chief Procurement Officer] will promulgate regulations [operational procedures] establishing standards for making emergency procurements and controlling delegations of authority by the Chief Procurement Officer or the head of a Purchasing Agency. Such regulations [operational procedures] may limit the authority of such officials to delegate the authority to make procurements above designated dollar amounts.

(2) While in a particular emergency an award may be made without any competition, the intent of this Code is to require as much competition as practicable in a given situation. When the amount of the emergency procurement is within that adopted for Section 3-104 (Small Purchases), the competitive procedures prescribed under that Section should be used when feasible.

(3) Use of this Section may be justified because all bids submitted under the competitive sealed bid method are unreasonable, and there is no time to re-solicit bids without endangering the public health, welfare, or safety. As with other emergency conditions, regulations [operational procedures] will further define these circumstances, and any procurements conducted pursuant to this authority must be done so as to treat all bidders fairly and to promote such competition as is practicable under the circumstances.

§3-107 Special Procurements.

Notwithstanding any other provision of this Code, the Chief Procurement Officer or the head of a Purchasing Agency may with prior public notice initiate a procurement above the small purchase amount specified in Section 3-104 where the officer determines that an unusual or unique situation exists that makes the application of all requirements of competitive sealed bidding or competitive sealed proposals contrary to the public interest. Any special procurement under this Section shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the procurement and for the

selection of the particular contractor shall be included by the Chief Procurement Officer or the head of a Purchasing Agency in the contract file, and a report shall be made publicly available at least annually describing all such determinations made subsequent to the prior report.

COMMENTARY:

Section 3-107 authorizes special procurements in very limited circumstances, where deviations from the strict requirements of the Code are necessary to protect the interest of the [Purchasing Agency]. It is based on the versions of the Code adopted by the States of Alaska and Arizona. See Alaska Statutes Section 36.30.308 (authorizing the use of an innovative procurement process under certain conditions to purchase new or unique state requirements, new technologies, or to achieve best value) and Arizona Revised Statutes Section 41-2537 (authorizing, under emergency procurement authority, a waiver for competitive sealed bidding or competitive sealed proposals when doing so is in the Purchasing Agency's best interests). To ensure proper safeguards, only the Chief Procurement Officer, or the head of a Purchasing Agency will authorize each special procurement process, and document both the reasons therefor and the selection process followed. The second sentence of the Section confirms that those requirements of the competitive processes that can practicably be applied to such procurement will be applied.

Part B - Cancellation of Invitations for Bids or Requests for Proposals

§3-201 Cancellation of Invitations for Bids or Requests for Proposals.

An Invitation for Bids, a Request for Proposals, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, when it is in the best interests of the [Purchasing Agency] in accordance with regulations [operational procedures]. The reasons therefor shall be made part of the contract file.

COMMENTARY:

It is contemplated that the authority granted by this Section should only be exercised for cogent and compelling reasons as set forth in the regulations [operational procedures].

Part C - Qualifications and Duties

§3-301 Responsibility of Bidders and Offerors.

- (1) *Determination of Nonresponsibility.* A written determination of nonresponsibility of a bidder or offeror shall be made in accordance with regulations [operational procedures]. The unreasonable failure of a bidder or

offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of non-responsibility with respect to such bidder or offeror.

- (2) *Right of Nondisclosure.* Confidential information furnished by a bidder or offeror pursuant to this Section shall not be disclosed outside of the Office of the Chief Procurement Officer or the Purchasing Agency without prior written consent by the bidder or offeror.

COMMENTARY:

(1) To obtain true economy, the [Purchasing Agency] must minimize the possibility of a subsequent default by the contractor, late deliveries, or other unsatisfactory performance which would result in additional administrative costs. Subsection (1) recognizes that it is important that the bidder or offeror will be a responsible contractor--that the contractor has the financial ability, resources, skills, capability, and business integrity necessary to perform the contract.

(2) An inquiry is not required in every case. The extent to which a review or investigation should be conducted will depend on the value and size of the procurement, and the bidder's or offeror's past record of contract performance in the public and private sectors. Since the information solicited from the bidder or offeror for such evaluation may be of a privileged or a proprietary nature, Subsection (2) prohibits the disclosure of such information without the consent of the bidder or offeror.

§3-302 Prequalification of Suppliers.

Prospective suppliers may be prequalified for particular types of supplies, services, and construction. The method of submitting prequalification information and the information required in order to be prequalified shall be determined by the [Chief Procurement Officer].

COMMENTARY:

(1) Prequalification is not a conclusive determination of responsibility, and a prequalified bidder or offeror may be rejected as nonresponsible on the basis of subsequently discovered information. Similarly, a prior failure to prequalify will not bar a subsequent determination that a bidder or offeror is responsible with respect to any given procurement.

(2) Prequalification is only of limited utility if a procurement cannot be limited to prequalified suppliers. Regulations [Operational procedures] should establish that unless an emergency exists or the contract is for a small purchase, a competition may not be limited to pre-qualified offerors unless public notice of the procurement was given in sufficient time for any interested firms to prepare necessary submissions and become prequalified.

§3-303 Substantiation of Offered Prices.

The Procurement Officer may request factual information reasonably available to the bidder or offeror to substantiate that the price or cost offered, or some portion of it, is reasonable, if:

- (1) the price is not:
 - (a) based on adequate price competition;
 - (b) based on established catalogue or market prices;or
 - (c) set by law or regulation; and
- (2) the price or cost exceeds an amount established in the regulations [operational procedures].

COMMENTARY:

The 1979 Code's requirement to submit certified cost or pricing data (which was modeled on the Truth in Negotiations Act, 10 U.S.C. 2306a) is changed to a less burdensome standard appropriate to the commercial supplies and services that state and local governments buy. The threshold for submission of such data is left to regulations [operational procedures] but should be substantial. The data must also be limited to that normally kept by the contractor and not require extensive sweeps to gather data not reasonably available.

Part D - Types of Contracts

§3-401 Types of Contracts.

Subject to the limitations of this Section, any type of contract which will promote the best interests of the [Purchasing Agency] may be used; provided that the use of a cost-plus-a-percentage-of-cost contract is prohibited. A cost-reimbursement contract may be used only when a determination is made in writing that such contract is likely to be less costly to the [Purchasing Agency] than any other type or that it is impracticable to obtain the supplies, services, or construction required except under such a contract.

COMMENTARY:

The intent of this Section is to authorize any type of contract which best suits the interest of the [Purchasing Agency] except that a cost-plus-a-percentage-of-cost contract is prohibited. Examples of contract types permitted are firm fixed price, fixed price with economic price adjustments, fixed price incentive, cost reimbursement and time and materials contracts. Other types of cost-reimbursement contracts may be used when uncertainties involved in the work to be performed are of such magnitude that the cost of performance is too difficult

to estimate with reasonable certainty, and use of a fixed-price contract could seriously affect a contractor's financial stability or result in payments by the [Purchasing Agency] for contingencies that never occur. Use of cost-type contracts is also authorized when it is impracticable to contract on any other basis.

§3-402 Approval of Accounting System.

Regulations [Operational procedures] shall be issued requiring that contractors submit appropriate documentation prior to the award of contracts in which the [Purchasing Agency] agrees to reimburse costs, confirming that:

- (a) the proposed contractor's accounting system will permit timely development of all necessary cost data in the form required by the specific contract type contemplated; and
- (b) the proposed contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles.

COMMENTARY:

This Section does not require any particular accounting method and leaves to the [Purchasing Agency's] discretion the determination of the adequacy of any given accounting system. Only when costs are to be reimbursed is there any need to review the contractor's cost accounting and allocation system. This review should be consistent with the type of costs to be reimbursed. For instance, if only direct material costs are to be reimbursed, there is much less chance that system inadequacies will lead to problems, than if reimbursement of actual overhead and general and administrative expenses are required by the contract.

§3-403 Multi-Year Contracts.

- (1) *Specified Period.* Unless otherwise provided by law, a contract for supplies or services may be entered into for any period of time deemed to be in the best interests of the [Purchasing Agency] provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.
- (2) *Use.* A multi-year contract is authorized where:

- (a) estimated requirements cover the period of the contract and are reasonably firm and continuing; and
 - (b) such a contract will serve the best interests of the [Purchasing Agency] by encouraging effective competition or otherwise promoting economies in [Purchasing Agency] procurement.
- (3) *Cancellation Due to Unavailability of Funds in Succeeding Fiscal Periods.* When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled and the contractor shall be reimbursed for the reasonable value of any non-recurring costs incurred but not amortized in the price of the supplies or services delivered under the contract. The cost of cancellation may be paid from any appropriations available for such purposes.

COMMENTARY:

(1) Multi-year contracts are a common method of procurement, and contract durations need not be tied exclusively to fiscal years. The phrase "multi-term" has been changed to "multi-year", which a number of commentators have suggested was confusing. Some jurisdictions may have legislative restrictions upon the use of funds in a calendar year other than that in which the funds are appropriated. This Section permits multi-year procurements in order to enable a [Purchasing Agency] to procure larger quantities and obtain the benefits of volume discounts. A multi-year contract should be used only for supplies or services needed on a continuing basis with annual quantity requirements that can be reasonably estimated in advance. Multi-year procurements should attract more competitors to submit bids or offers for the larger contract awards and thereby provide the jurisdiction with the benefits of increased competition.

(2) Subsection (3) is applicable when funds are not appropriated in a subsequent year of a multi-year contract which is in progress. Where funds are not appropriated or otherwise made available for the next funding period of the contract, there is no alternative but to cancel the contract and to reimburse the contractor for those non-recurring costs that have not been amortized through the selling price of goods already delivered under the contract.

(3) The phrase "non-recurring costs" in Subsection (3) should be broadly construed.

Part E - Inspection of Plant and Audit of Records

§3-501 Right to Inspect Plant.

The [Purchasing Agency] may, at reasonable times, inspect the part of the plant or place of business of a contractor or any subcontractor which is related to the performance of any contract awarded or to be awarded by the [Purchasing Agency].

§3-502 Right to Audit Records

- (1) *Audit of Cost or Pricing Data.* The [Purchasing Agency] may, at reasonable times and places, audit the books and records of any person who has submitted data in substantiation of offered prices pursuant to Section 3-303 (Substantiation of Offered Prices) to the extent that such books and records relate to that data. Any person who receives a contract, change order, or contract modification for which such data is required, shall maintain such books and records that relate to such cost or pricing data for [three] years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing.
- (2) *Contract Audit.* The [Purchasing Agency] shall be entitled to audit the books and records of a contractor or any subcontractor under any negotiated contract or subcontract other than a firm fixed-price contract to the extent that such books and records relate to the performance of such contract or subcontract. Such books and records shall be maintained by the contractor for a period of [three] years from the date of final payment under the prime contract and by the subcontractor for a period of [three] years from the date of final payment under the subcontract, unless a shorter period is otherwise authorized in writing.

Part F - Determinations and Reports

§3-601 Finality of Determinations.

The determinations required by Section 3-102(6) (Competitive Sealed Bidding, Correction or Withdrawal of Bids; Cancellation of Awards), Section 3-103(I) (Competitive Sealed Proposals, Conditions for Use), Section 3-103(7) (Competitive Sealed Proposals, Award), Section 3-105 (Sole Source Procurement), Section 3-106 (Emergency Procurements), Section 3-107 (Special Procurements), Section 3-301(1) (Responsibility of Bidders and Offerors, Determination of Non-responsibility), Section 3-303(3) (Substantiation of Offered Prices), Section 3-401 (Types of

Contracts), Section 3-402 (Approval of Accounting System), Section 3-403(2) (Multi-Term Contracts, Determination Prior to Use) and Section 5-103 (Choice of Project Delivery Methods) are final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.

§3-602 Reporting of Anticompetitive Practices.

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

§3-603 Retention of Procurement Records.

All procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the [Attorney General] [Attorney for the Enacting Jurisdiction]. All retained documents shall be made available to the [Attorney General] [Attorney for the Enacting Jurisdiction] or designee upon request and proper receipt therefor.

§3-704 Record of Procurement Actions Taken Under Section 3-105 (Sole Source Procurement), Section 3-106 (Emergency Procurements), and Section 3-107 (Special Procurements).

- (1) *Contents of Record.* The Chief Procurement Officer shall maintain a record listing all contracts made under Section 3-105 (Sole Source Procurement), Section 3-106 (Emergency Procurements), or 3-107 (Special Procurements) for a minimum of [five] years. The record shall contain:
 - (a) each contractor's name;
 - (b) the amount and type of each contract; and
 - (c) a listing of the supplies, services, or construction procured under each contract.
- (2) *Submission to [Legislature][Governing Body of the Enacting Jurisdiction].* A copy of the record required by Subsection (1) shall be submitted to the [legislature][Governing Body of the Enacting Jurisdiction]

on an annual basis. The record shall be available for public inspection.

ARTICLE 4 - SPECIFICATIONS

§4-101 Maximum Practicable Competition.

All specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the [Purchasing Agency's] needs, and shall not be unduly restrictive.

§4-102 Duties of the Chief Procurement Officer.

The [Chief Procurement Officer] shall monitor the use of specifications for supplies, services, and construction required by the [Purchasing Agency].

COMMENTARY:

Regulations [Operational procedures] will set standards as to how specifications and work statements are drafted. The Chief Procurement Officer is charged with ensuring those who prepare the specifications meet those standards.

§4-103 Relationship With Using Agencies.

The Chief Procurement Officer shall obtain expert advice and assistance from personnel of Using Agencies in the development of specifications and may delegate in writing to a Using Agency the authority to prepare and utilize its own specifications.

§4-104 Specifications Prepared by Other Than [Purchasing Agency] Personnel.

The requirements of this Article regarding the purposes and non-restrictiveness of specifications shall apply to all specifications prepared other than by [Purchasing Agency] personnel, including, but not limited to, those prepared by architects, engineers, and, when the design-build, design-build-operate-maintain, or design-build-finance-operate-maintain project delivery method are used, those persons preparing specifications for the project.

§4-105 Qualified Products List. [Reserved]

§4-106 Brand Name or Equal Specification.

- (1) *Use.* Brand name or equal specifications may be used when the Chief Procurement Officer (or the Chief Procurement Officer's delegee) determines in writing that:
 - (a) no other design or performance specification or qualified products list is available;
 - (b) time does not permit the preparation of another form of purchase description, not including a brand name specification;
 - (c) the nature of the product or the nature of the [Purchasing Agency's] requirements makes use of a brand name or equal specification suitable for the procurement; or
 - (d) use of a brand name or equal specification is in the [Purchasing Agency's] best interests.

COMMENTARY:

It is not intended that the prior written determination required for use of a brand name or equal specification will impose an undue administrative burden. Rather it is designed to capture the important management decision to use this type of specification. Such determination may be made for categories of supplies, services, or construction items or, in appropriate circumstances, for an entire procurement action event though a number of different items are being procured. Standard forms may be developed to record the determination.

- (2) *Designation of Several Brand Names.* Brand name or equal specifications shall seek to designate three, or as many different brands as are practicable, as "or equal" references and shall further state that substantially equivalent products to those designated will be considered for award.
- (3) *Required Characteristics.* Unless the purchasing agent determines in writing that the essential characteristics of the brand names included in the specifications are commonly known in the industry or trade, brand name or equal specifications shall include a description of the

particular design, functional, or performance characteristics which are required.

- (4) *Nonrestrictive Use of Brand Name or Equal Specifications.* Where a brand name or equal specification is used in a solicitation, the solicitation shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance, and characteristics desired and is not intended to limit or restrict competition.

§4-107 Brand Name Specification.

- (1) *Use.* Since use of a brand name specification is restrictive of product competition, it may be used only when the Chief Procurement Officer makes a written determination that only the identified brand name item or items will satisfy the [Purchasing Agency's] needs.
- (2) *Competition.* The purchasing agent shall seek to identify sources from which the designated brand name item or items can be obtained and shall solicit such sources to achieve whatever degree of price competition is practicable. If only one source can supply the requirement, the procurement shall be made under Section 3-105 (Sole Source Procurement).

ARTICLE 5 - PROCUREMENT OF INFRASTRUCTURE FACILITIES AND SERVICES

Part A - Contracting for Infrastructure Facilities and Services

§5-101 Project Delivery Methods Authorized

- (1) The following project delivery methods are authorized for procurements relating to the design, construction, routine operation, routine repair, and routine maintenance of infrastructure facilities and services in this [Enacting Jurisdiction]:
 - (a) Design-bid-build (including construction management at-risk);
 - (b) Operations and maintenance;
 - (c) Design-build;
 - (d) Design-build-operate-maintain;
 - (e) Design-build-finance-operate-maintain.
- (2) Participation in a report or study that is subsequently used in the preparation of design requirements for a project shall not disqualify a firm from participating as a member of a proposing team in a design-build, design-build-operate-maintain, or design-build-finance-operate-maintain procurement unless such participation would provide the firm with a substantial competitive advantage.

COMMENTARY:

(1) The purpose of this Part is to provide procurement officials with adequate authority to conduct procurement transactions by fair and open competition under varying market conditions in order to satisfy public needs for infrastructure-related supplies, services, and construction at the most economical prices. This Article does not compel government procurement officials to use only one of these methods, or to contract for maintenance and operations services which could be done internally. Rather, the article permits any one or more of the common components of an infrastructure facility procurement – design, construction, operations and maintenance, and finance – to be procured competitively by contract, either separately or in combination with one or more other elements.

(2) The Code permits integrated project delivery methods to be used as well, including design-build, design-build-operate-maintain, and design-build-finance-operate-maintain. The integration of design with construction (design-build), or design with construction and operations (design-build-operate-maintain), or design with finance, construction, and operations (design-build-finance-operate-maintain) offers significant quality, cost, and time benefits to government, to taxpayers, and to ratepayers, in appropriate circumstances.

§5-102 Source Selection Methods Assigned to Project Delivery Methods.

(1) *Scope*

This Section specifies the source selection methods applicable to procurements for the project delivery methods identified in Section 5-101 (Project Delivery Methods Authorized), except as provided in Section 3-104 (Small Purchases), 3-105 (Sole Source Procurement), 3-106 (Emergency Procurements), and 3-107 (Special Procurements).

(2) *Design-bid-build (and Construction Management At-Risk)*

(a) *Design: Architectural and Engineering Services.*

The qualifications based selection process set forth in Section 5-105 (Design: Architectural and Engineering Services) shall be used to procure architectural and engineering services in design-bid-build procurements.

(b) *Construction.*

Competitive sealed bidding, as set forth in Section 3-102 (1)(b) (Competitive Sealed Bidding), shall be used to procure construction in design-bid-build procurements, except the use of competitive sealed proposals, as set forth in Section 3-103 (Competitive Sealed Proposals), is authorized to procure construction management at-risk services.

COMMENTARY:

“Construction management at-risk” is one of the available purchasing options for the construction component of design-bid-build procurement. The intent of the Code is to permit the procurement of a construction manager prior to the completion of design, to provide pre-construction services and to perform the construction function.

(3) *Operations and Maintenance.*

Contracts for operations and maintenance shall be procured as set forth in Section 3-101 (Methods of Source Selection).

COMMENTARY:

Contracts for operations and maintenance services offer governments flexible, competitive procurement processes to combine initial strategies for delivering an infrastructure facility with long-term strategies to operate and maintain either new or existing facilities. Design-bid-build or design-build can be followed by an operations and maintenance procurement to provide for the overall delivery of an infrastructure facility and service.

(4) *Design-build.*

Contracts for design-build shall be procured by competitive sealed proposals, as set forth in Section 3-103 (Competitive Sealed Proposals), [except that the regulations [operational procedures] may describe the circumstances under which particular design-build procurements will not require the submission of proposal development documents as required in Section 3-103(5)(b).]

COMMENTARY:

The bracketed language provides procurement officials with the authority to exempt, by regulation, one or more design-build procurements from the requirement in Section 3-103(2)(b) that Request for Proposals for design-build services solicit proposal development documents from each offeror. The effect of this language, if used, is to permit the selection of a design-builder based primarily on qualifications. This option has the effect of applying a Qualifications Based Selection system ("QBS") to the design-build process. Without proposal development documents, design is insufficiently developed to include a fixed price as one of the evaluation criteria at the time the design-builder is selected. This approach has been applied successfully on numerous design-build projects, and is ideal where a firm limit on available funds has already been established by the public owner.

(5) *Design-build-operate-maintain.*

Contracts for design-build-operate-maintain shall be procured by competitive sealed proposals, as set forth in Section 3-103 (Competitive Sealed Proposals).

(6) *Design-build-finance-operate-maintain.*

Contracts for design-build-finance-operate-maintain shall be procured by competitive sealed proposals, as set forth in Section 3-103 (Competitive Sealed Proposals).

§5-103 Choice of Project Delivery Methods.

Regulations [Operational procedures] shall be promulgated describing the project delivery methods listed in Section 5-101 (Project Delivery Methods Authorized). These regulations [operational procedures] shall:

- (a) set forth criteria to be used in determining which project delivery method is to be used for a particular project;
- (b) grant to the Chief Procurement Officer, or the head of the Purchasing Agency responsible for carrying out the project, the discretion to select an appropriate project delivery method for a particular project;
- (c) describe the bond, insurance, and other security provisions contained in Part B of this Article that apply to each project;
- (d) describe the appropriate contract clauses and fiscal responsibility requirements contained in Part C of this Article that apply to each project; and
- (e) require the procurement officer to execute and include in the contract file a written statement setting forth the facts which led to the selection of a particular project delivery method for each project.

COMMENTARY:

(1) Procurement officials, in a single decision-making process, may assign different project delivery methods to a number of infrastructure facilities. Numerous state and local governments are looking for ways to better allocate scarce resources across all of their infrastructure holdings. The Code encourages procurement officials to make the project delivery decision in the context of an overall capital development program for infrastructure asset management.

(2) In addition to the project delivery methods listed in Section 5-101 and 5-102, other variations on the design-bid-build method might be used for design, construction, operations, maintenance, and, in appropriate circumstances, finance. This Section authorizes the [Purchasing Agency] to issue appropriate regulatory guidance for the use of these project delivery methods for infrastructure facilities and services. A contract clause which simply requires separate prime contractors to cooperate and coordinate with each other without a central planning and management coordinator is not considered an acceptable method of project delivery.

(3) The specific terms in a Request for Proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain services will necessarily vary based upon the specific financial, engineering, architectural, and technological issues confronting a particular project. This Section of the Code authorizes the [Purchasing Agency] to issue

appropriate regulatory guidance for the application of these methods to infrastructure facilities and services.

§5-104 Architectural and Engineering Services

(1) Policy.

It is the policy of this [Enacting Jurisdiction] to publicly announce all requirements for Architectural and Engineering Services and to negotiate contracts for Architectural and Engineering Services on the basis of demonstrated competence and qualification for the type of services required, and at fair and reasonable prices.

COMMENTARY:

This section must be read in conjunction with Section 5-202 (Source Selection Methods Assigned to Project Delivery Methods).

(2) Architectural and Engineering Selection Committee.

In the procurement of *Architectural and Engineering Services*, the Chief Procurement Officer or the head of a Purchasing Agency shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. [The Chief Procurement Officer or the head of a Purchasing Agency, the Procurement Officer, and [the State Architect]] shall comprise the Architect-Engineer Selection Committee for each Architectural and Engineering Services contract over [\$]. The Selection Committee for *Architectural and Engineering Services* contracts under this amount shall be established in accordance with regulations [operational procedures] promulgated by the [Chief Procurement Officer] [Purchasing Agency]. The Selection Committee shall evaluate current statements of qualifications and performance data on file with the [Purchasing Agency], together with those that may be submitted by other firms regarding the proposed contract. The Selection Committee shall conduct discussions with no less than three firms regarding the contract and the relative utility of alternative methods of approach for furnishing the required services, and then shall select therefrom, in order of preference, based upon criteria established and published by the Selection Committee, no less than three of the firms

deemed to be the most highly qualified to provide the services required.

(3) *Negotiation.*

The Procurement Officer shall negotiate a contract with the highest qualified firm for Architectural and Engineering Services at compensation which the Procurement Officer determines in writing to be fair and reasonable to the [Purchasing Agency]. In making this decision, the Procurement Officer shall take into account the estimated value, the scope, the complexity, and the professional nature of the services to be rendered. Should the Procurement Officer be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price the Procurement Officer determines to be fair and reasonable to the [Purchasing Agency], negotiations with that firm shall be formally terminated. The Procurement Officer shall then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the Procurement Officer shall formally terminate negotiations. The Procurement Officer shall then undertake negotiations with the third most qualified firm. Should the Procurement Officer be unable to negotiate a contract at a fair and reasonable price with any of the selected firms, the Procurement Officer shall select additional firms in order of their competence and qualifications, and the Procurement Officer shall continue negotiations in accordance with this Section until an agreement is reached.

COMMENTARY:

(1) This Section applies to procurement of all services within the scope of architecture and engineering services.

(2) The principal reasons supporting this selection procedure for Architectural and Engineering Services are the lack of a definitive scope of work for such services at the time the selection is made and the importance of selecting the best-qualified firm. In general, the architect-engineer or land surveyor is engaged to represent the Purchasing Agency's] interests and is, therefore, in a different relationship with the [Purchasing Agency] from that normally existing in a buyer-seller situation. For these reasons, the qualifications, competence, and availability of the three most qualified architect-engineers or land surveying firms are considered initially, and price negotiated later.

(3) It is considered more desirable to make the qualification selection first and then to discuss the price because both parties need to review in detail what is involved in the work (for example, estimates of man-hours, personnel costs, and alternatives that the architect-engineer or land surveyor should consider in depth). Once parameters have been fully

discussed and understood and the architect-engineer or land surveyor proposes a fee for the work, the recommended procedure requires the [Purchasing Agency] to make its own evaluation and judgment as to the reasonableness of the fee.

(4) If the fee is fair and reasonable, award is made without consideration of proposals and fees of other competing firms. If the fee cannot be negotiated to the satisfaction of the [Purchasing Agency], negotiations with other qualified firms are initiated. Thus price clearly is an important factor in the award of the Architectural and Engineering Services contract under this procedure. The principal difference between the recommended procedure for architect-engineer and land surveyor selection and the procedures used in most other competitive source selections is the point at which price is considered.

(5) If an enacting jurisdiction desires to use a different selection process, then it may consider the following language:

“The Procurement Officer shall negotiate with the highest qualified firms for a contract for Architectural and Engineering Services at compensation which the Procurement Officer determines in writing to be fair and reasonable to the [Purchasing Agency]. In making such determination, the Procurement Officer shall take into account, in the following order of importance, the professional competence of offerors, the technical merits of offers, and the price for which the services are to be rendered.”

Part B - Bonds, Insurance, Guarantees

§5-201 Bid Security.

(1) *Requirement for Bid Security.* Bid security shall be required for all competitive sealed bidding for construction contracts in a design-bid-build procurement when the price is estimated by the Procurement Officer to exceed [\$100,000] [an amount established by regulation]. Bid security shall be a bond provided by a surety company authorized to do business in this State, or the equivalent in cash, or otherwise supplied in a form satisfactory to the [Purchasing Agency]. Nothing herein prevents the requirement of such bonds on such contracts under [\$100,000] [the amount set by regulation] when the circumstances warrant.

(2) *Amount of Security.* Bid security shall be in an amount equal to at least [5%] of the amount of the bid.

(3) *Rejection of Bids for Noncompliance with Bid Security Requirements.* When the Invitation for Bids requires security, noncompliance requires that the bid be rejected unless, pursuant to regulations [operational procedures], it is determined that the bid fails to comply in a non-substantial manner with the security requirements.

(4) *Withdrawal of Bids.* After bids are opened, they shall be irrevocable for the period specified in the Invitation for Bids (except as provided for bids in Section 3-102(6)). If a bidder is permitted to withdraw its bid (or proposal) before award, or is excluded from the competition before award, no action shall be had against the bidder or the bid security.

§5-202 Contract Performance and Payment Bonds

(1) *When Required -- Amounts.* When a construction, design-build, design-build-operate-maintain, or design-build-finance-operate-maintain contract is awarded in excess of [\$100,000], the following bonds or security shall be delivered to the [Purchasing Agency] and shall become binding on the parties upon the execution of the contract:

- (a) a performance bond satisfactory to the [Purchasing Agency], executed by a surety company authorized to do business in this State or otherwise secured in a manner satisfactory to the [Purchasing Agency], in an amount equal to 100% of the portion of the contract price that does not include the cost of operation, maintenance, and finance; and
- (b) a payment bond satisfactory to the [Purchasing Agency], executed by a surety company authorized to do business in this State or otherwise secured in a manner satisfactory to the [Purchasing Agency], for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the construction work provided for in the contract. The bond shall be in an amount equal to 100% of the portion of the contract price that does not include the cost of operation, maintenance, and finance.

COMMENTARY:

The intent is to continue the requirement that surety bonds be provided to secure the faithful performance of construction associated with infrastructure facilities, as well as the faithful payment of suppliers and subcontractors, irrespective of project delivery method. Paragraph (b) confirms that the surety bonds are to be provided from reputable sureties authorized to do business in the [Enacting Jurisdiction]. Regulations [Operational procedures] requiring sureties to be listed on the U.S. Treasury list may be one appropriate vehicle for accomplishing this goal.

- (2) *Reduction of Bond Amounts.* Regulations [Operational procedures] may authorize the Chief Procurement Officer or head of a Purchasing Agency to reduce the amount of performance and payment bonds to [50%] of the amounts established in Subsection (1) of this Section.
- (3) *Authority to Require Additional Bonds.* Nothing in this Section shall be construed to limit the authority of the [Purchasing Agency] to require a performance bond or other security in addition to such bonds, or in circumstances other than specified in Subsection (1) of this Section.
- (4) *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 therefor before the expiration of a period of 90 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 or sums justly due such person; provided, however, that any person having a direct contractual relationship with a subcontractor of the contractor, 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 90 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. Such notice shall be personally served or served by other form of receipted transmittal that confirms actual delivery to the contractor at any

place the contractor maintains an office or conducts its business.

- (5) *Suits on Payment Bonds--Where and When Brought.* Every suit instituted upon a payment bond shall be brought in a court of competent jurisdiction for the county or district in which the construction contract was to be performed, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by the person bringing suit. The obligee named in the bond need not be joined as a party in any such suit.

COMMENTARY:

The provision of this Section with respect to suits on payment bonds essentially follows the Miller Act, 40 U.S.C. §270 (1970), and many similar State statutes.

§5-203 Bond Forms and Copies.

- (1) *Bond Forms.* The [Purchasing Agency] shall promulgate by regulation the form of the bonds required by this Part.
- (2) *Certified Copies of Bonds.* Any person may request and obtain from the [Purchasing Agency] a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond shall be prima facie evidence of the contents, execution, and delivery of the original.

§5-204 Errors and Omissions Insurance

Regulations [Operational procedures] shall be promulgated that specify when the Chief Procurement Officer or head of a Purchasing Agency shall require offerors to provide appropriate errors and omissions insurance to cover architectural and engineering services under the project delivery methods set forth in Section 5-101 (1) (a), (c), (d), and (e).

COMMENTARY:

The intent of this provision is to provide flexibility to procurement officials in requiring offerors to provide appropriate errors and omissions insurance with respect to the design component of any of the four delivery methods authorized in Section 5-201 which include professional design services, even where the provider of such services does not directly contract with the Purchasing Agency. Errors and omissions insurance may be of increased importance in the project delivery methods which integrate design and construction (design-build, design-build-operate-maintain, design-build-finance-operate-maintain),

particularly when the successful offeror is a joint venture or special purpose corporation formed particularly for the instant project. The inclusion of the public owner as a named insured on the errors and omissions policy furnished to the contractor by the designer may be a prudent procurement strategy.

§5-205 Other Forms of Security

Regulations [Operational procedures] shall be promulgated authorizing the Chief Procurement Officer or head of a Purchasing Agency to require a Request for Proposals to include one or more of the following forms of security to assure the timely, faithful, and uninterrupted provision of operations and maintenance services procured separately, or as one element of design-build-operate-maintain or design-build-finance-operate-maintain services:

- (1) Operations period surety bonds that secure the performance of the contractor's operations and maintenance obligations under the project delivery methods set forth in Section 5-101 (1) (b), (d) and (e);
- (2) Letters of credit in an amount appropriate to cover the cost to the [Purchasing Agency] of preventing infrastructure service interruptions for a period up to twelve months under the project delivery methods set forth in Section 5-101 (1) (b), (d) and (e); and
- (3) Appropriate written guarantees from the contractor (or depending upon the circumstances, from parent corporations) to secure the recovery of reprocurement costs to the [Purchasing Agency] in the event of a default in performance by the contractor.

COMMENTARY:

Design-build-operate-maintain, design-build-finance-operate-maintain, and pure operations and maintenance contracts will likely require separate forms of security to assure that contract performance of infrastructure services complies with contract requirements and is uninterrupted, even in the event of contractor default. A letter of credit setting aside immediately available funds in the event of a contractor default provides ready assurance to the government that emergency cash funds will be available to continue service if contractor termination and reprocurement is necessary. A corporate guarantee may be advisable in situations where the apparent successful bidder is a joint venture, or a special purpose entity formed only to provide the procured service. Corporate or parent corporation guarantee(s) may be required to secure the payment of reprocurement costs over and above the limits already secured by operations period bonds and letters of credit.

Part C - Contract Clauses and Fiscal Responsibility

§5-301 Contract Clauses and Their Administration.

(1) *Contract Clauses.*

Regulations [Operational procedures] shall be promulgated requiring the inclusion in [Purchasing Agency] contracts issued under this Article 5 of clauses providing for adjustments in prices, time of performance, or other contract provisions, as appropriate, and covering the following subjects:

- (a) the unilateral right of the [Purchasing Agency] to order in writing:
 - (i) changes in the work within the scope of the contract; and
 - (ii) changes in the time of performance of the contract that do not alter the scope of the contract work;
- (b) variations occurring between estimated quantities of work in a contract and actual quantities;
- (c) suspension of work ordered by the [Purchasing Agency]; and
- (d) site conditions differing from those indicated in the contract, or ordinarily encountered, except that differing site conditions clauses promulgated by the [Chief Procurement Officer] need not be included in a contract:
 - (i) when the contract is negotiated;
 - (ii) when the contractor provides the site or the design; or
 - (iii) when the parties have otherwise agreed with respect to the risk of differing site conditions.

COMMENTARY:

(1) The four new delivery methods - operations and maintenance, design-build, design-build-operate-maintain, and design-build-finance-operate-maintain – do not eliminate the need for regulations [operational procedures] that incorporate standard contract clauses. The Changes, Suspension of Work, and Variations clauses are standard mechanisms for government to maintain flexibility, and should be applicable to all procurement methods in Article 5. The principles underlying the Differing Site Conditions clause still apply to the design-bid-build process, and may apply to the negotiated processes (design-build, design-build-operate-maintain, design-build-finance-operate-maintain), depending upon the government's structuring of the competition. Procurement officials may properly decide to collect and furnish subsurface information to prospective offerors, with the intent of asking those offerors to rely on the information furnished in submitting offers. In such circumstances, a standard Differing Site Conditions clause is appropriate.

(2) The phrase "or other contract provisions" of this Section is not intended to alter the price adjustment provisions set forth in Subsection (2) of this Section. This Subsection is intended to enable the parties to deal with the effects of changes, variations in estimated quantities, suspensions of work, and differing site conditions on matters other than price or time for performance. For example, where a change order revises the specification, not only price or time for performance may be affected, but other terms or conditions such as insurance or inspection may also be affected.

(2) *Price Adjustments.*

- (a) Adjustments in price pursuant to clauses promulgated under Subsection (1) of this Section shall be computed in one or more of the following ways:
 - (i) by agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
 - (ii) by unit prices specified in the contract or subsequently agreed upon;
 - (iii) by the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;
 - (iv) in such other manner as the contracting parties may mutually agree; or
 - (v) in the absence of agreement by the parties, by a unilateral determination by the [Procurement Officer] of the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as computed by the

[Procurement Officer] in accordance with applicable sections of regulations [operational procedures].

- (b) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of Section 3-303 (Substantiation of Offered Prices).

(3) *Additional Contract Clauses.*

Regulations [Operational procedures] shall be promulgated requiring the inclusion in [Purchasing Agency] contracts of clauses providing for appropriate remedies and covering the following subjects:

- (a) liquidated damages as appropriate;
- (b) specified excuses for delay or nonperformance;
- (c) termination of the contract for default; and
- (d) termination of the contract in whole or in part for the convenience of the [Purchasing Agency].

(4) *Modification of Required Clauses.*

The Chief Procurement Officer or the head of a Purchasing Agency may vary the clauses promulgated by the [Chief Procurement Officer] under Subsection (1) and Subsection (3) of this Section for inclusion in any particular [Purchasing Agency] contract, provided that any variations are supported by a written determination that states the circumstances justifying such variations, and provided that notice of any such material variation be stated in the Invitation for Bids or Request for Proposals.

COMMENTARY:

(1) This Section directs the [Chief Procurement Officer] to promulgate contract clauses that call for adjustment of price, time for performance, or other contract provisions as appropriate with respect to situations that continually develop on construction projects. It does not require these situations to be treated in any particular way, but it does require that they be anticipated and addressed.

(2) Subsection (2) permits price adjustments pursuant to any clauses promulgated under Subsection (1) to be determined in accordance with the contract terms or by agreement. Absent an agreement, the Procurement Officer will make a unilateral determination of the

price adjustment which is subject to appeal under Article 9 (Legal and Contractual Remedies).

(3) In using unit prices it must be remembered that great variations in the number of units required may necessitate adjustments in the unit price.

(4) Other clauses not normally subject to the pricing formulas of Subsection (2) are also required to be included in the contract as appropriate by Subsection (3).

§5-302 Fiscal Responsibility.

Every contract modification, change order, or contract price adjustment under a contract with the [Purchasing Agency] in excess of [\$ ____] shall be subject to prior written certification by the fiscal officer of the entity responsible for funding the project or the contract, or other official responsible for monitoring and reporting upon the status of the costs of the total project budget or contract budget, as to the effect of the contract modification, change order, or adjustment in contract price on the total project budget or the total contract budget. In the event that the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget and/or the total contract budget, the Procurement Officer shall not execute or make such contract modification, change order, or adjustment in contract price unless sufficient funds are available therefor, or the scope of the project or contract is adjusted so as to permit the degree of completion that is feasible within the total project budget and/or total contract budget as it existed prior to the contract modification, change order, or adjustment in contract price under consideration; provided, however, that with respect to the validity, as to the contractor, of any executed contract modification, change order, or adjustment in contract price which the contractor has reasonably relied upon, it shall be presumed that there has been compliance with the provisions of this Section.

**ARTICLE 6 – MODIFICATIONS AND
TERMINATION OF CONTRACTS FOR
SUPPLIES - Reserved**

**ARTICLE 7 - COST PRINCIPLES -
Reserved**

**ARTICLE 8 – SUPPLY MANAGEMENT -
Reserved**

ARTICLE 9 - APPEALS AND REMEDIES

COMMENTARY:

(1) The American Bar Association notes that the North American Free Trade Agreement and the World Trade Organization Government Procurement Agreement, to which the United States is a signatory, require that the signatory states act in good faith to cause "sub-units" of national government (state and local governments) to have an appropriate bid protest procedure.

(2) Nothing in this Article is intended to preclude the use of alternative dispute resolution methods in the resolution of procurement related disputes, or in the use of contract clauses that provide for the avoidance, negotiation, or mediation of disputes.

§9-101 Authority to Resolve Protested Solicitations and Awards.

- (1) *Right to Protest.* Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract pursuant to this Code may protest to the Chief Procurement Officer or the head of a Purchasing Agency. The protest shall be submitted in writing within [14 days] after such aggrieved person knows or should have known of the facts giving rise thereto.
- (2) *Authority to Resolve Protests.* The Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer shall have the authority, prior to the commencement of an action in court concerning the controversy, to settle and resolve a protest of an aggrieved bidder, offeror, or contractor, actual or prospective, concerning the solicitation or award of a contract. This authority shall be exercised in accordance with regulations [operational procedures] promulgated by the [Chief Procurement Officer].
- (3) *Decision.* If the protest is not resolved by mutual agreement, the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer shall promptly issue a decision in writing. The decision shall:
 - (a) state the reasons for the action taken; and

- (b) inform the protestant of its right to judicial review as provided in this Article.
- (4) *Notice of Decision.* A copy of the decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the protestant and any other party intervening.
- (5) *Finality of Decision.* A decision under Subsection (3) of this Section shall be final and conclusive, unless fraudulent, or any person adversely affected by the decision commences an action in court in accordance with Section 9-106 (Access to Courts).
- (6) *Stay of Procurements During Protests.* In the event of a timely protest under Subsection (1) of this Section, or under Section 9-106 (Access to Courts), the [Purchasing Agency] shall not proceed further with the solicitation or with the award of the contract until the Chief Procurement Officer, after consultation with the head of a [Purchasing Agency], makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the [Purchasing Agency].
- (7) *Entitlement to Costs.* In addition to any other relief, when a protest is sustained and the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror shall be entitled to the reasonable costs incurred in connection with the solicitation, including bid preparation costs other than attorney's fees.

COMMENTARY:

- (1) It is essential that bidders, offerors, and contractors have confidence in the procedures for soliciting and awarding contracts. This can best be assured by allowing an aggrieved person to protest the solicitation, award, or related decision. This Section permits actual or prospective bidders, offerors, or contractors to:
 - (a) promptly protest the solicitation or award to the procurement officials; or
 - (b) promptly seek relief in the State courts; or
- (2) Nothing in this Section is intended to affect the power of the [Attorney General] [Attorney for the Enacting Jurisdiction] to settle actions pending before the courts.
- (3) Whether or not citizen or taxpayer remedies would be available would be controlled by existing local law.
- (4) In general, the filing of a protest should halt the procurement until the controversy is resolved. Essential governmental functions may continue, under Subsection (6), upon a determination in writing by the Chief Procurement Officer, as provided therein that such

action is necessary. It is expected that such a determination will occur only in those few circumstances where it is necessary to protect a substantial interest of the [Purchasing Agency].

(5) The award of costs under Subsection (7) is intended to compensate a party for reasonable expenses incurred in connection with a solicitation for which that party was wrongfully denied a contract award. No party can recover profits which it anticipates would have been made if that party had been awarded the contract. Attorney's fees associated with the filing and prosecution of the protest are not recoverable.

(6) Note that new definitions of "electronic," "signature," "public notice," and "written" or "in writing" contained in 1-301 will permit notices, decisions, and filings to be issued or made electronically.

§9-102 Authority to Debar or Suspend.

- (1) *Authority.* After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Chief Procurement Officer, after consultation with the Using Agency and the [Attorney General][Attorney for the Enacting Jurisdiction], shall have authority to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than [three years]. The same officer, after consultation with the Using Agency and the [Attorney General] [Attorney for the Enacting Jurisdiction], shall have authority to suspend a person from consideration for award of contracts if there is probable cause for debarment. The suspension shall not be for a period exceeding [three months]. The authority to debar or suspend shall be exercised in accordance with regulations [operational procedures].

COMMENTARY:

(1) It is intended that the Attorney General or equivalent legal officer in the enacting jurisdiction will be consulted concerning any proposed suspension or debarment.

(2) The National Association of State Procurement Officials suggests that regulations provide the option to debar a person from doing business with one or more agencies, or all agencies. It also recommends that regulations permit debarment to be limited to units within a corporation, as appropriate.

- (2) *Causes for Debarment or Suspension.* The causes for debarment or suspension include the following:
 - (a) conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;

- (b) conviction under State or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a [Purchasing Agency] contractor;
 - (c) conviction under State or federal antitrust statutes arising out of the submission of bids or proposals,
 - (d) violation of contract provisions, as set forth below, of a character which is regarded by the Chief Procurement Officer to be so serious as to justify debarment action:
 - (i) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or
 - (ii) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;
 - (e) any other cause the Chief Procurement Officer determines to be so serious and compelling as to affect responsibility as a [Purchasing Agency] contractor, including debarment by another governmental entity for any cause listed in regulations [operational procedures]; and
 - (f) for violation of the ethical standards set forth in Article 12 (Ethics in Public Contracting).
- (3) *Decision.* The Chief Procurement Officer or the head of a Purchasing Agency shall issue a written decision to debar or suspend. The decision shall:
- (a) state the reasons for the action taken; and

- (b) inform the debarred or suspended person involved of its rights to judicial review as provided in this Article.
- (4) *Notice of Decision.* A copy of the decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening.
- (5) *Finality of Decision.* A decision under Subsection (3) of this Section shall be final and conclusive, unless fraudulent, or the debarred or suspended person commences an action in court in accordance with Section 9-106 (Access to Courts).

§9-103 Authority to Resolve Contract and Breach of Contract Controversies.

- (1) *Applicability.* This Section applies to controversies between the [Purchasing Agency] and a contractor and which arise under, or by virtue of, a contract between them. This includes without limitation controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.
- (2) *Authority.* The Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer is authorized, prior to commencement of an action in a court concerning the controversy, to settle and resolve a controversy described in Subsection (1) of this Section. This authority shall be exercised in accordance with regulations [operational procedures].
- (3) *Decision.* If such a controversy is not resolved by mutual agreement, the Chief Procurement Officer, the head of a Purchasing Agency, or the designee of either officer shall promptly issue a decision in writing. The decision shall:
 - (a) state the reasons for the action taken; and
 - (b) inform the contractor of its right to judicial review as provided in this Article.

- (4) *Notice of Decision.* A copy of the decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the contractor.
- (5) *Finality of Decision.* The decision under Subsection (3) of this Section shall be final and conclusive, unless fraudulent, or the contractor commences an action in court in accordance with Section 9-107(Access to Courts).
- (6) *Failure to Render Timely Decision.* If the Chief Procurement Officer, the head of a Purchasing Agency, or the designee of either officer does not issue the written decision required under Subsection (3) of this Section within [120 days] after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

COMMENTARY:

(1) The word "controversy" is meant to be broad and all-encompassing. It includes the full spectrum of disagreements from pricing of routine contract changes to claims of breach of contract.

(2) Subsection (2) gives the Chief Procurement Officer the authority to settle all contract claims and controversies prior to the filing of a suit. This may avoid unnecessary litigation and often is essential for fair treatment of parties contracting with the [Purchasing Agency]. On the other hand, some safeguards are needed. Limitations upon the power to settle, including prerequisite approvals, should be established by appropriate regulation.

(3) It is important that administrative action upon claims be expeditious. Subsection (6) recognizes, however, that there can be complicated problems which require a considerable time for good faith investigation and negotiation, and that often claimants do not submit adequate documentation in support of their claims.

§9-104 Remedies Prior to an Award for Solicitations or Awards in Violation of Law.

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

- (a) cancelled; or
- (b) revised to comply with the law.

§9-105 Remedies After an Award for Solicitations or Awards in Violation of Law.

If after an award it is determined, administratively or upon administrative or judicial review, that a solicitation or award of a contract is in violation of law, then:

- (a) if the person awarded the contract has not acted fraudulently or in bad faith:
 - (i) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the [Purchasing Agency]; or
 - (ii) the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.
- (b) if the person awarded the contract has acted fraudulently or in bad faith:
 - (i) the contract may be declared null and void; or
 - (ii) the contract may be ratified and affirmed if such action is in the best interests of the [Purchasing Agency], without prejudice to the [Purchasing Agency's] rights to such damages as may be appropriate.

§9-106 Interest.

Interest on amounts ultimately determined to be due to a contractor or the [Purchasing Agency] shall be payable at the statutory rate applicable to judgments from the date the claim arose through the date of decision or judgment, whichever is later.

§9-107 Access to Courts.

- (1) *Solicitation and Award of Contracts.* The [designated court or courts of the State] shall have jurisdiction over an action between the [Purchasing Agency] and a bidder, offeror, or contractor, prospective or actual, to determine whether a solicitation or award of a contract is in

- accordance with the Constitution, statutes, regulations [operational procedures], and the terms and conditions of the solicitation. The [designated court or courts of the State] shall have such jurisdiction, whether the actions are at law or in equity, and whether the actions are for monetary damages or for declaratory, injunctive, or other equitable relief.
- (2) *Debarment or Suspension.* The [designated court or courts of this State] shall have jurisdiction over an action between the [Purchasing Agency] and a person who is subject to a suspension or debarment proceeding, to determine whether the debarment or suspension is in accordance with the Constitution, statutes, and regulations [operational procedures]. The [designated court or courts of the State] shall have such jurisdiction, whether the actions are at law or in equity, and whether the actions are for declaratory, injunctive, or other equitable relief.
 - (3) *Actions Under Contracts or for Breach of Contract.* The [designated court or courts of this State] shall have jurisdiction over an action between the [Purchasing Agency] and a contractor, for any cause of action which arises under, or by virtue of, the contract, whether the action is at law or in equity, whether the action is on the contract or for a breach of the contract, and whether the action is for monetary damages or declaratory, injunctive, or other equitable relief.
 - (4) *Limited Finality for Administrative Determinations.* In any judicial action under this Section, factual or legal determinations by employees, agents, or other persons appointed by the [Purchasing Agency] shall have no finality and shall not be conclusive, notwithstanding any contract provision, regulation, or rule of law to the contrary, except to the extent provided in Section 3-601 (Finality of Determinations).

COMMENTARY:

Where the court issues a temporary or preliminary injunction *pendente lite*, in order to protect the [Jurisdiction] and or successful bidder from further loss due to rising costs or

other causes, the court may, under applicable local law, condition the granting of such temporary or preliminary relief upon the posting of reasonable security.

§9-108 Time Limitations on Actions.

- (1) *Protested Solicitations and Awards.* Any action under Section 9-107 (1) (Access to Courts) shall be initiated as follows:
 - (a) within [30] days after the aggrieved person knows or should have known of the facts giving rise to the action; or
 - (b) within [14] days after receipt of a final administrative decision pursuant to Section 9-101(3) (Authority to Resolve Protested Solicitations and Awards, Decision).
- (2) *Debarments and Suspensions for Cause.* Any action under Section 9-107 (2) (Access to Courts) shall be commenced within [six] months after receipt of the decision of the Chief Procurement Officer under Section 9-102(3) (Authority to Debar or Suspend, Decision), or the decision of the [Ethics Commission] under Section 12-302(2)(c) (Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards, Supplemental Remedies), whichever is applicable.
- (3) *Actions Under Contracts or for Breach of Contract.* The statutory limitations on an action between private persons on a contract or for breach of contract shall apply to any action commenced pursuant to Section 9-107 (3) (Access to Courts).

ARTICLE 10 - COOPERATIVE PURCHASING

§10-101 Cooperative Purchasing Authorized for Infrastructure Facilities.

- (1) Any Public Procurement Unit may participate in, sponsor, conduct, or administer a Cooperative Purchasing agreement for the procurement of Infrastructure Facilities with one or more Public Procurement Units in accordance with an agreement entered into between the participants. Such Cooperative Purchasing may include, but is not limited to, joint or multi-party contracts between Public Procurement Units and open-ended Public Procurement Unit contracts that are made available to other Public Procurement Units.
- (2) All Cooperative Purchasing conducted under this Article shall be through contracts awarded through full and open competition, including use of source selection methods substantially equivalent to those specified in Article 3 (Source Selection and Contract Formation) of this Code.

§10-102 Supply of Personnel, Information, and Technical Services.

- (1) *Supply of Personnel.* Any Public Procurement Unit is authorized, in its discretion, upon written request from another Public Procurement Unit to provide personnel to the requesting Public Procurement Unit. The Public Procurement Unit making the request shall pay the Public Procurement Unit providing the personnel the direct and indirect cost of furnishing the personnel, in accordance with an agreement between the parties.
- (2) *Supply of Services.* The informational, technical, and other services of any Public Procurement Unit may be made available to any other Public Procurement Unit. The requesting Public Procurement Unit shall pay for the

expenses of the services so provided, in accordance with an agreement between the parties.

§10-103 Use of Payments Received by a Supplying Public Procurement Unit.

All payments from any Public Procurement Unit or External Procurement Activity received by a Public Procurement Unit supplying personnel or services shall be available [to the supplying Public Procurement Unit] [as authorized by law].

§10-104 Public Procurement Units in Compliance with Code Requirements.

Where the Public Procurement Unit administering a Cooperative Purchase complies with the requirements of this Code, any Public Procurement Unit participating in such a purchase shall be deemed to have complied with this Code. Public Procurement Units may not enter into a Cooperative Purchasing agreement for the purpose of circumventing this Code.

§10-105 Contract Controversies.

- (1) *Public Procurement Unit Subject to Article 9 (Legal and Contractual Remedies).* Under a Cooperative Purchasing agreement, controversies arising between an administering Public Procurement Unit and its bidders, offerors, or contractors shall be resolved between the ordering Public Procurement Unit and the supplying bidders, offerors, or contractors in accordance with [Article 9 (Legal and Contractual Remedies)] [the [administering] [ordering] Public Procurement Unit's existing procedures].
- (2) *Public Procurement Unit Not Subject to Article 9 (Legal and Contractual Remedies).* Any Public Procurement Unit which is not subject to Article 9 (Legal and Contractual Remedies), is authorized to enter into an agreement with another Public Procurement Unit to establish procedures or use such unit's or activity's existing procedures to resolve controversies with contractors, whether or not such controversy arose under a cooperative purchasing agreement.

ARTICLE 11 - ASSISTANCE TO SMALL AND DISADVANTAGED BUSINESSES

§11-101 Statement of Policy and Its Implementation.

- (1) *Statement of Policy.* It shall be the policy of this [Purchasing Agency] to assist small and disadvantaged businesses in learning how to do business with the [Purchasing Agency].
- (2) *Implementation.* The Chief Procurement Officer shall implement the policy set forth in Subsection (1) of this Section in accordance with regulations [operational procedures] under this Article.

§11-102 Mandatory Duties of the Chief Procurement Officer.

- (1) *Assistance Within [Purchasing] Agencies.* Where feasible, the Chief Procurement Officer shall provide appropriate staff who shall be responsible to the Chief Procurement Officer and who shall serve within designated [Purchasing Agencies] to assist small and disadvantaged businesses in learning how to do business with the [Purchasing Agency].
- (2) *Special Publications.* The Chief Procurement Officer shall give special publicity to procurement procedures and issue special publications designed to assist small and disadvantaged businesses in learning how to do business with the [Purchasing Agency].
- (3) *Source Lists.* The Chief Procurement Officer shall compile, maintain, and make available source lists of small and disadvantaged businesses for the purpose of encouraging procurement from small and disadvantaged businesses.
- (4) *Solicitation Mailing Lists.* To the extent deemed by such officer to be appropriate and as may be required by

regulation, the Chief Procurement Officer shall include small and disadvantaged businesses on solicitation mailing lists.

- (5) *Solicitation of Small and Disadvantaged Businesses.* The Chief Procurement Officer shall assure that small and disadvantaged businesses are solicited on each procurement for which such businesses may be suited.
- (6) *Training Programs.* The Chief Procurement Officer shall develop special training programs to be conducted by the [Purchasing Agency] to assist small and disadvantaged businesses in learning how to do business with the [Purchasing Agency].

§11-103 Discretionary Duties of the Chief Procurement Officer.

- (1) *Bonding.* Notwithstanding other provisions of this Code, the Chief Procurement Officer may reduce the level or change the types of bonding normally required or accept alternative forms of security to the extent reasonably necessary to encourage procurement from small and disadvantaged businesses.
- (2) *Progress Payments.* The Chief Procurement Officer may make such special provisions for progress payments as such officer may deem reasonably necessary to encourage procurement from small and disadvantaged businesses.

COMMENTARY:

(1) In reducing for small businesses the level or types of bonding normally required, the Chief Procurement Officer should take precautions to ensure that the government and any third parties will be adequately protected.

(2) Where federal assistance or contract requirements are stricter with regard to procurement from small and disadvantaged businesses than the procedures set forth in Section 11-102 (Mandatory Duties of the Chief Procurement Officer) and Section 11-203 (Discretionary Duties of the Chief Procurement Officer), Section 11-201 (Compliance with Federal Requirements) mandates that the Chief Procurement Officer comply with those requirements when expending such funds.

§11-104 Business Assistance Offices.

The Chief Procurement Officer may establish, as such officer may deem appropriate, business assistance offices throughout the

[Enacting Jurisdiction] to assist in carrying out the provisions of this Part.

§11-105 Report to the [Legislature] [Governing Body of the Enacting Jurisdiction].

The Chief Procurement Officer shall annually, before [insert appropriate date], report in writing to the [legislature] [Governing Body of the Enacting Jurisdiction] concerning the awarding of contracts to small and disadvantaged businesses during the preceding fiscal year.

§11-106 Compliance with Federal Requirements.

Where a procurement involves the expenditure of federal assistance or contract funds, the Chief Procurement Officer shall comply with such federal law and authorized regulations [operational procedures] which are mandatorily applicable and which are not presently reflected in this Code.

§11-107 Other Socioeconomic Procurement Programs.

[Reserved]

EDITORIAL NOTE:

A [Jurisdiction] enacting the Code should place any legislatively authorized socioeconomic procurement programs here.

ARTICLE 12 - ETHICS IN PUBLIC CONTRACTING

Part A - Standards of Conduct

§12-101 Statement of Policy.

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

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

To achieve the purpose of this Article, it is essential that those doing business with the [Purchasing Agency] also observe the ethical standards prescribed herein.

§12-102 General Standards of Ethical Conduct.

(1) *General Ethical Standards for Employees.*

Any attempt to realize personal gain through public employment by conduct inconsistent with the proper discharge of the employee's duties is a breach of a public trust.

In order to fulfill this general prescribed standard, employees must also meet the specific standards set forth in: Section 12-104 (Employee Conflict of Interest); Section 12-105 (Employee Disclosure Requirements); Section 12-106 (Gratuities and Kickbacks); Section 12-107 (Prohibition Against Contingent Fees); Section 12-108 (Restrictions on Employment of Present and Former

Employees); and Section 12-109 (Use of Confidential Information).

(2) *General Ethical Standards for Non-Employees.*

Any effort to influence any public employee to breach the standards of ethical conduct set forth in this Section and in Section 12-104 through Section 12-109 of this Article is also a breach of ethical standards.

COMMENTARY:

(1) The six specific standards of ethical conduct which must be met by employees and non-employees are incorporated into this Section. Non-employees, as well as employees, are required to meet ethical standards of conduct. Any effort by any person to influence a public employee to breach the standards of ethical conduct applicable to employees constitutes a breach of ethical standards.

(2) Some governmental agencies have adopted a practice of requiring each new employee dealing with the award or administration of governmental funds to certify that the employee has received, read, and understood the standards or conduct for governmental agencies. It is essential that those dealing with the [Purchasing Agency] also observe the ethical standards of this Code and that procedures be implemented to make sure that contractors understand the required standards of ethical conduct.

§12-103 Criminal Sanctions.

To the extent that violations of the ethical standards of conduct set forth in this Part constitute violations of the [State Criminal Code], they shall be punishable as provided therein. Such sanctions shall be in addition to the civil remedies set forth in this Article.

§12-104 Employee Conflict of Interest.

(1) *Conflict of Interest.* It shall be a breach of ethical standards for any employee to participate directly or indirectly in a procurement when the employee knows that:

- (a) the employee or any member of the employee's Immediate Family has a Financial Interest pertaining to the procurement;
- (b) a business or organization in which the employee, or any member of the employee's Immediate Family, has a Financial Interest pertaining to the procurement; or

- (c) any other person, business, or organization with whom the employee or any member of the employee's Immediate Family is negotiating or has an arrangement concerning prospective employment is involved in the procurement.
- (2) *Financial Interest in a Blind Trust.* Where an employee or any member of the employee's Immediate Family holds a Financial Interest in a Blind Trust, the employee shall not be deemed to have a conflict of interest with regard to matters pertaining to that Financial Interest, provided that disclosure of the existence of the Blind Trust has been made to the [Ethics Commission].
- (3) *Discovery of Actual or Potential Conflict of Interest, Disqualification, and Waiver.* Upon discovery of an actual or potential conflict of interest, an employee shall promptly file a written statement of disqualification and shall withdraw from further participation in the transaction involved. The employee may, at the same time, apply to the [Ethics Commission] in accordance with Section 12-401(3) ([Ethics Commission], Waiver) for an advisory opinion as to what further participation, if any, the employee may have in the transaction.
- (4) *Notice.* Notice of this prohibition shall be provided in accordance with regulations promulgated by the [Ethics Commission].

§12-105 Employee Disclosure Requirements.

- (1) *Disclosure of Benefit Received from Contract.* Any employee who has, or obtains any benefit from, any [Purchasing Agency] contract with a business in which the employee has a Financial Interest shall report such benefit to the [Ethics Commission]; provided, however, this Section shall not apply to a contract with a business where the employee's interest in the business has been placed in a disclosed Blind Trust.
- (2) *Failure to Disclose Benefit Received.* Any employee who knows or should have known of such benefit, and fails to

report such benefit to the [Ethics Commission], is in breach of the ethical standards of this Section.

- (3) *Notice.* Notice of this requirement shall be provided in accordance with regulations promulgated by the [Ethics Commission].

§12-106 Gratuities and Kickbacks.

- (1) *Gratuities.* It shall be 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.
- (2) *Kickbacks.* It shall be 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 subcontract or order.
- (3) *Contract Clause.* The prohibition against gratuities and kickbacks prescribed in this Section shall be conspicuously set forth in every contract and solicitation therefor.

§12-107 Prohibition Against Contingent Fees.

- (1) *Contingent Fees.* It shall be a breach of ethical standards for a person to be retained, or to retain a person, to solicit or secure a [Purchasing Agency] contract upon an agreement or understanding for a

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

- (2) *Representation of Contractor.* Every person, before being awarded a [Purchasing Agency] contract, shall represent, in writing, that such person has not retained anyone in violation of Subsection (1) of this Section. Failure to do so constitutes a breach of ethical standards.
- (3) *Contract Clause.* The representation prescribed in Subsection (2) of this Section shall be conspicuously set forth in every contract and solicitation therefor.

COMMENTARY:

The proscription stated in Subsection (1) shall not be understood to prevent an attorney, an accountant, or other professional person from representing a client in the pursuit of professional duties. For example, it would not prevent an attorney from representing a client in a bid protest nor would it prevent an attorney or an accountant from entering into contract negotiations with a [Purchasing Agency]. However, it would preclude a professional or any other person engaged in the actual act of soliciting or selling to the [Purchasing Agency] from being paid on a contingent basis.

§12-108 Restrictions on Employment of Present and Former Employees.

- (1) *Contemporaneous Employment Prohibited.* Except as may be permitted by regulations or rulings of the [Ethics Commission], it shall be a breach of ethical standards for any employee who is participating directly or indirectly in the procurement process to become or be, while such an employee, the employee of any person contracting with the governmental body by whom the employee is employed. Notice of this provision shall be provided in accordance with regulations promulgated by the [Ethics Commission].
- (2) *Restrictions on Former Employees in Matters Connected with Their Former Duties.*
 - (a) *Permanent Disqualification of Former Employee Personally Involved in a Particular Matter.* It shall be a breach of ethical standards for any former employee knowingly to act as a principal, or as an

agent for anyone other than the [Purchasing Agency], in connection with any:

- (i) judicial or other proceeding, application, request other determination;
- (ii) contract;
- (iii) claim; or
- (iv) 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 [Purchasing Agency] is a party or has a direct and substantial interest.

(b) *One Year Representation Restriction Regarding Matters for Which a Former Employee Was Officially Responsible.* It shall be a breach of ethical standards for any former employee, within one year after cessation of the former employee's official responsibility, knowingly to act as a principal, or as an agent for anyone other than the [Purchasing Agency], in connection with any:

- (i) judicial or other proceeding, application, request for a ruling, or other determination;
- (ii) contract;
- (iii) claim; or
- (iv) charge or controversy,

in matters which were within the former employee's official responsibility, where the [Purchasing Agency] is a party or has a direct or substantial interest.

COMMENTARY:

Where considered appropriate, a jurisdiction may desire to enact a more stringent provision which provides that, for a period of one year following termination of employment. An employee may not enter into any arrangement with any contractor if the employee had personally and substantially dealt with such contractor or had official responsibility concerning a contract with the contractor.

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

It shall be a breach of ethical standards for a business in which an employee has a financial interest knowingly to act as a principal, or as an agent for anyone other than the [Purchasing Agency], in connection with any:

- (a) judicial or other proceeding, application, request for a ruling, or other determination;
- (b) contract;
- (c) claim; or
- (d) 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 [Purchasing Agency] is a party or has a direct and substantial interest.

(4) *Selling to the [Purchasing Agency] After Termination of Employment is Prohibited.*

It shall be a breach of ethical standards for any former employee, unless the former employee's last annual salary did not exceed [\$_____] to engage in selling or attempting to sell supplies, services, or construction to the [Purchasing Agency] for one year following the date employment ceased.

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 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 this [Purchasing Agency], nor shall a former employee be precluded from serving as a consultant to this [Purchasing Agency].

COMMENTARY:

(1) This Section places restrictions on the contemporaneous employment of present employees who are involved in the procurement process. It also places permanent and temporary disqualifications on the employment of former employees.

(2) Subsection (1) provides that no employee participating directly or indirectly in the procurement process may become an employee of parties contracting with the particular governmental body in which the employee is employed except as may be permitted under [Ethics Commission] regulations. For the definition of "direct or indirect participation", Section 12-101(4) should be consulted.

(3) Subsection (2)(a) provides that former employees are permanently disqualified from knowingly acting as a principal, or agent for anyone other than the [Purchasing Agency], in certain matters in which the employee had participated personally and substantially while employed by the [Purchasing Agency] where the [Purchasing Agency] is a party or has a direct and substantial interest,

(4) Under Subsection (2)(b) a former employee is also prevented from appearing for one year after cessation of the employee's official responsibility before any court, department, or agency in connection with any matter which was within the employee's official responsibility where the [Purchasing Agency] is a party or directly and substantially interested.

(5) Subsection (3) prohibits businesses in which the employee has a financial interest from knowingly acting as principals, or as agents for anyone other than the [Purchasing Agency], in any matters in which the [Purchasing Agency] employee personally and substantially participates or which is the subject of the employee's official responsibility where the [Purchasing Agency] is a party or has a direct and substantial interest. The definition of "financial interest" is found in Section 12-101(5). This provision, which applies to businesses of employees, is distinguishable from Subsection (1), which is applicable to employees themselves. Section 12-104 (Employee Conflict of Interest) is also applicable only to employees and, unlike the immediate Section which relates to employment and business arrangements, is aimed at a broader array of financial interests.

(6) Subsection (4) provides that former high-level employees above a salary level to be prescribed by the enacting jurisdiction are prohibited from selling to the [State] for one year following termination of their employment.

§12-109 Use of Confidential Information.

It shall be a breach of ethical standards for any employee or former employee knowingly to use confidential information for actual or anticipated personal gain, or for the actual or anticipated personal gain of any other person.

COMMENTARY:

The term "confidential information" is limited by its definition in Section 12-101(2) to information which is available only because of one's status as a [Purchasing Agency] employee.

Part B - Remedies

§12-201 Civil and Administrative Remedies Against Employees Who Breach Ethical Standards.

- (1) *Existing Remedies Not Impaired.* Civil and administrative remedies against employees which are in existence on the effective date of this Code shall not be impaired.
- (2) *Supplemental Remedies.* In addition to existing remedies for breach of the ethical standards of this Article or regulations [operational procedures] promulgated hereunder, the [Ethics Commission] may impose any one or more of the following:
 - (a) oral or written warnings or reprimands;
 - (b) suspension with or without pay for specified periods of time; and
 - (c) termination of employment.
- (3) *Right to Recovery from Employee Value Received in Breach of Ethical Standards.* The value of anything received by an employee in breach of the ethical standards of this Article or regulations [operational procedures] promulgated hereunder shall be recoverable by the [Purchasing Agency] as provided in Section 12-303 (Recovery of Value Transferred or Received in Breach of Ethical Standards).
- (4) *Due Process.* All procedures under this Section shall be in accordance with due process requirements and existing law. In addition, notice and an opportunity for a hearing shall be provided prior to imposition of any suspension or termination of employment.

§12-202 Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards.

- (1) *Existing Remedies Not Impaired.* Civil and administrative remedies against non-employees which are in existence on the effective date of this Code shall not be impaired.

- (2) *Supplemental Remedies.* In addition to existing remedies for breach of the ethical standards of this Article or regulations [operational procedures] promulgated hereunder, the [Ethics Commission] may impose any one or more of the following:
 - (a) written warnings or reprimands;
 - (b) termination of transactions; and
 - (c) debarment or suspension from being a contractor or subcontractor under [Purchasing Agency] contracts.
- (3) *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 Article or regulations [operational procedures] promulgated hereunder by a non-employee shall be recoverable by the [Purchasing Agency] as provided in Section 12-303 (Recovery of Value Transferred or Received in Breach of Ethical Standards).
- (4) *Right of the [Purchasing Agency] to Debar or Suspend.* Debarment or suspension may be imposed by the [Ethics Commission] in accordance with the procedures set forth in Section 9-102 (Authority to Debar or Suspend) for breach of the ethical standards of this Article, provided that such action may not be taken without the concurrence of the [Attorney General].
- (5) *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 [Purchasing Agency] contract.

COMMENTARY:

The power to debar or suspend, with appropriate safeguards, is primarily entrusted to the Chief Procurement Officer under procedures and conditions set forth in Section 9-102 (Authority to Debar or Suspend). The supplementary and limited jurisdiction of the [Ethics Commission] to debar or suspend the violations or ethical standards is granted by Subsection (4) in the interest of providing a procedure which may be utilized in those cases where it is desirable for an outside, independent agency to proceed with debarment or suspension.

§12-203 Recovery of Value Transferred or Received in Breach of Ethical Standards.

- (1) *General Provisions.* The value of anything transferred or received in breach of the ethical standards of this Article or regulations [operational procedures] promulgated hereunder by an employee or a non-employee may be recovered from both the employee and non-employee.
- (2) *Recovery of Kickbacks by the [Purchasing Agency].* 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 shall be conclusively presumed that the amount thereof was included in the price of the subcontract or order and ultimately borne by the [Purchasing Agency] 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.

COMMENTARY:

The definition of "kickback" may be found in Section 12-106(2).

Part C - [Ethics Commission]

§12-301 [Ethics Commission].

- (1) *Regulations.* The [Ethics Commission] shall promulgate regulations to implement this Article and shall do so in accordance with the applicable provisions of the [Administrative Procedure Act] of this State.

COMMENTARY:

The [Ethics Commission] may particularly wish to require disclosure of substantial political contributions of contractors under applicable State or local laws.

- (2) *Advisory Opinions.* On written request of employees or contractors, the [Ethics Commission] may render written advisory opinions regarding the appropriateness of the course of conduct to be followed in proposed transactions. Such requests and advisory opinions must

be duly published in the manner in which regulations of this [Purchasing Agency] are published. Compliance with requirements of a duly promulgated advisory opinion of the [Ethics Commission] shall be deemed to constitute compliance with the ethical standards of this Article.

- (3) *Waiver.* On written request of an employee, the [Ethics Commission] may grant an employee a written waiver from the application of Section 12-204 (Employee Conflict of Interest) and grant permission to proceed with the transaction to such extent and upon such terms and conditions as may be specified. Such waiver and permission may be granted when the interests of the [Purchasing Agency] so require or when the ethical conflict is insubstantial or remote.

COMMENTARY:

(1) Some jurisdictions may want to use existing agencies to issue regulations pertaining to standards of ethical conduct. Other jurisdictions may wish to create a special "Ethics Commission" for this purpose. Therefore, the words "Ethics Commission" are bracketed wherever they appear in this Article.

(2) If an enacting jurisdiction chooses to create an [Ethics Commission], it will be necessary to adopt a regulation pertaining to its structure, duties, powers, and the appointment of its members.

(3) Subsection (2) authorizes an advisory opinion procedure which will provide guidance to public employees and contractors as to whether a prospective course of conduct is proper.

(4) Subsection (3) authorizes the [Ethics Commission] to waive the application of specified provisions of Article 12 to public employees when the public good will be served,

(5) If invoked, the waiver provision provides an administrative mechanism for averting the necessity of litigating such questions as whether an employee has a conflict of interest, and if so, to what extent that employee's further participation in the matter is barred. In *Graham v. McGrail*, 345 N.E.2d 888 (Mass. 1976), a dispute over such questions resulted in litigation which could have been avoided if a provision similar to Subsection (3) had been available.

§12-302 Appeal of Decisions of the [Ethics Commission].

- (1) *General.* Except as provided under Subsection (2) of this Section, a decision of the [Ethics Commission] under Section 12-201 (Civil and Administrative Remedies Against Employees Who Breach Ethical Standards) or Section 12-202 (Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards)

shall be reviewable in accordance with the [Administrative Procedure Act] of this State.

- (2) *Debarment or Suspension.* A decision of the [Ethics Commission] regarding debarment or suspension under Section 12-202(2)(c) (Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards, Supplemental Remedies) shall be reviewable as provided in Section 9-108(2) (Time Limitations on Actions).

Appendix A - Definitions:

- (1) ***Architectural and Engineering Services*** means:
- (a) professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this Subsection;
 - (b) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and
 - (c) such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including: studies, investigations, surveying, mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

COMMENTARY:

(1) The definition of architectural and engineering services adopts the federal statutory definition of such services codified at 40 U.S.C. 541. See also 48 C.F.R. Chapter 1, Section 36.102. The Code promotes a unified national definition of architectural and engineering services, to accurately describe the services design professionals typically provide, and to minimize transaction costs imposed on vendors of design services that arise from arcane differences in the definition of such services among state and local jurisdictions. This definition has been routinely applied for many years on federally supported state/local infrastructure projects for water, wastewater, transit, and highway projects.

(2) The 1979 edition of the Code included the following definition of "Architect-Engineer Services and Land Surveying Services":

“Architect-Engineer Services and Land Surveying Services are those professional services within the scope of the practice of architecture, professional engineering, or land surveying, as defined by the laws of this State.”

(3) The new definition promotes closer integration of project feasibility and evaluation services with the evaluation of design and project alternatives. Current nationwide efforts to improve overall Infrastructure Asset Management techniques and strategies reflects a growing need for public owners to assess the effects of alternative designs, technologies, projects, schedules, and finance methods on initial and life-cycle quality, cost, and time of delivery of entire collections of infrastructure facilities. Public owners need to structure long term strategies for the design, construction, operation, and maintenance of collections of infrastructure facilities. The American Consulting Engineers’ Council’s present focus on value based delivery systems, for instance, is one example of how an integrated approach to the procurement of design and related services encourages the design professional’s role as a trusted advisor in the simultaneous use of a variety of project delivery and finance methods.

- (2) **Blind Trust** means an independently managed trust in which the employee-beneficiary has no management rights and in which the employee-beneficiary is not given notice of alterations in, or other dispositions of, the property subject to the trust.
- (3) **Business** means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity.
- (4) **Change Order** means a written order signed by the Procurement Officer, directing the contractor to make changes which the Changes clause of the contract authorizes the Procurement Officer to order without the consent of the contractor.
- (5) **Chief Procurement Officer** means the person holding the position created in Section 2-101 (Establishment, Appointment and Qualifications, Tenure, Compensation), as the head of the procurement office for Infrastructure Facilities of the [Enacting Jurisdiction].

COMMENTARY:

Should the enacting jurisdiction desire to call this official by some other title, it should substitute that title for “Chief Procurement Officer” wherever such term appears in this Code and its implementing regulations [operational procedures].

- (6) **Confidential Information** means any information which is available to an employee only because of the employee’s status as an employee of the [Purchasing

Agency] and is not a matter of public knowledge or available to the public on request.

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

COMMENTARY:

Examples of a conspicuously written item within the meaning of Subsection (7) are printed heading in capitals, such as "COVENANT RELATING TO CONTINGENT FEES", or the use of a different typeface or larger typeface than other materials in proximity to the clause.

- (8) **Construction** means the process of building, altering, repairing, improving, or demolishing any public infrastructure facility, including any structure, building, or other improvements of any kind to real property. It does not include the routine operation, routine repair, or routine maintenance of any existing public infrastructure facility, including structures, buildings, or real property.

COMMENTARY:

The Code expands the definition of construction to include any "public infrastructure facility" defined in Appendix A Section 33. The revised definition preserves the statutory distinctions between operation and maintenance, which involves routine services; and construction, which is intended to apply to non-routine activities.

- (9) **Contract** means all types of [Purchasing Agency] agreements, regardless of what they may be called, for the procurement or disposal of supplies, services, or construction.

COMMENTARY:

Collective bargaining agreements between the enacting jurisdiction and its employees are excluded from coverage under this Code by the definition of "services." See Appendix A Section 52.

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

COMMENTARY:

The new definition of "written or in writing" in Appendix A, Section 60 will permit determinations to be issued electronically.

- (11) **Contractor** means any person having a contract with a governmental body.
- (12) **Cooperative Purchasing** means procurement conducted by, or on behalf of, one or more Public Procurement Units, as defined in this Code.
- (13) **Cost-Reimbursement Contract** means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this Code, and a fee, if any.
- (14) **Data** means recorded information, regardless of form or characteristic.
- (15) **Design-bid-build** (and, where authorized by regulation, **Construction Management At-Risk**) means a project delivery method in which the Purchasing Agency sequentially awards separate contracts, the first for architectural and engineering services to design the project and the second for construction of the project according to the design.

COMMENTARY:

Design-bid-build is a proven, commonly used public procurement method throughout the United States. Included within the concept of design-bid-build is a widely used variation known as construction management at-risk. The Code permits the [Purchasing Agency] to elect to employ construction management at-risk or design-bid-build, based upon the authority contained in Section 5-102(2)(b).

- (16) **Design-build** means a project delivery method in which the Purchasing Agency enters into a single contract for design and construction of an infrastructure facility.

COMMENTARY:

This definition is new to the Code. Design-build is a productive, competitive alternative to design-bid-build and construction management at-risk when the government has established the functional requirements (or design criteria) of a project. The Code defines these "functional requirements" or "design criteria" as "design requirements" in Appendix A Section 19.

- (17) **Design-build-finance-operate-maintain** means a project delivery method in which the Purchasing Agency enters into a single contract for design, construction, finance, maintenance, and operation of an infrastructure facility over a contractually defined period. No

[Purchasing Agency] funds are appropriated to pay for any part of the services provided by the contractor during the contract period.

COMMENTARY:

(1) Design-build-finance-operate-maintain is a proven delivery method in common use throughout the world and in American antiquity. Design-build-finance-operate-maintain integrates long term operation and maintenance, as well as project finance, into a single competition. Design-build-finance-operate-maintain depends on the prior establishment of functional requirements of a project.

(2) Design-build-finance-operate-maintain has characteristics distinct from design-build-operate-maintain as defined in Appendix A Section 18. In design-build-finance-operate-maintain, no agency funds are appropriated to pay for any part of the services provided by the contractor during the contract period. This distinction is important in the statutory scheme, since the government's competitive sealed proposal process is structured on the premise that offerors will be required to finance the project, with no expectation of state appropriations. This project delivery method should be carefully and wisely used, since design-build-finance-operate-maintain makes practical sense only where government has made a preliminary determination that project revenues are sufficient, over the length of the proposed contract, to cover design, construction, finance, and operations.

(18) ***Design-build-operate-maintain*** means a project delivery method in which the Purchasing Agency enters into a single contract for design, construction, maintenance, and operation of an infrastructure facility over a contractually defined period. All or a portion of the funds required to pay for the services provided by the contractor during the contract period are either appropriated to the [Purchasing Agency] prior to award of the contract or secured by the [Purchasing Agency] through fare, toll, or user charges.

COMMENTARY:

Design-build-operate-maintain integrates long term operation and maintenance into a single competition. Design-build-operate-maintain depends on the prior establishment by the government of the functional requirements of a project. Note the differences in the definition of design-build-operate-maintain from that of design-build-finance-operate-maintain. Projects which are partially or completely funded by direct public appropriations or by publicly imposed user charges, fares, or tolls are defined in the Code as design-build-operate-maintain projects.

(19) ***Design requirements*** means the written description of the infrastructure facility or service to be procured under this Article, including:

(a) required features, functions, characteristics, qualities, and properties that are required by the [Purchasing Agency];

- (b) the anticipated schedule, including start, duration, and completion; and
- (c) estimated budgets (as applicable to the specific procurement) for design, construction, operation and maintenance.

The **design requirements** may, but need not, include drawings and other documents illustrating the scale and relationship of the features, functions, and characteristics of the project.

COMMENTARY:

(1) The revised code requires that design requirements be set forth in Requests for Proposals that solicit proposals using the design-build, design-build-operate-maintain, and design-build-finance-operate-maintain project delivery methods. See Section 3-103 (2)(b).

(2) The Code flexibly defines design requirements, because the specifics of each project vary. Government prepares a functional description that sets forth only the essential features of each project, including anticipated schedule, and estimated budget for design, construction, operation, and maintenance. The integrated procurement methods – design-build, design-build-operate-maintain, and design-build-finance-operate-maintain permit the government to use the competitive process to test for higher quality, lower price, and quicker delivery. If the design requirements go beyond functional description into particular design, construction, finance, or operational requirements, the scope and the intensity of this competition is compromised, to the detriment of both government and offerors. For example, “design-build” competitions in which major design decisions are already set forth in the design requirements – known in the industry as “detail-build” – are not likely to produce innovation in the integration of design and construction. “Detail-build” procurements split the professional design function between government and the contractor, an allocation that leads to confusion and disputes over liability for design, for construction results, and for performance problems. The Code encourages government: (1) to prepare design requirements for each project before a procurement method is selected; and (2) to procure the design function from a single entity.

- (20) **Designee** means a duly authorized representative of a person holding a superior position.
- (21) **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.
- (22) **Disadvantaged Business** means a small business which is owned or controlled by a majority of persons, not limited to members of minority groups, who have been deprived of the opportunity to develop and maintain a

competitive position in the economy because of social disadvantages.

- (23) **Electronic** means electrical, digital, magnetic, optical, electromagnetic, or any other similar technology.

COMMENTARY

(1) The purpose of this definition is to facilitate the use of electronic documents of all types. The Code does not attempt to anticipate the specific technologies that may allow the procurement process to be performed electronically, but provides the [Chief Procurement Officer] with the necessary flexibility to adopt regulations [operational procedures] that do so.

(2) The implementation of electronic procurement processes should include sound system checks and balances that demonstrate a high level of accountability and integrity. The key to public and vendor confidence in the procurement system is the existence of reliable records as to how procurement decisions are made. Records, either electronic or paper, that are sufficient to document decisions must be created and maintained.

- (24) **Employee** means an individual drawing a salary from a governmental body, whether elected or not, and any noncompensated individual performing personal services for any governmental body.

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

- (a) is regularly maintained by a manufacturer or contractor;
- (b) is either published or otherwise available for inspection by customers, and
- (c) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved,

- (26) **External Procurement Activity** means any buying organization not located in this State which, if located in this State, would qualify as a Public Procurement Unit. Agencies of the United States and of any other State in the United States of America are External Procurement Activities.

COMMENTARY:

The term "External Procurement Activity" in Subsection (26) includes, but is not limited to, the Federal Supply Service (General Services Administration) of the United States, the

Defense Logistics Agency of the United States, and any Public Procurement Unit in States other than the enacting jurisdiction.

(27) **Financial Interest** means:

- (a) ownership of any interest or involvement in any relationship from which, or as a result of which, a person within the past [year] has received, or is presently or in the future entitled to receive, more than [\$_____] per year, or its equivalent;
- (b) ownership of such interest in any property or any business as may be specified by the [Ethics Commission]; or
- (c) holding a position in a business such as an officer, director, trustee, partner, employee, or the like, or holding any position of management.

COMMENTARY:

In Subsection (a), a dollar value of yearly entitlements should be inserted by enacting jurisdictions.

(28) **Governmental Body** means any department, commission, council, board, bureau, committee, institution, legislative body, agency, government corporation, or other establishment or official of the executive, legislative, or judicial branch of this [Enacting Jurisdiction].

(29) **Grant** means the furnishing by the [Enacting Jurisdiction] of assistance, whether financial or otherwise, to any person to support a program authorized by law. It does not include an award whose primary purpose is to procure an end product, whether in the form of supplies, services, or construction; a contract resulting from such an award is not a grant but a procurement contract.

(30) **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.

- (31) **Immediate Family** means a spouse, children, parents, brothers and sisters, [and such other relatives as may be designated by the Ethics Commission].
- (32) **Independent Peer Reviewer Services** are additional Architectural and Engineering services provided to the [Purchasing Agency] in design-build-operate-maintain or design-build-finance-operate-maintain procurements. The function of the independent peer reviewer is to confirm that the key elements of the professional engineering and architectural design provided by the contractor are in conformance with the applicable standard of care.

COMMENTARY:

(1) This definition is applicable to design-build-operate-maintain and design-build-finance-operate-maintain projects, that is, those procurements in which the design function is integrated with both construction and operations.

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

(1) The Code requires that the independent peer reviewer be identified by each offeror during the competitive process, and the experience and qualifications of each particular proposed reviewer is made an evaluation factor by Section 1-103(5)(b). Each offeror has a strong incentive to select a highly qualified reviewer, in whom both the government and the offeror have confidence.

- (33) **Infrastructure Facility** means a building; structure; or networks of buildings, structures, pipes, controls, and equipment that provide transportation, utilities, public education, or public safety services. Included are government office buildings; public schools; courthouses; jails; prisons; water treatment plants, distribution systems, and pumping stations; wastewater treatment plants, collection systems, and pumping stations; solid waste disposal plants, incinerators, landfills, and related facilities; public roads and streets; highways; public

parking facilities; public transportation systems, terminals, and rolling stock; rail, air, and water port structures, terminals, and equipment.

- (34) **Invitation for Bids** means all documents, whether attached or incorporated by reference, utilized for soliciting bids.
- (35) **Local Public Procurement Unit** means any county, city, town, and any other subdivision of the State or public agency of any such subdivision, public authority, educational, health, or other institution, and to the extent provided by law, any other entity which expends public funds for the procurement of supplies, services, and construction, and any nonprofit corporation operating a charitable hospital.

COMMENTARY:

The term "Local Public Procurement Unit" in Subsection (3) includes a nonprofit corporation which operates a charitable hospital. It is recognized that, in many communities, churches operate such hospitals. If church-operated hospitals are involved, and if the local doctrine of separation of State and church activities so requires, this provision may have to be removed. Similarly, some State constitutions prohibit the tending of public credit to private corporations. Such provisions would also necessitate removal of this provision from the definition set forth in Subsection (3).

- (36) **May** denotes the permissive.
- (37) **Official Responsibility** means direct administrative or operating authority, whether intermediate or final, either exercisable alone or with others, either personally or through subordinates, to approve, disapprove, or otherwise direct [Purchasing Agency] action.
- (38) **Operations and Maintenance** means a project delivery method whereby the Purchasing Agency enters into a single contract for the routine operation, routine repair, and routine maintenance of an infrastructure facility.

COMMENTARY:

Contracts for operations and maintenance services offer governments flexible alternatives to utilize competitive procurement processes to combine initial strategies for delivering an infrastructure facility with long-term strategies to operate and maintain either new or existing facilities. Design-bid-build or design-build can be followed by an operations and maintenance procurement to provide for the overall delivery of an infrastructure facility and service. Many governments will continue to produce new facilities using either the Design-bid-build or design-build project delivery method, followed by long term operations and

maintenance directly by public employees. The Code gives procurement officials the flexibility to use competitive sealed bidding to acquire all or a portion of the supplies and services required to maintain and operate infrastructure facilities.

- (39) **Person** means any business, individual, union, committee, club, other organization, or group of individuals.
- (40) **Procurement** means buying, purchasing, renting, leasing, or otherwise acquiring any supplies, services or construction. It also includes all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.
- (41) **Procurement Officer** means any person duly authorized to enter into and administer contracts and make written determinations with respect thereto. The term also includes an authorized representative acting within the limits of authority.
- (42) **Proposal development documents** means drawings and other design related documents that are sufficient to fix and describe the size and character of an infrastructure facility as to architectural, structural, mechanical and electrical systems, materials, and such other elements as may be appropriate to the applicable project delivery method.

COMMENTARY:

The Code requires that proposal development documents be solicited in Requests for Proposals that use design-build, design-build-operate-maintain, and design-build-finance-operate-maintain project delivery methods. See Section 3-103(2)(b).

- (43) **Public Notice** means the distribution or dissemination of information to interested parties using methods that are reasonably available. Such methods will often include publication in newspapers of general circulation, electronic or paper mailing lists, and web site(s) designated by the [Purchasing Agency] and maintained for that purpose.

COMMENTARY:

Because the adequacy of notice will, as a practical matter, vary from locality to locality and procurement to procurement, no attempt is made to define statutorily either a prescribed method of public notice or the duration of its publication. However, the implementing regulations [operational procedures] should provide criteria and general guidelines for the method and duration of public notice. Electronic dissemination of notice is specifically contemplated by the new definition.

- (44) **Public Procurement Unit** means any one of the following:
- (a) a Local Public Procurement Unit,
 - (b) an External Procurement Activity,
 - (c) a State Public Procurement Unit, and
 - (d) any not-for-profit entity comprised of more than one Unit or Activity listed in subparagraphs (a), (b), or (c).

COMMENTARY:

The definition of "Public Procurement Unit" is very broad. It includes any one or more of State Public Procurement Units, External Procurement Activities, and Local Public Procurement Units. It also includes any not-for-profit entity comprised of more than one such Unit or Activity.

- (44) **Purchase Description** means the words used in a solicitation to describe the supplies, services, or construction to be purchased, and includes specifications attached to, or made a part of the solicitation.
- (46) **Purchase Request** means that document whereby a Using Agency requests that a contract be entered into for a specified need, and may include, but is not limited to, the technical description of the requested item, delivery schedule, transportation, criteria for evaluation, suggested sources of supply, and information supplied for the making of any written determination required by this Code.
- (47) **Purchasing Agency** means any governmental body other than the Chief Procurement Officer which is authorized by this Code or its implementing regulations [operational procedures], or by way of delegation from the Chief Procurement Officer, to enter into contracts.
- (48) **Regulation** means a governmental body's statement, having general or particular applicability and future effect,

- designed to implement, interpret, or prescribe law or policy, or describing organization, procedure, or practice requirements, which has been promulgated in accordance with the [Administrative Procedure Act].
- (49) **Request for Proposals** means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.
- (50) **Responsible Bidder or Offeror** means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.
- (51) **Responsive Bidder** means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.
- (52) **Services** means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. This term shall not include employment agreements or collective bargaining agreements.
- (53) **Shall** denotes the imperative.
- (54) **Signature** means [enter the appropriate reference to the State's applicable Digital Signature Act if enacted] [a manual or electronic identifier, or the electronic result of an authentication technique attached to or logically associated with a record that is intended by the person using it to have the same force and effect as a manual signature.]

COMMENTARY:

(1) The purpose of this definition is to permit the acceptance of an electronic signature that is consistent with the [State's] [Electronic or Digital Signature Act] or [current legislation regarding the use of such technology]. In the absence of legislation on digital signatures, the Code offers a definition adapted from definitions of "electronic signature" adopted across the country. A review of emerging technologies indicates that digital signatures may emerge as the equivalent of manual signatures, provided that three key tests are met: (a) sender authentication (verification of the sender, typically through verification of a certificate identifying the sender); (b) message integrity (confirmation that the message or signature was properly received in the original format of the sender); and (c) nonrepudiation (confirmation that the Sender cannot deny the message or signature was sent).

(2) In defining the term "signature," the intent of the Code is to protect the integrity of the procurement process and to ensure that the transmission and receipt of information concerning public solicitations is accurate and reliable.

(55) **Small Business** means a United States business which is independently owned and which is not dominant in its field of operation or an affiliate or subsidiary of a business dominant in its field of operation.

(56) **Specification** means any description of the physical or functional characteristics, or of the nature of a supply, service, or construction item for an Infrastructure Facility. It may include a description of any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery.

(57) **State Public Procurement Unit** means the Office of the Chief Procurement Officer of this or any other State and any other Purchasing Agency of this State or any other State.

COMMENTARY:

The term "State Public Procurement Unit" relates to each entity within a State government which carries out procurement functions for the State government. In those States where procurement is completely centralized, the term "State Public Procurement Unit" refers to the centralized procurement unit of that State. In those States where procurement is partially centralized, the term "State Public Procurement Unit" describes the established primary procurement unit of the State government and such other units within the State government as are authorized to conduct procurement functions independent of the established primary State Public Procurement Unit. In those States where State procurement activities are completely decentralized, the term "State Public Procurement Unit" refers to any and all units of State government which are authorized to carry out procurement functions for the State government.

(58) **Supplies** means all property, including but not limited to equipment, materials, printing, insurance, and leases of real property, excluding land or a permanent interest in land.

(59) **Using Agency** means any governmental body of the [Enacting Jurisdiction] which utilizes any supplies, services, or construction procured under this Code.

(60) **Written** or **In Writing** means the product of any method of forming characters on paper, other materials, or viewable screens, which can be read, retrieved, and

reproduced, including information that is electronically transmitted and stored.

COMMENTARY:

This definition is a combination of definitions of “written” or “ in writing” found in the U.S. Code of Federal Regulations (CFR 48 CFR 2.101) and in the Florida Electronic Signature Act of 1996 (F.S.A. §282.72(4)). These definitions are similar to a number of other States’ definitions. The fact that “digital signatures” are currently in vogue does not mean that this technology will ultimately prove to be the most appropriate means of data transfer or communication for procurement purposes. The intent of the revisions to the Code is to authorize the responsible use of technological developments in electronic writings and signatures as they occur.

Appendix B - Typical Applications to Public Infrastructure Procurement

Finance Type	Project Delivery Method Per 2007 MC PIP	General Applicability	Specific Applications
PUBLICLY FINANCED (ONLY)	Design Bid Build See, MPC §1-301(10); §5-102(2)	Suitable where state does not establish a dedicated revenue stream collectible from the project. Financing is PUBLIC, typically from a general revenue source, often raised through municipal bond market	Building Projects of All Kinds: Schools; public buildings; roads; bridges; terminals; water treatment supply, treatment, distribution; wastewater treatment and discharge.
	Design Build Operate Maintain See below for MPC references.		
MIXED: SOME PUBLIC FINANCING WITH PRIVATE FINANCING	Design Build Operate Maintain See, MPC §1-301(18); §5-102(5), and §§3-103(2 and 5)	Suitable where the state establishes a “fence” around the revenue stream generated by a particular project or collection of projects and dedicates that stream to support long term contract, typically user fees or tolls. If revenues are sufficient to cover ongoing maintenance, repair, and operations work (and required expansion), <u>no additional public financing is needed</u> . If not, Public Financing commitment is made, e.g., through shadow toll or shadow user fee payment. Contract may include capital additions, technology enhancements, capital replacements.	Operations and Maintenance Contracts Paid Out of General Funds. Long-Term Concessions/Leases (25–35 Yrs) Water supply, distribution, and treatment (supported by rates) Wastewater collection, treatment, and discharge (supported by rates) Port, airport, terminal, intermodal transportation projects (supported by charges on goods or people moved, e.g., TEU's) Roads (supported by tolls) Bridges (supported by tolls) Tunnels (supported by tolls) Schools (supported by shadow payments per pupil) Prisons (supported by shadow payment per inmate)
	Operations and Maintenance See, MPC §1-301(38); §5-102(3)		
PRIVATELY FINANCED (ONLY)	Design Build Finance Operate and Maintain See, MPC §1-301(17); §5-102(6), and §§3-103(2 and 5)	Suitable where the state establishes a “fence” around the revenue stream from a project or collection of projects and dedicates that stream to support long term contract, as in DBOM. <u>But, different from DBOM</u> . Contractor takes the risk that customers will come, will pay prescribed tolls, and that revenue will be sufficient to fully operate and maintain facility and cover all costs and profit. Contract may include requirements for capital additions, replacements, and enhancements.	Long-Term Concessions/Leases (25–35 Yrs) Water supply, distribution, and treatment (supported by rates) Wastewater collection, treatment, and discharge (supported by rates) Port, airport, terminal, intermodal transportation projects (supported by charges on goods or people moved, e.g., TEU's, PFC's) Road projects (supported by tolls) Bridge projects (supported by tolls) Tunnel projects (supported by tolls)