METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

REGULATIONS TO THE PROCUREMENT CODE

Adopted By
The Procurement Standards Board
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CHAPTER 4.08 -- PROCUREMENT ORGANIZATION

Regulation 4.08.060 -- Delegation of Authority by the Purchasing Agent.

R4.08.060.01 The Purchasing Agent may, at the Purchasing Agent's discretion, delegate authority to Metro Departments and Agencies to issue purchases orders as releases against existing Metro and State contracts; to make purchases for supplies, services and construction with purchase dollar amounts less than the amount which requires competitive sealed bids or requests for proposals as defined in section 4.12.010 of the Code of Laws; and to make small purchases. Formats to be used to make such delegations shall be developed by the Purchasing Agent.

R4.08.060.02 Conditions Governing Delegation of Authority.

R4.08.060.02.1 In making such purchases through current Metro or state contracts, the Department shall issue directly to the vendor a Purchase Order that references the current contract number and the appropriate item numbers on the contract. Unit prices on line item purchase orders shall be the same as indicated on the current contract. Variances in unit pricing must be approved in advance by the Division of Purchases.

R4.08.060.02.2 If an item is available on a Metro contract and a state contract, the item shall be purchased through the Metro contract unless the Department can justify that it is in Metro's best interest for the Department to use the state contract.

R4.08.060.02.3 Purchases of supplies, services and construction with purchase dollar amounts less than the amount which requires competitive sealed bids or requests for proposals as defined in section 4.12.010 of the Code of Laws shall be made consistent with the quotations requirements set forth in the same section. To document quotes received in accordance with this delegation, Metro Departments must use the quote sheets provided by the Division of Purchases and cash discount terms and F.O.B. point must be documented on the completed quote sheet.

R4.08.060.02.4 The Purchasing Agent shall verify contract compliance for items purchased under contract. Contract compliance will include verifying the correctness of the contract number, the validity of the contract, and that the item purchased was within the scope of the contract.

R4.08.060.02.5 No procurements may be "split" in order to keep their value under $25,000.00

R4.080.060.02.6 Except in the case of an emergency purchase, no purchase order for the purchase of a product or service shall be issued until and unless the Division of Accounts certifies that funds for the designated purchase are available.

R4.080.060.02.7 All departmental officials who will be involved in the delegated purchasing process must complete training offered by the Division of Purchases in advance of that involvement.

R4.080.060.02.8 The Division of Purchases shall request an annual audit for review of departmental compliance with authority delegated by the Purchasing Agent. The Director of the Department shall be notified of the audit findings. If negative findings are encountered, the Director shall initiate corrective actions and shall notify the Purchasing Agent of actions taken and methods initiated to prevent recurrence.

Regulation 4.08.080 -- Authority to Contract for Professional Services

R4.08.080.01 Selection of Architects and Engineers

A. SELECTION PROCESS

An important goal of the selection process shall be the equitable distribution of consulting work among qualified firms.

For projects requiring architectural or engineering services, a department/agency shall submit a request to the Purchasing Agent. The request shall contain a description of the project, the professional services needed, the project's scope, its proposed location, expertise required, time frame and similar requirements. Similar projects for one or more departments may be grouped when feasible.

The Procurement Division will issue a Request for Qualifications to registered firms, which requests the submission of qualifications including the following information as appropriate:

1) A description of the project;

2) Any special expertise or unusual services required;

3) Any special qualifications the firm might have for this particular project;

4) A request for specific qualifications;

5) A request for relevant experience with references;

6) A request for specific project staffing schedule;

7) A request for resume of key assigned people;

8) A request for staffing schedules of existing projects;

9) A request for a list of affiliations, e.g., firms with whom the primary professional may associate, including small and disadvantaged business;

10) A request for other relevant data;

11) Special selection criteria, e.g., Equal Business Opportunity Program requirements, etc;

12) A request for financial information;

13) A request for a list of current litigation in which the firm is a defendant;

14) A request for a list of past licensing violations of employees within the past five years; and

15) Whether the firm has recently had an opportunity to perform work for Metro either as a prime contractor or

a sub-contractor and, if so, description of the work performed.

The Requests for Qualifications shall further include evaluation criteria that seek to obtain additional information including but not limited to:

1) The firm's ability to complete the project within the time frame prescribed;
2) The availability of sufficient qualified personnel to complete the project;
3) The firm's present financial condition;
4) Team and personnel qualifications;
5) Experience as a team;
6) Team and project management;
7) Ability to perform within the time constraints specified;
8) Firm's awareness of design opportunities and constraints;
9) Understanding project requirements;
10) Experience on similar projects;
11) Experience with similar agencies, including Metro;
12) Performance evaluations from Metro and other past clients;
13) Unique and relevant experience; and
14) Number of projects performed for Metro within the last three years.

An Evaluation Committee will be established for that specific project solicitation. The Composition of the Evaluation Committee will be approved in advance by the Purchasing Agent and may include:

1) Purchasing Agent or designee;
2) Representative(s) of proponent department/agency;
3) Representative(s) of other departments/agencies;
4) Private citizens with expertise important to the selection as determined by the Purchasing Agent; and
5) State or federal government personnel.

In instances where the Metropolitan Government issues a Request for Qualifications for Architectural and Engineering Services funded in whole or in part by the Tennessee Department of Transportation (TDOT), the procurement and selection process shall comply with the most recent Local Government Version of TDOT Consultant Selection Policy.

Based upon evaluation of the submitted responses to the Requests for Qualifications, the

Evaluation Committee will recommend the most qualified firm to perform the required work to the Purchasing Agent. The Purchasing Agent shall negotiate a contract with the selected firm for the services at compensation that is determined by the Evaluation Committee to be fair and reasonable to the Metropolitan Government. In making this determination, the Evaluation Committee shall take into account the estimated value, the scope, the complexity and the professional nature of the services to be rendered.

R4.08.080.02 Selection of Investment Managers

The Purchasing Agent shall have authority to award professional service contracts to Investment Managers recommended by the Investment Committee to carry out its duties under § 13.04 of the Metropolitan Charter. The Investment Committee shall recommend Investment Managers to the Purchasing Agent.

New Investment Managers - The Investment Committee recommendation shall be made only after choosing among Investment Managers recommended by the Committee's Investment Consultant and reviewed and agreed upon by staff.

The Investment Consultant shall conduct an appropriate search utilizing industry-accepted practices and databases and shall consider the appropriate qualifications and fees of the proposed Investment Managers within the overall risk parameters of the Committee's Investment Policy. The analysis of managers being considered shall use industry accepted criteria for comparison and analysis.

The analysis will contain a structural review of each investment manager. The review should be comprised of both qualitative and quantitative assessment focusing on the firms' strengths and weaknesses assessing the firm's ability to meet objectives within their asset class. Qualitative assessment should consider the firm's organizational structure, strategy considerations, product, personnel and philosophy of asset management. Quantitative assessment should consider portfolio risk and return statistics and benchmarking to other firms in the asset class.

Investment Managers with expiring Metro contract – The Investment Committee recommendations shall be made only after considering recommendations from the Committee's Investment Consultant reviewed and agreed upon by staff.

Because a new contract is necessitated by the expiration of an existing Metro contract (5 years have passed) selection shall be based on an updated qualitative and quantitative review (described in previous paragraph) of the manager. The Committee shall take into consideration the cost of making an Investment Manager change, performance within the style category of the manager, the role the investment strategy has within the overall portfolio and any other factor deemed appropriate for consideration.

CHAPTER 4.12 - SOURCE SELECTION AND CONTRACT FORMATION

Regulation 4.12.010 -- Definitions

R4.12.010.01 Definitions.

R4.12.010.01.1 *Award* is the presentation by Metro of a purchase order or contract to a bidder or offeror.

R4.12.010.01.2 *Capability,* as used in Section 4.12.010 (Definitions of Terms used in this Article) of the Metro Procurement Code, means, for the purpose of these regulations, capability at the time of award of the contract.

R4.12.010.01.3 *Cost Analysis* is the evaluation of actual or anticipated cost data. The analysis involves applying experience, knowledge, and judgment to data in an attempt to project reasonable estimated contract costs. Estimated costs serve as the basis for arriving at mutually agreeable contract prices. This analysis is more than the acquisition cost: it encompasses the total cost of ownership for the lifecycle of the product or service. Cost analysis will consider acquisition cost; transportation in; implementation and start-up costs; on-going maintenance, repair, and support costs; labor, material and overhead costs; upgrade costs; transportation out; disposal costs and/or the impact of resale.

R4.12.010.01.4 *Cost Data* are information concerning the actual or estimated cost of labor, material, overhead, and other cost elements which have been actually incurred or which are expected to be incurred by the contractor in performing the contract.

R4.12.010.01.5 *Discussions,* as used in the source selection process, means an exchange of information or other manner of negotiation during which the offeror and Metro may alter or otherwise change the conditions, terms, and price of the proposed contract. Discussions may be conducted in connection with competitive sealed proposals, sole source, and emergency procurement; discussions are not permissible in competitive sealed bidding (except to the extent permissible during the first phase of multi-step sealed bidding).

R4.12.010.01.6 *Offeror* means any responsive and responsible bidder, proposer to a solicitation or sole source request.

R4.12.010.01.7 *Prequalification for Inclusion on Bidders/Proposers Lists* means determining in accordance with Regulation 4.12.120 (Prequalification) that a prospective bidder or offeror satisfies the criteria established for being included on the bidders list.

R4.12.010.01.8 *Price Analysis* is the evaluation of price data with reasonable benchmarks, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.

R4.12.010.01.9 *Price Data* are factual information concerning prices, including profit, for supplies, services, or construction substantially similar to those being procured. In this definition, "prices" refer to offered or proposed selling prices, historical selling prices, and current selling prices of such items. This definition refers to data relevant to both prime and subcontract prices.

R4.12.010.01.10 *Solicitation* means an Invitation to Bid, a Request for Proposals, a Request for Quotations, or any other document issued by Metro for the purpose of soliciting bids or proposals to perform a Metro contract.

R4.12.010.01.11 *Suppliers,* as used in Section 4.12.120 (Prequalification) of the Metro Procurement Code, means prospective bidders or offerors. The term is used interchangeably with “vendor”.

Regulation 4.12.011 -- General Provisions

R4.12.011.01 Extension of Time for Bid or Proposal Acceptance.

After opening bids or proposals, the Purchasing Agent may request offerors to extend the time during which Metro may accept their bids or proposals, provided that, with regard to bids, no other change is permitted. The reasons for requesting such extension shall be documented.

R4.12.011.02 Extension of Time on Indefinite Quantity Contracts.

The time of performance of an indefinite quantity contract as defined in Regulation R4.12.140.09 (Definite Quantity and Indefinite Quantity Contracts) may be extended upon agreement of the parties, provided the extension is for 90 days or less and the Purchasing Agent determines in writing that it is not practical to award another contract at the time of such extension.

R4.12.011.03 Only One Bid or Proposal Received.

R4.12.011.03.1 *One Bid Received.* If only one responsive bid is received in response to an Invitation to Bid (including multi-step bidding), an award may be made to the single bidder if the Purchasing Agent finds that the price submitted is fair and reasonable and that either other prospective bidders had reasonable opportunity to respond or there is not adequate time for resolicitation. Otherwise, the bid may be rejected pursuant to the provisions of Regulation 3-301 (Cancellation of Solicitations; Rejection of Bids or Proposals) and:

a) new bids or offers may be solicited;

b) the proposed procurement may be cancelled; or

c) if the Purchasing Agent determines in writing that the need for the supply or service continues but that the price of the one bid is not fair and reasonable and there is no time for resolicitation or resolicitation would likely be futile, the procurement may then be conducted under Regulation 4.12.060 (Sole Source Procurement) or Regulation 4.12.070 (Emergency Procurements), as appropriate.

R4.12.011.03.2 *One Proposal Received.* If only one proposal is received in response to a Request for Proposals, the Purchasing Agent may, as such officer deems appropriate, either make an award in accordance with the procedures set forth in Section 4.12.040 (Competitive Sealed Proposals) of the Metro Procurement Code and Regulation 4.12.040 (Competitive Sealed Proposals) of these regulations or, if time permits, resolicit for the purpose of obtaining competitive sealed proposals.

R4.12.011.04 Multiple or Alternate Bids or Proposals.

Unless multiple or alternate bids or proposals are specifically provided, the solicitation shall allow for such bids or proposals but shall specify their treatment related to selection/evaluation. When prohibited, multiple or alternate bids or proposals shall be rejected, provided that if a bidder clearly indicates a base bid, it shall be considered for award as though it were the only bid or proposal submitted by the offeror.

R4.12.011.05 Procuring Metro-Produced Supplies or Services.

Using Agency requirements may be fulfilled by procuring supplies produced or services performed incident to Metro's own programs.

R4.12.011.06 Bid and Performance Bonds for Supply Contracts or Service Contracts.

Bid and performance bonds or other security may be required for supply contracts or service contracts as the Purchasing Agent, or such officer's designee, deems advisable to protect the interest of Metro. Any such requirements must be set forth in the solicitation. Bid or performance bonds should not be used as a substitute for a determination of offeror responsibility. Regulation 4.20.020 (Bid Bonds) and Regulation 4.20.030 (Performance and Payment Bonds) set forth bonding requirements applicable to construction contracts and may be considered when

establishing any such requirements for supply contracts or service contracts.

R4.12.011.07 Conditioning Bids or Proposals upon Other Awards Not Acceptable.

Any bid or proposal that is conditioned upon receiving award of both the particular contract being solicited and another Metro contract shall be deemed nonresponsive and not acceptable unless it is requested or allowed for in the RFx (Request for X -*Quote, Proposal, or Information*).

Regulation 4.12.012 -- Relations between Agencies

R4.12.012.01 Purchase Requests by Agencies.

R4.12.012.01.1 *Purchasing Agent's Authority to Reject.* When the Purchasing Agent, after consultation with the requesting agency, decides that processing the purchase request is clearly not in the best interest of Metro or that further review is needed, such officer shall return such purchase request to the requesting agency. Examples of reasons a purchase request may be returned include, but are not limited to:

a) the request can be satisfied from existing Metro stocks or Metro contracts;

b) the supplies, services, or construction requested could be procured more economically at a different time without detriment to Metro; or

c) the quality requested is inconsistent with Metro standards and usage.

R4.12.012.01.2 *Purchasing Agent's Authority to Establish Lead Times.* Upon receipt of purchase requests, the Purchasing Agent has authority to decide when the procurement will be initiated and the time for response to the solicitation, provided the requesting agency is notified if any dates the Purchasing Agent establishes exceed those stated by such agency in the purchase request or will result in deliveries under the contract being later than the delivery date stated in the purchase request.

R4.12.012.01.3 *Requesting Agency Response.* Any matters relating to disagreements between a requesting agency and the Purchasing Agent in respect to actions taken under Subsections R4.12.012.01.1 or R4.12.012.01.2 of this Section, or in regard to any other matter concerning a purchase request, may be brought through the Director of Finance to the Mayor for resolution.

R4.12.012.02 Determination of Contractual Terms and Conditions.

The Purchasing Agent is authorized to determine the contractual provisions, terms, and conditions of solicitations and contracts provided such provisions, terms, and conditions are not contrary to statutory or regulatory requirements governing the procurement.

Regulation 4.12.014 -- Contracting for Installment Purchase Payments

R4.12.014.01 Contracting for Installment Purchase Payments, Including Interest.

Supply contracts may provide for installment purchase payments, including interest charges, over a period of time. Installment payments, however, should be used judiciously in order to achieve economy and not to avoid budgetary restraints and shall be justified in writing by the head of the Using Agency. Heads of Using Agencies shall be responsible for ensuring that statutory or other prohibitions are not violated by use of installment provisions and budgetary, funding, or other required prior approvals are obtained. No such agreement shall be used unless provision for installment payments is included in the solicitation document. The Metro Council must approve any such transaction in which the total annual payments exceed $1,500.

Regulation 4.12.016 -- Purchase of Items Separately from Construction Contract

R4.12.016.01 Purchase of Items Separately from Construction Contract.

The Purchasing Agent is authorized to determine whether installation services, supply item, or group of supply items shall be included as a part of, or procured separately from, any contract for construction.

Regulation 4.12.030 Competitive Sealed Bidding; Multi-Step Sealed Bidding

R4.12.030.01 Application.

The provisions of this Regulation apply to every procurement made by competitive sealed bidding, including multi-step sealed bidding.

R4.12.030.02 Use of Competitive Sealed Bidding.

Competitive sealed bidding is the preferred method for the procurement of supplies, services, or construction where specifications are complete and there is little to no room for substitution.

R4.12.030.03 The Invitation to Bid.

R4.12.030.03.1 *Use.* The Invitation to Bid is used to initiate a competitive sealed bid procurement.

R4.12.030.03.2 *Content.* The Invitation to Bid shall include the following:

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

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

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

R4.12.030.03.3 *Incorporation by Reference.* The Invitation to Bid may incorporate documents by reference provided that the Invitation to Bid specifies where such documents can be obtained.

R4.12.030.03.4 *Acknowledgement of Amendments.* The Invitation to Bid shall require the acknowledgement of the receipt of all amendments issued. The Purchasing Agent shall establish procedures to follow up on acknowledgements not received.

R4.12.030.04 *Bidding Time.*

Bidding time is the period of time between the date of distribution of the Invitation to Bid and the time and date set for receipt of bids. In each case, bidding time will be set to provide bidders a reasonable time to prepare their bids. A minimum of 10 business days shall be provided unless a shorter time is deemed necessary for a particular procurement as determined in writing by the Purchasing Agent.

R4.12.030.05 Bidder Submissions.

R4.12.030.05.1 *Bid Form.* The Invitation to Bid shall provide a form that shall include space in which the bid price shall be inserted and which the bidder shall sign or testify to their ability to represent offers from their company and submit along with all other necessary submissions.

R4.12.030.05.2 *Telegraphic, Fax, Email, and Web Posting of Bids.* Telegraphic, fax and email bids will not be considered. If provided by Metro, web posting of bids to the secured Metro web location will be permitted.

R4.12.030.05.3 *Bid Samples and Descriptive Literature.*

a) "Descriptive literature" means information available in the ordinary course of business that shows the characteristics, construction, or operation of an item that enables Metro to consider whether the item meets its needs.

b) "Bid sample" means a sample to be furnished by a bidder to show the characteristics of the item offered in the bid.

c) Bid samples or descriptive literature may be required when it is necessary to evaluate required characteristics of the items bid.

R4.12.030.06 Public Notice.

R4.12.030.06.1 *Distribution.* Invitations to Bid or Notices of the Availability of Invitations to Bid shall be furnished to a sufficient number of bidders for the purpose of securing competition. Notices of Availability shall indicate where, when, and for how long Invitations to Bid may be obtained; generally describe the supply, service, or construction desired; and may contain other appropriate information. (See also Section R4.12.030.7 (Bidders Lists). A fee may be charged for extra copies and for providing copies of plans and specifications.

R4.12.030.06.2 *Publication.* Every procurement of goods or services in excess of $25,000 shall be published to the public through the media that most effectively generates competition for that solicitation. Public notice methods will often include publication in newspapers of general circulation, electronic or paper mailing lists, and Web site(s) designated by the Metropolitan Government and maintained for that purpose.

R4.12.030.06.3 *Public Availability.* A copy of the Invitation to Bid shall be made available for public inspection at the Purchasing Agent's office.

R4.12.030.07 Bidders Lists.

R4.12.030.07.1 *Purpose.* Bidders lists may be compiled to provide Metro with the names of businesses that may be interested in competing for various types of Metro contracts. Unless otherwise provided, inclusion or exclusion of the name of a business does not indicate whether the business is responsible in respect to a particular procurement or otherwise capable of successfully performing a Metro contract.

R4.12.030.07.2 *Deletion of Bidders.* Businesses that fail to submit bids in response to Invitations to Bid on three (3) consecutive procurements of similar items may be removed from the applicable bidders list and will be notified of their removal. Prospective bidders currently meeting the criteria for inclusion on the list may be reinstated on such lists at their request.

R4.12.030.07.3 *Public Availability.* Names and addresses on bidders lists shall be available for public inspection. A reasonable fee may be charged for copies of such lists.

R4.12.030.08 Pre-Bid Conferences.

Pre-bid conferences may be conducted to explain the procurement requirements. They shall be announced to all prospective bidders known to have received an Invitation to Bid. The conference should be held long enough after the Invitation to Bid has been issued to allow bidders to become familiar with it but sufficiently before bid opening to allow consideration of the conference results in preparing their bids. Nothing stated at the pre-bid conference shall change the Invitation to Bid unless a change is made by written amendment as provided in Section R4.12.030.9

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

R4.12.030.09 Amendments to Invitations to Bid.

R4.12.030.09.1 *Form.* Amendments to Invitations to Bid shall be identified as such and shall require that the bidder acknowledge receipt of all amendments issued. The amendment shall reference the portions of the Invitation to Bid it amends.

R4.12.030.09.2 *Distribution.* Amendments shall be sent to all prospective bidders known to have received an Invitation to Bid. Acknowledgement of receipt shall be in accordance with Subsection R4.12.030.03.4 of this Section.

R4.12.030.09.3 *Timeliness.* Amendments shall be distributed within a reasonable time to allow prospective bidders to consider them in preparing their bids. If the time and date set for receipt of bids will not permit such preparation, such time shall be increased to the extent possible in the amendment or, if necessary, by telefax or telephone and confirmed in the amendment.

R4.12.030.10 Pre-Opening Modification or Withdrawal of Bids.

R4.12.030.10.1 *Procedure.* Bids may be modified or withdrawn by written notice received in the office designated in the Invitation to Bid prior to the time and date set for bid opening.

R4.12.030.10.2 *Disposition of Bid Security.* If a bid is withdrawn in accordance with this Section, the bid security, if any, shall be returned to the bidder.

R4.12.030.10.3 *Records.* All documents relating to the modification or withdrawal of bids shall be made a part of the appropriate procurement file.

R4.12.030.11 Late Bids, Late Withdrawals, and Late Modifications.

R4.12.030.11.1 *Definition.* Any bid received after the time and date set for receipt of bids is late. Any withdrawal or modification of a bid received after the time and date set for opening of bids at the place designated for opening is late.

R4.12.030.11.2 *Treatment.* No late bid, late modification, or late withdrawal will be considered.

R4.12.030.11.3 *Notice.* Bidders submitting late bids that will not be considered for award shall be so notified as soon as practicable.

R4.12.030.11.4 Records. Records equivalent to those required in Section R4.12.030.10 (Pre-Opening Modification or Withdrawal of Bids, Records) shall be made and kept for each late bid, late modification, or late withdrawal.

R4.12.030.12 Receipt, Opening, and Recording of Bids.

R4.12.030.12.1 *Receipt.* Upon its receipt, each bid and modification shall be time-stamped but not opened and shall be stored in a secure place until the time and date set for bid opening.

R4.12.030.12.2 *Opening and Recording.* Bids and modifications shall be opened publicly, in the presence of one or more witnesses, at the time, date, and place designated in the Invitation to Bid. The name of each bidder, the bid price, and such other information as is deemed appropriate by the Purchasing Agent shall be read aloud or otherwise made available. Such information also shall be recorded at the time of bid opening, that is, the bids hall be tabulated or a bid abstract made. The names and addresses of required witnesses shall also be recorded at the opening. The opened bids shall be available for public inspection after evaluation.

R4.12.030.13 Mistakes in Bids.

R4.12.030.13.1 *General.* Correction or withdrawal of a bid because of an inadvertent, nonjudgmental mistake in the bid requires careful consideration to protect the integrity of the competitive bidding system, and to assure fairness. If the mistake is attributable to an error in judgment, the bid may not be corrected. Bid correction or withdrawal by reason of a nonjudgmental mistake is permissible but only to the extent it is not contrary to the interest of

Metro or the fair treatment of other bidders.

R4.12.030.13.2 *Mistakes Discovered Before Opening.* A bidder may correct mistakes discovered before the time and date set for bid opening by withdrawing or correcting the bid as provided in Section R4.12.030.10 (Pre-Opening Modification or Withdrawal of Bids).

R4.12.030.13.3 *Confirmation of Bid.* When the Purchasing Agent knows or has reason to conclude that a mistake has been made, such officer should request the bidder to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid. If the bidder alleges mistake, the bid may be corrected or withdrawn if the conditions set forth in Subsections R4.12.030.13.2 through R4.12.030.13.6 of this Section are met.

R4.12.030.13.4 *Mistakes Discovered After Opening but Before Award.* This Subsection sets forth procedures to be applied in three situations described in Subsections R4.12.030.13.4 (a) through R4.12.030.13.4(c) of this Subsection in which mistakes in bids are discovered after the time and date set for bid opening but before award.

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

i) return the number of signed bids required by the Invitation to Bid;

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

iii) acknowledge receipt of an amendment to the Invitation to Bid, but only if:

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

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

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

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

i) a mistake is clearly evident on the face of the bid document but the intended correct bid is not similarly evident; or

ii) the bidder submits proof of evidentiary value that clearly and convincingly demonstrates that a mistake was made.

R4.12.030.13.5 *Mistakes Discovered After Award.* Mistakes shall not be corrected after award of the contract except where the Purchasing Agent makes a written determination that it would be unconscionable not to allow the mistake to be corrected.

R4.12.030.13.6 *Determinations Required.* When a bid is corrected or withdrawn, or correction or withdrawal is denied, under Subsections R4.12.030.13.4 or R4.12.030.13.5 of this Section, the Purchasing Agent shall prepare a written determination showing that the relief was granted or denied in accordance with these regulations.

R4.12.030.14 Bid Evaluation.

R4.12.030.14.1 *General.* The contract is to be awarded "to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids." See Section 4.12.030.H (Competitive Sealed Bidding, Award) of the Metro Procurement Code. The Invitation to Bid shall set forth the requirements and criteria that will be used to determine the lowest responsive bidder. No bid shall be evaluated for any requirement or criterion that is not disclosed in the Invitation to Bid.

R4.12.030.14.2 *Responsibility and Responsiveness.* Responsibility of prospective contractors is covered by Regulation 4.12.110 (Responsibility) of this Chapter. Responsiveness of bids is covered by Section R4.12.010 of the Metro Procurement Code that defines "responsive bidder" as "a person who has submitted a bid which conforms in all material respects to the Invitation to Bid."

R4.12.030.14.3 *Product Acceptability.* The Invitation to Bid shall set forth any evaluation criterion to be used in determining product acceptability. It may require the submission of bid samples, descriptive literature, technical data, or other material. It may also provide for accomplishing any of the following prior to award:

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

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

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

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

R4.12.030.14.4 *Determination of Lowest Bidder.* Following determination of product acceptability as set forth in Subsection R4.12.030.14.3 of this Section, if any is required; bids will be evaluated to determine which bidder offers the lowest cost to Metro in accordance with the evaluation criteria set forth in the Invitation to Bid. Only objectively measurable criteria that are set forth in the Invitation to Bid shall be applied in determining the lowest bidder. Examples of such criteria include, but are not limited to, transportation cost, and ownership or life cycle cost formulas. Evaluation factors need not be precise predictors of actual future costs, but to the extent possible such evaluation factors shall:

a) be reasonable estimates based upon information Metro has available concerning future use; and

b) treat all bids equitably;

c) provide small business discounts in accordance with R4.44.020.02.4;

d) when determined by the Purchasing Agent in the Invitation to Bid, consider net present value in the award of contracts for goods, services, and construction on a life cycle cost basis;

e) when determined by the Purchasing Agent, consider the past performance of bidders based on measurements of customer satisfaction, performed and evaluated in accordance with procedures set forth in the Invitation to Bid.

R4.12.030.14.5 *Restrictions.* Nothing in this Section shall be deemed to permit contract award to a bidder submitting a higher quality item than that designated in the Invitation to Bid if such bidder is not also the lowest bidder as determined under Subsection R4.12.030.14.4 of this Section. Further, this Section does not permit negotiations with any bidder.

R4.12.030.15 Low Tie Bids.

R4.12.030.15.1 *Definition.* Low tie bids are low responsive bids from responsible bidders that are identical in price and which meet all the requirements and criteria set forth in the Invitation to Bid.

R4.12.030.15.2 *Award.* At the discretion of the Purchasing Agent, award may be made in any permissible manner that will discourage tie bids. Procedures that may be used to discourage tie bids include, but are not limited to:

a) award the contract to a business providing supplies produced or manufactured in Davidson County or to a business that otherwise maintains a place of business in Davidson County;

b) where identical low bids include the cost of delivery, award the contract to the tie bidder closest to the point of delivery;

c) award the contract to the identical bidder who received the previous award and continue to award all succeeding contracts to the same bidder as long as all low bids are identical.

If none of the above is effective, the Purchasing Agent may award by drawing lots.

R4.12.030.15.3 *Record.* Records shall be made of all Invitations to Bid on which tie bids are received showing at least the following information:

a) the identification number of the Invitation to Bids;

b) the supply, service, or construction item; and

c) a listing of all the bidders and the prices submitted.

A copy of each such record shall be maintained in the Division of Purchases.

R4.12.030.16 Notice of Intent to Award.

Following the evaluation of bids as described in Section R4.12.030.14 (Bid Evaluation) of this section, the Purchasing Agent shall provide the apparent successful bidder with written notice of Metro's intent to award whenever the solicitation requires the apparent successful bidder to fulfill bonding, insurance, or other conditions for award. Copies of such written notice also shall be mailed simultaneously to all other bidders and made available to the public.

For other bid awards of an estimated value of $25,000 or greater, the Purchasing Agent shall appropriately inform, in writing, each of the unsuccessful bidders who in their bid submittal indicated a desire to be notified regarding the status of their bid.

R4.12.030.17 Award.

Award is defined as the presentation by Metro of a purchase order or contract to a bidder or offeror.

R4.12.030.18 Documentation of Award.

Following award, a record showing the basis for determining the successful bidder shall be made a part of the procurement file. Any correspondence from a using agency to the Purchasing Agent recommending award to a bidder or bidders and any letter written by the Purchasing Agent to a vendor for the purpose of indicating Metro's intent to award a purchase or contract to that vendor shall also be made a part of the procurement file.

R4.12.030.19 Multi-Step Sealed Bidding.

R4.12.030.19.1 *Definition.* Multi-step sealed bidding is a two-phase process consisting of a technical first phase composed of one or more steps in which bidders submit unpriced technical offers to be evaluated by Metro and a second phase in which those bidders whose technical offers are determined to be acceptable during the first phase have their price bids considered. It is designed to obtain the benefits of competitive sealed bidding by award of a contract to the lowest responsive, responsible bidder and at the same time obtain the benefits of the competitive sealed proposals procedure through the solicitation of technical offers and the conduct of discussions to evaluate and determine the acceptability of technical offers.

R4.12.030.19.2 *Conditions for Use.* The multi-step sealed bidding method may be used when it is not practical to prepare initially a definitive purchase description that will be suitable to permit an award based on price. Multi-step sealed bidding may thus be used when it is considered desirable:

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

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

c) to accomplish Subsections R4.12.030.19.2(a) and R4.12.030.19.2(b) of this Section prior to soliciting priced bids; and

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

R4.12.030.20 Pre-Bid Conferences in Multi-Step Sealed Bidding.

Prior to the submission of unpriced technical offers, a pre-bid conference as contemplated by Section R4.12.030.08 (Pre-Bid Conferences) may be conducted by the Purchasing Agent. The Purchasing Agent may also hold a conference of all potential bidders in accordance with Section R4.12.030.08 at any time during the evaluation of the unpriced technical offers.

R4.12.030.21 Procedure for Phase One of Multi-Step Sealed Bidding.

R4.12.030.21.1 *Form.* Multi-step sealed bidding shall be initiated by the issuance of an Invitation to Bid in the form required by Section R4.12.030.03 (The Invitation to Bid), except as hereinafter provided. In addition to the requirements set forth in Section R4.12.030.03, the multi-step Invitation to Bid shall state:

a) that unpriced technical offers are requested;

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

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

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

e) that Metro, to the extent the Purchasing Agent finds necessary, may conduct oral or written discussions of the unpriced technical offers; and

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

R4.12.030.21.2 *Amendments to the Invitation to Bid.* After receipt of unpriced technical offers,

amendments to the Invitation to Bid shall be distributed only to bidders who submitted unpriced technical offers, and they shall be permitted to submit new unpriced technical offers or to amend those submitted. If, in the opinion of the Purchasing Agent, a contemplated amendment will significantly change the nature of the procurement, the Invitation to Bid shall be cancelled in accordance with Regulation 4.12.100 (Cancellation of Solicitations; Rejection of Bids or Proposals) of this Chapter, and a new Invitation to Bid issued.

R4.12.030.21.3 *Receipt and Handling of Unpriced Technical Offers.* Unpriced technical offers shall not be opened publicly but shall be opened in front of two or more employees of the Division of Purchases. Such offers shall not be disclosed to unauthorized persons.

R4.12.030.21.4 Evaluation of Unpriced Technical Offers. The unpriced technical offers submitted by bidders shall be evaluated solely in accordance with the criteria set forth in the Invitation to Bid. The unpriced technical offers shall be categorized as:

a) acceptable;

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

c) unacceptable. The Purchasing Agent shall record in writing the basis for finding an offer unacceptable and make it part of the procurement file.

The Purchasing Agent may initiate Phase Two of the procedure if, in his opinion, there are sufficient acceptable unpriced technical offers to assure effective price competition in the second phase without technical discussions. If the Purchasing Agent finds that such is not the case, he shall issue an amendment to the Invitation to Bid or engage in technical discussions as set forth in Subsection R4.12.030.21.5 of this Section.

R4.12.030.21.5 *Discussion of Unpriced Technical Offers.* The Purchasing Agent may conduct discussions with any bidder who submits an acceptable or potentially acceptable technical offer. During the course of such discussions, the Purchasing Agent shall not disclose any information derived from one unpriced technical offer to any other bidder. Once discussions are begun, any bidder who has not been notified that its offer has been finally found unacceptable may submit supplemental information amending its technical offer at any time until the closing date established by the Purchasing Agent. Such submission may be made at the request of the Purchasing Agent or upon the bidder's own initiative.

R4.12.030.21.6 *Notice of Unacceptable Unpriced Technical Offer.* When the Purchasing Agent determines a bidder's unpriced technical offer to be unacceptable, such offeror shall not be afforded an additional opportunity to supplement its technical offer.

R4.12.030.22 Mistakes During Multi-Step Sealed Bidding.

Mistakes may be corrected or bids may be withdrawn during Phase One at any time. During Phase Two, mistakes may be corrected or withdrawal permitted in accordance with Section R4.12.030.13 (Mistakes in Bids).

R4.12.030.23 Procedure for Phase Two.

R4.12.030.23.1 *Initiation.* Upon the completion of Phase One, the Purchasing Agent shall either:

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

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

R4.12.030.23.2 *Conduct.* Phase Two shall be conducted as any other competitive sealed bid procurement except:

a) as specifically set forth in Section R4.12.030.19 (Multi-Step Sealed Bidding) through this Section;

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

c) after award the unpriced technical offer of the successful bidder shall be available for public inspection.

Invitation to Bid

Contract

Regulation 4.12.040 -- Competitive Sealed Proposals

R4.12.040.01 Application.

The provisions of this Chapter apply to every procurement made by competitive sealed proposals.

R4.12.040.02 Conditions for Use of Competitive Sealed Proposals.

R4.12.040.02.1 *"Practicable" Distinguished From "Advantageous".* As used in Section 4.12.040(A) (Competitive Sealed Proposals, Conditions for Use) of the Metro Procurement Code, the words "practicable" and "advantageous" are to be given ordinary dictionary meanings. The term "practicable" denotes what may be accomplished or put into practical application. "Advantageous" connotes a judgmental assessment of what is in Metro's best interest. Competitive sealed bidding may be practicable, that is, reasonably possible, but not necessarily advantageous, that is, in Metro's best interest.

R4.12.040.02.2 *General Discussion.* Competitive sealed bidding is the preferred method of procurement; however, if it is not practicable, competitive sealed proposals should be used. If competitive sealed bidding is practicable, it may then be considered whether competitive sealed bidding is advantageous. If competitive sealed bidding is determined not to be advantageous, competitive sealed proposals may be used when authorized as provided in Subsection R4.12.040.02.5 of this Section.

The key element in determining advantageousness is the need for flexibility. The competitive sealed proposals method differs from competitive sealed bidding in two important ways:

a) it permits discussions with competing offerors and changes in their proposals including price; and

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

An important difference between competitive sealed proposals and competitive sealed bidding is the finality of initial offers. Under competitive sealed proposals, alterations in the nature of a proposal, and in prices, may be made after proposals are opened. Such changes are not allowed, however, under competitive sealed bidding (except to the extent allowed in the first phase of multi-step sealed bidding). Therefore, unless it is anticipated that a contract can be awarded solely on the basis of information submitted by bidders at the time of opening, competitive sealed bidding is not practicable or advantageous.

Another consideration concerns the type of evaluations needed after offers are received. Where evaluation factors involve the relative abilities of offerors to perform, including degrees of technical or professional experience or expertise, use of competitive sealed proposals is the appropriate procurement method. Similarly, such method is appropriate where the type of need to be satisfied involves weighing artistic and aesthetic values to the extent that price is a secondary

consideration. Further, where the types of supplies, services, or construction may require the use of comparative, judgmental evaluations to evaluate them adequately, use of competitive sealed proposals is the appropriate method.

R4.12.040.02.3 *When Competitive Sealed Bidding is Not Practicable.* Competitive sealed bidding is not practicable unless the nature of the procurement permits award to a low bidder who agrees by its bid to perform without condition or reservation in accordance with the purchase description, delivery or performance schedule, and all other terms and conditions of the Invitation to Bid. Factors to be considered in determining whether competitive sealed bidding is not practicable include:

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

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

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

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

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

R4.12.040.02.4 *When Competitive Sealed Bidding is Not Advantageous.* A determination may be made to use competitive sealed proposals if it is determined that it is not advantageous to Metro, even though practicable, to use competitive sealed bidding. Factors to be considered in determining whether competitive sealed bidding is not advantageous include:

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

b) whether the factors listed in Subsections R4.12.040.02.3(b) through R4.12.040.02.3(d) of this Section are desirable in conducting a procurement rather than necessary; if they are, then such factors may be used to support a determination that competitive sealed bidding is not advantageous.

R4.12.040.02.5 *Determinations.*

a) Before a contract may be entered into by competitive sealed proposals, the Purchasing Agent shall determine in writing that competitive sealed bidding is either not practicable or not advantageous to Metro.

b) The Purchasing Agent may make determinations by category of supply, service, or construction item that it is either not practicable or not advantageous to Metro to procure specified types of supplies, services, or construction by competitive sealed bidding. Procurements of the specified types of supplies, services, or construction may then be made by competitive sealed proposals based upon such determination. He or she may

modify or revoke it at any time, and such determination should be reviewed for current applicability from time to time.

c) The following supplies, services or constructions are hereby excepted from the requirement of a written determination:

i) Professional services as provided in paragraph 4.08.080 of the Metro Procurement Code.

ii) Consultant services, including those related to advertising and public relations, appraisals, art, demographics, data processing and information management,

dietetics, education and training, emergency medical, employment, the environment, expert witnesses, graphic design, health care, housing development, job analysis or classification, manpower utilization, marketing, organizational development, personnel development, productivity improvement, program review, property management, statistical research, strategic planning, wage surveys, welfare consulting, workflow consulting and general management.

iii) Property and facilities management and operation services, including those related to the Municipal Auditorium and the Nashville Convention Center.

iv) Social services, including day care, counseling, child and adult protective services, mental health services, vocational rehabilitation services, home-based physical health care services, evaluation and diagnosis, and interpretation.

v) Travel and travel-related services.

vi) Employee benefits, including insurance.

vii) Artistic services to create public works of art.

R4.12.040.03 Content of the Request for Proposals.

The Request for Proposals shall be prepared in accordance with Section R4.12.030 (The Invitation to Bid) provided that it shall also include:

a) a statement that discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award, but that proposals may be accepted without such discussions; and

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

R4.12.040.04 Proposal Preparation Time.

Proposal preparation time shall be set to provide offerors a reasonable time to prepare their proposals. A minimum of 14 calendar days shall be provided unless a shorter time is deemed necessary for a particular procurement as determined by the Purchasing Agent.

R4.12.040.05 Form of Proposal.

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

R4.12.040.06 Public Notice.

Public notice shall be given by distributing the Request for Proposals in the same manner provided for distributing an Invitation to Bid under Section R4.12.030.6 (Public Notice).

R4.12.040.07 Use of Bidders Lists.

Bidders lists compiled and maintained in accordance with Section R4.12.030.7 (Bidders Lists) may serve as a basis for soliciting competitive sealed proposals.

R4.12.040.08 Pre-Proposal Conferences.

Pre-proposal conferences may be conducted in accordance with Section R4.12.030.8 (Pre-Bid Conferences). Any such conference should be held prior to submission of initial proposals.

R4.12.040.09 Amendments to Requests for Proposals.

Amendments to Requests for Proposals may be made in accordance with Section R4.12.030.9 (Amendments to Invitations to Bid) prior to submission of proposals. After submission of proposals, amendments may be made in accordance with Section R4.12.030.21 (Procedure for Phase One of Multi-Step Sealed bidding, Amendments to the Invitation to Bid).

R4.12.040.10 Modification or Withdrawal of Proposals.

Proposals may be modified or withdrawn prior to the established due date in accordance with Section R4.12.030.10 (Pre-Opening Modification or Withdrawal of Bids). For the purposes of this Section and Section R4.12.030.11 (Late Proposals, Late Withdrawals, and Late Modifications), the established due date is either the time and date announced for receipt of proposals or receipt of modifications to proposals, if any; or, if discussions have begun, it is the time and date by which best and final offers must be submitted, provided that only offerors who submitted proposals by the time announced for receipt of proposals may submit best and final offers.

R4.12.040.11 Late Proposals, Late Withdrawals, and Late Modifications.

Any proposal, withdrawal, or modification received after the established due date at the place designated for receipt of proposals is late. See Section R4.12.040.10 (Modification or Withdrawal of Proposals) for the definition of "established due date." They may only be considered in accordance with Section R4.12.030.11 (Late Bids, Late Withdrawals, and Late Modifications).

R4.12.040.12 Receipt and Registration of Proposals.

Proposals shall not be opened publicly but shall be opened in the presence of two or more employees of the Division of Purchases. Proposals and modifications shall be time-stamped upon receipt and held in a secure place until the established due date. After the date established for receipt of proposals, a Register of Proposals shall be prepared which shall include for all proposals the name of each offeror, the number of modifications received, if any, and a description sufficient to identify the supply, service, or construction item offered. The Register of Proposals shall be open to public inspection only after award of the contract. Prior to award, proposals and modifications shall be shown only to Metro personnel having a legitimate interest in them and other individuals with expertise in the subject matter of the procurement as determined by the Purchasing Agent.

R4.12.040.13 Evaluation of Proposals.

R4.12.040.13.1 *Evaluation Factors in the Request for Proposals.* The Request for Proposals shall state all of the evaluation factors, including but not limited to price, ability to provide services at designated locations, prior Metro audit findings and contract non-compliance determinations, and their relative importance.

R4.12.040.13.2 *Evaluation.* The evaluation shall be based on the evaluation factors set forth in the Request for Proposals. Numerical rating systems may be used but are not required. Factors not specified in the Request for Proposals shall not be considered. The Purchasing Agent may appoint individuals to an evaluation committee who possess expertise in the subject matter of the procurement to provide award recommendations to the Purchasing Agent.

R4.12.040.13.3 *Classifying Proposals.* For the purpose of conducting discussions under Section

R4.12.040.14 (Proposal discussions with Individual Offerors), proposals shall be initially classified as:

a) acceptable;

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

c) unacceptable.

Offerors whose proposals are unacceptable shall be so notified promptly.

R4.12.040.14 Proposal discussions with Individual Offerors.

R4.12.040.14.1 *"Offerors" Defined.* For the purposes of Section 4.12.040.F (Competitive Sealed Proposals, Discussion with Responsible Offerors and Revisions to Proposals) of the Metro Procurement Code and this Section, the term "offerors" includes only those businesses submitting proposals that are acceptable or potentially acceptable. The term shall not include businesses who submitted unacceptable proposals.

R4.12.040.14.2 *Purposes of Discussions.* Discussions are held to:

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

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

R4.12.040.14.3 *Conduct of Discussions.* Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. The Purchasing Agent should establish procedures and schedules for conducting discussions. If during discussions there is a need for any substantial clarification of or change in the Request for Proposals, the Request shall be amended to incorporate such clarification or change. Auction techniques (revealing one offeror's price to another) and disclosure of any information derived from competing proposals are prohibited. Any substantial oral clarification of a proposal shall be reduced to writing by the offeror.

R4.12.040.14.4 *Best and Final Offers.* The Purchasing Agent may elect to solicit best and final offers. When he so elects, the Purchasing Agent shall establish a common date and time for the submission of best and final offers. Best and final offers shall be submitted only once; provided, however, the Purchasing Agent may make a written determination that it is in Metro's best interest to conduct additional discussions or change Metro's requirements and require another submission of best and final offers. Otherwise, no discussion of or changes in the best and final offers shall be allowed prior to award. Offerors shall also be informed that if they do not submit a notice of withdrawal or another best and final offer, their immediate previous offer will be construed as their best and final offer.

R4.12.040.15 Mistakes in Proposals.

R4.12.040.15.1 *Modification or Withdrawal of Proposals.* Proposals may be modified or withdrawn as provided in Section R4.12.040.10 (Modification or Withdrawal of Proposals).

R4.12.040.15.2 *Confirmation of Proposal.* When the Purchasing Agent knows or has reason to conclude before award that a mistake has been made, such officer should request the offeror to confirm the proposal. If the offeror alleges mistake, the proposal may be corrected or withdrawn during any discussions that are held or if the conditions set forth in Subsections R4.12.040.15.3 through R4.12.040.15.5 of this Section are met.

R4.12.040.15.3 *Mistakes Discovered After Receipt of Proposals but Before Award.* This Subsection sets forth procedures to be applied in four situations in which mistakes in proposals are discovered after receipt of proposals but before award.

a) During Discussions; Prior to Best and Final Offers. Once discussions are commenced with any offeror or after best and final offers are requested, any offeror may freely correct any mistake by modifying or withdrawing the proposal until the time and date set for receipt of best and final offers.

b) Minor Informalities. Minor informalities, unless otherwise corrected by an offeror as provided in this Section, shall be treated as they are under competitive sealed bidding.

See Section R4.12.030.13.4 (a) (Mistakes in Bids, Mistakes Discovered After Opening but

Before Award).

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

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

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

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

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

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

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

R4.12.040.15.4 *Mistakes Discovered After Award.* Mistakes shall not be corrected after award of the contract except where the Purchasing Agent finds it would be unconscionable not to allow the mistake to be corrected.

R4.12.040.15.5 *Determinations Required.* When a proposal is corrected or withdrawn, or correction or withdrawal is denied under Subsections R4.12.040.15 (b), R4.12.040.15 (b), R4.12.040.15(c), or R4.12.040.15.4 a written determination shall be prepared showing that relief was granted or denied in accordance with these regulations. The Purchasing Agent shall prepare the determination.

R4.12.040.16 Award.

Under Section 4.12.040.A (Competitive Sealed Proposals, Award) of the Metro Procurement Code and this Section, the Purchasing Agent shall make a written determination showing the basis on which the award was found to be most advantageous to Metro based on the factors set forth in the Request for Proposals.

R4.12.040.17 Publicizing Awards.

After a contract is entered into, notice of award shall be posted in the Procurement Officer's office or public information office of such officer's agency. When the award exceeds $25,000, each unsuccessful offeror shall be notified of the award.

Regulation 4.12.050 -- Small Purchases

R4.12.050.01 Application.

In accordance with Section 4.12.050 (Small Purchases) of the Metro Procurement Code, this Regulation is established for procurements of less than $1,000 for supplies, services, and construction.

R4.12.050.02 Authority to Make Small Purchases.

R4.12.050.02.1 *Amount.* The Purchasing Agent may use this Regulation if the procurement is to be less than $1,000 for supplies, services, or construction. If these methods are not used, the other methods of source selection provided in Section 4.12 (Methods of Source Selection) of the Metro Procurement Code shall apply.

R4.12.050.02.2 *Delegation.* Delegation of authority to make small purchases is provided for under Regulation 4.12 (Delegation of Procurement Authority) of these Regulations.

R4.12.050.02.3 *Existing Metro Contract for Item.* Supplies, services, or construction items that may be obtained under current Metro contracts shall be procured under such agreements in accordance with the terms of such contracts. Further, supplies, services, or construction items available from Metro stocks shall not be procured under this Regulation. Operational procedures and contract terms may provide for waivers or exceptions to this Subsection.

R4.12.050.02.4 *Available from One Business Only*. If the supply, service, or construction item is available from only one business, the sole source procurement method set forth in Regulation 4.16.60 (Sole Source Procurement) of these regulations shall be used even if the procurement is a small purchase as specified in Subsection R4.12.050.02.1 of this Section.

R4.12.050.02.5 *Division of Requirements.* Procurement requirements shall not be artificially divided to avoid using the other source selection methods set forth in Section 4.12 (Methods of Source Selection) of the Metro Procurement Code.

R4.12.050.03 Purchases of Supplies, Services or Construction of Less than $1,000 in Value (Replaces Regulation R3-204.03, competition for Small Purchases of Supplies, Services, or Construction Between $400 and $1,000)

R4.12.050.03.1 *Procedure.* No more than one quote is required on small purchases of less than $1,000 in value.

R4.12.050.03.2 *Records.* A log of the purchases made by each buyer under R4.12.050.3 shall be maintained by the Division of Purchases. The log shall document for each such purchase the requisition number and date; the date, number, and amount of the purchase order; and the supplier to which the order was issued. This requirement applies to buyers in the Division of Purchases as well as to buyers and departments with delegated purchasing authority.

Regulation 4.12.060 -- Sole Source Procurement

R4.12.060.01 Application.

The provisions of this Regulation apply to all sole source procurements unless emergency conditions exist as defined in Regulation 4.12.070 (Emergency Procurements) of these Regulations.

R4.12.060.02 Conditions for Use of Sole Source Procurement.

Sole source procurement is not permissible unless a requirement is available from only a single supplier. A requirement for a particular proprietary item does not justify a sole source procurement if there is more than one potential bidder or offeror for that item. The following are examples of circumstances that could necessitate sole source procurement:

a) where the compatibility of equipment, accessories, or replacement parts is the paramount consideration;

b) where a sole supplier's item is needed for trial use or testing;

c) where a sole supplier's item is to be procured for resale;

d) where public utility services are to be procured.

The determination as to whether a procurement shall be made as a sole source shall be made by the Purchasing Agent, or designee of such officer. Such determination and the basis therefore shall be in writing. Such officer may specify the application of such determination and the duration of its effectiveness. In cases of reasonable doubt, competition should be solicited. Any request by a Using Agency that a procurement be restricted to one potential contractor shall be accompanied by a full justification as to why no other source will be suitable or acceptable to meet the need.

R4.12.060.03 Negotiation in Sole Source Procurement.

The Purchasing Agent shall conduct negotiations, as appropriate, as to price, delivery, and terms.

R4.12.060.04 Record of Sole Source Procurement.

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

a) each contractor's name;

b) the amount and type of each contract;

c) a listing of the supplies, services, or construction procured under each contract; and

d) the identification number of each contract file.

R4.12.060.05 Items Approved for Sole Source Procurement.

Purchases of the items listed below are hereby approved for sole source procurement and are exempted from the requirement that each sole source purchase must be documented in a record of such procurements as required by Section R4.12.060.04 (Record of Sole Source Procurement) of these Regulations.

a) brand-name pharmaceuticals and medical and scientific equipment and supplies which are only available from a single source, or can be purchased at a fair and reasonable price by Metro through "group purchasing programs" as defined in Tenn. Code Annotated 11-1202(3); -• 68

b) maintenance of photocopiers, high technology equipment and systems (in addition to that already referenced), and software which is practicably available from only one source;

c) products and services which are sold by revenue-generating departments or agencies on a retail basis and are practicably available from only one source;

d) meeting and exhibition services which are provided by revenue-generating Metro facilities on a cost-reimbursable basis, with or without mark-up, and are practicably available from a single source;

e) additional items as listed below:

i. Postage, box rents, etc., from US Postal Service;
ii. Freight, express and trucking charges (if not included as an item of expense on a purchase order);
iii. Automobile licenses, emission testing, and titles;
iv. Messenger and delivery services;
v. Transportation of prisoners and/or witnesses;
vi. Radio, TV, Cable and Fiber services (as directed by Purchasing Agent pursuant to purchasing procedures);
vii. Publication of formal and legal notices;
viii. Subscriptions to newspapers, periodicals, and online services;
ix. Tax, law or other services on a subscription basis;

x. Memberships, registration fees, and tuition;
xi. Host and hostess expenses for light refreshments and beverages;
xii. Advertising (newspapers, periodicals, and other advertising venues);
xiii. Utility services (electric, water, gas, telephone, thermal transfer, etc.);
xiv. Subsistence and care of persons (other than food service contracts);
xv. Ambulance, clinic, and hospital services;
xvi. Funeral and burial services; and
xvii. Reference books, manuals, pamphlets, and instruction guides.
xviii. Speaking engagements, musical and entertainment acts (as directed by Purchasing Agent pursuant to purchasing procedures);
xix. Meeting and exhibition space for Metro hosted events.

Regulation 4.12.070 -- Emergency Procurements

R4.12.070.01 Application.

The provisions of this Regulation apply to every procurement made under emergency conditions that will not permit other source selection methods to be used.

R4.12.070.02 Definition of Emergency Conditions.

An emergency condition is a situation which creates a threat to public health, welfare, or safety such as may arise by reason of floods, natural disasters, epidemics, threat of spread of disease, riots, acts of terrorism, equipment failures, or such other reason as may be proclaimed by the Mayor, the Procurement Standards Board, or the Purchasing Agent in consultation with the Chair of the Procurement Standards Board. The existence of such condition creates an immediate and serious need for supplies, services, or construction that cannot be met through normal procurement methods and the lack of which would seriously threaten:

a) the functioning of Metro government;

b) the preservation or protection of property; or

c) the health or safety of any person.

R4.12.070.03 Scope of Emergency Procurements.

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

R4.12.070.04 Authority to Make Emergency Procurements.

Any Metro agency may make emergency procurements of up to the department's delegated purchasing approval level (which can be found on Metro's Procurement website) when an emergency condition arises and the need cannot be met through normal procurement methods, provided that whenever practical, approval by a Buyer in the Division of Purchases or the Purchasing Agent shall be obtained prior to the procurement. Prior to all such emergency procurements the Purchasing Agent or his designee shall approve the procurement. On weekends and holidays, such approval must be obtained from departmental management (department/agency head or deputy(ies) prior to the procurement. A report shall be generated for the Purchasing Agent before the end of the next Metro business day.

All purchases shall first be attempted through the contracted supplier(s). If such an attempt fails, when practicable, at least two, and preferably three, competitive telephone quotations shall be obtained, and the required supplies and/or services shall be procured from the lowest responsive and responsible bidder.

In all cases, the agency requiring the emergency procurement shall forward an emergency purchase requisition to the Purchasing Agent by not later than the next Metro business day. The emergency purchase requisition shall document the conditions prompting the emergency procurement, the authorizations received, and the status of the action; a copy of the delivery record shall be attached to the requisition.

R4.12.070.05 Source Selection Methods.

R4.12.070.05.1 *General.* The procedure used shall be selected to assure that the required supplies, services, or construction items are procured in time to meet the emergency. Given this constraint, such competition as is practicable shall be obtained.

R4.12.070.05.2 *After Unsuccessful Competitive Sealed Bidding.* Competitive sealed bidding is unsuccessful when bids received pursuant to an Invitation to Bid are unreasonable, noncompetitive, or the low bid exceeds available funds as certified by the appropriate fiscal officer, and time or other circumstances will not permit the delay required to resolicit competitive sealed bids. If emergency conditions exist after an unsuccessful attempt to use competitive sealed bidding, an emergency procurement may be made.

R4.12.070.06 Determination and Record of Emergency Procurement.

R4.12.070.06.1 *Determination.* The Purchasing Agent or the responsible department/agency official shall make a written determination stating the basis for an emergency procurement and for the selection of the particular contractor. Such determination by the department/agency official shall be sent promptly to the Purchasing Agent.

R4.12.070.06.2 *Record.* A record of each emergency procurement shall be made as soon as practicable and shall set forth:

a) the contractor's name;

b) the amount and type of the contract;

c) a listing of the supplies, services, or construction procured under the contract; and

d) the identification number of the contract file.

R4.12.080.01 Utilities.

The Purchasing Agent shall purchase or contract for the services delineated in Section 3-207 in such manner as he deems to be in the best interests of the Metropolitan Government. If the service is available on a sole source basis, the Purchasing Agent shall purchase it in accordance with Regulation R4.12.060 - Sole Source Procurement. If the service is available on a competitive basis, the Purchasing Agent shall seek maximum practicable competition.

Regulation 4.12.090 -- Purchases through State or Other Governments

R4.12.090.01 Purchases through the State Department of General Services.

As authorized by law and Section 4.12.090(A), the Purchasing Agent may ask the State Commissioner of General Services to purchase or contract for goods and services required by Metro.

R4.12.090.02 Purchases from State Contracts.

As authorized by law and Section 4.12.090(B), the Purchasing Agent may purchase goods or services, without public advertisement or competitive bidding, under the provisions of contracts or

price agreements entered into by the State Department of General Services.

The Purchasing Agent should consider factors that include the required delivery date for the product or service, the price of the item on state contract, and the actual or opportunity costs to Metro to process the needed item(s) through a competitive procurement process.

R4.12.090.03 Purchases of Secondhand Articles from Government.

As authorized by State law and Section 4.12.090(c), the Purchasing Agent may purchase from any federal, state or local governmental unit or agency secondhand articles or equipment or other materials, supplies, commodities, and equipment, without public advertising.

R4.12.090.04 Purchases for or from Local Government Units.

As authorized by State law and Section 4.12.090(D), the Purchasing Agent may, upon request, purchase supplies, equipment, or services for any municipality, county, utility, or other local government unit. Also as authorized by State law and Section 4.12.090(D), the Purchasing Agent may request other local governments to purchase supplies, equipment, or services for Metro. With regard to the latter, factors that the Purchasing Agent should consider include the required delivery date for the product or service, the price that has or can be established by the other local government, and the actual or opportunity costs to Metro to procure the needed item(s) through a competitive process.

R4.12.090.05 Intergovernmental cooperative purchasing.

As defined in chapter 4.44 Assistance to Small, Disadvantaged, and Service-Disabled Veteran Owned Businesses of the Code, the standards board strives to achieve a fair proportion to be purchased from small and service-disabled veteran owned businesses. Additionally, in chapter 4.46 Equal Business Opportunity Program of the Code, Metro strives to promote full and equal business opportunities for all persons doing business with the Metropolitan Government by increasing purchases from minority and women owned businesses.

To effectuate the achievement of these programs, the procurement standards board limits the participation in intergovernmental cooperative purchasing agreements to that of supplies and products that do not include services unless the purchasing agent, after consultation with the Director of Finance, determines that such cooperative purchasing is in the best interests of Metro.

Regulation 4.12.095 -- Privatization Contracts

R4.12.095.01 Privatization Contracts.

No contract which provides for privatizing governmental services shall become effective unless it complies with Metropolitan Code Section 4.12.095.

Regulation 4.12.100 -- Cancellation of Solicitations; Rejection of Bids or Proposals

R4.12.100.01 Scope of this Regulation.

The provision of this Regulation shall govern the cancellation of any solicitations whether issued by Metro under competitive sealed bidding, competitive sealed proposals, small purchases, or any other source selection method, and rejection of bids or proposals in whole or in part.

R4.12.100.02 Policy.

Solicitations should only be issued when there is a valid procurement need unless the solicitation

states that it is for informational purposes only. The solicitation shall give the status of funding for the procurement.

Preparing and distributing a solicitation requires the expenditure of Metro time and funds. Businesses likewise incur expense in examining and responding to solicitations. Therefore, although issuance of a solicitation does not compel award of a contract, a solicitation is to be cancelled only when there are cogent and compelling reasons to believe that the cancellation of the solicitation is in Metro's best interest.

R4.12.100.03 Cancellation of Solicitation--Notice.

Each solicitation issued by Metro shall state that the solicitation may be cancelled as provide in this Regulation.

R4.12.100.04 Cancellation of Solicitation; Rejection of All Bids or Proposals.

R4.12.100.04.1 *Prior to Opening.*

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

b) Prior to opening, a solicitation may be cancelled in whole or in part when a buyer, with the Purchasing Agent's approval, determines in writing that such action is in Metro's best interest for reasons including but not limited to:

i) Metro no longer requires the supplies, services, or construction;

ii) Metro no longer can reasonably expect to fund the procurement; or

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

c) When a solicitation is cancelled prior to opening, notice of cancellation shall be sent to all businesses solicited.

d) The notice of cancellation shall:

i) identify the solicitation;

ii) briefly explain the reason for cancellation; and

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

R4.12.100.04.2 *After Opening.*

a) After opening but prior to award, all bids or proposals may be rejected in whole or in part when the Purchasing Agent determines in writing that such action is in Metro's best interest for reasons including but not limited to:

i) the supplies, services, or construction being procured are no longer required;

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

iii) the solicitation did not provide for consideration of all factors of significance to Metro;

iv) prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;

v) all otherwise acceptable bids or proposals received are at clearly unreasonable prices; or

vi) there is reason to believe that the bids or proposals may not have been

independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith.

b) A notice of rejection should be sent to all businesses that submitted bids or proposals, and it shall conform to Subsection R4.12.100.04.1 (d) of this Section.

R4.12.100.04.3 *Documentation.* The reasons for cancellation or rejection shall be made a part of the procurement file and shall be available for public inspection.

R4.12.100.05 Rejection of Individual Bids or Proposals.

R4.12.100.05.1 *General.* This Section applies to rejections of individual bids or proposals in whole or in part.

R4.12.100.05.2 *Notice in Solicitation.* Each solicitation issued by Metro shall provide that any bid or proposal may be rejected in whole or in part when in the best interest of Metro as provided in this Regulation.

R4.12.100.05.3 *Reasons for Rejection.*

a) *Bids.* As used in this Subsection, "bid" means any bid submitted in competitive sealed bidding or in the second phase of multi-step sealed bidding and includes submissions under Regulation 4.12.050 (Small Purchases) if no changes in offers are allowed after submission. Reasons for rejecting a bid include but are not limited to:

i) the business that submitted the bid is non-responsible as determined under Section R4.12.110.02.5 (Written Determination of Non-responsibility Required) of this Chapter;

ii) the bid is not responsive, that is, it does not conform in all material respects to the Invitation for Bids; see Section R4.12.030.14.2 (Bid Evaluation and Award, Responsibility and Responsiveness) of this Chapter; or

iii) the supply, service, or construction item offered in the bid is unacceptable by reason of its failure to meet the requirements of the specifications or permissible alternates or other acceptability criteria set forth in the Invitation for Bids. (See Section R4.12.030.14.3 (Bid Evaluation and Award, Product Acceptability) of this Chapter.)

b) *Proposals.* As used in this Subsection, "proposal" means any offer submitted in response to any solicitation, including an offer under Regulation 4.12.050 (Small Purchases), except a bid as defined in Subsection R4.12.100.05.3 of this Section. Unless the solicitation states otherwise, proposals need not be unconditionally accepted without alteration or correction, and Metro's stated requirements may be revised or clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include but are not limited to:

i) the business that submitted the proposal is non-responsible as determined under Section R4.12.110 (Responsibility of Bidders and Offerors) of Metro Procurement Code;

ii) the proposal ultimately (that is, after any opportunity has passed for altering or clarifying the proposal) fails to meet Metro's announced requirements in some material respect; or

iii) the proposed price is clearly unreasonable;

iv) based on the initial review, the proposal in the judgment of the evaluation committee and the Purchasing Agent has no possibility of being selected.

R4.12.100.05.4 *Notice of Rejection.* Upon request, unsuccessful bidders or offerors shall be advised of the reasons therefore.

R4.12.100.06 "All or None" Bids or Proposals.

Only when provided by the solicitation may a bid or proposal limit acceptance to the entire bid or proposal offering. Otherwise, such bids or proposals shall be deemed to be nonresponsive. If the bid or proposal is properly so limited, Metro shall not reject part of such bid or proposal and award on the remainder.

R4.12.100.07 Disposition of Bids or Proposals.

When bids or proposals are rejected, or a solicitation cancelled after bids or proposals are received, the bids or proposals which have been opened shall be retained in the procurement file, or if unopened, returned to the bidders or offerors upon request, or otherwise disposed of.

Regulation 4.12.110 -- Responsibility

R4.12.110.01 Responsibility--Application.

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

R4.12.110.02 Standards of Responsibility.

R4.12.110.02.1 *Standards.* Factors to be considered in determining whether the standard of responsibility has been met include whether a prospective contractor has:

a) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;

b) a satisfactory record of performance as demonstrated by prior project evaluations conducted by user departments or audits of prior contracts;

c) a satisfactory record of integrity as demonstrated by the absence or existence of a final ruling by a court, or a final finding, citation, or penalty issued by a governmental agency of competent jurisdiction of such company's serious lack of business integrity or business honesty;

d) qualified legally to contract with Metro; and

e) supplied all necessary information in connection with the inquiry concerning responsibility.

R4.12.110.02.2 *Information Pertaining to Responsibility.* The prospective contractor shall supply an affidavit with the bid, proposal, or initial offer certifying compliance with all laws including having the necessary business licenses, payment of all gross receipt taxes, and payment of all personal property taxes. If such contractor fails to supply the affidavit, the bid, proposal or offer shall be determined to be non-responsible. The prospective contractor shall supply additional information requested by the Procurement Officer concerning the responsibility of such contractor. If such contractor fails to supply the requested information, the Procurement Officer shall base the determination of responsibility upon any available information or may find the prospective contractor non-responsible if such failure is unreasonable.

R4.12.110.02.3 Standards for Subcontractors. Prospective contractors shall require all its subcontractors to:

a) comply with all federal, state, and local laws applicable to the Metropolitan Government with regard to discrimination in employment and access to programs in terms equivalent to those in the Contractor's contract with the Metropolitan Government;

b) supply an affidavit prior to entering a subcontract certifying compliance with all laws

including having the necessary business licenses, payment of all gross receipt taxes, and payment of all personal property taxes Contractor shall provide supporting documentation of such compliance upon request from the Metropolitan Government.

As an example, Metropolitan Government could add the following to its contracts: Contractor and Contractor's subcontractors shall not subscribe to any personnel policy which permits or allows for the promotion, demotion, employment, dismissal or laying off of any individual due to race, creed, color, national origin, age, sex, or which is in violation of applicable laws concerning the employment of individuals with disabilities. It is the policy of the Metropolitan Government not to discriminate on the basis of age, race, sex, color, national origin, or disability in its hiring and employment practices, or in admission to, access to, or operation of its programs, services, and activities. With regard to all aspects of this contract, Contractor certifies and warrants that Contractor and all its subcontractors will comply with this policy. No person shall be excluded from participation in, be denied benefits of, be discriminated against in the admission or access to, or be discriminated against in treatment or employment in Metropolitan Government's contracted or subcontracted programs or activities, on the grounds of handicap and/or disability, age, race, color, religion, sex, national origin, or any other classification protected by federal or Tennessee Sate Constitutional or statutory law; nor shall they be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination in the performance of contracts or subcontracts with Metropolitan Government or in the employment practices of Metropolitan Government contractors or subcontractors. Accordingly, all Proposers entering into contracts with Metropolitan Government shall, upon request, be required to show proof of such nondiscrimination by itself and its proposed subcontractors and to post in conspicuous places that are available to all employees and applicants, notices of nondiscrimination and to require its subcontractors to post notices of nondiscrimination in conspicuous places that are available to all employees and applicants.

R4.12.110.03 Ability to Meet Standards

The prospective contractor may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request:

a) evidence that such contractor possesses such necessary items;

b) acceptable plans to subcontract for such necessary items; or

c) a documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items.

R4.12.110.04 Duty Concerning Responsibility.

Before awarding a contract, the Purchasing Agent must be satisfied that the prospective contractor is responsible.

R4.12.110.05 Written Determination of Non-responsibility Required.

If a bidder or offeror who otherwise would have been awarded a contract is found non-responsible, a written determination of Non-responsibility setting forth the basis of the finding shall be prepared by the Purchasing Agent or the head of a Purchasing Agency. A copy of the determination shall be sent promptly to the non-responsible bidder or offeror. The final determination shall be made part of the procurement file.

R4.12.120.01 Prequalification.

R4.12.120.01.1 *General.* Prospective contractors may be prequalified for bidder lists, but distribution of the solicitation shall not be limited to prequalified contractors nor may a prospective contractor be denied award of a contract simply because such contractor was not prequalified. The fact that a prospective contractor has been prequalified does not necessarily represent a finding of responsibility.

R4.12.120.01.2 *Qualified Products Lists.* This Section is not applicable to qualified products lists that are treated in Section R4.16.030.02 (Procedures for the Development of Specifications, Special Additional Procedures) of Chapter 4.16 (Specifications) of these regulations.

Regulation 4.12.130 -- Cost Data or Price Data and Analysis

R4.12.130.01 Scope of Regulation.

This Regulation sets forth the pricing policies that are applicable to contracts of any type and any price adjustments thereunder when cost or pricing data are required to be submitted. The provisions of this Regulation requiring submission of cost or pricing data do not apply to a contract let by competitive sealed bidding (including multi-step bidding) or small purchases. However, cost or pricing data may be required under a contract let by competitive sealed bidding when price adjustments are subsequently made in such a contract and, to this extent, those provisions would apply. See Section R4.12.130.02 (Requirement for Cost or Pricing Data) for when the contractor may be required to submit cost or pricing data.

R4.12.130.02 Requirement for Cost or Pricing Data.

R4.12.130.02.1 *Submission of Cost or Pricing Data.* Except as provided in Subsection R4.12.130.02.2 of this Section, cost or pricing data is required to be submitted in support of a proposal when:

a) any contract expected to exceed $100,000 is to be awarded by competitive sealed proposals, by sole source procurement, by competitive selection, or under R4.08.080.01 (Selection of Architects and Engineers) of these Regulations.

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

c) an emergency procurement is made in excess of $100,000 but such data may be submitted after contract award; or

d) the Purchasing Agent makes a written determination that the circumstances warrant requiring submission of cost or pricing data provided, however, cost or pricing data shall not be required where the contract award is made pursuant to competitive sealed bidding. However, generally cost or pricing data should not be required where the contract or modification is less than $25,000. Moreover, when less than complete cost analysis (for example, analysis of only specific factors) will provide a reasonable pricing result on awards under $100,000 without the submission of complete cost or pricing data, the Purchasing Agent shall request only that data considered adequate to support the limited extent of the cost analysis needed and need not require certification.

R4.12.130.02.2 *Exceptions.* Cost and pricing data need not be submitted or certified:

a) where the contract price is based on:

i) adequate price competition;

ii) established catalogue prices or market prices, except as provided by Section R4.12.130.03.3(c); or

iii) prices set by law or regulation; or

b) when the Purchasing Agent determines in writing to waive the applicable requirement for submission of cost or pricing data under Subsection R4.12.130.02.1 (a), (b), or (c) of this Section in a particular pricing action and the reasons for such waiver are stated in the determination. A copy of such determination shall be kept in the contract file and made available to the public upon request.

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

R4.12.130.03 Meaning of Terms "Adequate Price Competition," "Established catalogue Prices or Market Prices," and "Prices Set by Law or Regulation".

R4.12.130.03.1 *Application.* As used in the exceptions set forth in Section R4.12.130.02.2 (Requirement for Cost or Pricing Data, Exceptions) the terms "adequate price competition," "established catalogue prices or market prices," and "prices set by law or regulations" shall be construed in accordance with the following definitions.

R4.12.130.03.2 *Adequate Price Competition.* Price competition exists if competitive sealed proposals are solicited and at least two responsible offerors independently compete for a contract to be awarded to the responsible offeror submitting the lowest evaluated price by submitting priced offers (or best and final offers) meeting the requirements of the solicitation. If the foregoing conditions are met, price competition shall be presumed to be "adequate" unless the Procurement Officer determines in writing that such competition is not adequate.

R4.12.130.03.3 Established Catalogue Prices or Market Prices.

a) See Section 4.12.010 (Definitions) of Metro Procurement Code for the definition of established catalogue price. (This definition is quoted in Regulation 4.12.010).

b) "Established Market Price" means a current price, established in the usual and ordinary course of trade between buyers and sellers, which can be substantiated from sources which are independent of the manufacturer or supplier and may be an indication of the reasonableness of price.

c) If, despite the existence of an established catalogue price or market price, and after consultation with the prospective contractors, the Procurement Officer considers that such price is not reasonable, cost or pricing data may be requested. Where the reasonableness of the price can be assured by a request for cost or pricing data limited to data pertaining to the differences in the item or services being procured and those listed in the catalogue or market, requests should be so limited.

R4.12.130.03.4 *Prices Set by Law or Regulation.* The price of a supply or service is set by law or regulation if some governmental body establishes the price that the offeror or contractor may charge Metro and other customers.

R4.12.130.04 Submission of Cost or Pricing Data and Certification.

R4.12.130.04.1 *Time and Manner.* When cost or pricing data are required, they shall be submitted to the Purchasing Agent prior to beginning price negotiations at any reasonable time

and in any reasonable manner prescribed by the Purchasing Agent. When the Purchasing Agent requires the offeror or contractor to submit cost or pricing data in support of any proposal, such data shall either be actually submitted or specifically identified in writing.

R4.12.130.04.2 *Obligation to Keep Data Current.* The offeror or contractor is required to keep such submission current until the negotiations are concluded.

R4.12.130.04.3 *Time for Certification.* The offeror or contractor shall certify as soon as practicable after agreement is reached on price that the cost or pricing data submitted are accurate, complete, and current as of a mutually determined date prior to reaching agreement. Certification shall be made using the certificate set forth in Section R4.12.130.05 (Certificate of Current Cost or Pricing Data) of this Regulation.

R4.12.130.04.4 *Refusal to Submit Data.* A refusal by the offeror to supply the required data shall be referred to the Purchasing Agent whose duty shall be to determine in writing whether to disqualify the noncomplying offeror, to defer award pending further investigation or to enter into the contract. A refusal by a contractor to submit the required data to support a price adjustment shall be referred to the Purchasing Agent who shall determine in writing whether to further investigate the price adjustment, not to allow any price adjustment, or to set the amount of the price adjustment, subject to the contractor's rights under Chapter 4.36 (Legal and Contractual Remedies) of the Metro Procurement Code.

R4.12.130.05 Certificate of Current Cost or Pricing Data.

R4.12.130.05.1 *Form of Certificate.* When cost or pricing data must be certified, a certificate substantially as set forth below shall be included in the contract file along with any award documentation required under these regulations. The offeror or contractor shall be required to submit the certificate as soon as practicable after agreement is reached on the contract price or adjustment.

Certificate of Current Cost or Pricing Data.

This is to certify that, to the best of my knowledge and belief, cost or pricing data as defined in Section R4.12.130.4 of the Metro Procurement Regulations submitted, either actually or by specific identification in writing (see Section R4.12.130.04.1) to the Procurement Officer in support of..... *, are accurate, complete, and current as of (date) (month) (year)....." **

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

Firm .....

Name .....

Title .....

Date of Execution ..... ***

(End of Certificate)

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

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

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

R4.12.130.05.2 *Representation as to Accuracy of Cost or Pricing Data.* Although the certificate pertains to "cost or pricing data," it is not to be construed as a representation as to the accuracy of the offeror's or contractor's judgment on the estimated portion of future costs or projections. It does, however, constitute a representation as to the accuracy of the data upon which the offeror's or contractor's judgment is based. A Certificate of Current Cost or Pricing Data shall not substitute for examination and analysis of the offeror's or contractor's proposal.

R4.12.130.05.3 *Inclusion of Notice and Contract Clause.* Whenever it is anticipated that a Certificate of Current Cost or Pricing Data may be required, notice of this requirement shall be included in the solicitation. If such a certificate is required, the contract shall include a clause giving Metro a contract right to a reduction in the price as provided in Section R4.12.130.06 (Defective Cost or Pricing Data).

R4.12.130.05.4 *Exercise of Option.* The exercise of an option at the price established in the initial negotiation in which certified cost or pricing data were used does not require recertification or further submission of data.

R4.12.130.06 Defective Cost or Pricing Data.

R4.12.130.06.1 *Overstated Cost or Pricing Data.* If certified cost or pricing data are subsequently found to have been inaccurate, incomplete, or noncurrent as of the date stated in the certificate, Metro is entitled to an adjustment of the contract price, including profit or fee, to exclude any significant sum by which the price, including profit or fee, was increased because of the defective data. Judgmental errors made in good faith concerning the estimated portions of future costs or projections do not constitute defective data. It is presumed that overstated cost or pricing data increased the contract price in the amount of the defect plus related overhead and profit or fee. Therefore, unless there is a clear indication that the defective data were not used or relied upon; the price should be reduced in such amount. In establishing that the defective data caused an increase in the contract price, the Purchasing Agent is not expected to reconstruct the negotiation by speculating as to what would have been the mental attitudes of the negotiating parties if the correct data had been submitted at the time of agreement on price.

R4.12.130.06.2 *Offsetting Understated Cost or Pricing Data.* In determining the amount of a downward adjustment, the contractor shall be entitled to an offsetting adjustment for any understated cost or pricing data submitted in support of price negotiations for the same pricing action up to the amount of Metro's claim for overstated cost or pricing data arising out of the same pricing action.

R4.12.130.06.3 *Dispute.* If the contractor and the Purchasing Agent cannot agree as to the existence of defective cost or pricing data or amount of adjustment due to defective cost or pricing data, the Purchasing Agent shall set an amount in accordance with Subsections R4.12.130.06.1 and R4.12.130.06.2 of this Section and the contractor may appeal this decision as a contract controversy under Chapter 4.36 (Legal and Contractual Remedies) of the Metro Procurement Code.

R4.12.130.07 Price Analysis Techniques.

Price analysis is used to determine if a price is reasonable and acceptable. It involves an evaluation of the prices for the same or similar items or services. Examples of price analysis criteria include but are not limited to:

a) price submissions of prospective bidders or offerors in the current procurement;

b) prior price quotations and contract prices charged by the bidder, offeror, or contractor;

c) prices published in catalogues or price lists;

d) prices available on the open market; and

e) in-house estimates of cost.

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

R4.12.130.08 Cost Analysis Techniques.

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

a) specific elements of costs;

b) the necessity for certain costs;

c) the reasonableness of amounts estimated for the necessary costs;

d) the reasonableness of allowances for contingencies;

e) the basis used for allocation of indirect costs;

f) the appropriateness of allocations of particular indirect costs to the proposed contract; and

g) the reasonableness of the total cost or price.

R4.12.130.09 Evaluations of Cost or Pricing Data.

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

Regulation 4.12.140 -- Types of Contracts

R4.12.140.01 Scope of Regulation.

This Regulation contains descriptions of types of contracts and limitations as to when they should be utilized by Metro in its procurements.

R4.12.140.02 Prohibition of Cost-Plus-a-Percentage-of-Cost Contracting.

Except for a cost-plus-a-percentage-of-cost contract that is prohibited by Section R4.12.140 (Types of Contracts) of the Metro Procurement Code, the use of any type of contract is permissible.

> ***COMMENTARY:*** *A cost-plus-a-percentage-of-cost contract is one in which, prior to completion of the work, the parties agree that the fee will be a predetermined percentage of the total cost of the work. Thereby, the more the contractor spends, the greater its fee, and the contractor's incentive may therefore be to incur cost at the expense of Metro and not to economize.*

R4.12.140.03 Policy Regarding Selection of Contract Types.

R4.12.140.03.1 *General.* The selection of an appropriate contract type depends on factors such as the nature of the supplies, services, or construction to be procured, the uncertainties which may be involved in contract performance, and the extent to which Metro or the contractor is to assume the risk of the cost of performance of the contract. Contract types differ in the degree of responsibility assumed by the contractor.

The objective when selecting a contract type is to obtain the best value in needed supplies, services, or construction in the time required and at the lowest cost or price to Metro. In order to achieve this objective, the Purchasing Agent, before choosing a contract type, should review those elements of the procurement that directly affect the cost, time, risk, and profit incentives

bearing on the performance.

Among the factors to be considered in selecting any type of contract are:

a) the type and complexity of the supply, service, or construction item being procured:

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

c) the administrative costs to both parties;

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

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

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

g) the urgency of the requirement; and

h) the length of contract performance.

COMMENTARY: *It is self-defeating for Metro to select a type of contract that would place an unreasonable economic risk on the contractor, since such action may tend to jeopardize satisfactory performance of the contract.*

R4.12.140.03.2 *Use of Contract Types Not Herein Described.* The provisions of this Regulation 4.12.140 describe and define the principal contract types. Any other type of contract, except cost-plus-a-percentage-of-cost, may be used provided the Purchasing Agent determines in writing that such use is in Metro's best interest.

COMMENTARY: *The remaining sections of this Regulation are organized in the following manner:*

A) Contracts are first distinguished on the basis of compensation, that is, fixed-price (Section R4.12.140.04) or cost-reimbursement (Section R4.12.140.05). The class of fixed-price contracts includes firm fixed-price contracts and fixed-price contracts with price adjustment. The class of cost-reimbursement contracts includes the cost contract (that is, without fee) and cost-plus-fixed fee.

B) Cost incentive contracts (that is, contracts that provide special incentives to reduce total costs of performance) are treated next. This class of contracts includes fixed-price contracts in which the profit is increased or decreased by a contractually specified formula if total costs are less or more than the specified target. It also includes cost-reimbursement contracts with a cost incentive fee that specifies a formula to increase or decrease the fee if the performance is achieved and costs are less or more than the specified target.

C) Provision is also made for use of performance incentive contracts (Section R4.12.140.07) where rewards or punishments are given if specified performance goals are exceeded or missed in either fixed-price or cost reimbursement contracts.

D) Time and materials contracts are provided for separately with certain restrictions put on their use.

E) Contracts are also classified according to whether a definite or indefinite quantity is specified.

F) Leases are next distinguished and discussed.

G) Finally, options for renewal, extension, and purchase are covered.

R4.12.140.04 Types of Fixed-Price Contracts.

R4.12.040.04.1 *General.* A fixed-price contract places responsibility on the contractor for the delivery of the product or the complete performance of the services or construction in accordance with the contract terms at a price that may be firm or may be subject to contractually specified adjustments. The fixed-price contract is appropriate for use when the extent and type of work necessary to meet Metro's requirements can be reasonably specified and the cost can be reasonably estimated, as is generally the case for construction or standard commercial products. A fixed-price type of contract is the only type of contract that can be used in competitive sealed bidding.

> ***COMMENTARY:*** *Fixed-price contracts are preferred for use in Metro procurements and should be used whenever possible. However, when risks are unknown or not readily measurable in terms of cost, the use of such contracts can result in inflated prices and inadequate competition; poor performance, disputes, and claims when performance proves difficult; or excessive profits when anticipated contingencies do not occur.*

R4.12.140.04.02*Firm Fixed-Price Contract.* A firm fixed-price contract provides a price that is not subject to adjustment because of variations in the contractor's cost of performing the work specified in the contract. It should be used whenever prices that are fair and reasonable to Metro can be established at the outset. Bases upon which firm fixed prices may be established include:

a) adequate price competition for the contract;

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

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

d) use of other adequate means to establish a firm price.

R4.12.140.02.3 *Fixed-Price Contract with Price Adjustment.*

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

i) changes due to rapid and substantial price fluctuations, which can be related to an accepted index (such as contracts for gasoline, heating oils, and dental gold alloy); and

ii) in requirements contracts:

A)when a general price change applicable to all customers occurs;

B)when a general price change alters the base price (such as a change in a manufacturer's published price list or posted price to which a fixed discount is applied pursuant to the contract to determine the contract price).

b) If the contract permits unilateral action by the contractor to bring about the condition under which a price increase may occur, the contract shall reserve to Metro the right to reject the price increase and terminate without cost the future performance of the contract. The contract shall also require that notice of any such price increase shall be given within such time prior to its effective date as is specified in the contract. These restrictions shall not apply to fixed-price cost incentive contracts that are covered in Section R4.12.140.06.4 (Cost Incentive Contracts, Fixed-Price Cost Incentive Contract) and fixed-price performance incentive contracts, which are covered in Section R4.12.140.07

(Performance Incentive Contracts).

COMMENTARY: *Clauses providing for most-favored-customer prices for Metro, that is, the price to Metro will be lowered to the lowest price sales to any other customer made during the contract period, should only be used in the most exceptional circumstances such as emergencies or sole source procurements because they are anticompetitive.*

R4.12.140.05 Types of Cost-Reimbursement Contracts.

R4.12.140.05.1 *General.* The cost-reimbursement type contract provides for payment to the contractor of allowable costs incurred in the performance of the contract as determined in accordance with [Chapter 7 (Cost Principles) of these regulations and as provided in the contract.] This type of contract establishes at the outset an estimated cost for the performance of the contract and a dollar ceiling which the contractor may not exceed (except at its own expense) without prior approval or subsequent ratification by the Procurement Officer and, in addition, may provide for payment of a fee. The contractor agrees to perform as specified in the contract until the contract is completed or until the costs reach the specified ceiling, whichever first occurs.

This type of contract is appropriate when the uncertainties involved in contract performance are of such magnitude that the cost of contract performance cannot be estimated with sufficient certainty to realize economy by use of any type of fixed-price contract. In addition, a cost-reimbursement contract necessitates appropriate monitoring by Metro personnel during performance so as to give reasonable assurance that the objectives of the contract are being met. It is particularly suitable for research, development, and study type contracts.

R4.12.140.05.2 *Determination Prior to Use.* A cost-reimbursement type contract may be used only when the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer determines in writing that:

a) such a contract is likely to be less costly to Metro than any other type or that it is impracticable to obtain otherwise the supplies, services, or construction;

b) the proposed contractor's accounting system will permit timely development of all necessary cost data in the form required by the specific contract type contemplated; and

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

R4.12.140.05.3 *Cost Contract.* A cost contract provides that the contractor will be reimbursed for allowable costs incurred in performing the contract but will not receive a fee.

R4.12.140.05.4 *Cost-Plus-Fixed Fee Contract.* This is a cost-reimbursement type contract that provides for payment to the contractor of an agreed fixed fee in addition to reimbursement of allowable incurred costs. The fee is established at the time of contract award and does not vary whether or not the actual cost of contract performance is greater or less than the initial estimated cost established for such work. Thus, the fee is fixed but not the contract amount because the final contract amount will depend on the allowable costs reimbursed. The fee is subject to adjustment only if the contract is modified to provide for an increase or decrease in the scope of work specified in the contract. The cost-plus-fixed-fee contract can be either a Completion Form or Term Form.

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

b) The Term Form is one which describes the scope of work to be done in general terms and which obligates the contractor to devote a specified level of effort for stated period of time. Under this form, the fixed fee is payable at the termination of the agreed period of

time upon certification that the contractor has exerted the level of effort specified in the contract in performing the work called for, and that such performance is considered satisfactory by Metro.

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

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

R4.12.140.06 Cost Incentive Contracts.

R4.12.140.06.1 *General.* A cost incentive type of contract provides for the reimbursement to the contractor of allowable costs incurred up to the ceiling amount and establishes a formula whereby the contractor is rewarded for performing at less than target cost (that is, the parties' agreed best estimate of the cost of performing the contract) or is penalized if it exceeds target cost. The profit or fee under such a contract will vary inversely with the actual, allowable costs of performance and consequently is dependent on how effectively the contractor controls cost in the performance of the contract.

R4.12.140.06.2 *Fixed-Price Cost Incentive Contract.* In a fixed-price cost incentive contract, the parties establish at the outset a target cost, a target profit (that is, the profit which will be paid if the actual cost of performance equals the target cost), a formula which provides a percentage increase or decrease of the target profit depending on whether the actual cost of performance is less than or exceeds the target cost, and a ceiling price. After performance of the contract, the actual cost of performance is arrived at based on the total incurred allowable costs as determined in accordance with established procedure and as provided in the contract. The final contract price is then established in accordance with the formula using the actual cost of performance. The final contract price may not exceed the ceiling price. The contractor is obligated to complete performance of the contract, and, if actual costs exceed the ceiling price, the contractor suffers a loss.

> ***COMMENTARY:*** *The fixed-price cost incentive contract serves three objectives. It permits the establishment of a firm ceiling price for performance of the contract that takes into account uncertainties and contingencies in the cost of performance. It motivates the contractor economically since cost is in inverse relation to profit; the lower the cost, the higher the profit. It provides a flexible pricing mechanism for establishing a cost sharing responsibility between Metro and contractor depending on the nature of the supplies, services, or construction being procured, the length of the contract performance, and the performance risks involved.*

R4.12.140.06.3 *Cost-Reimbursement Contract with Cost Incentive Fee.* In a cost-reimbursement contract with cost incentive fee, the parties establish at the outset a target cost; a target fee; a formula for increase or decrease of fee depending on whether actual cost of performance is less than or exceeds the target cost, with maximum and minimum fee limitations; and a cost ceiling which represents the maximum amount which Metro is obligated to reimburse the contractor. The contractor continues performance until the work is complete or costs reach the ceiling specified in the contract, including any modification thereof, whichever first occurs. After performance is complete or costs reach the ceiling, the total incurred, allowable costs reimbursed in accordance with established procedure and as provided in the contract are applied to the formula to establish the incentive fee payable to the contractor.

> ***COMMENTARY:*** *This type of contract gives the contractor a stronger incentive to efficiently manage the contract than a cost-plus-fixed-fee contract provides.*

R4.12.140.06.4 *Determinations Required.* Prior to entering into any cost incentive contract, the Purchasing Agent shall make the written determination [required by Section 3-502 (Approval of

Accounting System) of the Metro Procurement Code.] Prior to entering any cost-reimbursement contract with cost incentive fee, the Procurement Officer shall make the written determination required by Section R4.12.140.05.2 (Types of Cost-Reimbursement Contracts, Determination Prior to Use).

R4.12.140.07 Performance Incentive Contracts.

In a performance incentive contract, the parties establish at the outset a pricing basis for the contract, performance goals, and a formula that varies the profit or the fee if the specified performance goals are exceeded or not met. For example, early completion may entitle the contractor to a bonus while late completion may entitle Metro to a price decrease.

R4.12.140.08 Time and Materials Contracts; Labor Hour Contracts.

R4.12.140.08.1 *Time and Materials Contracts.* Time and materials contracts provide an agreed basis for payment for materials supplied and labor performed. such contracts shall, to the extent possible, contain a stated ceiling or an estimate that shall not be exceeded without prior Metro approval and shall be entered into only after the Procurement Officer determines in writing that:

a) Metro personnel have been assigned to closely monitor the performance of the work; and

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

R4.12.140.08.2 *Labor Hour Contracts.* A labor hour contract provides only for the payment of labor performed. It shall contain the same ceiling as provided in Subsection R4.12.140.08.1 of this Section. Prior to the award of such contract, the Purchasing Agent shall make the determinations as required in Subsection R4.12.140.08.1 of this Section.

R4.12.140.09 Definite Quantity and Indefinite Quantity Contracts.

R4.12.140.09.1 *Definite Quantity.* A definite quantity contract is a fixed-price contract that provides for delivery of a specified quantity of supplies or services either at specified times or when ordered.

R4.12.140.09.2 *Indefinite Quantity.* An indefinite quantity contract is a contract for an indefinite amount of supplies or services to be furnished at specified times, or as ordered, that establishes unit prices of a fixed-price type. Generally, an approximate quantity or the best information available as to quantity is stated in the solicitation. The contract may provide a minimum quantity Metro is obligated to order and may also provide for a maximum quantity provision that limits Metro's obligation to order.

R4.12.140.09.3 *Requirements Contracts.* A requirements contract is an indefinite quantity contract for supplies or services that obligates Metro to order all the actual requirements of designated Using Agencies during a specified period of time. The obligation to order Metro's actual requirements is limited by the applicable provisions of the Tennessee Code Annotated. For the protection of Metro and the contractor, requirements contracts shall include the following:

a) a provision that requires Metro and any other users named in the solicitation to order their actual requirements of the supplies or services covered. However, Metro may reserve in the solicitation and in the resulting contract the right to take bids separately if a particular quantity requirement arises which exceeds Metro's normal requirements or an amount specified in the contract;

b) two exemptions from ordering under the contract when:

i) the Purchasing Agent approves a finding that the supply or service available under the contract will not meet a nonrecurring, special need of Metro; or

ii) supplies are produced or services are performed incidental to Metro's own programs, such as industries of correctional institutions that can satisfy the need.

R4.12.140.10 Leases.

R4.12.140.10.1 *Description.* A lease is a contract for the use of equipment or other supplies or real property under which title will not pass to Metro at anytime. Section R4.12.140.11 (Option Provisions) applies to a lease with purchase option where title may pass to Metro.

R4.12.140.10.2 *Use.* A lease may be entered into provided:

a) it is in the best interest of Metro;

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

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

R4.12.140.11 Option Provisions.

R4.12.140.11.1 *Contract Provisions.* When a contract is to contain an option for renewal, extension, or purchase, notice of such provision shall be included in the solicitation. Exercise of the option is always at Metro's discretion only, and not subject to agreement or acceptance by the contractor.

R4.12.140.11.2 *Exercise of Option.* Before exercising any option for renewal, extension, or purchase, the Procurement Officer should attempt to ascertain whether a competitive procurement is practical, in terms of pertinent competitive and cost factors, and would be more advantageous to Metro than renewal or extension of the existing contract.

R4.12.140.11.3 *Lease with Purchase Option.* A purchase option in a lease may be exercised only if the lease containing the purchase option was awarded under competitive sealed bidding or competitive sealed proposals, or the leased supply or facility is the only supply or facility that can meet Metro's requirements, as determined in writing by the Purchasing Agent. Before exercising such an option, the Purchasing Agent shall:

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

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

COMMENTARY: *Careful evaluation of the economics of leasing versus buying is required prior to a decision to award a lease or lease-purchase contract. Such evaluation examines the comparative costs of leasing and the costs of outright purchase and maintenance, projected as total costs for the estimated use of the item, and the consideration of other pertinent factors such as continuing need and functional obsolescence or inefficiencies which could result from technological advancements.*

Regulation 4.12.150 -- Multiple Source Contracting

R4.12.150.01 Incremental Award.

R4.12.150.01.1 *General.* An incremental award is an award of portions of a definite quantity requirement to more than one contractor. Each portion is for a definite quantity and the sum of the portions is the total definite quantity required. An incremental award may be used only when awards to more than one bidder or offeror for different amounts of the same item are necessary to obtain the total quantity or the required delivery.

R4.12.150.01.2 *Intent to Use.* If an incremental award is anticipated prior to issuing a solicitation,

Metro shall reserve the right to make such an award and the criteria for award shall be stated in the solicitation.

R4.12.150.01.3 *Determination Required.* The Purchasing Agent shall make a written determination setting forth the reasons for the incremental award, which shall be made a part of the procurement file.

R4.12.150.02 Multiple Award.

R4.12.150.02.1 *General.* A multiple award is an award of an indefinite quantity contract for one or more similar supplies or services to more than one bidder or offeror when Metro is obligated to order all of its actual requirements for the specified supplies or services from those contractors. The obligation to order Metro's actual requirements is limited by the provisions of TCA 47-2-306.

R4.12.150.02.2 *Limitations on Use.* A multiple award may be made when award to two or more bidders or offerors for similar products is necessary for adequate delivery, service, or product compatibility. Any multiple awards shall be made in accordance with the provisions of Regulation 4.12.030 (Competitive Sealed Bidding), Regulation 4.12.040 (Competitive Sealed Proposals), Regulation 4.12.050 (Small Purchases), and Regulation 4.12.070 (Emergency Procurements), as applicable. Multiple awards shall not be made when a single award will meet Metro's needs without sacrifice of economy or service. Awards shall not be made for the purpose of dividing the business, making available product or supplier selection to allow for user preference unrelated to utility or economy, or avoiding the resolution of tie bids. Any such awards shall be limited to the least number of suppliers necessary to meet the valid requirements of Using Agencies.

R4.12.150.02.3 *Contract and Solicitations Provisions.* All eligible users of the contract shall be named in the solicitations, and it shall be mandatory that the actual requirements of such users that can be met under the contract be obtained in accordance with the contract, provided, that:

a) Metro shall reserve the right to take bids separately if a particular quantity requirements arises which exceeds its normal requirement or an amount specified in the contract;

b) Metro shall reserve the right to take bids separately if the Purchasing Agent approves a finding that the supply or service available under the contract will not meet a nonrecurring special need of Metro; and

c) the contract shall allow Metro to procure supplies produced, or services performed, incidental to Metro's own programs, such as industries of correctional institutions, when such supplies or services satisfy the need.

R4.12.150.02.4 *Intent to Use.* If a multiple award is anticipated prior to issuing solicitations, Metro shall reserve the right to make such an award and the criteria for award shall be stated in the solicitation.

R4.12.150.02.5 *Determination Required.* The Purchasing Agent shall make a written determination setting forth the reasons for a multiple award, which shall be made a part of the procurement life.

> ***COMMENTARY:*** *Within these regulations, purchase arrangements which establish more than one source of supply are either multiple or progressive award contracts. It is recognized that such contracts have been variously referred to as "open-end contracts," "term contracts," "blanket contracts," "blanket orders," "serial awards," "progressive awards," and "purchase agreements." Competitive sealed bidding is the conventional procurement method for establishing such contracts, although competitive sealed proposals, small purchase procedures, and emergency procurements may be used if appropriate as determined in accordance with Regulation 4.12.040, Regulation 4.12.050, or Regulation 4.12.060 respectively. Similar analysis and care is called for prior to exercising a lease option to purchase, particularly with respect to protecting the principles of open competition and preventing the acquisition of outmoded equipment.*

The question of leasing versus buying involves policy matters important to the budget function as well as to procurement, and the budget and procurement entities need to collaborate in establishing criteria or guidelines applicable to lease and lease-purchase.

Regulation 4.12.160 -- Multi-Year Contracts

R4.12.160.01 Multi-Term Contracts - General.

R4.12.160.01.1 *General.* A multi-term contract is appropriate when it is in Metro's best interest to obtain uninterrupted services extending over more than one fiscal period, where the performance of such services involves high start-up costs, or where a changeover of service contractors involves high phase-in/phase-out costs during a transition period. The multi-term method of contracting is also appropriate when special production of definite quantities of supplies for more than one fiscal period is necessary to best meet Metro needs but funds are available only for the initial fiscal period. Special production refers to production for contract performance that requires alteration in the contractor's facilities or operations involving high start-up costs. The contractual obligation of both parties in each fiscal period succeeding the first is subject to the appropriation and availability of funds therefore. The contract shall provide that, in the event that funds are not available for any succeeding fiscal period, the remainder of such contract shall be cancelled and the contract shall be reimbursed the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies delivered or services performed under the contract.

R4.12.160.01.2 *Objective.* The objective of the multi-term contract is to promote economy and efficiency in procurement by obtaining the benefits of sustained volume production and consequent low prices, and by increasing competitive participation in procurements which involve special production with consequent high start-up costs and in the procurement of services which involve high start-up costs or high phase-in/phase-out costs during changeover of service contractors.

R4.12.160.01.3 *Multi-Term Contract Regulation Inapplicable.* This Regulation 4.12.160 (Multi-Term Contracts) applies only to contracts for supplies or services described in Subsection R4.12.160.01.1 of this Section and does not apply to any other contract including, but not limited to, contracts for construction and leases (including leases of real property).

R4.12.160.02 Conditions for Use of Multi-Term Contracts.

A multi-term contract may be used when it is determined by the Purchasing Agent that:

a) special production of definite quantities or the furnishing of long-term services are required to meet Metro needs; and

b) a multi-term contract will serve Metro' best interests by encouraging effective completion or otherwise promoting economies in Metro procurement. The following factors are among those relevant to such a determination:

i) firms which are not willing or able to complete because of high start-up costs or capital investment in facility expansion will be encouraged to participate in the competition when they are assured of recouping such costs during the period of contract performance;

ii) lower production costs because of larger quantity or service requirements, and substantial continuity of production or performance over a longer period of time, can be expected to result in lower unit prices;

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

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

COMMENTARY: *One example of a situation that may be suitable for a multi-year*

contract is a trash removal contract where the contractor would have to buy trucks and other equipment solely to meet the Metro's requirements but such equipment would have a useful life in excess of one year.

R4.12.160.03 Multi-Term Contract Procedure.

R4.12.160.03.1 *Solicitation.* The solicitation shall state:

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

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

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

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

e) whether bidders or offerors may submit prices for:

i) the first fiscal period only;

ii) the entire time of performance only; or

iii) both the first fiscal period and the entire time of performance;

f) that a multi-term contract may be awarded and how award will be determined including, if prices for the first fiscal period and entire time of performance are submitted, how such prices will be compared; and

g) that, in the event of cancellation as provided in Subsection R4.12.160.03.1(c) of this Section, the contractor will be reimbursed the unamortized, reasonably incurred, nonrecurring costs.

R4.12.160.03.2 *Award.* Award shall be made as stated in the solicitation and permitted under the source selection method utilized. Care should be taken when evaluating multi-term prices against prices for the first fiscal period that award on the basis of prices for the first period does not permit the successful bidder or offeror to "buy in", that is, give such bidder or offeror an undue competitive advantage in subsequent procurements.

R4.12.160.03.3 Cancellation.

a) "Cancellation," as used in multi-term contracting, means the cancellation of the total requirements for the remaining portion of the contract because funds were not appropriated or otherwise made available. The contract for the first fiscal period shall not be cancelled. Cancellation results when the Purchasing Agent:

i) notifies the contractor of non-availability of funds for contract performance for any fiscal period subsequent to the first; or

ii) fails to notify the contractor by the date set forth in the contract, unless the parties agree to extend such date, that funds are available for performance of the succeeding fiscal period and funds that may be used for the contract have been appropriated or otherwise made available.

b) These provisions on cancellation of multi-term contracts do not limit Metro's rights or the contractor's rights under any termination clause of the contract if the contract is terminated pursuant to that clause rather than cancelled as provided in this Subsection.

Regulation 4.12.170 -- Inspections

R4.12.170.01 Inspection of Plant or Site.

Circumstances under which Metro may perform inspections include, but are not limited to, inspections of the contractor's plant or site in order to determine:

a) whether the standards set forth in Section 4.12.110.02 (Standards of Responsibility) have been met or are capable of being met; and

b) if the contract is being performed in accordance with its terms.

R4.12.170.02 Access to Plant or Place of Business.

Metro may enter a contractor's or subcontractor's plant or place of business to:

a) inspect supplies or services for acceptance by Metro pursuant to the terms of a contract;

b) audit cost or pricing data or audit the books and records of any contractor or subcontractor pursuant to Section 4.12.180 (Right to Audit Records) of the Metro Procurement Code which is quoted in Regulation 4.12.180 (Audits); and

c) investigate in connection with an action to debar or suspend a person from consideration for award of contracts pursuant to Section 4.36.020 (Authority to Debar or Suspend) of the Metro Procurement Code.

R4.12.170.03 Inspection and Testing of Supplies and Services.

R4.12.170.03.1 *Solicitation and Contractual Provisions.* Metro contracts may provide that Metro may inspect supplies and services at the contractor or subcontractor's facility and perform tests to determine whether they conform to solicitation requirements, or, after award, to contract requirements, and are therefore acceptable. Such inspections and tests shall be conducted in accordance with the terms of the solicitation and contract.

R4.12.170.03.2 *Procedures for Trial Use and Testing.* The Purchasing Agent may establish operational procedures governing the testing and trial use of equipment, materials, and other supplies by any Metro agency, and the application of resulting information and data to specifications or procurements.

R4.12.170.04 Conduct of Inspections.

R4.12.170.04.1 *Inspectors.* Inspections or tests shall be performed so as not to unduly delay the work of the contractor or subcontractor. No inspector other than the Purchasing Agent may change any provision of the specifications or the contract without written authorization of the

Purchasing Agent. The presence or absence of an inspector shall not relieve the contractor or subcontractor from any requirements of the contract.

R4.12.170.04.2 *Location.* When an inspection is made in the plant or place of business of a contractor or subcontractor, such contractor or subcontractor shall provide without charge all reasonable facilities and assistance for the safety and convenience of the person performing the inspection or testing.

R4.12.170.04.3 *Time.* Inspection or testing of supplies and services performed at the plant or

place of business of any contractor or subcontractor shall be performed at reasonable times.

R4.12.170.05 Inspection of Construction Projects.

On-site inspection of construction shall be performed in accordance with the terms of the contract.

Regulation 4.12.180 -- Audit

R4.12.180.01 Right to Audit Records.

Pursuant to Section 4.12.180 (Right to Audit Records) of the Metro Procurement Code, Metro may, at reasonable times and places, audit the books and records of a contractor, prospective contractor, subcontractor, or prospective subcontractor that are related to:

a) the cost or pricing data submitted under Section 4.12.130 (Cost or Pricing Data) of the Metro Procurement Code; and

b) a Metro contract, including subcontracts, other than a firm fixed-price contract, awarded pursuant to the following Metro Procurement Code Sections:

i) Section 4.12.030 (Competitive Sealed Proposals);

ii) Section 4.12.040 (Sole Source Procurement);

iii) Section 4.12.050 (Emergency Procurements);

iv) Section 4.12.060 (Competitive Selection Procedures for Services Specified in Section 4.08.080)

R4.12.180.02 Auditors; Audit Reports.

Audits requested under this Subpart shall be performed by the Division of Audit. An audit report shall be prepared in accordance with Section R4.12.180.04 (Cost or Pricing Data Audit Report) or Section R4.12.180.06 (Contract Audit Report). Such report shall be made available to the party audited upon request.

R4.12.180.03 Cost or Pricing Data Audit.

R4.12.180.03.1 *General.* The Purchasing Agent may require an audit of cost or pricing data that has been submitted under Regulation R4.120.130 (Cost Data or Price Data and Analysis).

R4.12.180.03.2 *Conditions for an Audit.* An audit should be required when in respect to the contractor, prospective contractor, subcontractor, or prospective subcontractor, there is:

a) a question as to the adequacy of accounting policies or cost systems;

b) a substantial change in the methods or levels of operation;

c) previous unfavorable experience indicating doubtful reliability of estimating, accounting, or purchasing methods;

d) a lack of cost experience due to the procurement of a new supply or service; or

e) other evidence that an audit is in Metro's best interests as determined by the Purchasing Agent, or such officer's designee.

R4.12.180.04 Cost or Pricing Data Audit Report.

When the Chief Procurement Officer, the head of a Purchasing Agency, or such officer's designee requires an audit under Section R4.12.180.03 (Cost or Pricing Data Audit), the auditor shall submit a written report to the officer by an agreed upon date.

COMMENTARY: *Subject to final determination by Metro's auditor, the report should contain the following in respect to the contractor, prospective contractor, subcontractor, or prospective subcontractor:*

A) a description of the original proposal and all submissions of cost or pricing data;

B) an explanation of the basis and the method used in preparing the proposal;

C) a statement identifying any cost or pricing data not submitted but examined by the auditor which has a significant effect on the proposed cost or price;

D) a description of any deficiency in the cost or pricing data submitted and an explanation of its effect on the proposal;

E) a statement summarizing those major points where there is a disagreement as to the cost or pricing data submitted; and

F) a statement identifying any information obtained from other sources.

R4.12.180.05 Contract Audit.

R4.12.180.05.1 *Types of Contracts Audited.* Under the authority of Section R4.12.180.1 (Statutory Authority to Audit) the type of contract under which books and records should be audited is that in which price is based on costs or is subject to adjustment based on costs, or that in which auditing would be appropriate to assure satisfactory performance, such as a time and materials contract.

COMMENTARY: *It should be noted that Metro may conduct an audit of the books and records of a contractor under a fixed-price contract related to any change order or contract modification when cost or pricing data were required to be submitted under the authority of Section R4.12.180.04 (Cost or Pricing Data Audit Report) of this Regulation.*

R4.12.180.05.2 *Conditions for an Audit.* The requirement of a contract audit may be warranted when a question arises in connection with any one of the following:

a) the financial conditions, integrity, and reliability of the contractor or subcontractor;

b) any prior audit experience;

c) the adequacy of the contractor's or subcontractor's accounting system;

d) the number or nature of invoices or reimbursement vouchers submitted by the contractor or subcontractor for payment;

e) the use of federal assistance funds;

f) the fluctuation of market prices affecting the contract;

g) contractor’s compliance with the affidavit of nondiscrimination; or

h) any other situation when the Purchasing Agent finds that such an audit is necessary for the protection of Metro's interest.

The scope of the audit may be limited by the Purchasing Agent.

R4.12.180.06 Contract Audit Report.

Where the Purchasing Agent, or such officer's designee requires a contract audit under Section R4.12.180.05 (Contract Audit), the auditor shall submit a written report to the officer by an agreed upon date.

COMMENTARY: *The scope of the report will depend on the scope of the audit ordered. However, the report should contain specific reference to the terms of the contract to which the*

audited data relate and a statement of the degree to which the auditor believes the audited data evidence compliance with those terms.

R4.12.180.07 Retention of Books and Records.

R4.12.180.07.1 *Relating to Cost and Pricing Data.* Any contractor who receives a contract, change order, or contract modification for which cost or pricing data is required under Section 4.12.130 (Cost or Pricing Data) of the Metro Procurement Code 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. See Section 4.12.180(A) (Right to Audit Records, Audit of Cost or Pricing Data) of the Metro Procurement Code.

R4.12.180.07.2 *Relating to Metro Contracts.* Books and records that relate to a Metro contract, including subcontracts, other than a firm fixed-price contract, awarded under any method set forth in Section R4.12.180.01 (Statutory Authority to Audit) shall be maintained:

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

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

(See Section 4.12.180(B) (Right to Audit Records, Contract Audit) of the Metro Procurement Code.)

Regulation 4.12.190 -- Anticompetitive Practices Among Bidders or Offerors

R4.12.190.01 Anticompetitive Practices.

For the purposes of this Regulation, an anticompetitive practice is a practice among bidders or offerors that reduces or eliminates competition or restrains trade. An anticompetitive practice can result from an agreement or understanding among competitors to restrain trade such as submitting collusive bids or proposals, or result from illicit business actions that have the effect of restraining trade, such as controlling the resale price of products or an improper collective refusal to bid. Indications of suspected anticompetitive practices include, but are not limited to, identical bids or proposals, rotated low bids or proposals, sharing of the business, "tie-in" sales, resale price maintenance, and group boycotts. [See Section R4.12.190.5 (Other Anticompetitive Practices).]

COMMENTARY: *Bidders and offerors are prohibited by federal and some states' law from collectively responding to a solicitation in a manner that controls directly or indirectly the price of a supply, service, or construction item sought. This prohibition may extend generally to such actions as establishing any of the following: minimum or maximum prices; uniform credit terms; uniform discounts; uniform costs and mark-ups; uniform trade-in allowances; specified price differentials between varying grades of the same product; price ranges; price scales or price calculation formulas; and minimum fee schedules.*

R4.12.190.02 Independent Price Determination.

Every solicitation shall provide that by submitting a bid or offer, the bidder or offeror certifies that the price submitted was independently arrived at without collusion.

R4.12.190.03 Detection of Anticompetitive Practices.

In order to assist in ascertaining whether or not an anticompetitive practice may have occurred or may be occurring, the Purchasing Agent should be alert and sensitive to conditions of the market

place and will often find it necessary to study past procurements including, as appropriate, the following:

a) a study of the bidding history of a supply, service, or construction item over a period of time sufficient to determine any significant bidding patterns or changes;

b) a review of similar Metro contract awards over a period of time; or

c) consultation with outside sources of information, such as bidders or offerors who have competed for similar Metro business in the past but who are no longer competing for such business.

COMMENTARY: *Guidance on the detection of collusive bidding may be found in Government Purchasing and the Antitrust Laws at pages 21-24 (National Association of Attorneys General and National Association of State Purchasing Officials, May 1977).*

R4.12.190.04 Identical Bidding and Price Fixing.

The term "identical bidding" means the submission by bidders or offerors of the same total price or the same price on a particular line item. The submission of identical bids may or may not signify the existence of collusion. In some instances, price controls imposed by State or federal governments result in the submission of identical bids. Identical bids for supplies are more likely to occur in the absence of collusion if:

a) the supply is a commodity with a well-established market price or a brand name with a "suggested retail price;"

b) the quantity being purchased is small in relation to the supplier's total sales;

c) early delivery is required; or

d) transportation expenses are low relative to total costs.

In seeking to determine whether collusion has taken place, the Procurement Officer should view the identical bids against present and past pricing policies of the bidders or offerors, the structure of the industry involved including comparisons of prices f.o.b. shipping point and f.o.b. destination, and the nature of the supply, service, or construction involved, such as whether it is a basis chemical or metal. Identical bids may also result from resale price maintenance agreements [which are described in Section R4.12.190.05.3 (Other Anticompetitive Practices, Resale Price Maintenance).] Any other attempt by bidders or offerors to fix prices should also be reported.

COMMENTARY: *Executive Order No. 10,936,26 Fed. Reg. 3555 (1961) directs the US Attorney General to invite state and local governments to report tie bids.*

R4.12.190.05 Other Anticompetitive Practices.

R4.12.190.05.1 *General.* The practices which are described in Subsection R4.12.190.05.2 through subsection R4.12.190.06 of this Section and which the Purchasing Agent suspects might be anticompetitive shall be reported in accordance with Section R3-701.06 (Reporting Suspected Anticompetitive Practices).

R4.12.190.05.2 *Rotated Low Bids or Proposals.* Rotated low bids or proposals result where all bidders or offerors participating in the collusive scheme submit bids and by agreement alternate being the lowest bidder or offeror. To aid in determining whether rotation may be occurring, the Purchasing Agent must review past similar procurements in which the same bidders or offerors have participated.

R4.12.190.05.3 *Resale Price Maintenance.* The practice of resale price maintenance consists of an agreement between a manufacturer and a distributor or a dealer to fix the resale price of a supply. The Purchasing Agent should consider the possibility that such an agreement exists where prices offered adhere to an established pattern, such as a published price schedule, and

when identical bidding occurs.

R4.12.190.05.4 *Sharing of the Business.* Sharing of the business occurs where potential bidders or offerors allocate business among themselves based on the customers or the territory involved. Thus, Metro might discover that a potential bidder or offeror is not participating in Metro procurement because a particular Metro agency, or a particular territory has not been allocated to such bidder or offeror by the producer or manufacturer.

R4.12.190.05.5 *"Tie-in" Sales.* "Tie-in" sales are those in which a bidder or offeror attempts to sell one supply or service only upon the condition that the Procurement Officer purchase another particular supply or service.

R4.12.190.05.6 *Group Boycott.* A group boycott results from an agreement between competitors not to deal with another competitor or not to participate in, for instance, Metro procurement until the boycotting competitors' conditions are met by the boycotted competitor or Metro. The boycott of a competitor by other competitors may have an effect on the market structure or price of a supply, service, or construction item needed by Metro.

R4.12.190.06 Reporting Suspected Anticompetitive Practices.

The Purchasing Agent, in consultation with the Director of Law, shall develop procedures, including forms, for reporting suspected anticompetitive practices. If the Purchasing Agent suspects that an anticompetitive practice has occurred or may be occurring, he shall follow these procedures.

> ***COMMENTARY:*** *Protecting the principles of competition in public procurement is a difficult and often complex task. A program of communication and cooperation between procurement and legal offices, institutionalized to the extent feasible, is essential in combating anticompetitive practices. A requirement that Procurement Officers report incidents involving suspected anticompetitive practices is not likely to be effective unless the appropriate legal officers are prepared to investigate those incidents.*

This need for cooperation has been discussed in Government Purchasing and the Antitrust Laws. The information and recommendations in this publication provide guidance for an effective program. This publication is available through the Council of State Governments, Iron Works Pike, Lexington, Kentucky 40511.

Regulation 4.12.200 -- Retention of Procurement Records

R4.12.200.01 Retention of Procurement Records.

All procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the standards board, the public records commission, and the director of law. All procurement records shall be retained for a period of at least three years; however, a longer retention period may be established.

Regulation 4.12.210 -- Reports of Procurement Action

R4.12.210.01 Workload and Performance Reports.

The Purchasing Agent shall make regular performance reports. Such reports shall be similar in content to the following.

FOR: Director of Finance

FROM: Purchasing Agent

SUBJECT: Workload and Performance Report for [Month, Year]

1. Operating Statistics	[Month]	YTD
"BOB" Requests from SDBs Processed		
No. of Bids Requested by "BOB" Requesters		
No. of New "BOB" Recipients Added		
Vendor Applications Processed		
Requisitions Proc'd by Div. of Purchases		
Requisitions Proc'd by Storeroom		
Requests for Quotes Processed		
ITBs, excl. construction, Issued		
Construction ITBs Issued		
RFPs Issued		
Architect/Engineer Selections Processed		
Sole Source Approvals		
Emergency Purchase Approvals		
Purchase Orders Issued by Div. of Purchases		
Purchase Orders Issued by Delegees		
Notices of Correction Processed		
New Contracts Implemented		
Protest Hearings Conducted		
Construction Change Auths. Processed		
Formal Change Orders Processed		
Receiving Reports Processed		
Departmental Vouchers Processed		

2. Productivity Improvement [Description of one or more actions that are planned, being taken, or completed.]

R4.12.210.02 Assistance to Small and Disadvantaged Businesses.

The Purchasing Agent shall make regular reports regarding assistance to small and disadvantaged businesses. Effective July 1, 1994, such reports shall be similar in content and format to the following:

ASSISTANCE TO SMALL AND DISADVANTAGED BUSINESS

REPORTING PERIOD OF _____

Bidders List

Total Number of New Additions to List

Number of New SDB Additions to List

Percentage of New Additions That Are SDBs

Listing of New SDB Additions to List, with the Commodity/Service Categories for Each

Total Number of Firms on List

Number of SDBs on List

Percentage of Total List Represented by SDBs

Small, Open Market Purchases (Less than $1,000)

Total Number of Phone Quotes, RFQs, and ITBs

Number of Such Solicitations on Which at Least One SDB was Solicited

Percentage of Such Solicitations on Which at Least One SDB was Solicited

Total Number of Purchase Orders (P.O.s) Issued

Number of P.O.s Issued to SDBs

Percentage of Total P.O.s Issued to SDBs

Total Dollar Value of P.O.s Issued

Dollar Value of P.O.s Issued to SDBs

Percentage of Total P.O. Dollar Value Issued to SDBs

Listing of SDB Vendors Receiving POs, with

Dollar Value and Commodity/Service of

Each PO, and Total Dollar Value to Each SDB

Large, Open Market Purchases ($1,000 and Greater)

Total Number of ITBs and RFPs in this Category

Number of Such Solicitations on Which at Least One SDB was Solicited

Percentage of Such Solicitations on Which at Least One SDB was Solicited

Large, Open Market Purchases ($1,000 and Greater) (Continued)

Total Number of P.O.s Issued

Number of P.O.s Issued to SDBs

Percentage of Total P.O.s Issued to SDBs

Total Dollar Value of P.O.s Issued

Dollar Value of P.O.s Issued to SDBs

Percentage of Total P.O. Dollar Value Issued to SDBs

Listing of SDB Vendors Receiving P.O.s, with Dollar Value and Commodity/Service of Each P.O. and Total Dollar Value to Each SDB

Term Contracts

Total Number of Contract ITBs and RFPs

Number of Contract Solicitations on Which at Least One SDB was Solicited

Percentage of Contract Solicitations on Which at Least One SDB was Solicited

Total Number of New Contracts Established

Number of New Contracts Established with SDBs

Percentage of New Contracts Established with SDBs

Listing of SDB Vendors Awarded Contracts, with Commodity/Service and Estimated Value of Each Such Contract, if Known

Sub-Contracts

Total Number of Sub-Contracts Awarded

Number of Sub-Contracts Awarded to SDBs

Percentage of Total Sub-Contracts Awarded to SDBs

Listing of SDB Vendors Awarded Sub-Contracts, showing the Contract Number, Prime Contractor, the Subcontract Classification, and the Dollar Value for Each Sub-Contract Awarded to an SDB

NOTE: The above data will be broken out further by category of small and disadvantaged business (small; disadvantaged; minority, etc.)

CHAPTER 4.16 -- SPECIFICATIONS

Regulation 4.16 -- Definitions

R4.16.010 Definitions.

R4.16.010.01 *Brand Name Specification* means a specification limited to one or more items by manufacturers' names or catalogue numbers.

R4.16.010.02 *Brand Name or Equal Specification means* a specification that uses one or more manufacturer's names or catalogue numbers to describe the standard of quality, performance, and other characteristics needed to meet Metro requirements, and which provides for the submission of equivalent products.

R4.16.010.03 *Qualified Products List* means an approved list of supplies, services, or construction items described by model or catalogue numbers, which, prior to competitive solicitation, the Purchasing Agent has determined will meet the applicable specification requirements.

R4.16.010.04 *Specification* means any description of the physical, functional, or performance characteristics, or of the nature of a supply, service, or construction item. A specification includes, as appropriate, requirements for inspecting, testing, or preparing a supply, service, or construction item for delivery. Unless the context requires otherwise, the terms "specification" and "purchase description" are used interchangeably throughout the Metro Procurement Regulations.

R4.16.010.05 *Specification for a Common or General Use Item* means a specification that has been developed and approved for repeated use in procurements in accordance with the provisions of Section R4.16.030.02.2 (Procedures for the Development of Specifications, Special Additional Procedures).

Regulation 4.16.020 -- General Provisions

R4.16.020.01 General Purpose and Policies.

R4.16.020.01.1 *Purpose.* The purpose of a specification is to serve as a basis for obtaining a supply, service, or construction item adequate and suitable for Metro's needs in a cost-effective manner, taking into account, to the extent practicable, the costs of ownership and operation as well as initial acquisition costs. It is the policy of Metro that specifications permit maximum practicable competition consistent with this purpose. Specifications shall be drafted with the objective of clearly describing Metro's requirements.

R4.16.020.01.2 *Use of Functional or Performance Descriptions.* Specifications shall, to the extent practicable, emphasize functional or performance criteria while limiting design or other detailed physical descriptions to those necessary to meet Metro's needs. To facilitate the use of such criteria, Using Agencies shall endeavor to include as a part of their purchase requisitions the principal functional or performance needs to be met. It is recognized, however, that the preference for use of functional or performance specifications is primarily applicable to the procurement of supplies and services. Such preference is often not practicable in construction, apart from the procurement of supply type items for a construction project.

R4.16.020.01.3 *Preference for Commercially Available Products.* It is the general policy of Metro to procure standard commercial products wherever practicable. In developing specifications, accepted commercial standards shall be used and unique requirements shall be avoided, to the extent practicable.

R4.16.020.01.4 Availability of Documents.

Specifications and any written determination or other documents generated or used in the development of a specification shall be available for public inspection to the extent authorized by TCA Section 10-7-503.

Regulation 4.16.030 -- Purchasing Agent's Responsibilities

R4.16.030.01 Authority to Prepare Specifications.

R4.16.030.01.1 *Statutory Authority of the Purchasing Agent.* The Purchasing Agent is authorized in Section 4-202 [Duties of the Purchasing Agent] of Metro Procurement Code to prepare specifications subject to the authority granted Purchasing Agencies in Section 4.16.040 (Exempted Items) of the Metro Procurement Code. (See Regulation 4.16.040 (Exempted Items)). The Purchasing Agent may delegate in writing the authority to prepare and utilize specifications to Using Agencies for any type of supplies, services, or construction provided such delegations may be revoked by the Purchasing Agent.

R4.16.030.01.2 Authority to Contract for Preparation of Specifications.

a) When a written determination is made by Purchasing Agent or the head of a Using Agency authorized to prepare such specifications that there will be no substantial conflict of interest involved and it is otherwise in Metro's best interest, a contract to prepare specifications for Metro use in procurement of supplies or services may be entered into provided such officer retains the authority to finally approve the specifications.

b) Whenever it is determined under Section 4.20.010 (Responsibility for Selection of Methods of Construction Contracting Management) of the Metro Procurement Code that the appropriate method of construction contracting management involves allowing specifications to be prepared by other than Metro personnel, a contract may be entered into for such preparation provided the Purchasing Agent retains the authority to finally approve the specifications.

R4.16.030.01.3 *Small Purchase and Emergency Authority.* If a specification for general or common use or a qualified products list exists for an item to be procured under Regulation 4.12.50 (Small Purchases), it shall be used except as otherwise provided by the Purchasing Agent. If no such specification exists, Using Agencies are hereby granted the authority to prepare specifications for use in such purchases. In an emergency under Regulation 4.12.070 (Emergency Procurements), any necessary specifications may be utilized by the Using Agency without regard to the provisions of this Chapter.

R4.16.030.02 Procedures for the Development of Specifications.

R4.16.030.02.01*Provisions of General Application.*

a) Application of Section. This Section applies to all persons who may prepare a specification for Metro use, including the Purchasing Agent, the head of a Using Agency, and the designees of such officers.

b) Specification of Alternates May Be Included. A specification may provide alternate descriptions of supplies, services, or construction items where two or more design, functional, or performance criteria will satisfactorily meet Metro's requirements.

c) Contractual Terms Not to be Included. To the extent feasible, a specification shall not include any solicitation or contract term or condition such as a requirement for time or place or bid opening, time of delivery, payment, liquidated damages, or qualification of bidders.

d) Use of Existing Specifications. If a specification for a common or general use item has been developed in accordance with Subsection R4.16.030.02.2 (a) of this Section or a qualified products list has been developed in accordance with Subsection R4.16.030.02.2 (a) of this Section for a particular supply, service, or construction item, it shall be used unless the Purchasing Agent makes a written determination that its use is not in Metro's best interest and that another specification shall be used.

COMMENTARY: *The Purchasing Agent should provide for the periodic review of specifications*

to determine whether any existing specification needs revision, or a new specification is needed to reflect changes in:

A) the state-of-the-art;

B) the characteristics of the available supplies, services, or construction items; or

C) needs of the Using Agency.

R4.16.030.02.2 *Special Additional Procedures.*

a) Specifications for Common or General Use Items.

i) *Preparation and Utilization.* A specification for common or general use shall, to the extent practicable, be prepared to be utilized when:

A) a supply, service, or construction item is used in common by several Using Agencies or used repeatedly by one Using Agency, and the characteristics of the supply, service, or construction items, as commercially produced or provided, remain relatively stable while the frequency or volume of procurements is significant;

B) Metro's recurring needs require uniquely designed or specially produced items; or

C) the Purchasing Agent, or the head of a Using Agency authorized to prepare such specifications finds it to be in Metro's best interest.

In the event a Using Agency requests the preparation of a specification for a common or general use item, the Purchasing Agent shall prepare such a specification if such officer determines the conditions in Subsections R4.16.030.02.2 (a) (i) (A), (B), or (C) of this Section have been met.

ii) *Comments on the Draft.* The Purchasing Agent or the head of a Purchasing or Using Agency preparing a specification for a common or general use item shall provide the Using Agencies, and a reasonable number of manufacturers and supplies as such officer deems appropriate, an opportunity to comment on the draft specification.

iii) *Final Approval.* Final approval of a proposed specification for a common or general use item shall be given only by the Purchasing Agent or by the head of a Using Agency authorized to give such approval.

iv) *Revision.* Revisions to specifications for common or general use items which do not change the technical elements of the specifications but which are necessary for clarification may be made upon approval of the Purchasing Agent or the head of a Using Agency authorized to approve such specifications. Interim revisions for a particular procurement that change the technical elements of the specification may be made by the Purchasing Agent or the head of a Using Agency authorized to approve such a specification. All other revisions shall be made in accordance with Subsections R4.16.030.02.2 (a) (ii) and R4.16.030.02.2 (a) (iii) of this Section.

v) *Cancellation.* A specification for a common or general use item may be cancelled by the Purchasing Agent, or by the head of a Using Agency authorized to give final approval to such specifications.

b) Brand Name or Equal Specification.

i) *Applicability of this Subsection.* This subsection R4.16.030.02.2 (b) shall apply whenever brand names are used in specifications except as provided in Subsection R4.16.030.02.2(c) of this Section.

ii) *Use.* Brand name or equal specifications may be prepared to be used when the Purchasing Agent determines in writing that:

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

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

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

D) use of brand name or equal specification is in Metro's best interest.

COMMENTARY: *It is not intended that the determination required for use of a brand name or equal specification will impose an undue administrative burden. Such determination may be made on appropriate forms; for categories of supplies, services, or construction items; or, in appropriate circumstances, for an entire procurement action even though a number of different items are being procured.*

iii) *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.

iv) *Required Characteristics.* Unless the Purchasing Agent or the head of a Purchasing or Using Agency authorized to finally approve specifications determines that the essential characteristics of the brand names included in the specifications are commonly known in the industry or trade, brand name or equal specifications shall include a description of the particular design, functional, or performance characteristics which are required.

v) *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 it not intended to limit or restrict competition.

c) Brand Name Specification.

i) *Use.* Since use of a brand name specification is restrictive, it may be used only when the Purchasing Agent makes a written determination that only the identified brand name item or items will satisfy Metro's needs.

ii) *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 competition is practicable. If only one source can supply the requirement, the procurement shall be made under Regulation 4.12.060 (Sole Source Procurement).

iii) *Reports.* Buyers and the heads of Using Agencies with delegated, open market purchasing authority shall submit monthly reports to the Purchasing Agent stating any brand name specification used; the number of suppliers solicited; the identify of these suppliers; the supplier awarded the contract; and the contract price.

d) Qualified Products List.

i) *Use.* A qualified products list may be developed with the approval of the Purchasing Agent, or the head of a Using Agency authorized to develop qualified products lists, when testing or examination of the supplies or construction items prior to issuance of the solicitation is desirable or necessary in order to best satisfy Metro requirements.

ii) *Comments, Final Approval, Revisions, and Cancellation.* Comments on, final approval of, and revisions to the proposed criteria and methodology for establishing and maintaining a qualified products list, and the cancellation thereof, shall follow the procedures of Subsections R4.16.030.02.2(a)(ii) through R4.16.030.02.2(a)(v) of this Section applicable to specifications for common or general use items.

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

iv) *Testing Data.* Inclusion on a qualified products list shall be based on results of tests or examinations conducted in accordance with prior published requirements.

Regulation 4.16.040 -- Exempted Items

R4.16.040.01 Authority to Prepare Specifications for Exempted Items.

The Purchasing Agent may prepare specifications for Professional Services procured pursuant to Section (Authority to Procure Professional Services) or for supplies, services, or construction exempted pursuant to the Charter.

Regulation 4.16.060 -- Requirement of Non-restrictiveness

R4.16.050.01 Non-restrictiveness Requirement.

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

Regulation 4.16.070 -- Specifications Prepared by Other Than Metro Personnel

R4.16.070.01 Specifications Prepared by Other Than Metro Personnel.

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

Regulation 4.16.080 -- Energy Efficiency Standards and Life Cycle Costs

R4.16.080.01 Requirement.

The Purchasing Agent shall include in Metro's solicitations any energy efficiency standards and life cycle costing methodologies which are included by Metro in its procurement policies.

CHAPTER 4.20 -- PROCUREMENT OF CONSTRUCTION SERVICES

Regulation 4.20.010 -- Management of Construction Contracting

R4.20.010.01 Application of Regulation and General Policy.

R4.20.010.01.1 *Application.* This regulation contains provisions applicable to the selection of the appropriate method of implementing construction contracts, that is, the contracting method and configuration that will most likely result in timely, economical, and otherwise successful completion of the construction project. The options available include but are not limited to single prime contractor, multiple prime contractors, design-build or turnkey, construction manager, sequential design and construction, and phased design and construction.

R4.20.010.01.2 *Flexibility.* The Purchasing Agent shall have sufficient flexibility in formulating the project delivery approach in a particular project to fulfill Metro's needs. In each instance, consideration commensurate with the project's size and importance should be given to all the appropriate and effective means of obtaining both the design and construction of the project.

R4.20.010.01.3 *Selecting the Method of Construction Contracting.* In selecting the construction contracting method, the Purchasing Agent should consider the results achieved on similar projects in the past and the methods used. Consideration should be given to all appropriate and effective methods and their comparative advantages and disadvantages and how they might be adapted or combined to meet Metro's requirements.

R4.20.010.01.4 *Use of Regulation.* This regulation is intended to guide Metro personnel in selecting the appropriate contracting method. It is not intended to create any third party rights.

R4.20.010.02 Criteria for Selecting Construction Contracting Methods.

R4.20.010.02.1 *Metro Requirements.* Before choosing the construction contracting method to use, the Purchasing Agent must make a careful assessment of requirements the project must satisfy and those other characteristics that would be desirable. In addition to those factors set forth in Subsections R4.20.010.02.2 and R4.20.010.02.3 of this Section, some of the factors to be considered are:

a) when the project must be ready to be occupied.

b) the type of project -- for example, housing offices, or heavy or specialized construction, such as highway or water treatment.

c) the extent to which Metro's requirements and the ways in which they are to be met are known.

d) the location of the project and whether a contractor's site may be used; and

e) the size, scope, complexity, and economics of the project.

R4.20.010.02.2 Metro Resources.

a) The amount and type of financing available for the project is relevant to the selection of the appropriate construction contracting method including:

i) whether the budget is fixed or flexible;

ii) what the source of funding is, for example, general or special appropriation, federal assistance monies, public improvement bonds, or general obligation bonds.

b) Proper selection of a contracting method depends on a realistic appraisal of the availability, qualifications, and experience Metro personnel can bring to the project and, of equal importance, how much time such personnel can devote to the project.

c) When examining resources for a proposed construction project, the availability of outside consultants may be considered. Such consultants may be able to handle tasks and supply valuable expertise otherwise unavailable to Metro.

R4.20.010.02.3 *Prospective Contractors.* Choice of the proper construction contracting method entails not only the internal examination described in Subsections R4.20.010.02.1 and R4.20.010.02.2 of this Section, but must also take into account the characteristics, experience, and availability of the contractors who can work on the project. The design firms Metro may contract with to prepare the plans and specifications must be evaluated as a group to determine whether they can efficiently divide the work into specialty packages if multiple contractors are to be used, or design the project in phases appropriate to use of phased design and construction. Prospective construction contractors must also be appraised as a group to determine whether they have the capability and willingness to bid on the construction project as designed and as required by the contracting method chosen. Similarly, if the contracting method involves use of consultants, an evaluation of the availability of qualified consultants should also be made. If the design-build Regulations for Article 5 method or some variation of it is considered, availability of firms capable of both designing and constructing the facility must be ascertained. In respect to all of the potential contractors, it is important to consider the amount of competition current in the market for the particular type of Metro contract and whether a price can be obtained that is fair and reasonable when considered together with the benefit to Metro obtainable from such a contract.

R4.20.010.02.4 *Purchasing Agent Determination.* If other than the single prime contractor method is to be used, the Purchasing Agent shall make a written determination that describes the construction contracting method chosen and sets forth the facts and conclusions that led to the selection of that method. This determination need only support the contracting method selected. It shall, however, demonstrate that Metro's requirements, its resources, and the various groups of potential contractors were all considered in making the decision.

Regulation 4.20.020 -- Bid Security

R4.20.020.01.1 Bid Security: General.

Invitations to Bid on Metro construction contracts shall require the submission of bid security in an amount equal to at least 10% of the bid, at the time the bid is submitted. If a contractor fails to accompany its bid with the required bid security, the bid shall be deemed nonresponsive, in accordance with R4.12.030.14.2 (Bid Evaluation: Responsibility and Responsiveness) of these regulations except as provided by subsection R4.20.020.01.3 (Non-substantial Failure to Comply).

R4.20.020.01.2 Acceptable Bid Security.

Acceptable bid security shall be limited to:

a) an annual or one-time bid bond in a form satisfactory to Metro underwritten by a company with a Best rating of A-X or better and licensed to issue bonds in the State of Tennessee;

b) cash or a bank certified check drawn on a bank chartered in the United States, acceptable to the Purchasing Agent, and payable to the Metropolitan Government.

R4.20.020.01.3 Non-substantial Failure to Comply.

If a bid does not comply with the security requirements set forth in Section 4.20.020, paragraph (C) (Rejection of Bids for Noncompliance with Security Requirements), the bid shall be rejected as nonresponsive, unless the failure to comply is determined by the Purchasing Agent to be Non-

substantial where:

a) only one bid is received, and there is not sufficient time to rebid the contract;

b) the amount of the bid security submitted, though less than the amount required by the Invitation to Bid, is equal to or greater than the difference in the price stated in the next higher acceptable bid and the bidder increases the amount of the bond to the required level within 48 hours of after receipt of written notification by the Purchasing Agent;

c) the bid guarantee becomes inadequate as a result of the correction of the mistake in the bid or bid modification in accordance with R4.12.030.13 (Mistakes in Bids) of these regulations, if the bidder increases the amount of guarantee to required limits within 48 hours after receipt of written notification by the Purchasing Agent.

Regulation 4.20.030 -- Contract Performance and Payment Bonds

R4.20.030.01 Reduction of Bond Amounts for Construction.

The Purchasing Agent may reduce the amount of performance and payment bonds to an amount not less than fifty percent (50%) of the contract price for each bond.

Regulation 4.20.040 -- Bonds Forms

R4.20.040 Bond Forms for Construction.

The form of bonds required by this part shall be in substantially the following form:

PERFORMANCE BOND

_____, as surety ("Surety"), and_____as principal ("Contractor"), enter into, execute this bond ("Performance Bond"), and bind themselves in favor of The Metropolitan Government of Nashville and Davidson County as obligee ("Owner") in the penal sum of ($).

WHEREAS, the Contractor has executed a contract with the Owner ("Construction Contract") for construction of ("Project"); and,

WHEREAS, the Owner has required the Contractor to furnish a Performance Bond containing the terms and conditions set forth herein as a condition to executing the Construction Contract with the Contractor;

NOW THEREFORE, the Surety and the Contractor, both jointly and severally, and for themselves, their heirs, administrators, executors and successors agree:

1. The Construction Contract is hereby incorporated herein and by reference made a part hereof to the same extent and effect as though it were copied verbatim herein. The Surety and the Contractor are bound for the full performance of the Construction Contract including without exception all of its terms and conditions, both express and implied, including, without limitation, any obligation to remedy defects for a specified period after full completion of the Project.

2. If the Contractor is in default of the Construction Contract and the Owner, by written notice to the Contractor and the Surety, declares the Contractor to be in default and terminates the right of the Contractor to proceed, the Surety shall thereupon promptly notify the Owner in writing as to which of the actions permitted to the Surety in Paragraph 3 it will take.

3. Upon the default and termination of the Contractor and notice to the Contractor and Surety as provided in Paragraph 2 above, the Surety shall within 30 days proceed to take one or, at its option, more than one of the following of the courses action:

a) Proceed itself, or through others acting on its behalf, to complete full performance of the Construction Contract including, without limitation, correction

of defective and nonconforming work performed by or on behalf of the Contractor. During such performance by the Surety the Owner shall pay the Surety from its own funds only such sums as would have been due and payable to the Contractor in the absence of default and termination;

b) With the prior agreement and written consent of the Owner, Owner may, at the Surety's cost and expense, obtain bids or proposals from contractors in accordance with applicable procurement laws and regulations, for full performance of the Construction Contract. The Owner shall furnish the Surety a copy of such bids or proposals following opening of same. Unless Surety objects, the Owner shall, in accordance with applicable procurement laws and regulations, award a contract, acceptable to Owner, for fulfillment and completion of the Construction Contract. Any payment or performance bonds required therewith shall not relieve the Surety from any of its obligations under this Performance Bond. Should Surety object to the award, the Surety shall proceed under another permissible course of action. In the event of award, the Owner shall pay the completing contractor from its own funds only such sums as would have been due and payable to the Contractor under the Construction Contract as and when they would have been due and payable to the Contractor in the absence of the default and termination. To the extent that the Owner is obligated to pay the completing contractor sums which would not have been due and payable to the Contractor under the Construction Contract, the Surety shall provide the Owner with such sums in a sufficiently timely manner that the Owner can utilize such sums in making timely payment to the completing contractor; or,

c) Take any and all other acts, if any, mutually agreed upon in writing by the Owner and the Surety.

4. In addition to those duties set forth hereinabove, the Surety shall promptly pay the Owner all loss, costs and expenses resulting from the Contractor's default(s), including, without limitation, fees, expenses and costs for architects, engineers, consultants, testing, surveying and attorneys, liquidated or actual damages, as applicable, for delay in completion of the Project, and fees, expenses and costs incurred at the direction, request, or as a result of the acts or omissions of the Surety.

5. In no event shall the Surety be obligated to the Owner hereunder for sum in excess of the Penal Sum.

6. The Surety waives notice of any changes to the Construction Contract including, without limitation, changes in the contract time, the contract price, or the work to be performed.

7. This Performance Bond is provided by the Surety for the sole and exclusive benefit of the Owner and, if applicable, any dual obligee designated by rider attached hereto together with their heirs, administrators, executors, successors or assigns. No other party, person or entity shall have any rights against the Surety hereunder.

8. Any and all notices to the Surety or the Contractor shall be given by Certified Mail. Return Receipt Requested, to the address set forth for each party below:

Surety:_____

Contractor:_____

Owner: Purchasing Agent

The Metropolitan Government of Nashville and Davidson County

222 Third Avenue North, Suite 601

Nashville, TN 37201

9. Any statutory limitation, which may be contractually superseded to the contrary notwithstanding, any action hereon may be instituted so long as the applicable statute of

limitations has not ***expired***.

CONTRACTOR:_____

Seal

_____ _____

(Typed Name)

By: _____

(Signature)

_____ _____

(Printed Name, title and Address)

_____ _____

(Date of Execution)

PAYMENT BOND

_____ , as surety ("Surety"), and_____, principal ("Contractor"), enter into, execute this bond ("Payment Bond"), and bind themselves in favor of The Metropolitan Government of Nashville and Davidson County as obligee ("Owner") in the penal sum of ($).

WHEREAS, the Contractor has executed a contract with the Owner of even date herewith ("Construction Contract") for construction of ("Project"); and,

WHEREAS, the Owner has required the Contractor to furnish a Payment Bond containing the terms and conditions set forth herein as a condition to executing the Contraction Contract with the Contractor;

NOW, THEREFORE, the Surety and the Contractor, both jointly and severally, and for themselves, their heirs, administrators, executors and successors agree:

1. The Construction Contract is hereby incorporated herein and by reference made a part hereof to the same extent and effect as though it were copied verbatim herein. The Surety and the Contractor are bound for the full performance of Contractor's obligations under the Construction Contract to pay, without limitation, for labor, materials, services and equipment provided in connection with the Construction Contract performance, and including, without limitation, all taxes, licenses, assessments, contributions, penalties and interest thereon, and including, without limitation, any obligation to remedy defects following final completion of the Project;

2. All notices of claims under this Payment Bond shall be given in accordance with the laws of the State of Tennessee. Notices may also be given directly to the Surety, in which case the Surety shall furnish a copy of the notice to the Owner.

3. In no event shall the Surety be obligated hereunder for sums in excess of the Penal Sum.

4. Upon receipt or notice of a claim of a Beneficiary hereunder, the Surety shall promptly, and in no event later than 30 days after receipt or notice of such claim, respond to such claim in writing (furnishing a copy of such response to the owner) by:

a) making payment of all sums not in dispute; and,

b) stating the basis for disputing any sums not paid.

5. Any action on this Payment Bond shall be commenced in the manner and within the

time limits provided by the laws of the State of Tennessee.

6. Any and all notices shall be given by Registered Mail, Return Receipt Requested, or by personal delivery, to the address set forth for each party below:

Surety: _____Contractor:_____

Owner: Purchasing Agent
The Metropolitan Government of Nashville and Davidson County
222 Third Avenue North, Suite 601
Nashville, TN 37201

7. This Payment Bond shall remain in full force and effect for one year following full performance of the Contraction Contract. In the event of default or early termination, this Payment Bond shall remain in full force and effect for one year following the declaration of default or the notice of early termination.

CONTRACTOR:_____

Seal

_____ _____

(Typed Name)

By: _____

(Signature)

_____ _____

(Printed Name, title and Address)

_____ _____

(Date of Execution)

Regulation 4.20.050 -- Contract Clauses

R4.20.050 Contract Clauses and their Administration.

The Purchasing Agent shall include clauses in all Metropolitan Government construction contracts which provide for adjustments in prices, time of performance, or other contract provisions, as appropriate, and which cover the subjects itemized in Section 4.20.050, paragraphs A. "Contract Clauses" and C. "Additional Contract Clauses." Clauses shall be in a form approved by the Department of Law.

CHAPTER 4.24 -- MODIFICATION AND TERMINATION OF CONTRACTS FOR SUPPLIES AND SERVICES

Regulation 4.24.010 -- Contract Clauses and Their Administration

R4.24.010 *Standard Contract Documents.* The standard contract documents provided below are approved for use by the Purchasing Agent. They include the invitation to bid form (form number PF104); the contract form for non-complex (simple) products and services (form number PF105); the purchase order form (form number PF106); and the architectural/engineering services agreement form (form number PF107).

Regulation 4.24.020 -- Contract Modifications and Change Orders

R4.24.020 *Standard Contract Change Order Form.* The standard contract change order form (form number PF108), provided below is approved for use by the Purchasing Agent. The field authorization approval form (PF109) and the change authorization approval form (form number PF110) are also approved for use by the Purchasing Agent.

CHAPTER 4.28 – NON-DISCRIMINATION POLICY

Regulation 4.28.020 Affidavit of Compliance -- Contract Requirements

R4.28.020 *Contract Requirements.* The non-discrimination clause and the non-discrimination covenant affidavit set forth below shall be included in all contracts entered into by the Metropolitan Government. Any contractor who violates this provision is subject to debarment or suspension.

R4.28.020.01 Non-Discrimination Clause for the Invitation to Bid [or Request for Proposals].

Bidder [or Proposer], after being first duly sworn, affirms that by its employment policy, standards, and practices, it does not subscribe to any personnel policy which permits or allows for the promotion, demotion, employment, dismissal, or laying off of any individual due to the individual's race, creed, color, national origin, age or sex and it is not in violation of and will not violate any applicable laws concerning the employment of individuals with disabilities.

R4.28.020.02 Covenant of Non-Discrimination

Submitted bids and proposals shall include a signed affidavit that details their covenant of non-discrimination. Each response to a procurement solicitation must include such signed affidavit in which the offeror commits to nondiscrimination in the procurement process and in the performance of any resulting contract or agreement. Additionally, the covenant will be included with signed contract, prior to execution of the contract by the Purchasing Agent, for those procurement that are not pursuant to an ITB or RFP (for example, sole source or emergency).

The Division of Purchasing shall receive proof of adherence to this affidavit which may include, but not be limited to, the production of documentation verifying good faith efforts including techniques used to maximize the use of available disadvantaged businesses and/or the explanation of the discrepancies in the contractual or proposed use of disadvantaged businesses with the actual availability of such prior to the execution of the contract by the Purchasing Agent.

Such techniques shall include, but not be limited to the submission of a signed good faith effort affidavit detailing disadvantaged businesses sought for participation, the methods used and outcomes; segmenting the totality of the work into two or more smaller portions where feasible and can be accomplished in accordance with common and accepted industry practices relating to the utilization of subcontractors; attendance at pre-solicitation, pre-bid and other conferences and forums that allow interested small and disadvantaged owned firms to market their goods and services; letters and other direct personal contacts; advertising in publications in general circulation, as well as those directed to specific trades or marketed to small and disadvantaged businesses; reasonable solicitation follow-ups; reasonable assistance with supplies, bonding, insurance, or technical matters; adherence to equal opportunity provisions when replacing or adding subcontractors and suppliers; providing a nondiscriminatory work site'; reporting improper conduct; and cooperating with Metro Government in administration and monitoring of compliance with its nondiscrimination policies. The burden of proving nondiscrimination is the responsibility of the proposer/contractor." Again, it shall be verified by DMSBA prior to the execution of the contract by the Purchasing Agent.

CHAPTER 4.32 -- SUPPLY MANAGEMENT

Regulation 4.32.010 -- Supply Management and Disposition

CODE PROVISION:

R4.32.010.1 Definitions of Terms Used in this Article.

1. Supplies means, for purposes of this Article, tangible personal property owned by Metro but not classified as a fixed asset.

2. Nonexpendable Supplies means all tangible supplies having an original acquisition cost of over $1,000 per unit and a probable useful life of more than one year.

3. Expendable Supplies means all tangible supplies other than nonexpendable supplies.

4. Excess Supplies means any supplies other than expendable supplies having a remaining useful life but which are no longer required by the Using Agency in possession of the supplies.

5. Surplus Supplies means any supplies other than expendable supplies no longer having any use to Metro. This includes obsolete supplies, scrap materials, and nonexpendable supplies that have completed their useful life cycle.

R4.32.010.2 General.

Objectives of Metro supply management include preventing waste; continuing utilization of supplies; and obtaining a fair return of value upon disposal of supplies. In order to achieve these objectives, sound inspection, testing, warehousing, and inventory practices are called for, and effective means of transferring and disposing of property must be employed.

R4.32.010.3 Quality Assurance, Inspection, and Testing.

The Purchasing Agent shall take such steps as deemed desirable to ascertain or verify that supplies, services, or construction items procured by such agent conform to specifications. In performing this duty, the Purchasing Agent may establish inspection and testing facilities, employ inspection personnel, enter into arrangements for the joint or cooperative use of laboratories and inspection and testing facilities, and contract with others for inspection or testing work as needed. The Purchasing Agent may delegate authority for inspection and testing to Using Agencies.

R4.32.010.4 Inventory Management.

The Purchasing Agent shall have general supervision of all inventories of tangible personal property, whether warehoused or in use, belonging to Metro or any of its agencies. This responsibility shall not, however, relieve any agency of accountability for tangible personal property and other supplies under its control. All warehouses and similar storage areas shall be inventoried at least annually.

R4.32.010.5 Warehousing and Storage.

The Purchasing Agent shall exercise general supervision of any receiving, storage, and distribution facilities and services maintained and operated by the Office of the Chief Procurement Officer or Using Agencies.

R4.32.010.6 Authority of the Chief Procurement Officer.

No Using Agency shall transfer, sell, trade-in, or otherwise dispose of supplies owned by Metro without written authorization of the Purchasing Agent.

R4.32.015 Report of Supplies.

Using Agencies shall notify the Director of Public Property, on such forms and at such times as that officer may prescribe, of all excess supplies. In so doing, a Using Agency may suggest a dollar value per item or per lot that it desires to receive from any transfer or disposition of such excess supplies, but the suggestion shall not constitute the minimum sale or transfer amount.

R4.32.020 Disposal of Surplus, Obsolete, or Unused Supplies or Equipment.

R4.32.020.01 *Transfer of Excess and Surplus Supplies.* Insofar as feasible and practical, the Purchasing Agent shall transfer excess supplies to other Metro agencies, other units of government or charitable organizations. The price of the supply transferred shall be the fair market price based, where possible, on previous sales of similar products in the open market, or on an appraised value, and shall be one mutually agreed upon between the owning agency and the recipient, and approved by the Purchasing Agent. If agreement cannot be reached, the Purchasing Agent shall establish the price. When a supply is transferred to another Using Agency, another unit of government, or a charitable organization, the recipient shall agree in writing not to transfer title or otherwise dispose of the supply within 12 months without prior approval of the Purchasing Agent.

R4.32.020.02 *Online Auction Terms and Conditions.* The following Online Auction Terms and Conditions are adopted for purposes of disposing of surplus property through auctions conducted on the Internet:

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY
Department of Finance
Division of Public Property
222 Third Avenue North, Suite 650
Nashville, TN 37201

ONLINE AUCTION – Terms and Conditions

• Buyer must be registered, and in good standing with the online vendor.

• Buyer must be of legal age to enter into a contract with the Metropolitan Government.

• All Property is offered for sale “As-is, Where-is” with no warranty or guarantee as to its fitness for any use or purpose offered or implied. Please note that ALL SALES ARE FINAL.

• Every effort will be made to accurately describe the items offered for sale. However, the bidder is cautioned that the items presented are used and may contain defects not immediately detectable. Items are available for public inspection prior to your bidding. Please use your best judgment when bidding.

• The measure of the Metropolitan Government’s liability, in any case where liability of the Government to the Buyer has been established, shall not exceed refund of such portion of the purchase price as the Metropolitan Government may have received.

• The Metropolitan Government of Nashville and Davidson County reserves the right, at its absolute discretion, to reject any and/or all bids considered as not in its best interest. The Government also reserves the right to withdraw an item at any time – including during the bidding process.

• Payment for all merchandise must be made to the Metropolitan Government, in the form of Cash, Cashier’s Check, Money Order, Certified Check, Traveler’s Check, Credit Card, or Debit Card. No other forms of payment, which includes without limitation, personal checks, will be accepted by the Metropolitan Government, unless otherwise agreed to in writing by the Metropolitan Government. Only after full payment has been received may your

merchandise be claimed at the Public Property Warehouse. Items will not be shipped unless otherwise specifically agreed to in writing by the Metropolitan Government.

• Items must be paid for and claimed within ten (10) government working days from the date of the award. If not paid and claimed, the Metropolitan Government reserves the right to auction, in its sole discretion, any such items after the aforementioned ten (10) day period, whereby the Metropolitan Government shall refund the purchase price if paid. In any event, the bidder will be liable for any storage, administrative, or other expenses necessary to re-auction the unclaimed item. Any item not claimed after the ten (10) day period may be assessed a handling charge of ten percent (10%) of the bid price of the unclaimed item in the event the Metropolitan Government agrees to proceed with the sale. The foregoing remedies are non-exclusive and are in addition to any other remedies that the Metropolitan Government has at law or in equity.

• Sales Tax will be added to the total amount of the purchase on all items other than titled vehicles.

• On vehicles, good and marketable titles will be issued when the vehicle is paid for, in full. Vehicles must be picked up in Nashville, Tennessee. Open titles cannot be issued. **The Metropolitan Government WILL NOT issue replacement titles.**

• Bidder warrants that he/she is not an employee, whether full-time, part-time, or temporary of the Metropolitan Government or of any other contractor of the Metropolitan Government that assists either directly or indirectly with the disposal of the Metropolitan Government's surplus property, member of the employee's immediate family (as defined by the Civil Service Rules), or any person acting on behalf of the employee whether or not a formal agency relationship exists.

• Bidders may be barred from participation in Metropolitan Government sales for any of the following:

1. Failure to observe these Terms and Conditions.
2. Failure to make good and timely payment for the item(s) awarded.
3. Failure to claim purchases.

Wherefore, these terms and conditions are adopted pursuant to M.C.L. ξ 4.32.020 effective the nineteenth day of January, 2001, and will remain in full force and effect unless later modified in accordance with the Metropolitan Code of Laws.

R4.32.060 Disposition of Surplus Supplies.

R4.32.060.01 *General Requirements.* Surplus supplies shall be offered through competitive sealed bids, public auction, established markets, or posted prices. It is recognized, however, that some types and classes of items can be sold or disposed of more readily and advantageously by other means, including barter. In such cases, and also where the nature of the supply or unusual circumstances call for its sale to be restricted or controlled, the Chief Procurement Officer may employ such other means, including appraisal, provided such officer makes a written determination that such procedure is advantageous to Metro. Only United States Postal Money Orders, certified checks, or cashiers' checks shall be accepted for sales of surplus property except cash or a personal check may be accepted for petty cash sales of less than $100. A copy of all sales notifications or invoices shall be sent to the Internal Audit Manager.

R4.32.060.02 Competitive Sealed Bidding.

a) Solicitation and Opening. When making sales by competitive sealed bidding, notice of the sale should be given at least ten days before the date set for opening bids. Notice shall be given by mailing a Request for Sale Bids to prospective bidders, including those

bidders on lists maintained for this purpose, and by making the Request for Sale Bids publicly available. Newspaper advertisement may also be used. The Request for Sale Bids shall list the supplies offered for sale; designate their location and how they may be inspected; and state the terms and conditions of sale and instructions to bidders including the place, date, and time set for biding opening. Bids shall be opened publicly.

b) Award. Award shall be made in accordance with the provisions of the Request for Sale Bids to the highest responsive and responsible bidder, provided that the price offered by such bidder is acceptable to the Purchasing Agent. Where such price is not acceptable, the Purchasing Agent may reject the bids in whole or in part and negotiate the sale provided the negotiated sale price is higher than the highest responsive and responsible bidder's price, or such officer may resolicit bids.

R4.32.060.03 *Auctions.* Supplies may be sold at auction. When appropriate, an experienced auctioneer should be used to cry the sale and assist in preparation of the sale. The solicitation to bidders should stipulate, at a minimum, all the terms and conditions of any sale; that a deposit may be required in order to participate in the bidding; that the purchaser must remove within a stated time all surplus supplies purchased; and that Metro retains the right to reject any and all bids.

R4.32.060.04 *Established Markets.* Established markets are places where supplies such as livestock and produce are regularly sold in wholesale lots and prices are set by open competition. Surplus supplies may be sold in established markets for such supplies.

R4.32.060.05 *Posted Prices.* Surplus supplies may be sold at posted prices as determined by the Purchasing Agent when such prices are based on fair market value and the sale is conducted pursuant to written procedures established by the Purchasing Agent.

R4.32.060.06 *Trade-in.* Surplus supplies may be traded-in only when the Purchasing Agent determines the trade-in value is expected to exceed the value estimated to be obtained through the sale or other disposition of such supplies.

R4.32.060.07 *Disposition of Proceeds.* Net proceeds from the disposition of excess or surplus supplies shall be deposited in the general fund of the district from whose operating budget the last agency using the real property is financed (Metropolitan Code of Laws, Section 2.24.250.C.1.)

CHAPTER 4.36 -- LEGAL AND CONTRACTUAL REMEDIES

Part A -- Pre-Litigation Resolution of Controversies

R4.36.010 Authority to Resolve Protested Solicitations and Awards.

a) Right to Protest. Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the Purchasing Agent. The protest shall be submitted in writing within 10 days after such aggrieved person knows or should have known of the facts giving rise thereto. Such facts shall be detailed in the submitted protest.

b) Mandatory Procedure. The protest and appeal procedures set forth in this Chapter are mandatory administrative procedures, which all aggrieved actual or prospective bidders, offerors, and contractors must utilize and exhaust prior to seeking judicial review or remedy.

c) Authority to Resolve Protests. The Purchasing Agent shall have the authority to settle and resolve a protest of an actual or prospective aggrieved bidder, offeror, or contractor, concerning the solicitation or award of a contract. This authority shall be exercised in accordance with regulations promulgated by the standards board.

d) Decision. If the protest is not resolved by mutual agreement, the Purchasing Agent shall promptly issue a decision in writing. The decision shall:

i) state the reasons for the action taken; and

ii) inform the protestant of its right to administrative review as provided in this chapter.

e) Notice of Decision. A copy of the decision under Subsection (c) of this Section shall be mailed, emailed or otherwise furnished immediately to the protestant and any other interested party.

f) Finality of Decision. A decision under Subsection (c) of this Section shall be final and conclusive, unless any person adversely affected by the decision appeals administratively to the Procurement Appeals Board in accordance with Section 4.36.110.

g) Stay of Procurements During Protests. In the event of a timely protest under Subsection (a) of this Section, under Section 4.36.100 Procurement Appeals Board - Jurisdiction, the Metropolitan Government shall not proceed further with the solicitation of or with the award of the contract until the Purchasing Agent, after consultation with the head of the Using Agency, makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the Metropolitan Government.

R4.36.020 Authority to Debar or Suspend.

a) Authority. After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Purchasing Agent, after consultation with the Using Agency and the Director of Law, shall have the 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 Purchasing Agent, after consultation with the Using Agency and the Director of Law, shall have authority to suspend a person from consideration for award of contracts for up to twelve months. The authority to debar or suspend shall be exercised in accordance with regulations promulgated by the standards Board.

b) Causes for Debarment or Suspension. The causes for debarment or suspension include, but are not limited to the following:

i) Conviction of 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;

ii) Conviction under State or federal statues 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 Metropolitan Government contractor;

iii) Conviction under State or federal antitrust statutes arising out of the submission of bids or proposals;

iv) Violation of contract provisions such as willful failure to perform in accordance with the terms of one or more contracts, a documented past history of failure to perform, unsatisfactory performance of one or more contracts, or a failure to cooperate in correcting performance issues or documenting charges during a contract;

v) Violation of the ethical standards set forth in Chapter 4.48 (Ethics in Public Contracting); or

vi) Any other cause the Purchasing Agent after consultation with the Using Agency and the Director of Law, determines to be so serious and compelling as to affect responsibility as a metropolitan government contractor, including but not limited to suspension or debarment by another governmental entity.

c) Decision. The Purchasing Agent shall issue a written decision to debar or suspend. The decision shall:

i) state the reasons for the action taken; and

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

d) Notice of Decision. A copy of the decision under Subsection (c) of this Section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other interested party.

e) Finality of Decision. A decision under Subsection (c) of this Section shall be final and conclusive, unless the debarred or suspended person appeals administratively to the Procurement Appeals Board in accordance with Section 4.36.120 (Suspension or Debarment Proceedings).

R4.36.030 Authority to Resolve Contract and Breach of Contract Controversies.

a) Applicability. This Section applies to controversies between the Metropolitan Government 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 recession.

b) Authority. The Purchasing Agent is authorized, prior to commencement of an action in a court concerning the controversy, to settle and resolve a controversy described in Subsection (a) of this Section. This authority shall be exercised in accordance with regulations promulgated by the standards board.

c) Decision. If such a controversy is not resolved by mutual agreement, the Purchasing Agent shall promptly issue a decision in writing. The decision shall state the reasons for the action taken.

d) Notice of Decision. A copy of the decision under Subsection (c) of this Section shall be mailed or otherwise furnished immediately to the contractor.

e) Failure to Render Timely Decision. If the Purchasing Agent does not issue the written

decision required under Subsection (c) 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:

i) 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.

ii) Subsection (b) gives the Purchasing Agent 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 Metro. On the other hand, some safeguards are needed. Limitations upon the power to settle, including prerequisite approvals, should be established by appropriate regulation.

iii) It is important that administrative action upon claims be expeditious. Subsection (e) 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.

Part B -- Solicitations or Awards in Violation of Law

R4.36.040 Applicability of Sections 4.36.040 through 4.36.060.

The provisions of this Section 4.36.040 through 4.36.060 apply where it is determined administratively, or upon administrative, that a solicitation or award of a contract is in violation of law.

R4.36.050 Remedies Prior to Award.

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

a) cancelled; or

b) revised to comply with the law.

R4.36.060 Remedies After an Award.

If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

a) If the person receiving an award has not acted fraudulently or in bad faith:

i) The award may be revised to comply with the law and ratified and affirmed, provided it is determined that doing so is in the best interests of the Metropolitan Government; or

ii) The contract may be terminated and the person receiving the notice of award may be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.

b) If the person receiving the award has acted fraudulently or in bad faith:

i) The award may be declared null and void; or

ii) The award may be ratified and affirmed if such action is in the best interests of the Metropolitan Government, without prejudice to the Metropolitan Government's rights to such damages as may be appropriate.

Part C -- Procurement Appeals Board

R4.36.070 Procurement Appeals Board Establishment and Membership.

There is hereby established a Procurement Appeals Board to be composed of a chairperson and at least two other members, but not more than 5 members. The chairperson and members of the Board shall be appointed by the Mayor. The members of the board may be directors, department heads, or other officials of Metropolitan Government in similar positions as determined by the mayor. The Mayor, by executive order, shall determine the size of the board and the qualifications and terms of members, if any.

> ***COMMENTARY:*** *It is important that all the members of the Board be qualified in terms of experience and education to examine facts and apply legal principles to the controversies falling within the Board's jurisdiction.*

R4.36.080 Procurement Appeals Board - Rules of Procedure.

The Procurement Appeals Board shall adopt rules of procedure that, to the fullest extent possible, will provide for the expeditious resolution of controversies.

R4.36.090 Procurement Appeals Board - Issuance of Decisions.

Acting by one or more of its members, the Procurement Appeals Board shall issue a decision in writing or take other appropriate action on each appeal submitted. A copy of any decision shall be provided to all parties and the Purchasing Agent.

R4.36.100 Procurement Appeals Board - Jurisdiction.

The Board shall have jurisdiction to review and determine *de novo* any appeal by an aggrieved party from a determination by the Purchasing Agent, or a designee of either officer that is authorized by:

a) Section 4.36.010 (Authority to Resolve Protested Solicitations and Awards);

b) Section 4.36.020 (Authority to Debar or Suspend).

R4.36.110 Protest of Solicitations or Awards.

a) Scope. This Section applies to an appeal addressed to the Board of a decision under Section 4.36.010 (c) (Authority to Resolve Protested Solicitations and Awards, Decision).

b) Time Limitations on Filing a Protest or an Appeal. For an appeal under this Section, the aggrieved person shall file an appeal within seven days of receipt of a decision under Section 4.36.010 (c) (Authority to Resolve Protested Solicitations and Awards, Decision).

c) Decision. On any appeal under this Section, the Board shall promptly decide whether the solicitation or award was in accordance with the Constitution, statutes this code, regulations, and the terms and conditions of the solicitation.

R4.36.120 Suspension or Debarment Proceedings.

a) Scope. This section applies to a review by the Procurement Appeals Board of a decision under Section 4.36.020 (Authority to Debar or Suspend).

b) Time Limitation on Filing an Appeal. The aggrieved person shall file its appeal with the Board within 30 days of the receipt of a decision under Section 4.36.020(c) (Authority to Debar or Suspend, Decision).

c) Decision. The Board shall promptly decide whether, or the extent to which, the debarment or suspension was in accordance with the Constitution, statutes this code, regulations, and the best interests of the Metropolitan Government, and was fair. The Board may order the reinstatement of any person previously suspended or debarred.

CHAPTER 4.40 -- SPECIFIC PROCEDURES

Part B - Recycled Products

Regulation 4.40.040 -- Purchase of Recycled Products

R4.40.040

The Purchasing Agent, whenever feasible and financially reasonable, shall purchase recycled products, consider remanufactured equipment, and contract with service providers who utilize recycled products to produce services on contracts specifically for products or services with recycled or remanufactured content. Additionally, the Purchasing Agent may provide incentives in purchase solicitations for generic contracts that encourage but do not necessarily require vendors to offer products or services with recycled content.

CHAPTER 4.44 -- ASSISTANCE TO SMALL AND DISADVANTAGED BUSINESSES

Regulation 4.44.010 -- Definitions

R4.44.010.01 Definition of a Small and Disadvantaged Business.

For purposes of tracking and reporting, disadvantaged businesses shall be classified as (1) minority-owned, (2) female-owned, (3) disabled-owned. Minority businesses shall be classified further as (a) African American-owned, (b) Native American-owned, (c) Hispanic American-owned, and (d) Asian
American owned.

R4.44.010.02 Definition of Small Business.

A Small Business satisfies all of the following criteria:

(a) A United States business which is independently owned and operated, and which is not dominant in its field of operation or an affiliate or subsidiary of a business dominant in its field of operation;

(b) Either has less than the following number of employees or has less than the following annual sales volume for the applicable industry; and

Industry	*Annual Sales Volume*	*No. of Employees*
Agriculture, Forestry, Fishing	$500,000[1]	9 or less
Architectural/Design/Engineering	$2,000,000[1]	30 or less
Construction	$2,000,000[1]	30 or less
Educational	$1,000,000[1]	9 or less
Finance, Insurance and Real Estate	$1,000,000[1]	9 or less
Information Systems/Technology	$2,000,000[1]	30 or less
Manufacturing	$2,000,000[1]	99 or less
Marketing/Communications/PR	$2,000,000[1]	30 or less
Medical/Healthcare	$2,000,000[1]	30 or less
Mining	$1,000,000[1]	49 or less

Retail Trade	$750,000[1]	9 or less
Service Industry	$500,000[1]	9 or less
Transportation, Commerce, and Utilities	$1,000,000[1]	9 or less
Wholesale Trade	$1,000,000[1]	19 or less

[1] State of Tennessee standard.

(c) Meets the following additional criteria:

1. Has demonstrated capability to perform independently a substantial portion of the contract they seek, or a substantial portion of the subcontract for which they are proposed by a bidder or offeror, as specified by the Purchasing Agent;
2. Not share or jointly use office space, production, marketing and sales, business support systems, personnel, or equipment with any business not classified by Metro as a small business (i.e., a large business);
3. Has existed as a legal business entity for a minimum of one year (twelve months of continuous business enterprise), performing independently and satisfactorily and achieving a minimum of $35,000.00 sales income during the previous tax year and supported by tax documentation;
4. Not be owned, controlled, or directed by individuals or groups of individuals who own, control, or direct a large business involved in the same category of work as the business for which small business status is sought;

R4.44.010.03 Definition of "Employee".
Employee means a person (or persons) employed on a full-time (or full-time equivalent), a permanent basis. Full-time equivalent includes employees who work 30 hours per week or more. Full-time equivalent also includes the aggregate of employees who work less than 30 hours a week, where the work hours of such employees add up to at least a 40-hour workweek. For purposes of determining small and disadvantaged business status, the entity's owners, temporary employees, independent contractors, and leased employees are not considered employees.

Regulation 4.44.020 -- Policy and Implementation

R4.44.020.01 Annual Goal.

Annually, the goal for the amount of the fair proportion of government purchases to be made from Small and/or Service Disabled Veteran-owned businesses shall be established by the Procurement Standards Board.

R4.44.020.02 Participation.

In order to be eligible to participate in the small business program, a business must submit to the Purchasing Agent, IRS Form 941: Employer's Quarterly Federal Tax Return (or subsequent equivalent form adopted by the Internal Revenue Service) and a copy of the business' most recent Federal Tax Return which provide factual information regarding the ownership of the business, including the annual dollar volume of sales and the number of persons employed by the business. If the business is a subsidiary of any other business, the same information must be provided for the parent business.

R4.44.020.03 Targets or Set Asides.

The Purchasing Agent may target or set aside for Small and/or Service Disabled Veteran-owned business competition the following types of purchases and/or contracts:

a) Small purchases as defined in -204) 2050 (c) for which the Purchasing Agent has made a written determination that there exists three (3) or more eligible small and/or service disabled veteran-owned businesses which are capable of providing the needed goods or services. The Purchasing Agent shall include such written determination on the procurement documents.

b) For other than small purchases, in addition to the requirements of subsection a, the Purchasing Agent must also determine in writing that limiting the purchase and/or contract to small and/or service disabled veteran-owned businesses is not detrimental to the interests of the Metropolitan Government. In making this determination, the Purchasing Agent shall at least consider the likelihood that price competition will occur between eligible businesses and the degree to which such target or set aside for the purchase and/or contract will contribute to the achievement of the goal set in R11-201(A). Such written determination must be included in any invitation to bid or request for proposals for the goods, services, or construction.

c) Departments may negotiate and/or value engineer a project but not in such a manner as to reduce or eliminate small, service disabled veteran-owned and disadvantaged business participation if such participation was a requirement or selection criteria for the awarding of a purchase. The contractor must maintain its committed percentage level of such subcontracting business(es).

R4.44.020.04 Incentives.

The Purchasing Agent may include in purchase solicitations objectively measurable criteria which provide incentives to offerors to maximize the participation of small, service disabled veteran-owned, and disadvantaged businesses as contractors, subcontractors or suppliers. Examples of such criteria include, but are not limited to, minimum requirements for small, service disabled veteran-owned, and disadvantaged business participation and life cycle cost-type formulas. Evaluation factors need not be precise predictors of actual value to Metro, but to the extent possible, such evaluation factors shall:

a) be reasonable estimates based upon information Metro has available concerning the amount and value of small, service disabled veteran-owned, and disadvantaged business participation;
b) treat all bids equitably.

R4.44.020.04.1 *Discounts for Offers Submitted by Small and/or Service Disabled Veteran-owned Businesses.* For bid comparison and proposal evaluation purposes only, the Purchasing Agent may include in purchase solicitations (both written and verbal) objectively measurable discounts for offers submitted by small and/or service disabled veteran-owned businesses, as defined in this chapter and the regulations thereto.

When establishing such discounts, the Purchasing Agent shall use the following scale as a guideline for goods and services:

15% on low bids from	$ 0	$ 1,500
10% on low bids from	1,500	19,999
9% on low bids from	20,000	39,999
8% on low bids from	40,000	59,999
7% on low bids from	60,000	79,999
6% on low bids from	80,000	99,999
5% on low bids from	100,000	149,999
4% on low bids from	150,000	249,999
3% on low bids from	250,000	499,999
2% on low bids from	500,000	999,999
1% on low bids from		1,000,000 or more

Offers in excess of the percentages on the above scale shall be deemed financially unreasonable for goods and services.

When a discount is to be applied in an offer in which “line item” is the stated basis of award and it is contemplated that awards may be made to two or more offerors, the Purchasing Agent may select from the table the discount that would apply were a single contract to be awarded. The discount rate to be applied in the award of indefinite quantity contracts shall be stated in the solicitation for such contracts.

For construction related solicitations, the Purchasing Agent shall use the following scale to establish the maximum acceptable contract price based on the lowest responsive and responsible offer multiplied by one plus the corresponding rate below:

20.00%	on low bids from	$0	to	$100,000
17.50%	on low bids from	100,001	to	200,000
15.00%	on low bids from	200,001	to	300,000
12.50%	on low bids from	300,001	to	400,000
10.00%	on low bids from	400,001	to	1,000,000
9.80%	on low bids from	1,000,001	to	1,200,000
9.40%	on low bids from	1,200,001	to	1,400,000
9.00%	on low bids from	1,400,001	to	1,600,000
8.60%	on low bids from	1,600,001	to	1,800,000
8.20%	on low bids from	1,800,001	to	2,000,000
7.80%	on low bids from	2,000,001	to	2,200,000
7.40%	on low bids from	2,200,001	to	2,400,000
7.00%	on low bids from	2,400,001	to	2,600,000
6.60%	on low bids from	2,600,001	to	2,800,000
6.20%	on low bids from	2,800,001	to	3,000,000
5.83%	on low bids from	3,000,001	to	3,500,000
5.63%	on low bids from	3,500,001	to	4,000,000
5.38%	on low bids from	4,000,001	to	4,500,000
5.13%	on low bids from	4,500,001	to	5,000,000
5.00%	on low bids from	5,000,001	to	10,000,000
4.25%	on low bids from	10,000,001	to	15,000,000
2.75%	on low bids from	15,000,001	to	20,000,000
1.89%	on low bids from	20,000,001	to	25,000,000
1.63%	on low bids from	25,000,001	to	30,000,000
1.38%	on low bids from	30,000,001	to	35,000,000
1.13%	on low bids from	35,000,001	to	40,000,000
1.00%	on low bids from	40,000,001	to	99,999,999

This establishes the maximum acceptable contract price (MACP) that will be awarded. The firm that does not exceed the MACP and has the lowest evaluated bid price after consideration of Small and/or Service Disabled Veteran-owned business participation will win the award for Invitations to Bid or receive the maximum score for the cost criteria in a Request for Proposal.

The Purchasing Agent shall specify in each solicitation, the minimum amount of small and/or service-disabled veteran business participation that must be demonstrated by an offer in order for the offeror to be eligible to receive the small and/or service-disabled veteran business incentive.

R4.44.020.05 Verification of Small and Service Disabled Veteran-owned Business Status and Participation.

Small, service disabled veteran-owned, and disadvantaged business status of contractors and subcontractors shall be verified by the Purchasing Agent prior to award. Moreover, following such

an award, the Purchasing Agent shall require the contractor to provide regular, periodic reports of actual small business participation in the contract. If the actual small business participation is less than that committed to at award, the Purchasing Agent may terminate the contract for cause and/or invoke other penalties as provided for in the procurement solicitation or contract.

Departments of the Metropolitan Government may not negotiate or value engineer a project in such a manner as to reduce or eliminate small business participation if such participation was a requirement or selection criteria for the awarding of a purchase. The contractor must maintain its committed percentage level of small and disadvantage subcontracting business.

CHAPTER 4.46 – EQUAL BUSINESS OPPORTUNITY PROGRAM

R4.46.030 Duties of the Business Assistance Office (BAO) in administering the Equal Business Opportunity ("EBO") Program.

R4.46.030.01 Duties of the Business Assistance Office.

In administering the EBO program, the BAO shall have the following authority and duties for the encouragement of non-discrimination in Metropolitan Government contracting/procurement:

A. Establishment of written procedures, informal guidelines, and forms as may be necessary to effectuate the EBO program.
B. Monitoring compliance with the requirements of the EBO at all points in the process.
C. Certification of businesses as MBEs or WBEs, in accordance with the applicable provisions of the EBO program.
D. Development and maintenance of public databases of certified MBEs and WBEs.
E. Attendance at pre-bid, pre-proposal, pre-construction, and pre-work conferences.
F. Provide to business entities of all forms, applications, documents, and papers necessary to participate in and comply with the EBO program.
G. Provide information to potential bidders including names and contact information of certified MWBEs for each eligible project, to reinforce and support outreach efforts by potential bidders.
H. Notification by certified mail to an applicant who has been denied certification as a MWBE.
I. Notification to the Purchasing Agent of any determination of non-compliance regarding the requirements of the EBO program.
J. Monitoring, for data gathering and informational purposes, utilization of MWBEs on eligible projects.
K. Maintaining documents, forms, records, or data regarding the EBO program including:
(a) documents, forms, records, or data regarding the dollar amounts subcontracted to or expended for services performed by subcontractors and suppliers on eligible projects, including the race and gender ownership of each subcontractor and supplier; and
(b) documents, forms, records, or data regarding certified MWBEs.
L. Development and implementation of outreach and assistance programs to promote equal contracting opportunities for all businesses that wish to do business with the Metropolitan Government.
M. Monitoring compliance with requirements for mentor-protégé or joint venture arrangements, as applicable.
N. Investigation of alleged violations of the EBO program or any aspect thereof.
O. Recommendation of whether any of the penalties set forth in Metro Code Section 4.46.100 should be applied to a participant.

R4.46.030.02 Additional Duties of the Business Assistance Office.

The BAO is also tasked with assisting contractors and subcontractors in implementing the EBO program. As a standard procedure, such assistance includes:

A. Recommending the establishment and communication of aspirational and/or contract goals in the relevant Metropolitan Government solicitations;
B. Facilitating and attending pre-proposal/bid conferences to explain the EBO program and the programmatic elements applicable to the particular bid or contract;
C. Identifying MWBEs in BAO databases and providing or producing a list of available MWBEs upon request;
D. Remaining available to assist bidders in developing their MWBE plans;

E. Monitoring MWBE participation levels on projects throughout the duration of a contract;
F. Reporting annually to the Metropolitan Government and the public, based on available data, the progress made by Metropolitan Government toward satisfying the EBO program purposes and policy objectives;
G. Receiving and analyzing external and internal information, including statistical data regarding the barriers encountered by MWBE firms in attempting to obtain contract opportunities at the Metropolitan Government, and the relative effectiveness of various program elements in addressing those barriers;
H. Monitoring and supporting the implementation of the EBO program and proposing modifications to appropriate Metropolitan Government officials as necessary to fully achieve the purpose and objectives of the program;
I. Providing public education internally and externally regarding the purposes and objectives of the EBO program;
J. To the extent permitted by the Metropolitan Code, collaborating with partners such as financing institutions, educational institutions, local chambers, government agencies, and trade organizations in Mentor-Protégé programs, Joint Venture projects, one-on-one business assessment and coaching services, and any innovative and creative program or project(s) to increase MWBE capacity in areas where there are limited numbers of MWBE firms available to do the work in both Prime and Subcontracting categories;
K. Increasing and facilitating business networking opportunities for MWBE firms, and providing seminars and technical assistance to MWBE firms to enhance their ability to effectively compete for contracts;
L. Investigating alleged violations of EBO program and providing written recommendations to appropriate authorities regarding remedial action and sanctions and penalties when necessary, in accordance with Metro Code 4.46.100.
M. Utilizing a formal mechanism to obtain feedback from MWBE participants and registrants on the effectiveness of the EBO process, ease of use, and other components to be decided by the Purchasing Agent

R4.46.030.03 Outreach and Forecasting.

Metropolitan Government considers information dissemination and communication with MWBEs as an integral part of the EBO program.

The BAO shall act as a resource for information on MWBEs. The BAO accordingly may undertake to foster among MWBEs a better understanding about business opportunities with the Metropolitan Government and provide information on taking advantage of the EBO program, and is authorized to provide the following assistance:

A. Disseminate at community events, trade shows, and other appropriate business functions, and publish at regular intervals, in print and in electronic media (including publications or electronic media targeted to MWBEs and small businesses) information describing the EBO program and the functions of the BAO. In addition, the BAO may disseminate information in print and/or electronic form, may provide individualized counseling, and/or may conduct seminars regarding the certification process.
B. Establish a procedure to engage in continuous recruitment and outreach efforts directed at business assistance organizations to increase the pool of businesses available to do business with the Metropolitan Government. The BAO may identify suppliers through business development organizations and participation at various trade shows, supplier diversity groups and work with various national and local supplier development counsels and organizations.
C. Disseminate at community events, trade shows, and other appropriate business functions, and publish at regular intervals, in print or in electronic media information identifying ongoing contracting opportunities with the Metropolitan Government and providing contact information by which businesses may obtain additional information from the BAO. BAO

may provide this information in languages other than English, where appropriate. To the extent feasible, the BAO may share data regarding issued solicitations, and subcontracting opportunities on projects, with other businesses and agencies or jurisdictions in the Program Area.

D. Assist businesses seeking to participate in the Metro procurement process by disseminating information in print or electronic form, by providing technical assistance as appropriate, and/or by conducting seminars regarding the process for complying with the Equal Businesses Opportunity Program. The BAO may sponsor "How to do business with the Metropolitan Government" seminars and invite a wide array of businesses.
E. Actively encourage businesses to attend the pre-bid conferences.
F. Create workshops for businesses located within the Program Area on how to compete in the private sector, including advice on marketing, soliciting, and preparing a bid. BAO may establish a program which will incorporate business and entrepreneurial training and assistance mentoring, matchmaking, individual consulting and regular training workshops and seminars. To accomplish the same, BAO may reach out to and collaborate with regional higher educational institutions.
G. Develop communications and other written materials that are meant to encourage and provide information to contractors to increase their utilization of subcontractors. In addition, BAO may sponsor networking events that allow businesses to meet each other and that create an opportunity for contractors to discuss with subcontractors upcoming needs.
H. May develop a resource directory to be provided to interested businesses, with information regarding assistance in bonding and financing, financial management, accounting, construction management and technical assistance.
I. Develop and update its website to provide general information on doing business with the Metropolitan Government, on the bid process, on how to get certified, to provide a calendar of events, bid lists, bid status reports, to post solicitation notices, contract awards, and to provide downloadable forms and other appropriate information.
J. Develop and implement such other and further outreach activities and programs as the Purchasing Agent may from time to time recommend.

R4.46.050 MWBE Certification Processes

R4.46.050.01 Application for certification.

MWBEs who wish to be recognized as certified by the BAO must submit a written certification application on a form approved and provided by the office of contract compliance. In lieu of this action, the BAO may also accept certificates from other certifying entities consistent with Metro Code 4.46.050(B).

R4.46.050.02 Certification Standards.

The BAO shall determine the eligibility of MWBEs to be certified according to the following standards:

A. The owner of a MWBE must be an African American, Asian American, Hispanic American, Native American or female as defined in Metro Code 4.46.020.
B. The business enterprise seeking certification must be a for-profit entity that is independent and continuing.
C. The MWBE owner(s) listed on the certification application must "own" and "control" the business, as those terms are defined in Metro Code 4.46.020;
D. The MWBE must be able to demonstrate that it is or will be performing a commercially useful function; and
E. The MWBE must be located in the Metropolitan Nashville Statistical Area.

R4.46.50.03 Certification Denial.

The BAO will review and evaluate applications or certificates, and may reject an application based on one or more of the following:

A. The applicant does not meet the requirements for certification as a MWBE as set forth herein.
B. The application is not satisfactorily completed within a reasonable period of time, as determined by the office.
C. The application contains false information.
D. The applicant does not promptly provide required information in connection with the certification review conducted by the BAO.

R4.46.050.04 Certification Investigation.

The BAO shall investigate as appropriate, including on- site investigation if necessary, African American, Asian American, Hispanic American, Native American, and female business ownership arrangements beyond formal documents submitted by such businesses if:

A. The business is applying for certification with the Metropolitan Nashville Government for the first time;
B. The business is newly-formed or the business has African American, Asian American, Hispanic American, and/or female ownership of less than 100 percent;
C. A business which is not a MWBE has an ownership interest in such entity;
D. The ownership of the business has changed since documents have been submitted to the office of contract compliance;
E. A review of the documents submitted with the application otherwise raises concerns regarding either ownership or control of the business; and/or
F. The BAO director deems it appropriate under the circumstances.

R4.46.050.05 Decertification.

The BAO may decertify a business that it finds is not or is no longer a bona fide MWBE. Businesses decertified for reasons other than by voluntary request may not apply for recertification for such time as may be specified, up to one year. A business that is decertified may request that the BAO reconsider the decertification determination. Any of the following reasons, which are not intended to be all-inclusive, are sufficient grounds for decertification:

A. The business has changed to the extent that it no longer satisfies the ownership, control, and/or other requirements set forth herein;
B. The business fails to submit within a reasonable time information requested by the BAO;
C. The business ceases to be a viable enterprise for profit because of involuntary bankruptcy, dissolution or other cessation of commerce.
D. Information or evidence that was not available to the BAO at the time the firm was certified is now available, and said information, if known at the time of certification review would have resulted in a denial of certification.
E. Information was concealed or misrepresented by the firm in connection with the certification application or review conducted by the office of contract compliance.
F. A change in the certification standard or requirements of the city has occurred since the certification of the firm.

R4.46.050.06 Continuing Duty.

Certified MWBEs shall be under a continuing duty to inform the BAO in writing of any changes in the business if, as a result of such changes, the business no longer satisfies the requirements of subsection R46.050.02.

R4.46.060 Goals and Goal-Setting

R4.46.060.01 Annual Aspirational Goals.

For each five-year period following a Disparity Study, the Procurement Standards Board shall establish a non-mandatory annual aspirational percentage goal for overall MWBE Prime and Subcontract participation based on the MWBE availability by industry in accordance with the most recent Disparity Study findings, along with such data to be collected by the BAO reporting on the utilization of MWBE firms.

Annual Aspirational Goals are not to be routinely applied to individual contracts, but are intended to serve as a benchmark against which to measure the overall effectiveness of the MWBE aspects of the EBO program on an annual basis, and to gauge the need for future adjustments to the mix and aggressiveness of remedies and program elements being applied pursuant to the EBO program.

R4.46.060.02 Use of a Contract Forecasting Plan.

As part of the Metropolitan Government's Annual Fiscal Year Budget Approval Process, the Chief Diversity Officer or its designee shall submit to the BAO the anticipated expenditures of each Department, and the BAO shall develop MWBE spending targets based upon MWBE availability in the relevant market to perform the work on anticipated projects. The forecasting plan and spending targets shall be public records. The BAO may publicize this report on the Procurement Division website and provide notification of the report to any and all contractors, consultants, and vendors as requested. The BAO, however, shall email a copy of the plan and report to all MWBE firms who are certified with the Metropolitan Government as of the close of the previous fiscal year so that they will be aware of upcoming opportunities to contract with the Metropolitan Government.

R4.46.060.03 The Goal Setting Committee.

The Goal Setting Committee (GSC) shall be established on a project-by-project basis and shall consist of the head of the originating department or designee, the BAO Director, and the Purchasing Agent. Consideration by the Goal Setting Committee and Approval of the Purchasing Agent must be obtained prior to the inclusion of project-by-project goals in any solicitation. In establishing Project Goals, the GSC shall review in advance proposed contract bid specifications to ensure that they are not unnecessarily restrictive and do not adversely affect the ability of MWBE firms to competitively bid without adequate business justification.

R4.46.060.04 Project Goals.

All subcontracting goals authorized under the EBO program are intended to be established by the Goal Setting Committee, approved by the Purchasing Agent, and implemented only on a contract-by-contract basis. It is intended that such goal-setting will be based upon careful analysis of the availability of Commercially Useful subcontracting opportunities within a given contract and the relative availability of MWBE firms to perform required tasks on such subcontract opportunities. Such contract-by-contract goal-setting shall be based upon reasonably reliable Subcontractor availability data. Compliance with contract- specific subcontracting goals shall also require

compliance with Good Faith Efforts procedures as established herein.

R4.46.060.04.1 Project Goal Setting Methodology. The Goal Setting Methodology employed shall be approved by the Procurement Standards Board prior to the establishment of any project-by-project goals.

R4.46.070. Bids and Non-Discrimination in Bidding.

All bidders are required to make efforts to ensure that businesses are not discriminated against on the basis of their race, ethnicity or gender, and to demonstrate compliance with the EBO program requirements. Bidders are required to ensure that prospective subcontractors, vendors, suppliers and other potential participants are not denied opportunities to compete for work on a Metro contract on the basis of their race, ethnicity, or gender, and must afford all firms, including those owned by racial or ethnic minorities and women, opportunities to participate in the performance of the business of Metro to the extent of their availability, capacity and willingness to compete.
Bidders shall conduct their contracting and purchasing programs so as to prohibit any discrimination and to resolve all allegations of discrimination. Bidders shall include a clause in its subcontracts that require the subcontractor to adopt and distribute a written non- discrimination policy that is the same as that of the contractor. The BAO shall review and investigate allegations of discrimination which claim that prohibited forms of discrimination have occurred. Allegations of discrimination that are determined to have merit may be subject to penalties as provided in Metro Code 4.46.100.

R4.46.080 Determination of compliance with the EBO Program during bid process.

No bidder shall be awarded a contract unless it is determined that the bidder has satisfied the non-discrimination requirements set forth in the EBO Program.

R4.46.080.01 EBO program compliance, monitoring, and audit.

The BAO has the authority to conduct an audit of a bidder's work on eligible projects to confirm the bidder's compliance with the EBO Program.

R4.46.080.02 Good Faith Efforts Considerations.

A. In addition to the Good Faith Efforts considerations set forth in Metro Code 4.46.080 (C) and (D), if the MWBE participation submitted by the bidder does not meet the established goal(s) for the contract bidders are required to provide documentation to the BAO, upon request, of the following, as applicable:

   i) Attendance at a pre-bid meeting, if any, scheduled by Metro to inform MWBEs of subcontracting opportunities under a given solicitation;

   ii) Advertisement in general circulation media, trade association publications, and other media in a timely manner;

   iii) Written notification to MWBEs that their interest in the contract is solicited;

   iv) Efforts made to select portions of the work proposed to be performed by MWBEs in order to increase the likelihood of achieving the stated goal;

   v) Good faith efforts to negotiate with MWBEs for specific subcontracts, including without limitation:

1. The names, addresses, and telephone numbers of MWBEs that were contacted;
2. A description of the information provided to MWBEs regarding the plans and specifications for portions of the work to be performed;
3. A statement of why additional agreements with MWBEs were not reached;

B. Concerning each MWBE, the MWBE contacted but rejected as unqualified, and the reasons for the bidder's conclusion; and Efforts made to assist the MWBEs contacted that needed assistance in obtaining bonding or insurance required by the prime contractor or Metro.

R4.46.080.03 Establishment of Good Faith Efforts.

In order for a contract to be awarded to a bidder or offeror that has failed to meet MWBE project goals, the BAO will determine whether the bidder actively and reasonably made efforts to meet the established goal(s) for the contract and make such recommendation to the Purchasing Agent.

R4.4.46.100 Sanctions and Penalties for Non-Compliance with the EBO Program.

The BAO shall recommend to the Purchasing Agent appropriate sanctions to be imposed on a participant for failure to comply with the EBO Program. The Purchasing Agent is authorized to impose sanctions for non-compliance with the EBO Program in accordance with Metro Code 4.46.100. A participant has the right to appeal sanctions imposed by the Purchasing Agent as provided in Metro Code 4.46.100.

Factors that the BAO may consider in determining the type of sanctions to recommend to the Purchasing Agent include, but are not limited to, the following:

A. Intentional misrepresentation to Metro of the use which a contractor intends to make of a MWBE subcontractor, mentor-protégé, or a joint venture partner, in performing work under a contract with Metro;
B. Material misrepresentation of the composition of the ownership of a business entity certified as a MWBE;
C. Repeated failure to provide demonstration of post award utilization of MWBEs; and
D. Repeated failure to provide required MWBE utilization reporting.

CHAPTER 4.48 – ETHICS IN PUBLIC CONTRACTING

R4.48.010 Definitions.

"Employee" means an individual drawing a salary or wages from the metropolitan government, whether elected or not, who is involved in Procurement as defined in Metro Code Section 4.04.050.

R4.48.020 Purpose.

In accordance with Chapter 4.48 (Ethics in Public Contracting) of the Metropolitan Procurement Code, these regulations are established to further address conduct of employees engaged in procurement on behalf of Metro as well as nonemployees participating in Metro procurement.

R4.48.030 - General Standards of Ethical Conduct for Employees.

Each employee of the metropolitan government shall comply with:

A. The provisions of Chapter 4.48 of the Metropolitan Procurement Code ("Ethics in Public Contracting");
B. The provisions of the Standards of Conduct outlined in Chapter 2.222 of the Metropolitan Code;
C. Executive Orders of the Mayor; and
D. Other applicable laws and regulations.

R4.48.030.01 Communications during the Procurement Process.

A. During an active solicitation, communication between offerors and the procuring department/agency regarding the solicitation should be facilitated by the division of purchases.
B. Members of an evaluation committee shall refrain from discussions with individuals who are not part of the evaluation process for the solicitation until such time as an award is issued by the division of purchases.
C. Prior to the issuance of the intent to award, members of an evaluation committee and employees shall not divulge, publish, reproduce, or reveal by word, conduct, or any other means any proposal or source selection information, except as necessary to perform official duties related to any procurement as assigned by the purchasing agent or designee.
D. Members of an evaluation committee and employees shall take all reasonable precautions to secure all proposals and source selection information received against unlawful disclosure and forward or refer all requests for information regarding any procurement to the purchasing agent or designee.
E. Members of an evaluation committee and employees shall disclose the time, place, manner, content, and originator of any attempted communications concerning any active procurement to the purchasing agent or designee.