

Central Midlands Regional Transit Authority	
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## **Procurement and Contract Administration Policy**

### **ARTICLE 1. GENERAL PROCUREMENT POLICY**

#### **Section 1. Purpose**

The purpose of this Procurement and Contract Administration Policy (Policy) is to set forth the general procurement policy that will govern the conduct of the procurement activities of The Central Midlands Regional Transit Authority (CMRTA) and of CMRTA personnel engaged in those activities. In the administration of this Policy, the CMRTA adopts the purposes of the South Carolina Consolidated Procurement Code contained in S.C. Code Ann. § 11-35-20, as it may be amended from time to time. All procurement transactions, regardless of the method of procurement shall be conducted in a manner that provides maximum open and free competition, consistent with the applicable of this Policy, applicable State and Federal laws and regulations, the CMRTA’s Employee Code of Ethics and the South Carolina Ethics Act. CMRTA’s Policy is to ensure open and free competition wherever possible, to maximize competitive opportunities, and to encourage a competitive environment for contractors and vendors competing for CMRTA contracts. It shall be the policy of the CMRTA to utilize the State’s Material Management Office’s Master Pricing Agreement Lists to the fullest extent, a applicable. In addition, CMRTA will utilize the South Carolina Department of Transportation DBE Certification Directory for the purpose of making contracting opportunities known to vendors.

#### **Section 2. Application**

(1) This Policy applies to all contracts solicited or entered into by CMRTA after the date of this Policy and applies to every procurement or expenditure of funds by the CMRTA irrespective of the source of the funds, including federal assistance monies except as regards compliance with federal requirements, as set forth below, and except that this Policy does not apply to gifts, to the issuance of grants, or to contracts between public procurement units, except as provided in Article 5, Intergovernmental Relations. It also applies to the disposal of CMRTA supplies as provided in Section 7.1. To avoid inconsistent or arbitrary decisions or results, the CMRTA will apply this policy and the relevant federal, state, and local laws to every procurement and contracting action it takes.

(2) Where a procurement involves the expenditure of federal assistance, grant, or contract funds, CMRTA also shall comply with federal laws, specifically including the Federal Transit Administration (FTA) (including authorized regulations, policies and circulars, specifically including but not limited to FTA Circular 4220.1F “Third Party Contracting

Guidance,” and 49 CFR Part 18, “Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments”) as are mandatorily applicable and which are not presently reflected in this Policy. Notwithstanding, where federal assistance, grant, or contract funds are used in a procurement, this Policy, including any requirements that are more restrictive than federal requirements, must be followed, except to the extent such action would render CMRTA ineligible to receive federal funds whose receipt is conditioned on compliance with mandatorily applicable federal law. In those circumstances, the solicitation must identify and explain the impact of such federal laws on the procurement process, including any required deviation from this Policy.

(a) In contracts using federal funds, each solicitation shall state the specific third party contract provisions required and include the requirement that each third party contractor extend those provisions to its subcontractors to the extent required.

### **Section 3. Obligation of Good Faith**

Every contract or duty within this Policy imposes an obligation of good faith in its negotiation, performance or enforcement. “Good faith” means honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.

### **Section 4. Standards of Conduct**

(1) Personal Conflicts of Interest. As provided in the Common Grant Rules and in the Federal Transit Administration (FTA) Master Agreement, no employee, officer, agent, or board member, or his or her immediate family member, partner, or organization that employs or is about to employ any of the foregoing individuals may participate in the selection, award, or administration of a contract supported with FTA assistance if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when any of those individuals previously listed has a financial or other interest in the firm selected for award.

(2) Gifts. The CMRTA’s officers, employees, agents, or board members may neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subcontracts. The CMRTA may set minimum rules when the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value of \$25.00 or less.

(3) Violations. To the extent permitted by State or local law or regulations, such standards of conduct will provide for penalties, sanctions, or other disciplinary action for violation of such standards by the recipient’s officers, employees, agents, board members, or by contractors, subcontractors, or subrecipients or their agents.

### **Section 5. Organizational Conflicts of Interest**

The CMRTA will analyze each planned acquisition in order to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible, and

avoid, neutralize, or mitigate potential conflicts before contract award. An organizational conflict of interest arises when any of the following circumstances occurs:

(1) **Lack of Impartiality or Impaired Objectivity.** When the contractor is unable, or potentially unable, to provide impartial and objective assistance or advice to the recipient due to other activities, relationships, contracts, or circumstances.

(2) **Unequal Access to Information.** The contractor has an unfair competitive advantage through obtaining access to nonpublic information during the performance of an earlier contract.

(3) **Biased Ground Rules.** During the conduct of an earlier procurement, the contractor has established the ground rules for a future procurement by developing specifications, evaluation factors, or similar documents.

### **Section 6. Ensuring Most Efficient and Economic Purchase**

The CMRTA, during its annual budget process, should determine, to the extent practicable, the procurement actions necessary to sustain its operations through the next fiscal year. A list of these procurement actions should be forwarded to the Executive Director and Board annually. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase and to avoid purchase of unnecessary or duplicative items. The CMRTA will review other procurement sources identified in Article 5, Intergovernmental Relations, to ensure economical purchases.

(1) **Lease vs. Purchase.** Where appropriate, an analysis will be made of lease versus purchase alternatives and any other appropriate analysis to determine the most economical approach. Before the CMRTA leases an asset, CMRTA must make a written comparison of the cost of leasing the asset with the cost of purchasing or constructing the asset in compliance with FTA regulations, “Capital Leases,” 49 CFR Part 639, Subpart C. The CMRTA may lease the asset if leasing is more cost effective than ownership. Costs used in the comparison must be reasonable, based on realistic current market conditions, and based on the expected useful service life of the asset.

### **Section 7. Payment for Goods and Services Received by CMRTA**

CMRTA shall pay for all goods and services within thirty work days from CMRTA’s acceptance of the goods or services and receipt of proper invoice. In any contract using federal funding, the CMRTA will not authorize and will not participate in funding payments to a contractor prior to the incurrence of costs by the contractor unless prior written concurrence is obtained from FTA.

### **Section 8. Procurement Authority and Responsibility**

(1) **Policies.** The CMRTA Board of Directors (Board) has the authority and responsibility to promulgate policies governing the procurement, management, control, and disposal of any and all supplies, goods, services, and construction required by the CMRTA.

(2) Approve Contracting Officers. The Board shall identify and approve CMRTA employees or other designees authorized to conduct procurements and to enter into contracts on behalf of the CMRTA. These individuals, also known as Contracting Officers, shall be recommended to the Board by the Chief Executive Officer.

(3) Appoint Procurement Appeals Panel. The Board shall appoint on an *ad hoc* or standing basis a Panel to hear procurement appeals. Employees of the CMRTA may, but need not, be appointed to the Panel. No member of a Panel may have an economic interest, as defined in the State Ethics and Accountability Act, in the procurement protest on which he sits. Neither the Contract Officer nor a member of the Evaluation Committee for a procurement protest may serve on the Panel. The Panel shall consist of five members with three members constituting a quorum.

(4) Contracts and Contract Modification Approvals

(a) *Contracts.* The Board shall approve by resolution all the CMRTA contracts regardless of any dollar threshold, except for contracts for standard commercial supplies, services or construction that are less than \$100,000.

(b) *Contract Modifications.* The Board shall approve by resolution all modification of any contract awarded pursuant to 3(a) above or any contract where the modification is equal to or greater than five percent (5%) of the cumulative contract amount.

(c) “Standard Commercial Supplies and Services” are supplies or services that are regularly used by the CMRTA in the course of normal business operations, are commercially available and have been similarly sold or traded to the general public. Examples include vehicle parts, grounds keeping and janitorial services, office and janitorial supplies, ordinary equipment (such as personal computers, copier and postage machines), etc.

**Section 9. Determinations**

Written determinations expressly required the Policy must be retained in an official contract file of the Contracting Officer administering the contract.

**Section 10. Definitions**

All definitions in 49 U.S.C. §5302, FTA Circular 4220.1F are adopted for purposes of this Policy. Unless the context clearly indicates otherwise:

(1) “CMRTA” means the Central Midlands Regional Planning Authority.

(2) “Board” means the Board of Directors of the Central Midlands Regional Planning Authority.

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

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

(5) “Contract Officer” means the CMRTA employee approved by the Board to solicit and manage an CMRTA contract.

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

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

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

(9) “Contractor” means any person having a contract with CMRTA.

(10) “Days” means calendar days. In computing any period of time prescribed by this Policy, the day of the event from which the designated period of time begins to run is not included. If the final day of the designated period falls on a Saturday, Sunday, or a legal holiday for the state or federal government, then the period shall run to the end of the next business day.

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

(12) “Designee” means a duly authorized representative of a person with formal responsibilities under the Policy.

(13) “Disadvantaged Business Enterprise” or “DBE” means a business firm owned and operated by a person(s) in an historically socially and economically disadvantaged group. This term has the same meaning as and is used interchangeably with “Minority Business Enterprise” or “MBE”.

(14) “Employee” means an individual drawing a salary from CMRTA, whether elected or not, and any non-salaried individual performing personal services for CMRTA.

(15) “Executive Director” means the individual responsible for the day to day operations of the CMRTA and who is responsible to the Board.

(16) “FTA” means the Federal Transit Administration.

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

(18) “Grantee” includes the CMRTA, insofar as it is a public entity to which a grant or cooperative agreement is awarded by any Federal or State agency. Grantee means any other public or private entity to which a grant or cooperative agreement has been awarded by the Federal or State agency. The grantee is the entire legal entity even if only a particular component of the entity is designated in the assistance award document. For the purposes of this Policy, “grantee” also includes any subgrantee of the CMRTA as grantee. Furthermore, the CMRTA is responsible for assuring that its subgrantees comply with the requirements and standards of all Federal circular, and that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(19) “Invitation for bids” means a written or published solicitation issued by an authorized Contract Officer for bids to contract for the procurement or disposal of stated supplies, services, information technology, or construction, which will ordinarily result in the award of the contract to the responsible bidder making the lowest responsive bid.

(20) “Minority Business Enterprise” or “MBE” means a business firm owned and operated by a person(s) in an historically socially and economically disadvantaged group. This term has the same meaning as and is used interchangeably with “Disadvantaged Business Enterprise” or “DBE”.

(21) “Panel” means the procurement appeals Panel appointed by the Board.

(22) “Piggybacking” is an assignment of existing contract rights to purchase supplies, equipment, or services. Piggybacking is permissible when the solicitation document and resultant contract contain an assignability clause that provides for the assignment of all or a portion of the specified deliverables as originally advertised, completed, evaluated, and awarded. If the supplies were solicited, competed and awarded through the use of an indefinite-delivery-indefinite-quantity (IDIQ) contract, then both the solicitation and contract award must contain both a minimum and a maximum quantity that represents the reasonably foreseeable needs of the party(s) to the solicitation and contract. If the CMRTA and another party jointly solicit and award an IDIQ contract, then there must be a total minimum and maximum.

(23) “Policy” means the Procurement and Contract Administration Policy.

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

(25) “Real property” means any land, all things growing on or attached thereto, and all improvements made thereto including buildings and structures located thereon.

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

(27) “Services” means the furnishing of labor, time, or effort by a contractor not required to deliver a specific end product, other than reports which are merely incidental to required performance. This term includes consultant services other than architectural, engineering, land surveying, construction management, and related services.

(28) “State” means the State of South Carolina, or any agency or instrumentality of South Carolina exclusive of local governments. “State” does not include any public and Indian housing agency under the United States Housing Act of 1937.

(29) “Subcontractor” means any person having a contract to perform work or render service to a prime contractor as a part of the prime contractor’s agreement with a governmental body.

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

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

## **Section 11. Public Access to Procurement Information**

(1) Procurement information must be a public record to the extent required by Chapter 4 of Title 30 (The Freedom of Information Act) with the exception that commercial or financial information obtained in response to a request for proposals or any type of bid solicitation that is privileged and confidential need not be disclosed.

(2) Privileged and confidential information is information in specific detail not customarily released to the general public, the release of which might cause harm to the

competitive position of the party supplying the information. Examples of this type of information include:

- (a) customer lists;
- (b) design recommendations and identification of prospective problem areas under an RFP;
- (c) design concepts, including methods and procedures; and
- (d) biographical data on key employees of the bidder.

(3) For all documents submitted in response or with regard to a solicitation or other request, the documents need not be disclosed if an award is not made.

(4) Evaluative documents predecisional in nature such as intra-agency memoranda containing technical evaluations and recommendations are exempt so long as the contract award does not expressly adopt or incorporate the intra-agency memoranda reflecting the predecisional deliberations.

(5) For all documents submitted in response or with regard to any solicitation or other request, the person submitting the documents shall comply with instructions provided in the solicitation for marking information exempt from public disclosure. Information not marked as required by the applicable instructions may be disclosed to the public.

**Section 12. Environmental Protections** The Board intends that this Policy be administered to strengthen environmental outcomes through purchasing decisions that cause less pollution and waste, minimize toxicity to humans, conserve resources and habitats, minimize local and global climate impact, and contribute to sustainable economic growth within the State of South Carolina. Products and services that conserve natural resources, protect the environment, and are energy efficient will, to the extent practicable and economically feasible, be preferred. In implementing this Policy, the CMRTA intends that

(1) Primary consideration shall be given to information published by recognized independent third-party certification organizations when considering environmentally acceptable product (and service) attributes;

(2) Secondary weight should be given to existing environmentally preferable product lists maintained by the State or the federal government; and.

(3) Final regard may be given to Environmental Advocacy and Label Entities that do not certify products and services, but that offer supporting background for considering Environmentally Preferable Purchasing decisions.

### **Section 13. Purchase Necessity**

(1) Review of Procurement Requisitions for Purchase Necessity. The Contracting Officer shall evaluate each individual procurement requisition to avoid the purchase of unnecessary supplies and services, duplicative items and quantities or options the CMRTA does not intend to use or whose use is unlikely.

(2) Limit on Assignments. To the extent allowed by the FTA, the CMRTA may contract only for its current and reasonably expected needs and may not add quantities or options solely to permit assignment to a third party at a later date. These limits on assignments, however, do not preclude joint procurements that are entered into simultaneously by two or more parties to obtain advantages unavailable for smaller procurements.

(a) Piggybacking. The CMRTA may assign those contract rights to other FTA recipients if the original contract contains an assignability provision that permits the assignment of all or a portion of the specified deliverables under the terms originally advertised, competed, evaluated, and awarded, or contains other appropriate assignment provisions.

(3) Five-Year Limitation. When federal funds are used for the contract, the CMRTA may enter into a multi-year contract to buy rolling stock, with an option not exceeding five (5) years to buy additional rolling stock or replacement parts, 49 U.S.C. Section 5325(e)(1). The CMRTA may not exercise that option later than five (5) years after the date of its original contract.

### **Section 14. Options in Federally Funded Contracts**

The CMRTA must be able to justify options in its contracts as needed for its public transportation or project purposes. An option is a unilateral right in a contract by which, for a specified time, the CMRTA may acquire additional equipment, supplies, or services than originally procured. An option may also extend the term of the contract.

(1) Exercise of Options. A recipient may use contract options held by another recipient with the following limitations:

(a) Consistency with the Underlying Contract. The terms and conditions of the any option exercised by the CMRTA should be substantially similar to the terms and conditions of the option as stated in the original contract at the time it was awarded.

(b) Price. The option price must be better than prices available in the market, as determined by the CMRTA, or the option must be determined to be more advantageous at the time the CMRTA intends to exercise the option.

(c) Awards Treated as Sole Source Procurements. The following actions constitute sole source awards, and must meet FTA standards for sole source awards:

(i) Failure to Evaluate Options Before Awarding the Underlying Contract. If a contract has one or more options and those options were not evaluated as part

of the original contract award, exercising those options after contract award will result in a sole source award.

(ii) Negotiating a Lower Option Price. Exercising an option after the recipient has negotiated a lower or higher price will also result in a sole source award unless that price can be reasonably determined from the terms of the original contract, or that price results from Federal actions that can be reliably measured, such as changes in Federal prevailing labor rates, for example.

**Section 15. Record Keeping.** For procurements using federal funds, the CMRTA will prepare and maintain adequate, reasonable, and readily accessible project performance and financial records, covering procurement transactions as well as other aspects of project implementation. These records will be available to FTA officials, U.S. Department of Transportation officials, the U.S. Comptroller General, or any of their representatives. The CMRTA will maintain these records for three years after CMRTA has made final payment and all other pending matters are closed. The recipient must also prepare, maintain, and distribute the following documents as necessary:

(1) Procurement Method. The record should document the rationale for the method of procurement used for each contract, including a sole source justification for any acquisition that does not qualify as competitive;

(2) Contract Type. The record should state the reasons for selecting the contract type it used (fixed price, cost reimbursement, and so forth); and

(3) Contractor Selection. The record must state the reasons for contractor selection, and include a written responsibility determination for the successful contractor.

(4) Contract Price. The record must contain the justification for the contract cost or price.

**Section 16. Federal Cost Principles.** In contracts using federal funds, CMRTA's project costs must conform to applicable Federal cost principles for allowable costs. In general, costs must be necessary and reasonable, allocable to the project, authorized or not prohibited by Federal law or regulation, and must comply with Federal cost principles applicable to the CMRTA.

**Section 17. Exemptions.** The Board may, at its own motion or at the recommendation of the Executive Director, exempt specific supplies, services, information technology, or construction from the purchasing procedures required in this Policy. A majority shall be required for such exemption and the vote of the Board members must be recorded.

**ARTICLE 2.**  
**SOURCE SELECTION AND CONTRACT FORMATION**

**Section 1.** The CMRTA recognizes the following basic contracting methods for procuring supplies, services, equipment, and construction, both locally funded and federally assisted projects and programs:

- (1) competitive sealed bidding;
- (2) competitive fixed price bidding;
- (3) competitive best value bidding;
- (4) competitive online bidding;
- (5) competitive sealed proposals;
- (6) small purchases;
- (7) sole source purchases;
- (8) emergency procurement; and
- (9) participation in auction or sale of supplies from bankruptcy.

Any pre-bid or pre-proposal conferences held shall not be mandatory.

**Section 2. Competitive Sealed Bidding**

(1) Condition for Use. Contracts amounting to fifty thousand dollars or more shall be awarded by competitive sealed bidding except when the CMRTA determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the CMRTA, in which case the CMRTA will use the most advantageous method from Section 2.1.

(a) In solicitations using federal funds, sealed bid procurements should be used when the following conditions are met:

(i) Precise Specifications. A complete, adequate, precise, and realistic specification or purchase description is available.

(ii) Adequate Sources. Two or more responsible bidders are willing and able to compete effectively for the business.

(iii) Fixed Price Contract. The procurement generally lends itself to a firm fixed price contract.

(iv) Price Determinative. The successful bidder can be selected on the basis of price and those price-related factors listed in the solicitation including, but not

limited to, transportation costs, life cycle costs, and discounts expected to be taken. Apart from responsibility determinations, contractor selection may not be determined on the basis of other factors whose costs cannot be measured at the time of award.

(v) Discussions Unnecessary. Discussions with one or more bidders after bids have been submitted are expected to be unnecessary as award of the contract will be made based on price and price-related factors alone.

(2) Invitation for Bids. An invitation for bids shall be issued in an efficient and economical manner to include specifications and all contractual terms and conditions applicable to the procurement.

(3) Notice. Adequate notice of the invitation for bids shall be given at a reasonable time prior to the date set forth therein for the opening bids. Such notice shall include publications in a newspaper of general circulation in the State such as “South Carolina Business Opportunities” or through a means of central electronic advertising as approved by the Board.

(4) Receipt and Safeguarding of Bids. All bids (including modifications) received prior to the time of opening shall be kept secure and unopened, except as provided for by regulation of the board.

(5) Bid Opening. Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids and in the manner prescribed by regulation of the board. The amount of each bid, and such other relevant information as may be specified by regulation, together with the name of each bidder, shall be tabulated. The tabulation shall be open to the public inspection at that time.

(6) Bid Acceptance and Bid Evaluation. Bids must be accepted unconditionally without alteration or correction, except as otherwise authorized in this code. The invitation for bids must set forth the evaluation criteria to be used. Criteria must not be used in bid evaluation that are not in the invitation for bids. Bids must be evaluated based on the requirements in the invitation for bids and in accordance with this Policy.

(7) Correction or Withdrawal of Bids. Cancellation of Awards. Correction or withdrawal of inadvertently erroneous bids before bid opening, withdrawal of inadvertently erroneous bids after award, or cancellation and reaward of awards or contracts, after award but before performance, may be permitted in accordance with regulations promulgated by the Board. After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the CMRTA or fair competition must not be permitted. After opening, bids must not be corrected or withdrawn except in accordance with the provisions of this Policy. Except as otherwise provided by regulation, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts, after award but before performance, must be supported by a written determination of appropriateness made by the Contract Officer.

(8) Discussion with Bidders. As provided in the invitation for bids, discussions may be conducted with apparent responsive bidders for the purpose of clarification to assure full understanding of the requirements of the invitation for bids. All bids, in the CMRTA’s sole judgment, needing clarification must be accorded that opportunity. Clarification of a bidder’s bid

must be documented in writing by the Contract Officer and must be included with the bid. Documentation concerning the clarification must be subject to disclosure upon request as required by Section 1.9.

(9) Tie Bids. If two or more bidders are tied in price while otherwise meeting all of the required conditions, awards are determined in the following order of priority:

(a) If there is a South Carolina firm tied with an out-of-state firm, the award must be made automatically to the South Carolina firm.

(b) Tie bids involving South Carolina produced or manufactured products, when known, and items produced or manufactured out of the State must be resolved in favor of the South Carolina commodity.

(c) Tie bids involving a business certified by the South Carolina Office of Small and Minority Business Assistance as a Minority Business Enterprise must be resolved in favor of the Minority Business Enterprise.

(d) Tie bids involving South Carolina firms must be resolved in favor of the South Carolina firm located in the same taxing jurisdiction as the governmental body's consuming location.

(e) In all other situations in which bids are tied, the award must be made to the tied bidder offering the quickest delivery time, or if the tied bidders have offered the same delivery time, the tie must be resolved by the flip of a coin witnessed by the Contract Officer. All responding vendors must be invited to attend.

(10) Award. Unless there is a compelling reason to reject bids as prescribed by regulation of the Board, notice of an intended award of a contract to the lowest responsive and responsible bidders whose bid meets the requirements set forth in the invitation for bids shall be given by posting such notice at a location specified in the invitation for bids.

(11) Negotiations After Unsuccessful Competitive Sealed Bidding. When bids received pursuant to an invitation for bids are considered unreasonable by the procuring agency, or are not independently reached in open competition, or the low bid exceeds available funds as certified by the appropriate fiscal officer, and it is determined in writing by the chief Contract Officer, the head of a purchasing agency, or the designee of either officer above the level of Contract Officer, that time or other circumstances will not permit the delay required to resolicit competitive sealed bids, a contract may be negotiated pursuant to this section, provided that:

(a) each responsible bidder who submitted a bid under the original solicitation is notified of the determination and is given reasonable opportunity to negotiate;

(b) the negotiated price is lower than the lowest rejected bid by any responsible and responsive bidder under the original solicitation; and

(c) the negotiated price is the lowest negotiated price offered by any responsible and responsive offeror.

(12) Request for Qualifications.

(a) Before soliciting bids, the Contract Officer, may issue a request for qualifications from prospective bidders. The request must contain, at a minimum, a description of the scope of work to be solicited by the invitation for bids, the deadline for submission of information, and how prospective bidders may apply for consideration. The request must require information concerning the prospective bidders' product specifications, qualifications, experience, and ability to perform the requirements of the contract. Adequate public notice of the request for qualifications must be given in the manner provided in Section 2.2(3).

(b) After receipt of the responses to the request for qualifications from prospective bidders, the rank of the prospective bidders must be determined in writing from most qualified to least qualified on the basis of the information provided. Bids then must be solicited from at least the top two prospective bidders by means of an invitation for bids. The determination regarding how many bids to solicit is not subject to review.

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

(a) failure of a bidder to return the number of copies of signed bids required by the solicitation;

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

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

(d) failure of a bidder to acknowledge receipt of an amendment to a solicitation, but only if:

(i) the bid received indicates in some way that the bidder received the amendment, such as where the amendment added another item to the solicitation and the bidder submitted a bid, on it, if the bidder states under oath that it received the amendment before bidding and that the bidder will stand by its bid price; or

(ii) the amendment has no effect on price or quantity or merely a trivial or negligible effect on quality or delivery, and is not prejudicial to bidders, such as an amendment correcting a typographical mistake in the name of the governmental body.

(e) failure of a bidder to furnish an affidavit concerning affiliates;

(f) failure of a bidder to execute the certifications with respect to equal opportunity and affirmative action programs;

(g) failure of a bidder to furnish cut sheets or product literature;

(h) failure of a bidder to furnish certificates of insurance;

(i) failure of a bidder to furnish financial statements;

(j) failure of a bidder to furnish references;

(k) failure of a bidder to furnish its bidder number; and

(l) notwithstanding S.C. Code Title 40, the failure of a bidder to indicate his contractor's license number or other evidence of licensure, except that a contract must not be awarded to the bidder unless and until the bidder is properly licensed under the laws of South Carolina.

(14) Rejection of Bids. Any and all bids may be rejected if there is a sound, documented business reason.

**Section 3. Resident Vendor Preference: Local Fund Source** This section is only applicable to solicitations that do not use federal funding.

(1) "End product" means the tangible product described in the solicitation including all component parts and in final form and ready for the CMRTA's intended use.

(2) "Grown" means to produce, cultivate, raise, or harvest timber, agricultural produce, or livestock on the land, or to cultivate, raise, catch, or harvest products or food from the water which results in an end product that is locally derived from the product cultivated, raised, caught, or harvested.

(3) "Labor cost" means salary and fringe benefits.

(4) “Made” means to assemble, fabricate, or process component parts into an end product, the value of which, assembly, fabrication, or processing is a substantial portion of the price of the end product.

(5) “Manufactured” means to make or process raw materials into an end product.

(6) “Office” means a nonmobile place for the regular transaction of business or performance of a particular service which has been operated as such by the bidder for at least one year before the bid opening and during that year the place has been staffed for at least fifty weeks by at least two employees for at least thirty-five hours a week each.

(7) “Services” means services as defined by Section 1.8(24).

(8) “South Carolina end product” means an end product made, manufactured, or grown in South Carolina.

(9) “United States end product” means an end product made, manufactured, or grown in the United States of America.

(10) When evaluating pricing for purposes of making an award determination, the Contract Officer shall decrease by seven percent (7%) the price of any offer for a South Carolina end product.

(11) When evaluating pricing for purposes of making an award determination, the Contract Officer shall decrease by two percent (2%) the price of any offer for a United States end product. This preference does not apply to an item to which the South Carolina end product preference has been applied.

(12) Whether award is to be made by item or lot, the preferences must be applied to the price of each line item of end product. A preference must not be applied to an item for which a bidder does not qualify.

(13) If a contract is awarded to a bidder that received the award as a result of the South Carolina end product or United States end product preference, the contractor may not substitute a nonqualifying end product for a qualified end product. A substitution in violation of this item is grounds for debarment. If a contractor violates this provision, the CMRTA may terminate the contract for cause and, in addition, the contractor shall pay to the CMRTA an amount equal to twice the difference between the price paid by the CMRTA and the bidder’s evaluated price for a substituted item.

(14) If a bidder is requesting this preference, the bidder, upon request of the Contract Officer, must provide documentation that establishes the bidder’s qualifications for the preference. Bidder’s failure to provide this information promptly is grounds to deny the preference and for enforcement pursuant to subsection 30.

(15) When evaluating pricing for purposes of making an award determination, the Contract Officer shall decrease a bidder's price by seven percent (7%) if the bidder maintains an office in this State and either:

(a) maintains at a location in South Carolina at the time of the bid an inventory of expendable items which are representative of the general type of commodities on which the award will be made and which have a minimum total value, based on the bid price, equal to the lesser of fifty thousand dollars or the annual amount of the contract;

(b) is a manufacturer headquartered and having an annual payroll of at least one million dollars in South Carolina and the end product is made or processed from raw materials into a finished end product by that manufacturer or its affiliate (as defined in Section 1563 of the Internal Revenue Code); or

(c) at the time of bidding, directly employs or has a documented commitment with individuals domiciled in South Carolina that will perform services expressly required by the solicitation and the total direct labor cost to bidder for those individuals to provide those services exceeds fifty percent (50%) of the bidder's total bid price.

(16) Whether award is to be made by item or lot, the preferences must be applied to the price of each line item of end product or work, as applicable. A preference must not be applied to an item for which a bidder does not qualify.

(17) If a bidder is requesting this preference, the bidder, upon request by the Contract Officer, must provide documentation that establishes the bidder's qualifications for the preference and, for the preference claimed pursuant to subsection 15(c), must identify the persons domiciled in South Carolina that will perform the services involved in the procurement upon which bidder relies in qualifying for the preference, the services those individuals are to perform, and documentation of the bidder's labor cost for each person identified. Bidder's failure to provide this information promptly is grounds to deny the preference and for enforcement under subsection 30 below.

(18) When evaluating pricing for purposes of making an award determination, the Contract Officer shall decrease a bidder's price by two percent (2%) if:

(a) the bidder has a documented commitment from a single proposed first-tier subcontractor to perform some portion of the services expressly required by the solicitation; and

(b) at the time of the bidding, the subcontractor directly employs or has a documented commitment with individuals domiciled in South Carolina that will perform services expressly required by the solicitation and the total direct labor cost to the subcontractor for those individuals to provide those services exceeds twenty percent (20%) of bidder's total bid price.

(19) When evaluating pricing for purposes of making an award determination, the Contract Officer shall decrease a bidder's price by four percent (4%) if:

(a) the bidder has a documented commitment from a single proposed first-tier subcontractor to perform some portion of the services expressly required by the solicitation; and

(b) at the time of the bidding, the subcontractor directly employs or has a documented commitment with individuals domiciled in South Carolina that will perform services expressly required by the solicitation and the total direct labor cost to the subcontractor for those individuals to provide those services exceeds forty percent (40%) of bidder's total bid price.

(20) Whether award is to be made by item or lot, the preferences must be applied to the price of each line item of work. A preference must not be applied to an item for which a bidder does not qualify.

(21) Subject to other limits in this section, an offeror may benefit from applying for more than one of, or from multiple applications of, the preferences allowed by items 18 and 19.

(22) In its bid, a bidder requesting any of the preferences allowed by items 18 and 19 must identify the subcontractor to perform the work, the work the subcontractor is to perform, and the bidder's factual basis for concluding that the subcontractor's work constitutes the required percentage of the work to be performed in the procurement.

(23) If a bidder is requesting a preference allowed by items 18 or 19, upon request by the Contract Officer, the bidder shall identify the persons domiciled in South Carolina that are to perform the services involved in the procurement upon which the bidder relies in qualifying for the preference, the services those individuals are to perform, the employer of those persons, the bidder's relationship with the employer, and documentation of the subcontractor's labor cost for each person identified. Bidder's failure to provide this information promptly will be grounds to deny the preference and for enforcement pursuant to subsection 30 below.

(24) If a contract is awarded to a bidder that received the award as a result of a preference allowed by items 18 or 19, the contractor may not substitute any business for the subcontractor on which the bidder relied to qualify for the preference, unless first approved in writing by the Contract Officer. A substitution in violation of this subitem is grounds for debarment. If a contractor violates this provision, the Contract Officer may terminate the contract for cause. If the contract is not terminated, the Contract Officer may require the contractor to pay the CMRTA an amount equal to twice the difference between the price paid by the CMRTA and the price offered by the next lowest bidder, unless the substituted subcontractor qualifies for the preference.

(25) A business is not entitled to any preferences unless the business, to the extent required by law, has:

(a) paid all taxes assessed by the State; and

(b) registered with the South Carolina Secretary of State and the South Carolina Department of Revenue.

(26) The preferences provided in subsections 10 and 15(a) and (b) do not apply to a single unit of an item with a price in excess of fifty thousand dollars or a single award with a total potential value in excess of five hundred thousand dollars.

(27) The preferences provided in subsections 15(c) and 18 do not apply to a bid for an item of work by the bidder if the annual price of the bidder's work exceeds fifty thousand dollars or the total potential price of the bidder's work exceeds five hundred thousand dollars.

(28) A solicitation must provide potential bidders an opportunity to request the preferences that apply to a procurement. By submitting a bid and requesting that a preference be applied to that bid, a business certifies that its bid qualifies for the preference for that procurement. For purposes of applying this section, a bidder is not qualified for a preference unless the bidder makes a request for the preference as required in the solicitation. If a solicitation specifies which preferences, if any, apply to a procurement, the applicability of preferences to that procurement is conclusively determined by the solicitation unless the solicitation document is timely protested. If two or more bidders are tied after the application of the preferences allowed by this section, the tie must be resolved as provided in Article 2, Section 2.9. Price adjustments required by this section for purposes of evaluation and application of the preferences do not change the actual price offered by the bidder.

(29) This section does not apply to an acquisition of motor vehicles as defined in Section 56-15-10 or an acquisition of supplies or services relating to construction. This section does not apply to a procurement conducted pursuant to Section 2.9, Section 2.8, or Article 3.

(30) Pursuant to Section 4.3, a business may be debarred if:

(a) the business certified that it qualified for a preference;

(b) the business is not qualified for the preference claimed; and

(c) the certification was made in bad faith or under false pretenses. If a contractor has invalidly certified that a preference is applicable, the Contract Officer may terminate the contract for cause, and may require the contractor to pay the CMRTA an amount equal to twice the difference between the price paid by the CMRTA and the price offered by the next lowest bidder.

(31) The sum of all preferences allowed by items 18 and 19, when applied to the price of a line item of work, may not exceed six percent (6%) unless the bidder maintains an office in this State. Under no circumstances may the cumulative preferences applied to the price of a line item exceed ten percent (10%).

(32) As used in items 15(c), 18(b), and 19(b), the term “documented commitment” means a written commitment by the bidder to employ directly an individual, and by the individual to be employed by the bidder, both contingent on the bidder receiving the award.

(33) The remedies available in this section are cumulative of and in addition to all other remedies available at law and equity.

**Section 4. Geographic Preference: Federal Funding Source** This section applies to any solicitation that uses any federal funding.

(1) Geographic preference is prohibited in situations involving federal funding. The only exception is in Architectural and Engineering contracts, when Geographic location may be a selection criterion if an appropriate number of qualified firms are eligible to compete for the contract in view of the nature and size of the project.

#### **Section 5. Competitive Fixed Price Bidding**

(1) Conditions for Use. When the CMRTA determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the CMRTA, a contract may be entered into by competitive fixed price bidding subject to the provisions of Section 2.2, unless otherwise provided for in this section.

(2) Fixed Price Bidding. The purpose of fixed price bidding is to provide multiple sources of supply for specific services, supplies, or information technology based on a preset maximum price which the CMRTA will pay for such services, supplies, or information technology.

(3) Public Notice. Adequate notice of the solicitation shall be given at a reasonable time prior to the date set forth therein for the opening bids. Such notice shall include publications in a newspaper of general circulation in the State such as “South Carolina Business Opportunities” or through a means of central electronic advertising as approved by the Board.

(4) Pricing. The Board shall establish, before issuance of the fixed price bid, a maximum amount the CMRTA will pay for the services, supplies, or information technology desired.

(5) Evaluation. Vendors’ responses to the fixed price bid will be reviewed to determine if they are responsive and responsible.

(6) Discussion with Responsive Bidders. Discussions may be conducted with apparent responsive bidders to assure understanding of the requirements of the fixed price bid. All bidders whose bids, in the procuring agency’s sole judgment, need clarification shall be accorded such an opportunity.

(7) Award. Award must be made to all responsive and responsible bidders to the CMRTA’s request for competitive fixed price bidding. The contract file shall contain the basis on which the award is made and must be sufficient to satisfy external audit.

(8) Bids Received After Award. Bidders not responding to the initial fixed price bid may be added to the awarded vendors' list provided the bidder furnishes evidence of responsibility and responsiveness to the CMRTA's original fixed price bid as authorized by the solicitation.

(9) Remedies. The failure of a specific offeror to receive business, once it has been added to the awarded vendors' list, shall not be grounds for a contract controversy.

## **Section 6. Competitive Best Value Bidding**

(1) Conditions for Use. When the CMRTA determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the CMRTA, a contract may be entered into by competitive best value bidding subject to the provisions of Article 2, Section 2, unless otherwise provided for in this section.

(2) Best Value Bidding. The purpose of best value bidding is to allow factors other than price to be considered in the determination of award for specific supplies, services, or information technology based on pre-determined criteria identified by the CMRTA.

(3) Public Notice. Adequate notice of the solicitation shall be given at a reasonable time prior to the date set forth therein for the opening bids. Such notice shall include publications in a newspaper of general circulation in the State such as "South Carolina Business Opportunities" or through a means of central electronic advertising as approved by the Board.

(4) Bid Opening. At bid opening, the only information that will be released is the names of the participating bidders. Cost information will be provided after the ranking of bidders and the issuance of award.

(5) Evaluation Factors. The best value bid must state the factors to be used in determination of award and the numerical weighting for each factor. Cost must be a factor in determination of award and cannot be weighted at less than sixty percent (60%). Best value bid evaluation factors may include, but are not limited to, any of the following as determined by the Contract Officer in its sole discretion and not subject to protest:

- (a) operational costs the CMRTA would incur if the bid is accepted;
- (b) quality of the product or service or its technical competency;
- (c) reliability of delivery and implementation schedules;
- (d) maximum facilitation of data exchange and systems integration;
- (e) warranties, guarantees, and return policy;
- (f) vendor financial stability;

- (g) consistency of the proposed solution with the CMRTA's planning documents and announced strategic program direction;
- (h) quality and effectiveness of business solution and approach;
- (i) industry and program experience;
- (j) prior record of vendor performance;
- (k) vendor expertise with engagement of similar scope and complexity;
- (l) extent and quality of the proposed participation and acceptance by all user groups;
- (m) proven development methodologies and tools; and
- (n) innovative use of current technologies and quality results.

(6) Discussion with Responsive Bidders. Discussions may be conducted with apparent responsive bidders to assure understanding of the best value bid. All bidders whose bids, in the CMRTA's sole judgment, need clarification shall be accorded such an opportunity.

(7) Selection and Ranking. Bids shall be evaluated by using only the criteria stated in the best value bid and by adhering to the weighting as assigned. All evaluation factors, other than cost, will be considered prior to determining the effect of cost on the score for each participating bidder. Once the evaluation is complete, all responsive bidders shall be ranked from most advantageous to least advantageous to the CMRTA, considering only the evaluation factors stated in the best value bid.

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

## **Section 7. Competitive Online Bidding**

(1) Conditions for Use. When the CMRTA determines that on-line bidding is more advantageous than other procurement methods provided by this code, a contract may be entered into by competitive on-line bidding, subject to the provisions of Article 2, Section 2, unless otherwise provided in this section.

(2) Bidding Process. The solicitation must designate both an Opening Date and Time and a Closing Date and Time. The Closing Date and Time need not be a fixed point in time, but may remain dependent on a variable specified in the solicitation. At the Opening Date and Time, the CMRTA must begin accepting real-time electronic bids. The solicitation must remain open until the Closing Date and Time. If the lowest responsive bid is withdrawn after the Closing Date

and Time, the CMRTA may cancel the solicitation in accordance with this code or reopen electronic bidding to all pre-existing bidders by giving notice to all pre-existing bidders of both the new Opening Date and Time and the new Closing Date and Time. Notice that electronic bidding will be reopened must be given as specified in the solicitation.

(3) Receipt and Safeguarding of Bids. Other than price, any information provided to the CMRTA by a bidder shall be kept secure, except as provided for by regulation of the board.

## **Section 8. Competitive Sealed Proposals**

(1) Conditions for Use. When CMRTA determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the CMRTA, a contract may be entered into by competitive sealed proposals subject to the provisions of Article 2, Section 2, unless otherwise provided for in this section. Proposals must be solicited from an adequate number of qualified sources.

(2) Public Notice. Adequate notice of the solicitation shall be given at a reasonable time prior to the date set forth therein for the opening bids. Such notice shall include publications in a newspaper of general circulation in the State such as “South Carolina Business Opportunities” or through a means of central electronic advertising as approved by the Board.

(3) Receipt of Proposals. Proposals shall be opened publicly in accordance with regulations of the board. A tabulation of proposals shall be prepared and shall be open for public inspection after contract award.

(4) Request for Qualifications. Prior to soliciting proposals, CMRTA may issue a request for qualifications from prospective officers. The request must contain at a minimum a description of the scope of the work to be solicited by the request for proposals and must state the deadline for submission of information and how prospective offerors may apply for consideration. The request must require information only on their qualifications, experience, and ability to perform the requirements of the contract.

After receipt of the responses to the request for qualifications from prospective offerors, rank of the prospective offerors must be determined in writing from most qualified to least qualified on the basis of the information provided. Proposals then must be solicited from at least the top two prospective offerors by means of a request for proposals.

(5) Evaluation Factors. The request for proposals shall state the relative importance of the factors to be considered in evaluating proposals but shall not require a numerical weighting for each factor. Price may, but need not, be an evaluation factor.

(6) Selection and Ranking. Proposals shall be evaluated using only the criteria stated in the request for proposals and there must be adherence to any weighting that have been previously assigned. Once evaluation is complete, and all responsive offerors shall be ranked from most advantageous to least advantageous to the CMRTA, considering only the evaluation factors stated in the request for proposals. If price is an initial evaluation factor, award shall be made in accordance with subsection (8) below.

(7) Negotiations. Whether price was an evaluation factor or not, the Contract Officer in his sole discretion and not subject to challenge through a protest, may proceed in any of the manners indicated below, except that in no case may confidential information derived from proposals and negotiations submitted by competing offerors be disclosed:

(a) negotiate price with the highest ranked offeror on price, on matters affecting the scope of the contract, so long as the changes are within the general scope of the request for proposals, or on both.. If a satisfactory contract cannot be agreed upon, negotiations may be conducted, in the sole discretion of the Contract Officer, with the second, and then the third, and so on, ranked offerors to such level of ranking as determined by the Contract Officer in his sole discretion; or

(b) during the negotiation process as outlined in item (a) above, if the Contract Officer is unsuccessful in his first round of negotiations, he may reopen negotiations with any offeror with whom he previously negotiated; or

(c) the Contract Officer may make changes within the general scope of the request for proposals and may provide all responsive offerors an opportunity to submit their best and final offers.

(8) Award. Award must be made to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the CMRTA, taking into consideration price and the evaluation factor set forth in the request for proposals, unless the Contract Officer determines to utilize one of the negotiation options provided in subsection 7 above.

## **Section 9. Small Purchases**

(1) CMRTA. The following small purchase procedures may be utilized in conducting procurements that are less than \$50,000.00 in actual or potential value. However, procurement requirements shall not be artificially divided by governmental bodies so as to constitute a small purchase under this section.

(2) Competition and Price Reasonableness. Routine purchases less than \$500.00 may or may not involve written quotes. Generally, routine purchases will be for items approved in the annual budget, such as office supplies, meeting expenses, and data processing supplies, software upgrades, etc.

(a) **Purchases Not in Excess of \$2,500.00**. Small purchases not exceeding \$2,500.00 may be made after getting not less than three telephone quotations if the prices are considered to be reasonable. The telephone quotations must be documented in the contract file. The Contract Officer shall annotate the purchase requisition: 'Price is fair and reasonable,' provide a description of how that determination was made, and sign. The purchases must be distributed equitably among qualified suppliers. When practical, a quotation must be solicited from other than the previous supplier before placing a repeat

order. The administrative cost of verifying the reasonableness of the price of purchase “not in excess of” may more than offset potential savings in detecting instances of overpricing.

(i) The size of the procurement may not be reduced or divided merely to come within this limit.

(ii) These purchases are exempt from FTA’s Buy America requirements Davis-Bacon prevailing wage requirements, however, will apply to construction contracts exceeding \$2,000.

(b) **Purchases from \$2,500.01 to \$10,000.00.** Solicitations of written quotes from a minimum of three qualified sources of supply shall be made and documentation of the quotes attached to the purchase requisition. The award shall be made to the lowest responsive and responsible source.

(c) **Purchases from \$10,000.01 to \$50,000.00.** Written solicitation of written quotes, bids, or proposals shall be made. The procurement shall be advertised at least once in the South Carolina Business Opportunities publication or through a means of central electronic advertising as approved by the Board. A copy of the written solicitation and written quotes shall be attached to the purchase requisition. The award shall be made to the lowest responsive and responsible source or, when a request for proposal process is used the highest ranking offeror.

(3) Requirement to Advertise. All competitive procurements above \$10,000.00 must be advertised at least once in the “South Carolina Business Opportunities” publication or through a means of central electronic advertising as provided by the Office of General Services.

**Section 10. Third Party Review of Specifications/Solicitation Documents**

Prior to issuance of solicitation documents for procurements in excess of \$50,000.00, excepting procurements subject to Section 2.12, the CMRTA shall submit the proposed solicitation documents to the SCDOT Procurement Office and the appropriate EDM of the Mass Transit Office for review and comment. The CMRTA will allow seven working days for SCDOT review and comments. If no comments are provided by the SCDOT within the seven working day timeframe, the CMRTA will proceed with the solicitation process and procurement

**Section 11. Sole Source Procurements**

A contract may be awarded for a supply, service, or construction item without competition when, under regulations promulgated by the board, the chief Contract Officer, Executive Director, or a designee of either officer, above the level of the Contract Officer, determines in writing that there is only one source for the required supply, service, or construction item. These regulations must include the requirements contained in this paragraph. Written documentation must include the determination and basis for the proposed sole source procurement. Any delegation of authority by either the Executive Director of the CMRTA with respect to sole source determinations must be submitted to the Board in writing for prior approval. In cases of reasonable doubt, competition

must be solicited. Any decision by the CMRTA that procurement be restricted to one potential vendor must be accompanied by an explanation as to why no other will be suitable or acceptable to meet the need.

(1) Out of Scope Changes. When the recipient requires an existing contractor to make a change to its contract that is beyond the scope of that contract, the recipient has made a sole source award that must be justified.

(2) For contracts involving federal funds, the property or services are available from a sole source if the following conditions are met:

(a) Unique or Innovative Concept. The offeror demonstrates a unique or innovative concept or capability not available from another source. Unique or innovative concept means a new, novel, or changed concept, approach, or method that is the product of original thinking, the details of which are kept confidential or are patented or copyrighted, and is available to the recipient only from one source and has not in the past been available to the recipient from another source.

(b) Patents or Restricted Data Rights. Patent or data rights restrictions preclude competition.

(c) Substantial Duplication Costs. In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components thereof, when it is likely that award to another contractor would result in substantial duplication of costs that are not expected to be recovered through competition.

(d) Unacceptable Delay. In the case of a follow-on contract for the continued development or production of a highly specialized equipment and major components thereof, when it is likely that award to another contractor would result in unacceptable delays in fulfilling the recipient's needs.

(3) Single Bid or Single Proposal. Upon receiving a single bid or single proposal in response to a solicitation, the CMRTA will determine if competition was adequate. This should include a review of the specifications for undue restrictiveness and might include a survey of potential sources that chose not to submit a bid or proposal. The Procurement Officer shall document the file regarding how many vendors requested a copy of the solicitation and the reasons, to the extent they are available, that vendors did not submit a response to the solicitation.

## **Section 12. Emergency Procurements**

An emergency condition is a situation which creates a threat to public health, welfare, or safety such as may arise by reason of floods, epidemics, riots, equipment failure, fire loss, or such other reason as may be proclaimed by the Executive Director or a designee. The existence of such conditions must create 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: (1) the functioning of the CMRTA; (2) the preservation or protection of property; or (3) the health or safety of any person.

Notwithstanding any other provision of this policy, the Executive Director, or a designee may make or authorize others to make emergency procurements only when there exists an immediate threat to public health, welfare, critical economy and efficiency, or safety under emergency conditions as defined in regulations promulgated by the board; and provided, that such emergency procurements shall be made with as much competition as is practicable under the circumstances.

A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the procurement file.

A record or documentation of emergency procurements shall be maintained that lists the:

- (1) a description of the supplies, services or construction purchased;
- (2) date of purchase;
- (3) amount of purchase;
- (4) department;
- (5) each contractor's name;
- (6) method of procurement;
- (7) condition that caused the emergency procurement;
- (8) identification number of the procurement file; and
- (9) written approval by Executive Director
- (10) Contract Officer shall conduct negotiations, as appropriate, as to price, delivery, and terms.

### **Section 13. Responsibility of Bidders and Offerors.**

(1) Determination of Responsibility. Responsibility of the bidder or offeror shall be ascertained for each contract let by the CMRTA based upon full disclosure to the Contract Officer concerning capacity to meet the terms of the contracts and based upon past record of performance for similar contracts. CMRTA adopts the standards of responsibility contained in S.C. Code Ann. Reg. 19-445.2125.A, which standards shall be enforced in all CMRTA contracts.

(2) Determination of Nonresponsibility. A written determination of nonresponsibility of a bidder or offeror shall be made in accordance with Section 13(1). The unreasonable failure of a bidder or offeror to supply information promptly in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such bidder or offeror.

(3) Right of Nondisclosure. Except as otherwise provided by law, information furnished by a bidder or offeror pursuant to this section shall not be disclosed outside of the offices of the CMRTA without prior written consent by the bidder or offeror.

#### **Section 14. Participation in Auction or Sale of Supplies from Bankruptcy**

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

**Section 15. Prequalification Lists.** In contracts using federal funds, the CMRTA may elect to use prequalification lists in procurements of property involving lengthy evaluations needed to determine whether it satisfies the CMRTA's standards. The prequalification lists must be current and include enough qualified sources to provide maximum full and open competition. Potential bidders or offerors must be allowed to qualify during the solicitation period.

**Section 16. Revenue Contracts.** A revenue contract is a contract in which the CMRTA provides access to public transportation assets for the primary purpose of either producing revenues in connection with an activity related to public transportation, or creating business opportunities with the use of FTA assisted property. The CMRTA has broad latitude in determining the extent and type of competition appropriate for a particular revenue contract. Nevertheless, to ensure fair and equal access to FTA assisted property and to maximize revenue derived from such property, the CMRTA will conduct its revenue contracting as follows:

(1) Limited Contract Opportunities. If there are several potential competitors for a limited opportunity (such as advertising space on the side of a bus), then the CMRTA will use a competitive process to permit interested parties an equal chance to obtain that limited opportunity.

(2) Open Contract Opportunities. If, however, one party seeks access to a public transportation asset (such as a utility that might seek cable access in a subway system), and the CMRTA is willing and able to provide contracts or licenses to other parties similarly situated (because there is room for a substantial number of such cables without interfering with transit operations), then competition would not be necessary because the opportunity to obtain contracts or licenses is open to all similar parties.

**Section 17. Independent Cost Estimates** The CMRTA must perform a cost or price analysis in connection with every procurement action, excepting Sections 2.9.1 and 2.9.2(a) and (b), including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation (*e.g.*, FTA Circular 4420.1E Sec.10).

(1) The CMRTA must make independent estimates before receiving bids or proposals. These estimates may be obtained from published competitive prices, results of competitive

procurements, historical prices and trends, or by the Contractor Officer's estimate or outside estimators. The Contract Officer or his designee may use the following resources, or such other resources as may be approved by the FTA, as guidance in performing cost or price analysis:

- (a) FTA's "Best Practices Procurement Manual"
  - (b) The National Transit Institute Course, "Cost or Price Analysis and Risk Assessment"
  - (c) Pricing Guide for FTA Grantee, FTA Website:  
[http://www.fta.dot.gov/documents/Helpline\\_Price\\_Guide.doc](http://www.fta.dot.gov/documents/Helpline_Price_Guide.doc)
  - (d) FAR Part 31, Contract Cost Principles and Procedures
- (2) The CMRTA must perform a cost analysis when:
- (a) The offeror is required to submit the elements (i.e., Labor Hours, overhead, Materials, etc) of the estimated cost, e.g., under professional consulting and architectural and engineering services contracts.
  - (b) Adequate price competition is lacking for sole source procurements, and for contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or on the basis of prices set by law or regulation. A price analysis may be used in all other instances to determine the reasonableness of the proposed contract price.
    - (i) Profit must be negotiated as a separate element of the cost for each contract in which there has been no price competition, and in all acquisitions in which the CMRTA performs or acquires a cost analysis. To establish a fair and reasonable profit, the CMRTA will consider the complexity of the work to be performed, the risk undertaken by the contractor, the contractor's investment, the amount of subcontracting, the quality of the contractor's record of past performance, and industry profit rates in the surrounding geographical area for similar work.
- (3) If the CMRTA determines that competition was adequate, a price analysis, rather than a cost analysis, is required to determine the reasonableness of the proposed contract price.
- (4) The Cost and Price Analysis Form must be a part of the procurement file prior to issuing any solicitation.

### **Section 18. Contract Price Adjustment—Fiscal Responsibility**

Every contract modification, change order, or contract price adjustment under a contract with the CMRTA shall be subject to prior written certification by the official responsible for

monitoring and reporting upon the status of the costs of the total project budget or contract budget, as to the effect of the contract modification, change order, or adjustment in contract price on the total project budget or the total contract budget. In the event that the certification of the responsible official discloses a resulting increase in the total project budget and/or the total contract budget, the Contract Officer shall not execute or make such contract modification, change order, or adjustment in contract price unless sufficient funds are available therefore, or the scope of the project or contract is adjusted so as to permit the degree of completion that is feasible within the total project budget and/or total contract budget as it existed prior to the contract modification, change order, or adjustment in contract price under consideration; provided, however, that with respect to the validity, as to the contractor, of any executed contract modification, change order, or adjustment in contract price which the contractor has reasonably relied upon, it shall be presumed that there has been compliance with the provisions of this Section.

### **Section 19. Evaluations of Bid Alternates**

When bid alternates are included in a bid or proposal document, these alternates must be evaluated as part of the overall bid. This evaluation must be in a written narrative detailing the contract award and takes the alternate into account in reaching a procurement decision. This evaluation must be submitted to the Contract Officer prior to proceeding with the procurement.

### **Section 20. Liquidated Damages Provisions**

The CMRTA may use liquidated damages if it may reasonably expect to suffer damages (increased costs on project involved) from late completion and the extent or amount of such damages would be difficult or impossible to determine. The amount of liquidated damages must be reasonable in light of the loss suffered. The assessment for damages shall be at a specific rate per day for each day of overrun in contract time; and the rate must be specified in the third party contract. The procurement file should include a record of the calculation and rationale for the amount of damages established. Any liquidated damages recovered must be credited to the project account involved unless FTA permits otherwise.

### **Section 21. Requirements for Solicitations and Contracts Using Federal Funds.**

(1) Each solicitation and resulting contract must identify those Federal requirements that will affect contract scope and performance. Additionally, the following information must be included in every solicitation for a contract using federal funds:

(a) Clear Descriptions. A clear and accurate description of the technical requirements for the material, product, or service to be procured.

(b) Nonrestrictive Specifications. In competitive procurements, the description may not contain features that unduly restrict competition.

(c) Quality Requirements. A description may include a statement of the qualitative nature of the material, product, or service to be procured and, when necessary,

describe minimum essential characteristics and standards to which the property or services must conform if it is to satisfy the CMRTA's intended use.

(d) Brand Name or Equal. If a solicitation asks for a "brand name" product, it must allow an equal product and list the salient characteristics that the equal product must meet to be acceptable for award.

(e) Evaluation Factors. The solicitation must identify all factors to be used in evaluating bids or proposals.

(e) Termination. Contracts over \$10,000 and using federal funds must contain provisions both for termination for cause and termination for convenience. The CMRTA may terminate a contract for cause or for convenience. The contractor may terminate the contract only after FTA approval.

(f) Metric Usage. The CMRTA will accept products and services dimensioned in the metric systems of measurement, to the extent practicable and economically feasible.

(2) Preference for Performance Specifications. The Common Grant Rule for governmental recipients advises the recipient that [d]etailed product specifications should be avoided if at all possible. The Common Grant Rule for non-governmental recipients advises the recipient to describe technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

(3) Payment Restrictions.

(a) Advance Payments. In general, federal funds may not be used to make payments to a third party contractor before the contractor has incurred the costs for which the payments would be attributable. Advance payments with federal funds may be made when:

(i) Those advance payments are customary, such as for public utility connections and services, rent, tuition, insurance premiums, subscriptions to publications, software licenses, construction mobilization costs, transportation, hotel reservations, and conference and convention registrations. If a customary advance payment exceeds \$100,000, FTA concurrence is required; and

(ii) Sound business reasons exist. Adequate security for the advance payment is required, as is written FTA concurrence.

(b) Progress Payments. Progress payments are payments for contract work that has not been completed. The CMRTA must provide adequate security for progress payments, including taking title or obtaining a letter of credit or taking equivalent measures to protect the CMRTA's interest in the progress payment, and have sufficient written documentation to substantiate the amount of work for which payment is requested.

(i) Percentage of Completion Method. Any progress payments for construction contracts must be made on a percentage completed method. This method is to be used only for construction contracts.

**Section 22. Cardinal Changes (“Tag-Ons”) Prohibited.** Cardinal changes are prohibited in contracts using federal funds. A cardinal change is a significant change in contract work (property or services) that causes a major deviation from the original purpose of the work or the intended method of achievement, or causes a revision of contract work so extensive, significant, or cumulative that, in effect, the contractor is required to perform very different work from that described in the original contract. A change within the scope of the contract (sometimes referred to as an in-scope change) is not a tag-on or cardinal change.

**Section 23. Buy America Requirements.**

(1) If steel or manufactured products (as defined in 49 CFR 661.3 and 661.5) are being procured, the appropriate certificate as set forth below shall be completed and submitted by each bidder in accordance with 49 CFR 661.13(b).

(2) If buses or other rolling stock (including train control, communication, and traction power equipment) are being procured, the appropriate certificate as set forth below shall be completed and submitted by each bidder in accordance with 49 CFR 661.13(b) of this part.

(3) Pre-Delivery Audits. Before an award for rolling stock is made under this Policy, the CMRTA must ensure a pre-award certification under 49 CFR 663.25 is completed. This includes:

(a) There is a letter from FTA which grants a waiver to the rolling stock to be purchased from the Buy America requirements under section 165(b)(1), (b)(2), or (b){4) of the Surface Transportation Assistance Act of 1982, as amended; or

(b) The recipient is satisfied that the rolling stock to be purchased meets the requirements of section 165(a) or (b)(3) of the Surface Transportation Assistance Act of 1982, as amended, after having reviewed itself or through an audit prepared by someone other than the manufacturer or its agent documentation provided by the manufacturer which lists -

- i. Component and subcomponent parts of the rolling stock to be purchased identified by manufacturer of the parts, their country of origin and costs; and
- ii. The location of the final assembly point for the rolling stock, including a description of the activities that will take place at the final assembly point and the cost of final assembly. If the CMRTA cannot make a pre-award certification required

either by section (3)(a) or (b) of the section, CMRTA cannot make an award to the vendor and the vendor's bid or proposal shall be rejected.

(4) Post-Delivery Audits. Before title to the rolling stock is transferred to the CMRTA, the CMRTA must ensure a post-delivery audit under 49 CFR 663.33 is complete. This includes:

(a) A post-delivery Buy America certification, which is a certification that the CMRTA keeps on file that:

(i) there is a letter from the FTA that grants a waiver to the rolling received from the Buy America requirements under section 165(b)(1) or (b)(4) of the Surface Transportation Assistance Act of 1982, as amended; or

(ii) CMRTA is satisfied that the rolling stock meets the requirements of section 165(a) or (b)(3) of the Surface Transportation Assistance Act of 1982, as amended, after having reviewed itself or by means of an audit prepared by someone other than the manufacturer or its agent documentation provided by the manufacturer that lists:

(1) Components and subcomponent parts of the rolling stock identified by the manufacturer of the parts, and their country of origin and costs; and

(2) The actual location of the final assembly point for the rolling stock, including a description of the activities that took place at the final assembly point and the cost of final assembly.

(b) A post-delivery purchaser's requirements certification, which is a certification that the CMRTA keeps on file that:

(i) Except for procurements covered under paragraph (iii) in this section, a resident inspector (other than an agent or employee of the manufacturer) was at the manufacturing site throughout the period of the manufacture of the rolling stock to be purchased and monitored and completed a report on the manufacture of the rolling stock. Such a report, at a minimum, shall:

(1) Provide accurate records of all vehicle construction activities; and

(2) Address how the construction and the operation of the vehicles fulfills the contract specifications.

(ii) After reviewing the report required under paragraph (i) of this section, and visually inspecting and road testing the delivered vehicles, the vehicles meet the contract specifications.

(iii) For procurements of ten or fewer buses, or any number of primary manufacturer standard production and unmodified vans, after visually inspecting and road testing the vehicles, the vehicles meet the contract specifications.

(c) When appropriate, a manufacturer's Federal Motor Vehicle Safety Standard self-certification information as described in 49 CFR 663.41 or 663.43.

If the CMRTA cannot complete a post-delivery audit because the CMRTA or its agent cannot certify Buy America compliance or that the rolling stock meet the requirements specified in the contract, the rolling stock may be rejected and final acceptance by the CMRTA will not be required. The CMRTA may exercise any legal rights it has under the contract or at law. This provision does not preclude the CMRTA and manufacturer from agreeing to a conditional acceptance of the rolling stock pending manufacturer's corrections of deviations within a reasonable period of time.

#### **Section 24. Veterans Employment.**

(1) The CMRTA shall ensure that contractors working on a capital project funded using Federal financial assistance give a hiring preference, to the extent practicable, to veterans (as defined in section 2108 of title 5) who have the requisite skills and abilities to perform the construction work required under the contract. This subsection shall not be understood, construed, or enforced in any manner that would require an employer to give a preference to any veteran over any equally qualified applicant who is a member of any racial or ethnic minority, female, and individual with a disability, or a former employee.

### **ARTICLE 3. CONSTRUCTION, ARCHITECT-ENGINEER, AND LAND SURVEYING SERVICES**

#### **Part A—Construction**

#### **Section 1. Definitions Used in this Article**

(1) "Architect-engineer and land surveying services" are those professional services associated with the practice of architecture, professional engineering, land surveying, landscape architecture, and interior design pertaining to construction, as defined by the laws of this State, as well as incidental services that members of these professions and those in their employ may logically or justifiably perform, including studies, investigations, surveys, evaluations, consultations, planning, programming conceptual designs, plans and specifications, cost estimates, inspections, shop drawing reviews, sample recommendations, preparation of operating and maintenance manuals, and other related services.

(2) "Construction manager agent" means a business that has been awarded a separate contract with the governmental body to provide construction management services but not construction.

(3) “Construction manager at-risk” means a business that has been awarded a separate contract with the governmental body to provide both construction management services and construction using the construction management at-risk project delivery method. A contract with a construction manager at-risk may be executed before completion of design.

(4) “Construction management services” are those professional services associated with contract administration, project management, and other specified services provided in connection with the administration of a project delivery method defined in Section 3.2 (Project Delivery Methods Authorized).

(5) “Construction management at-risk” means a project delivery method in which the governmental body awards separate contracts, one for architectural and engineering services to design an infrastructure facility and the second to a construction manager at-risk for both construction of the infrastructure facility according to the design and construction management services.

(6) “Design-bid-build” means a project delivery method in which the governmental body sequentially awards separate contracts, the first for architectural and engineering services to design an infrastructure facility and the second for construction of the infrastructure facility according to the design.

(7) “Design-build” means a project delivery method in which the governmental body enters into a single contract for design and construction of an infrastructure facility.

(8) “Design-build-finance-operate-maintain” means a project delivery method in which the governmental body enters into a single contract for design, construction, finance, maintenance, and operation of an infrastructure facility over a contractually defined period. Money appropriated by the CMRTA is not used to pay for a part of the services provided by the contractor during the contract period.

(9) “Design-build-operate-maintain” means a project delivery method in which the governmental body enters into a single contract for design, construction, maintenance, and operation of an infrastructure facility over a contractually defined period. All or a portion of the money required to pay for the services provided by the contractor during the contract period are either appropriated by the CMRTA before the award of the contract or secured by the CMRTA through fare, toll, or user charges.

(10) “Design requirements” means the written description of the infrastructure facility to be procured pursuant to this article, including:

(a) required features, functions, characteristics, qualities, and properties that are required by the CMRTA;

(b) the anticipated schedule, including start, duration, and completion; and

(c) estimated budgets as applicable to the specific procurement, for design, construction, operation, and maintenance. The design requirements may, but need not, include drawings and other documents illustrating the scale and relationship of the features, functions, and characteristics of the project. .

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

(12) “Operations and maintenance” means a project delivery method in which the governmental body enters into a single contract for the routine operation, routine repair, and routine maintenance of an infrastructure facility.

(13) “Proposal development documents” means drawings and other design-related documents that are sufficient to fix and describe the size and character of an infrastructure facility as to architectural, structural, mechanical and electrical systems, materials, and such other elements as may be appropriate to the applicable project delivery method.

## **Section 2. Project Delivery Methods Authorized**

The following project delivery methods are authorized for procurements relating to infrastructure facilities:

- (1) design-bid-build;
- (2) construction management at-risk;
- (3) operations and maintenance;
- (3) design-build;
- (4) design-build-operate-maintain; and
- (5) design-build-finance-operate-maintain.

## **Section 3. Choice of Project Delivery Method**

The project delivery method used for a CMRTA construction project must be that method which is most advantageous to the CMRTA and results in the most timely, economical, and successful completion of the construction project. The Contracting Officer shall select the

appropriate project delivery method for a particular project and shall state in writing the facts and considerations leading to the selection of that particular method.

#### **Section 4. Source Selection Methods Assigned to Project Delivery Methods**

(1) Scope. This section specifies the source selection methods applicable to procurements for the project delivery methods identified in Section 3-2 (Project delivery methods authorized), except as provided in Sections 2.9 (Small Purchases), 2.11 (Sole Source Procurement), and 2.12 (Emergency Procurements). For contracts using federal funds, the use of the percentage of construction cost method of contracting and the use of the cost plus a percentage of cost method of contracting are prohibited.

(2) Design-bid-build:

(a) Design. Architect-engineer, construction management, and land surveying services. The qualifications based selection process in Section 3.B.3 (Qualifications Based Selection Procedures) must be used to procure architect-engineer, construction management, and land surveying services, unless those services are acquired in conjunction with construction using one of the project delivery methods provided in Section 3.A.4(3), (5), (6) and (7).

(b) Construction. Competitive sealed bidding, as provided in Section 2.3 (Competitive Sealed Bidding), must be used to procure construction in design-bid-build procurements.

(3) Construction Management at-risk. Contracts for construction management at-risk must be procured as provided in either Section 2.2 (Competitive Sealed Bidding) or Section 11-35-1530 (Competitive Sealed Proposals).

(4) Operations and Maintenance. Contracts for operations and maintenance must be procured as set forth in Section 2.1 (Methods of Source Selection).

(5) Design-build. Contracts for design-build must be procured by competitive sealed proposals, as provided in Section 2.8 (Competitive Sealed Proposals).

(6) Design-build-operate-maintain. Contracts for design-build-operate-maintain must be procured by competitive sealed proposals, as provided in Section 2.8 (Competitive Sealed Proposals).

(7) Design-build-finance-operate-maintain. Contracts for design-build-finance-operate-maintain must be procured by competitive sealed proposals, as provided in Section 2.8 (Competitive Sealed Proposals).

## **Section 5. Additional Bidding Procedures for Construction Procurement.**

Exceptions in Competitive Sealed Bidding Procedures. The process of competitive sealed bidding as required by Section 3.4.2(b) must be performed in accordance with the procedures outlined in Article 2 of this Policy subject to the following exceptions:

(1) Invitation for Bids. The invitation must include, but not be limited to, all contractual terms and conditions applicable to the procurement. The invitation must be published in SCBO for two (2) consecutive weeks.

(2) Bid Acceptance. Instead of Section 2.2(6), the following provision applies. Bids must be accepted unconditionally without alteration or correction, except as otherwise authorized in this code. The governmental body's invitation for bids must set forth all requirements of the bid including, but not limited to:

(i) The CMRTA, in consultation with the architect-engineer assigned to the project, shall identify by specialty, if any, in the invitation for bids all subcontractors who are expected to perform work for the prime contractor to or about the construction when those subcontractors' contracts are each expected to exceed three percent of the prime contractor's total base bid. In addition, the CMRTA, in consultation with the architect-engineer assigned to the project, may identify by specialty in the invitation for bids a subcontractor who is expected to perform work which is vital to the project. The determination of which subcontractors are included in the list provided in the invitation for bids is not protestable. A bidder in response to an invitation for bids shall set forth in his bid the name of only those subcontractors to perform the work as identified in the invitation for bids. If the bidder determines to use his own employees to perform a portion of the work for which he would otherwise be required to list a subcontractor and if the bidder is qualified to perform that work under the terms of the invitation for bids, the bidder shall list himself in the appropriate place in his bid and not subcontract that work except with the approval of the governmental body for good cause shown.

(ii) Failure to complete the list provided in the invitation for bids renders the bidder's bid unresponsive.

(iii) The CMRTA shall send all responsive bidders a copy of the bid tabulation within ten working days following the bid opening.

(3) Instead of Section 2.2(10), the following provisions apply:

(i) Unless there is a compelling reason to reject bids as prescribed by regulation of the board, notice of an intended award of a contract to the lowest responsive and responsible bidder whose bid meets the requirements set forth in the invitation for bids must be given by posting the notice at a location that is specified in the invitation for bids. The invitation for bids and the posted notice must contain a statement of the bidder's right to protest pursuant to Section 4. A.1 and the date and location of posting must be announced at bid opening. In addition to posting notice, the governmental body promptly

shall send all responsive bidders a copy of the notice of intended award and of the bid tabulation. The mailed notice must indicate the posting date and must contain a statement of the bidder's right to protest pursuant to Section 4.A.1.

(ii) After ten days' notice is given, the CMRTA may enter into a contract with the bidder named in the notice in accordance with the provisions of this code and of the bid solicited. The procurement officer must comply with Section 2.13.

(iii) If, at bid opening, only one bid is received and determined to be responsive and responsible and within the CMRTA's construction budget, award may be made without the ten-day waiting period.

(4) Negotiations after Unsuccessful Competitive Sealed Bidding. Instead of Section 2.2(11), if bids received pursuant to an invitation for bids exceed available funds, and it is determined in writing by the governmental body that circumstances do not permit the delay required to resolicit competitive sealed bids, and the base bid, less deductive alternates, does not exceed available funds by an amount greater than ten percent of the construction budget established for that portion of the work, a contract may be negotiated pursuant to this section with the lowest responsible and responsive bidder. The CMRTA may change the scope of the work to reduce the cost to be within the established construction budget but may not reduce the cost below the established construction budget more than ten percent without a written request to and approval by the Board, based on the best interest of the CMRTA.

## **Section 6. Value Engineering**

The CMRTA will use value engineering clauses for construction and other capital projects of sufficient size to offer reasonable opportunity for increased efficiency. Value engineering is a systematic and creative analysis to ensure that the project is designed and constructed to perform its essential functions in the most cost-effective manner. The process may include consideration of life-cycle costing, and intangible or indirect benefits such as sustainability.

## **Section 7. Contract Administration and Records**

The CMRTA will maintain a contract administration system designed to ensure conformance by all parties with the terms, conditions, and specifications of their contracts. CMRTA shall maintain records detailing the history of procurement in a manner consistent with the size, complexity and cost of the contract.

## **Section 8. Bid Bond and Security**

### **(1) Bid Security.**

(a) Bid security is required for all competitive sealed bidding for construction contracts in a design-bid-build procurement in excess of fifty thousand dollars and other contracts as may be prescribed by the Board, so long as the requirements are not unduly restrictive of competition. Bid security is a bond provided by a surety company meeting

the criteria established by the regulations of the board or otherwise supplied in a form that may be approved the Board.

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

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

(d) Withdrawal of Bids. After the bids are opened, they must be irrevocable for the period specified in the invitation for bids. If a bidder is permitted to withdraw its bid before bid opening pursuant to Section 2.2(7), action must not be had against the bidder or the bid security.

(2) Contract Performance Payment Bonds.

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

(i) a performance bond satisfactory to the Board, executed by a surety company meeting the criteria established by the board in regulations, or otherwise secured in a manner satisfactory to the Board, in an amount equal to one hundred percent of the portion of the contract price that does not include the cost of operation, maintenance, and finance;

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

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

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

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

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

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

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

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

(3) Bonds Forms and Copies.

(a) Bonds Forms. The Board may adopt any form of the bonds required by this section which form has been adopted by the South Carolina Budget and Control Board.

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

(4) Retention.

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

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

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

**Section 9. Errors and omissions insurance.**

The Board may adopt a policy or may determine on an *ad hoc* bases that specify when offerors are required to provide appropriate errors and omissions insurance to cover architectural and engineering services under the project delivery methods set forth in this Policy.

**Section 10. Other forms of security.**

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

(a) operations period surety bonds that secure the performance of the contractor’s operations and maintenance obligations;

(b) letters of credit in an amount appropriate to cover the cost to the governmental body of preventing infrastructure service interruptions for a period up to twelve months; and

(c) appropriate written guarantees from the contractor, or depending upon the circumstances, from a parent corporation, to secure the recovery of procurement costs to the governmental body if the contractor defaults in performance.

**Section 11. Contract clauses and their administration.**

The Board may include in CMRTA construction contracts and subcontracts any clauses providing for adjustments in prices, time of performance, liquidated damages and other appropriate contract provisions that have been adopted by the South Carolina State Engineer pursuant to the South Carolina Consolidated Procurement Code.

**Part B—Architect-Engineer and Land  
Surveying Services**

**Section 1. Policy.**

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

**Section 2. Preference for resident design service; definitions; exceptions.**

(1) As used in this section:

(a) “Design services” means architect-engineer, construction management, or land surveying services as defined in Section 3.A.1 and awarded pursuant to Section 3.A.4.

(b) “Resident” means a business that employs, either directly or through consultants, an adequate number of persons domiciled in South Carolina to perform a majority of the design services involved in the procurement.

(2) A business responding to an invitation involving design services shall submit a certification with its response stating whether the business is a resident for purposes of the procurement. Submission of a certification under false pretenses is grounds for suspension or debarment.

(3) An award to a nonresident of a contract involving design services must be supported by a written determination explaining why the award was made to the selected firm.

(4) In an evaluation conducted pursuant to Section 3.B.3, a resident firm must be ranked higher than a nonresident firm if the agency selection committee finds the two firms otherwise equally qualified.

(5) This section does not apply to a procurement if either the procurement does not involve construction or the design services are a minor accompaniment to a contract for nondesign services, or where prohibited by federal law.

### **Section 3. Qualifications based selection procedures.**

In a qualifications based selection procedure, price is excluded as an evaluation factor. The offeror’s qualifications are evaluated to determine contract award.

(1) Agency Selection Committee. The Board shall establish its own architect-engineer, construction management, and land surveying services selection committee, which must be composed of those individuals, who need not be employees of the CMRTA, the Executive Director determines to be qualified to make an informed decision as to the most competent and qualified firm for the proposed project. The Executive Director or his qualified responsible designee shall sit as a permanent member of the agency selection committee for the purpose of coordinating and accounting for the committee’s work. To assist an agency selection committee in the selection of firms to be employed for significant or highly technical projects and to facilitate prompt selections, the selection committee may invite an engineer from another Regional Transit Authority, municipality or the State Engineer or his designee to sit as a nonvoting member of the committee.

#### (2) Advertisement of Project Description.

(a) The agency selection committee is responsible for:

- (i) developing a description of the proposed project;
- (ii) enumerating all required professional services for that project; and
- (iii) preparing a formal invitation to firms for submission of information.

(b) The invitation must include, but not be limited to, the project title, the general scope of work, a description of all professional services required for that project, the submission

deadline, and how interested firms may apply for consideration. The invitation must be advertised formally in SCBO.

(3) Response to Invitation. The date for submission of information from interested persons or firms in response to an invitation must not be less than fifteen days after publication of the invitation. Interested architect- engineer, construction management, and land surveying persons or firms shall respond to the invitation with the submission of a current and accurate Federal Standard Form 254, Architect-Engineer and Related Services Questionnaire, and Federal Standard Form 255, Architect-Engineer and Related Services Questionnaire for Specific Project, or their successor forms or similar information as the Board may prescribe, and other information that the particular invitation may require.

(4) Interviews with Interested Firms. Following receipt of information from all interested persons and firms, the agency selection committee shall hold interviews with at least three persons or firms who respond to the committee's advertisement and who are considered most qualified on the basis of information available before the interviews. A list of firms selected for interview must be sent to all firms that submitted information in response to the advertisement, before the date selected for the interviews. If less than three persons or firms respond to the advertisement, the committee shall hold interviews with those that did respond. The agency selection committee's determination as to which are to be interviewed must be in writing and based upon its review and evaluation of all submitted materials. The written report of the committee must list specifically the names of all persons and firms that responded to the advertisement and enumerate the reasons of the committee for selecting those to be interviewed. The purpose of the interviews is to provide the further information that may be required by the agency selection committee to fully acquaint itself with the relative qualifications of the several interested firms.

(5) Selection and Ranking of the Three Most Qualified.

(a) The agency selection committee shall evaluate each of the persons or firms interviewed in view of their:

- (i) past performance;
- (ii) the ability of professional personnel;
- (iii) demonstrated ability to meet time and budget requirements;
- (iv) location and knowledge of the locality of the project if the application of this criterion leaves an appropriate number of qualified firms, given the nature and size of the project;
- (v) recent, current, and projected workloads of the firms;
- (vi) creativity and insight related to the project;
- (vii) related experience on similar projects;
- (viii) volume of work awarded by the using agency to the person or firm during the previous five years, with the objective of effectuating an equitable distribution of contracts by the State among qualified firms including Minority Business Enterprises certified by the South Carolina Office of Small and Minority Business Assistance and firms that have not had previous state work; and

(ix) any other special qualification required pursuant to the solicitation of the using agency.

(b) Based upon these evaluations, the selection committee shall select the three persons or firms that, in its judgment, are the best qualified, ranking the three in priority order. The selection committee's report ranking the three chosen persons or firms must be in writing and include data substantiating its determinations.

(6) Notice of Selection and Ranking. When it is determined by the selection committee, that the ranking report is final, the Board shall send written notification of the highest ranked person or firm immediately to all firms interviewed.

(7) Negotiation of Contract. The Board or its designee shall negotiate a contract for services with the most qualified person or firm at a compensation that is fair and reasonable to the CMRTA. If the Board or its designee is unable to negotiate a satisfactory contract with this person or firm, negotiations must be terminated formally. Negotiations must commence in the same manner with the second and then the third most qualified until a satisfactory contract is negotiated. If an agreement is not reached with one of the three, additional persons or firms in order of their competence and qualifications must be selected after consultation with the agency selection committee, and negotiations must be continued in the same manner until agreement is reached.

**Section 4. Exception for small architect-engineer and land surveying services contract.**

(1) Procurement Procedures for Certain Contracts. If the architect-engineer or land surveying service contract is estimated not to exceed fifty thousand dollars, CMRTA may award contracts by direct negotiation and selection, taking into account:

- (a) the nature of the project;
- (b) the proximity of the architect-engineer or land surveying services to the project;
- (c) the capability of the architect, engineer, or land surveyor to produce the required service within a reasonable time;
- (d) past performance; and
- (e) ability to meet project budget requirements.

(2) Maximum Fees Payable to One Person or Firm. Fees paid during the twenty-four month period immediately preceding negotiation of the contract by the CMRTA for professional services performed by an architectural-engineering or land surveying firm pursuant to Section 3.B.4(1) may not exceed fifty thousand dollars. Persons or firms seeking to render professional services pursuant to this section shall furnish the Board a list of professional services, including fees paid for them, performed for the CMRTA during the fiscal year immediately preceding the

fiscal year in which the negotiations are occurring and during the fiscal year in which the negotiations are occurring.

(3) Splitting of Larger Projects Prohibited. The Board may not break a project into small projects for the purpose of circumventing the provisions of Section 4.B.3 and this section.

**ARTICLE 4.  
LEGAL AND CONTRACTUAL REMEDIES/**

**Part A – Pre-Litigation Resolution of Controversies**

**Section 1. Authority to Resolve Protested Solicitations and Awards.**

(1) *Right to Protest, Exclusive Remedy.*

(a) A prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the Panel in the manner stated in subsection (2)(a) within fifteen (15) days of the date of issuance of the Invitation for Bids or Requests for Proposals or other solicitation documents, whichever is applicable, or any amendment to it, if the amendment is at issue. An Invitation for Bids or Request for Proposals or other solicitation document, not including an amendment to it, is considered to have been issued on the date required notice of the issuance is given in accordance with this Ordinance.

(b) Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the Panel in the manner stated in subsection (2)(b) within ten (10) days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this Ordinance; except that a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.

(c) The rights and remedies granted in this article to bidders, offerors, contractors, or subcontractors, either actual or prospective, are to the exclusion of all other rights and remedies of the bidders, offerors, contractors, or subcontractors against the County.

(d) The rights and remedies granted by subsection (1) are not available for contracts with an actual or potential value of up to twenty-five thousand dollars.

(2) *Protest Procedure.*

(a) A protest pursuant to subsection (1)(a) must be in writing, filed with the Contract Officer, and set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided. The protest must be received by the Panel through service upon the Contract Officer within the time provided in subsection (1).

(b) A protest pursuant to subsection (1)(b) must be in writing and must be received by the Panel through service upon the Procurement Director within the time limits established by subsection (1)(b). At any time after filing a protest, but no later than fifteen (15) days after the date award or notification of intent to award, whichever is earlier, is posted in accordance with this Ordinance, a protestant may amend a protest that was first submitted within the time limits established by subsection (1)(b). A protest, including amendments, must set forth both the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided.

(c) The CMRTA, in its next quarterly Milestone Progress Report and at its next Project Management Oversight review, if any, will notify the FTA of any protest filed to which FTA C 4220.1F applies, and will keep the FTA informed regarding the status of the protest.

(i) The CMRTA will provide to the FTA the following information:

(1) A list of protests involving third party contracts and potential third party contracts that:

(a) Have a value exceeding \$100,000, or

(b) Involve a controversial matter, irrespective of amount,  
or

(c) Involve a highly publicized matter, irrespective of amount.

(2) The following information about each protest:

(a) A brief description of the protest,

(b) The basis of disagreement, and

(c) If open, how far the protest has proceeded, or

(d) If resolved, the agreement or decision reached, and

(e) Whether an appeal has been taken or is likely to be taken.

(ii) If a bid protest is denied, the CMRTA will notify the FTA Regional Administrator for the region administering a regional project, or the FTA Associate Administrator for the program office administering a headquarters project directly.

(3) *Duty and Authority to Attempt to Settle Protests.* Before commencement of an administrative review as provided in subsection (4), the Contract Officer may attempt to settle by mutual agreement a protest of an aggrieved bidder, offeror, contractor, or subcontractor, actual or prospective, concerning the solicitation or award of the contract. The Contract Officer has the

authority to approve any settlement reached by mutual agreement that is within the scope of the contract and does not exceed five percent of the contract amount.

(4) *Authority to Resolve Protests.* The Panel shall have the authority, prior to the commencement of an action in court concerning the controversy, to settle and resolve a protest of an aggrieved bidder, offeror, or contractor, actual or prospective, concerning the solicitation or award of a contract.

(5) *Decision.* If the protest is not resolved by mutual agreement, the Panel shall promptly issue a decision in writing. The decision shall:

- (a) state the reasons for the action taken; and
- (b) inform the protestant of its right to judicial review as provided in this Article.

(6) *Notice of Decision.* A copy of the decision under Subsection (5) of this Section shall be mailed or otherwise furnished immediately to the protestant and any other party intervening.

(7) *Finality of Decision.* A decision under Subsection (5) of this Section shall be final and conclusive, unless fraudulent or unless any person adversely affected by the decision appeals to the circuit court in accordance with the provisions of this Article

(8) *FTA's Role and Responsibilities.* FTA has developed an appeals process for reviewing protests of a recipient's procurement decisions.

(a) Requirements for the Protester. The protester must:

(i) Qualify as an Interested Party. Only an interested party qualifies for FTA review of its appeal. An interested party is a party that is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award or failure to award the third party contract at issue.

(1) Subcontractors. A subcontractor does not qualify as an interested party because it does not have a direct economic interest in the results of the procurement.

(2) Consortia/Joint Ventures/Partnerships/Teams. An established consortium, joint venture, partnership, or team that is an actual bidder or offeror and is acting in its entirety, would qualify as an interested party because it has a direct economic interest in the results of the procurement. An individual member of a consortium, joint venture, partnership, or team, acting solely in its individual capacity, does not qualify as an interested party because it does not have a direct economic interest in the results of the procurement.

(3) Associations or Organizations. An association or organization that does not perform contracts does not qualify as an interested party, because it does not have a direct economic interest in the results of the procurement.

(ii) Exhaust Administrative Remedies. The protester must exhaust its administrative remedies by pursuing the recipient's protest procedures to completion before appealing the recipient's decision to FTA.

(iii) Appeal Within Five Days. The protester must deliver its appeal to the FTA Regional Administrator for the region administering its project or the FTA Associate Administrator for the program office administering its project within five (5) working days of the date when the protester has received actual or constructive notice of the recipient's final decision. Likewise, the protester must provide its appeal to the FTA Regional Administrator for the region administering its project or the FTA Associate Administrator for the program office administering its project within five (5) working days of the date when the protester has identified other grounds for appeal to FTA. For example, other grounds for appeal include the recipient's failure to have or failure to comply with its protest procedures or failure to review the protest.

(b) Extent of FTA Review. As provided in the Common Grant Rule for governmental recipients, FTA will limit its review of third party contract protests as follows:

(i) The Recipient's Procedural Failures. FTA will consider a protest if the recipient:

- (1) Does not have protest procedures, or
- (2) Has not complied with its protest procedures, or
- (3) Has not reviewed the protest when presented an opportunity to do

so.

(ii) Violations of Federal Law or Regulations. FTA will not consider every appeal filed by a protestor of an FTA recipient's protest decision merely because a Federal law or regulation may be involved. Instead, FTA will exercise discretionary jurisdiction over those appeals involving issues important to FTA's overall public transportation program. FTA will refer violations of Federal law for which it does not have primary jurisdiction to the Federal authority having proper jurisdiction.

(iii) Violations of State or Local Law or Regulations. FTA will refer violations of State or local law to the State or local authority having proper jurisdiction.

(c) FTA Determinations to Decline Protest Reviews. FTA's determination to decline jurisdiction over a protest does not mean that FTA approves of or agrees with the recipient's decision or that FTA has determined the contract is eligible for Federal participation. FTA's determination means only that FTA does not consider the issues presented to be sufficiently important to FTA's overall program that FTA considers a review to be required.

(8) *Stay of Procurements During Protests.* In the event of a timely protest under Subsection (1) of this Section, the CMRTA shall not proceed further with the solicitation or with the award of the contract until the Panel issues its Decision or makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the CMRTA.

(9) *Entitlement to Costs and Authority to Grant Other Relief.* In the event a protestant contends that it should have been awarded the contract under a solicitation but was not, then the party may apply to the Panel for relief. Upon receipt of this application, the Panel shall promptly issue a decision in writing within thirty (30) days. The decision shall state the reason(s) for the action taken. The Panel may order the computation and award of a reasonable reimbursement including bid preparation costs, and may order such other and further relief as justice dictates including, but not limited to, a reaward of the contract or a rebid of the contract. The decision of the Panel is the final administrative review.

## **Section 2. Posting of Bond or Irrevocable Letter of Credit.**

The CMRTA may request that the Panel require any bidder or offeror who files an action protesting the intended award or award of a contract solicited under Policy and valued at five hundred thousand dollars (\$500,000) or more to post with a bond or irrevocable letter of credit payable to the CMRTA in an amount equal to one percent (1%) of the total potential value of the contract as determined by the Contract officer. The decision to require a bond or irrevocable letter of credit is not appealable under this Policy. The bond or irrevocable letter of credit shall be conditioned upon the payment of all reasonable reimbursement costs which may be adjudged against the bidder or offeror filing the protest in the administrative hearing in which the action is brought and in any subsequent appellate court proceeding. For protests of intended award or award of a contract of the CMRTA's request for sole source or emergency procurements, the bond or irrevocable letter of credit shall be in an amount equal to one percent (1%) of the Contract Officer's estimate of the contract amount for the sole source or emergency procurement requested. In lieu of a bond or irrevocable letter of credit, the CMRTA may accept a cashier's check or money order in the amount of the bond or irrevocable letter of credit. If, after completion of the administrative hearing process and any appellate court proceedings, the CMRTA prevails, it may request that the allow it to recover all reasonable reimbursement costs and charges associated with the protest which shall be included in the final order or judgment, excluding attorneys' fees. Upon payment of such costs and charges by the bidder or offeror protesting the intended award or award of a contract, the bond, irrevocable letter of credit, cashier's check, or money order shall be returned to the bidder or offeror. Failure to pay such costs and charges by the bidder or offeror protesting the intended award or award of a contract shall result in the forfeiture of the bond, irrevocable letter of credit, cashier's check, or money order to the extent necessary to cover the payment of all reasonable reimbursement costs adjudged against the protesting bidder or offeror. If the bidder or offeror prevails in the protest, the cost of providing the bond, irrevocable letter of credit or cashier's check may be sought from the CMRTA.

## **Section 3. Authority to Debar or Suspend.**

(1) *Authority.* After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Panel shall have authority to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than three (3) years. The Panel shall have authority to suspend a person from consideration for award of contracts if there is probable cause for debarment. The suspension shall not be for a period exceeding six (6) months.

- a. In contracts using federal funds, the U.S. Department of Transportation regulations, Nonprocurement Suspension and Debarment, 2 CFR Part 1200 apply to each third party contract at any tier of \$25,000 or more, to each third party contract at any tier for a federally required audit (irrespective of the contract amount), and to each third party contract at any tier that must be approved by an FTA official irrespective of the contract amount. Thus, the CMRTA must apply U.S. Department of Transportation's debarment and suspension requirements to itself and each third party contractor at every tier to the extent required by U.S. Department of Transportation's regulations that incorporate the requirements of Office of Management and Budget (OMB), Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement), 2 CFR Part 180.

(2) *Causes for Debarment or Suspension.* The causes for debarment or suspension include the following:

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

(b) Conviction under local, state or federal government statutes for 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 and directly affects responsibility as a the county contractor;

(c) Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;

(d) Violation of contract provisions, as set forth below, of a character which is regarded by the Executive Director to be so serious as to justify debarment action:

(i) Deliberate failure without good cause to perform in accordance with the specifications or within the time limitation provided in the contract; or

(ii) A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;

(e) Any other cause the Executive Director determines to be so serious and compelling as to affect responsibility as a County contractor, including debarment by another governmental entity for cause; and

(f) For violation of the ethical standards set forth in the State Ethics Act.

(3) *Decision.* The Panel, through the Administrator, shall issue a written decision within thirty (30) days to debar or suspend. The decision shall state the reason for the action taken.

(4) *Notice of Decision.* A copy of the decision under subsection 11(C)(iv) of this section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening.

(5) *Finality of Decision.* A decision under subsection 11(C)(iv) of this section constitutes the final agency decision, unless fraudulent.

#### **Section 4. Authority to Resolve Contract and Breach of Contract Controversies.**

(1) *Applicability.* This section applies to controversies between the CMRTA and a contractor or subcontractor, when the subcontractor is the real party in interest, that arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or recession. The procedure set forth in this section constitutes the exclusive means of resolving a controversy between a governmental body and a contractor or subcontractor, when the subcontractor is the real party in interest, concerning a contract solicited and awarded pursuant to the provisions of the Policy.

(2) *Request for Resolution; Time for Filing.* Either CMRTA or the contractor or subcontractor, when the subcontractor is the real party in interest, may initiate resolution proceedings before the Panel by submitting a request for resolution to the Contract Officer in writing setting forth the specific nature of the controversy and the specific relief requested with enough particularity to give notice of every issue to be decided. A request for resolution of contract controversy must be filed within one (1) year of the date the contractor last performs work under the contract; except that, in the case of latent defects, a request for resolution of a contract controversy must be filed within three (3) years of the date the requesting party first knows or should know of the grounds giving rise to the request for resolution.

(3) *Duty and Authority to Attempt to Settle Contract Controversies.* Before commencement of an administrative review as provided in subsection (4), the Contract Officer shall attempt to settle by mutual agreement a contract controversy brought pursuant to this section. The Contract Officer has the authority to approve any settlement reached by mutual agreement.

(4) *Administrative Review and Decision.* If, in the opinion of the Contract Officer, after reasonable attempt, a contract controversy cannot be settled by mutual agreement, the Panel promptly shall conduct an administrative review and issue a decision in writing within ten (10) days of completion of the review. The decision must state the reasons for the action taken.

(5) *Notice of Decision.* A copy of the decision pursuant to subsection (4) and a statement of appeal rights must be mailed or otherwise furnished immediately to all parties participating in the administrative review proceedings. The Panel also shall post a copy of the decision at a time and place communicated to all parties participating in the administrative review, and the posted decision must indicate the date of posting on its face and must be accompanied by a statement of the right to appeal provided in Section 4.C.2.

(6) *Finality of Decision.* A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected requests a hearing in the court of common pleas for Richland County within thirty (30) days of the posting of the decision in accordance with Section 4.C.2. The CMRTA shall have the opportunity to participate fully in a later review or appeal.

## **Part B - Remedies**

### **Section 1. Solicitations or Awards in Violation of Law.**

(1) *Applicability.* Where it is determined by the Contract Officer that a solicitation or award of a contract is in violation of the law, the remedies set forth herein may be granted by the Contract Officer.

(a) *Remedies Prior to Award.* If, prior to award of a contract, it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award may be:

(i) Canceled;

(ii) Revised to comply with the law and rebid; or

(iii) Awarded in a manner that complies with the provisions of this Ordinance.

(b) *Remedies After Award.* If, after an award of a contract, it is determined that the solicitation or award is in violation of the law:

(i) The contract may be ratified and affirmed, provided it is in the best interest of the CMRTA; or

(ii) The contract may be terminated and the payment of such damages, if any, as may be provided in the contract, may be awarded.

(c) *Entitlement to Costs.* In addition to or in lieu of any other relief, when a protest is sustained and it is determined that the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror may request and be awarded a reasonable amount, including reimbursement of its reasonable bid preparation costs. The Contract Officer in the case of review may award such relief as is necessary to resolve the controversy as allowed by the terms of the contract or by applicable law.

### **Section 2. Frivolous Protest.**

(1) *Signature on Protest Constitutes Certificate.* The signature of an attorney or party on a request for review, protest, motion, or other document constitutes by the signer that the signer has read such document, that to the best of the signer's knowledge, information and belief, after reasonable inquiry, it is well-grounded in fact and is warranted by existing law and is not interposed

for any improper purpose, such as to harass, limit competition or cause unnecessary delays or needless increase in the cost of the procurement or of the litigation.

(2) *Sanctions for Violations.* If a request for review, protest, pleading, motion, or other document is signed in violation of this section on or after appeal to the Panel, the Panel may, upon motion or its own initiative, recommend to the Council that they impose upon the person who signed it, a represented party or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the protest, pleading, motion, or other paper, including reasonable attorneys' fees.

### **Part C - The Panel**

**Section 1. The Panel.** The Panel shall have jurisdiction to hear all procurement matters as set forth in Article 4.

**Section 2. Appeal to Circuit Court.** Any decision made by the Panel shall be appealable to the Court of Common Pleas for Richland County as provided by law, provided such appeal is filed within thirty (30) days of the date of the decision.

### **ARTICLE 5 - INTERGOVERNMENTAL RELATIONS.**

Notwithstanding any provisions of this Ordinance, the Executive Director may procure supplies, services or construction items through the contracts established by the purchasing division of the State of South Carolina, as provided in S.C. Code Ann. §§ 11-35-10, Article 19, as it may be amended from time to time. Additionally, the Executive Director may procure supplies, services or construction items through contracts established by other South Carolina transit authorities whose procurement policies are in compliance with the South Carolina Consolidated Procurement Code and all federal statutes, regulations and bulletins regulating public bus transportation.

### **ARTICLE 6. DISADVANTAGES BUSINESS ENTERPRISE POLICY**

**Section 1. Policy.** It is the CMRTA's policy to actively encourage and assist minority business enterprises (MBE) to participate competitively in CMRTA's procurement actions in accordance with FTA Circular 4220.1F Sec. IV-7, as amended or replaced from time to time, and Sections 11-35-5210, et seq. of the South Carolina Code. The MBE officer reports directly to the Board on all matters pertaining to the MBE program. The MBE officer is responsible for MBE program coordination and enforcement.

**Section 2. Review.** The MBE officer will annually review procurement plans and recommend appropriate organizational MBE contracting goals based on anticipated procurement actions and available certified MBE suppliers or contractors. MBE goals are established annually based on projected expenditures for construction, professional services, materials and supplies, and equipment, and anticipated opportunities to use MBE vendors to fulfill those requirements.

**Section 3. Maximize Participation.** The CMRTA shall take affirmative steps to establish maximum participation of MBE vendors such as:

- (1) Placing qualified MBEs on vendor solicitation lists;
- (2) Assuring MBEs are solicited when they are potential sources;
- (3) When economically feasible, dividing total requirements into smaller tasks or quantities to permit maximum participation;
- (4) When opportunity permits, establishing delivery schedules to encourage MBE participation; and
- (5) If subcontracts shall be let, requiring the prime contractor to take the same affirmative steps as listed above in (1) through (5) of this paragraph.

The Purchasing Agent shall place copies of all advertising and publicized solicitation material in the related master file.

## **ARTICLE 7 REGULATIONS FOR SALE, LEASE, TRANSFER, AND DISPOSAL**

### **Section 1. Regulations for sale, lease, transfer and disposal.**

The Board shall develop and adopt a policy governing the sale, lease, or disposal of surplus supplies by public auction, competitive sealed bidding, or other appropriate methods designated by such regulations;

### **Section 2. Allocation of proceeds for sale or disposal of surplus supplies.**

Except as provided in Section 7.3 and the regulations pursuant to them, the sale of all CMRTA-owned supplies, or personal property not in actual public use must be conducted and directed by the designated Board office. The sales must be held at such places and in a manner as in the judgment of the designated Board office is most advantageous to the CMRTA. Unless otherwise determined, sales must be by either public auction or competitive sealed bid to the highest bidder. CMRTA shall inventory and report to the designated Board office all surplus personal property not in actual public use held for sale. The designated Board office shall deposit the proceeds from the sales, less expense of the sales, in the CMRTA general fund or as otherwise directed by the Board.

### **Section 3. Trade-in sales.**

(1) Trade-in Value. Unless otherwise provided by law, CMRTA may trade-in personal property, the trade-in value of which may be applied to the procurement or lease of like items. The trade-in value of such personal property shall not exceed an amount as specified in the policy established by the Board.

(2) Approval of Trade-in Sales. When the trade-in value of personal property of CMRTA exceeds the specified amount, the Board shall have the authority to determine whether:

(a) the subject personal property shall be traded in and the value applied to the purchase of new like items; or

(b) the property shall be classified as surplus and sold in accordance with the provisions of Section 7.2. The board's determination shall be in writing and be subject to the provisions of this chapter.

(3) Record of Trade-in Sales. Governmental bodies shall submit quarterly to the materials management officer a record listing all trade-in sales made under subsections (1) and (2) of this section.

## **ARTICLE 8 MISCELLANEOUS**

### **Section 1. Contract Administration System**

The following documents and resources form the basis of CMRTA Policy:

1. The Common Grant Rules
2. FTA Master Agreement
3. FTA Circular 4220.1F
4. South Carolina Consolidated Procurement Codes
5. Regional Transit CMRTA Grant Resolution
6. Regional Transit Authority Code of Conduct
7. Central Midlands RTA Administrative Policies and Procedures
  - a. SCDOT Procurement and Contract Administration
  - b. Delegation Authority and Execution of Contracts Policy
  - c. Agency Records Management
  - d. Capitalization Policy for Project Execution

#### References for Best Practices:

1. FTA's Best Practices Procurement Manual (BPPM)
2. FTA Project and Construction Management guidelines 2003 Update
3. Federal Acquisition Regulation Part 31- Federal Cost Principles and Procedures
4. Federal Acquisition Regulation Part 42 – Contract Administration
5. Federal Acquisition Regulation Part 43 – Contract Modifications
6. The National Transit Institute Course, "Cost or Price Analysis and Risk Assessment"
7. FTA's Price and Cost Analysis guide located at Pricing Guide for FTA Grantees

## **Section 2. Compliance**

This Contracts and Procurement Policy and Procedures establish guidelines and minimum standards that Central Midlands RTA will use to process third party contracts. This policy is intended to help the CMRTA comply with the Federal Transit Administration's standards to ensure competitive bidding through full and open competition and equitable treatment of all potential sources for all purchases made with funding derived from the federal, state, and local governments. Competitive proposals and sealed bid transactions will be conducted in a manner to provide maximum open and free competition consistent with FTA Circular 4220.1F "Third Party Contracting Guidance," and Department of Transportation 49 CFR Part 18, "Uniform Administrative Requirements for Grants and Cooperative Agreements to States and Local Governments." The policies and procedures contained herein establish standard business practices to ensure the timely, efficient, and economical delivery of services and materials. To ensure full compliance, the CMRTA Contract Officer will maintain the procurement master files for capital and planning projects. It is important for Finance to work closely with the Contract Officer to make sure the forms and documentation are completed on schedule and placed in the master file.