

Procurement Regulations

Introduction

The local public agency provisions of the Kentucky Model Procurement Code, KRS 45A.345 to 45A.460, contain the law which governs all purchasing done by the Jefferson County School District. These provisions are based on the Model Procurement Code developed by a committee of the American Bar Association, and were enacted into law in Kentucky in 1978.

The local public agency provisions of the Kentucky Model Procurement code have been effective within the Jefferson County School District since 1980. These provisions give each local public agency the right to adopt regulations which will assist in the purchasing process. The Jefferson County Board of Education first adopted procurement regulations in September 1980. The revised procurement regulations in this booklet were adopted by the Jefferson County Board of Education in July, 2006.

Contents

<p>Article I General Provisions 1</p> <p>1.0 Title 1</p> <p>1.1 Purposes, Rules of Construction 1</p> <p>1.1.1 Liberal Construction. 1</p> <p>1.1.2 Purposes and Policies. 1</p> <p>1.1.3 Singular-Plural and Gender Rules 1</p> <p>1.2 Application of these Regulations 1</p> <p>1.3 Severability. 1</p> <p>1.4 Determinations and Findings 1</p> <p>1.5 Definitions 1</p> <p>1.6 Applicable Provisions of KRS Chapter 45A. 5</p> <p>Article II Procurement Organization 6</p> <p>2.1 Scope of Superintendent’s Authority 6</p> <p>2.2 Specific Powers of the Board 6</p> <p>2.2.1 Acquire Land 6</p> <p>2.2.2 Convey Easements 6</p> <p>2.2.3 Enter into Contracts. 6</p> <p>2.2.4 Purchasing Methods 6</p> <p>2.2.5 Grants and Contracts with Other Governments or Entities 6</p> <p>2.2.6 Acceptance of Grants, Gifts and Like Items 6</p> <p>2.2.7 Intergovernmental Body Property Transfers; Disposal of Property 6</p> <p>2.2.8 Economical Operation of Procurement 6</p> <p>2.2.9 Common Item Procurement 6</p> <p>2.2.10 Submission of Bids and Terms and Conditions 6</p> <p>2.2.11 Testing and Inspection 6</p>	<p>2.2.12 Statistics 7</p> <p>2.3 Issuance and Amendment of Procurement Regulations 7</p> <p>Article III Source Selection and Contract Formation 8</p> <p>3.1 Scope 8</p> <p>3.2 Competitive Sealed Bidding. 8</p> <p>3.3 The Invitation for Bids 8</p> <p>3.4 Bidding Time 8</p> <p>3.5 Bidder Submissions 8</p> <p>3.6 Public Notice 9</p> <p>3.7 Bidder Mailing Lists. 9</p> <p>3.8 Pre-Bid Conferences. 10</p> <p>3.9 Amendments to Invitations for Bids. 10</p> <p>3.10 Modification or Withdrawal of Bids Prior to Bid Opening 10</p> <p>3.11 Late Bids, Late Withdrawals and Late Modifications 10</p> <p>3.12 Receipt, Opening and Recording of Bids 11</p> <p>3.13 Responsiveness of Bids. 11</p> <p>3.14 Mistakes in Bids. 11</p> <p>3.15 Bid Evaluation and Award 12</p> <p>3.16 Tie Bids 12</p> <p>3.17 Documentation of Award 12</p> <p>3.18 Publicizing Awards 12</p> <p>3.19 Competitive Negotiation Procedure 12</p> <p>3.20 Procedure for Phase One of the Competitive Negotiation. 13</p> <p>3.21 Mistakes During Competitive Negotiation Procedure 14</p>
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3.22	Pre-Bid Conferences in Competitive Negotiation Procedure	15
3.23	Negotiation After Competitive Sealed Bidding	15
3.24	Noncompetitive Negotiation	15
3.25	Cost Reimbursement Contracts	16
3.26	Multiyear Contracts	16
3.27	Small Purchase Procedures	16

Article IV Specifications and Methods for Supplies and Services 18

4.1	Specification Standardization	18
4.2	Maximum Practicable Competition	18
4.3	Prohibition Against Restrictive Specifications	18
4.4	Methods of Construction Contracting Management	18

Article V Architect-Engineer Selection Procedures. 19

5.0	Scope of Section.	19
5.1	Selection Policy and Criteria	19
5.2	Selection Procedures	19
5.3	Special Approval of Selections.	20

Article V-A Fiscal Agent Selection Procedures . . . 21

5-A.0	Scope of Selection	21
5-A.1	Selection Policy and Criteria	21
5-A.2	Selection Procedures	21
5-A.3	Special Approval of Selections.	21

Article VI Contract Modification and Termination. 22

6.1	Policy	22
-----	------------------	----

6.2	Change Orders	22
6.3	Administrative Changes	23
6.4	Termination	23
6.5	Termination for Convenience	23

Article VII Cost Principles 24

7.1	Definitions	24
7.2	Cost Principles	24
7.3	Allowable Costs	24
7.4	Reasonable Costs	24
7.5	Allocable Costs	25
7.6	Treatment of Specific Cost	26
7.7	Costs Requiring Prior Approval to be Allowable	28
7.8	Applicable Credits	29
7.9	Advance Agreements	29
7.10	Use of Federal Cost Principles	30
7.11	Authority to Deviate from Cost Principles	30
7.12	Right to Audit Books and Records.	30

Article VIII Supply Management and Surplus Property Disposal Regulations 31

8.1	Quality, Assurance, Inspection and Testing	31
8.2	Disposition of Excess, Nonexpendable Supplies	31
8.3	Disposition of Surplus Supplies	31

Article IX Legal and Contractual Remedies 33

9.0	Prelitigation Resolution of Controversies	33
9.1	Authority to Resolve Protested Solicitations and Awards	33
9.2	Authority to Debar or Suspend.	33

9.3 Authority to Resolve Contract and Breach of Contract Disputes. 33

9.4 Solicitations or Awards in Violation of the Law 34

9.5 Interest 34

9.6 Actions on Board Contracts 34

9.7 Presumption of Correctness of Board Decisions 34

**Article X
Intergovernmental Relations 35**

10.0 Definitions 35

10.1 Cooperative Purchasing Authorized. 35

10.2 Acquisition or Use of Property Owned by a Public Purchasing Unit or Foreign Purchasing Unit 35

10.3 Cooperative Use of Supplies and Services 35

10.4 Public Purchasing Units in Compliance with Source Selection Requirements 35

10.5 Federal Grants 35

10.6 Supplies Subject to Price Agreement with Commonwealth 35

**Article XI
Ethics and Standards of Conduct 36**

11.0 Statement of Policy. 36

11.1 General Standards of Conduct for Employees 36

11.2 General Standards of Conduct for Nonemployees 36

11.3 Conflicts of Interest 36

11.4 Employees Not to Benefit. 36

11.5 Restrictions on Employment of Present and Former Board Employees. 37

11.6 Use of Confidential Information. 37

11.7 Public Access to Procurement Information Records. 37

11.8 Civil and Administrative Remedies Against Employees Who Violate Ethical Standards 37

11.9 Civil and Administrative Remedies Against Nonemployees. 38

11.10 Recovery of Value Transferred or Received in Violation of Ethical Standards 38

11.11 Criminal Penalties for Violations 38

11.12 Reporting of Suspected Collusion 38

**Article XII
Prequalification, Disbarment and Suspension 39**

12.0 Prequalification 39

12.1 Authority 39

12.2 Duties 39

12.3 Refusal to List Prospective Bidder 39

12.4 Prompt Notification 39

12.5 Appeal of Disapproval of Application 39

12.6 Re-Application for Qualification 39

12.7 Conditions for Accepting Bid from Non-Prequalified Bidder. 39

12.8 Establishment and Maintenance of Records and Lists of Firms or Individuals Debarred or Suspended 39

12.9 Grounds for Debarment and Suspension, and Treatment to be Accorded Debarred or Suspended Parties 40

12.10 Debarment 41

12.11 Suspension of Firm or Individual 41

12.12 Causes for Suspension 41

12.13 Period and Scope of Suspension. 42

12.14 Exceptions 42

12.15 Period of Suspension 42

12.16 Scope of Suspension 42

12.17 Notice of Suspension 42

12.18 Reporting 43

Article I

General Provisions

1.0 Title

These regulations shall be known and may be cited as the Board Procurement Regulations, and are referred to herein as “these regulations.”

1.1 Purposes, Rules of Construction

1.1.1 Liberal Construction

These regulations shall be liberally construed and applied to promote the underlying purposes and policies set forth herein.

1.1.2 Purposes and Policies

The underlying purposes and policies of these regulations are as follows:

- (a) To simplify, clarify and modernize the procedures governing purchases by the Board;
- (b) To permit the continuing development by the Board of purchasing policies and practices;
- (c) To make as consistent as possible the regulations governing purchasing by the Board;
- (d) To provide increased public confidence in the procedures followed in public procurement by the Board;
- (e) To insure the fair and equitable treatment of all persons who deal with the procurement system of the Board;
- (f) To provide increased economy in the Board’s procurement activities by fostering effective competition; and
- (g) To provide safeguards for the maintenance of a procurement system of quality and integrity.

1.1.3 Singular-Plural and Gender Rules

In these regulations, unless the context otherwise clearly requires:

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

1.2 Application of these Regulations

These regulations shall apply to every expenditure of public funds by the Board under any contract or like business agreement; provided, however, that these regulations shall not apply to contracts or like business agreements between the Board and the Commonwealth of Kentucky or any

other local public agencies, except as expressly provided herein. These regulations shall also apply to the disposal of the Board’s property, to the extent provided herein.

1.3 Severability

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

1.4 Determinations and Findings

Every determination required by these regulations or by any provision of KRS Chapter 45A applicable to the Board shall be set forth in writing, shall be based upon written findings of the Board, or of the official or employee making the determination, and shall be signed by the secretary of the Board, or by the official or employee making the determination. The determination and findings shall be retained in the official contract file in the office of the Director of Purchasing or the Executive Director of Facilities and Transportation, as the case may require, or in the office of any school or other division or function of the Board authorized to administer the contract.

1.5 Definitions

As used throughout these regulations, the words and terms defined in this section shall have the meaning set forth below unless (a) the context in which they are used clearly requires a different meaning; or (b) a different definition is prescribed for a particular section of these regulations or portion thereof.

1.5.1 “AGGREGATE AMOUNT” shall mean the total dollar amount during a fiscal year of items of a like nature, function and use, the need for which can reasonably be determined at the beginning of the fiscal year. Items the need for which could not reasonably be established in advance or which were unavailable because of a failure of delivery need not be included in the aggregate amount.

1.5.2 “BOARD” shall mean the Board of Education of Jefferson County, Kentucky.

1.5.3 “BUSINESS” shall mean any corporation, partnership, limited liability company, individual, sole proprietorship, joint stock company, joint venture, or any legal entity through which business is conducted.

1.5.4 “CHANGE ORDER” shall mean a written order signed by the contracting officer directing the contractor to make changes which the changes clause of the contract authorizes the contracting officer to order without the consent of the contractor.

1.5.5 “CHIEF FINANCIAL OFFICER AND TREASURER” shall mean the person responsible and appointed by the Superintendent to administer the Board function in the area of fiscal services as defined by his or her job description, regardless of his or her current actual title.

1.5.6 “COMPENSATION” shall mean any money, thing of value, or financial benefit conferred in return for services rendered or to be rendered, but it does not include the salary or other payment provided by law or appropriation for services rendered in a public office, position or employment.

1.5.7 “CONFIDENTIAL INFORMATION” shall mean any information which is available to an employee only because of his or her status as an employee of the Board and is not a matter of public knowledge or available to the public on request.

1.5.8 “CONSTRUCTION” shall mean the process of building, altering, repairing or improving any Board-owned or Board-leased structure or building, or other public improvements of any kind to any Board-owned or Board- leased real property. It does not include the routine operation, routine repair or routine maintenance of existing structures, buildings or real property.

1.5.9 “CONTRACT” shall mean all types of Board agreements, including grants and orders, for the purchase or disposal of supplies, services, construction, or any other items. It shall include awards and notices of awards; contracts of a fixed price, cost, cost reimbursement, or incentive type; contracts providing for the issuance of job or task orders; leases, letter contracts; and purchase orders. It also shall include supplemental agreements with respect to any of the foregoing. It shall not include labor contracts with employees of the Board.

1.5.10 “CONTRACT MODIFICATION” shall mean any written alteration in the specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any existing contract, whether accomplished by unilateral action in accordance with a contract provision, or by mutual action of the parties to the contract. It shall include bilateral actions, such as supplemental agreements, and unilateral actions, such as change orders, administrative changes, notices of termination, notices of exercise of a contract option.

1.5.11 “CONTRACTING OFFICER” shall mean the Superintendent, or any designee of the Superintendent charged with the responsibility of negotiating and/or signing and/or the implementation of Board contracts.

1.5.12 “CONTRACTOR” shall mean any person having a contract with the Board.

1.5.13 “COOPERATIVE PURCHASING” shall mean purchasing conducted by, or on the account of, the Board and one or more other public purchasing unit or by the Board and a foreign purchasing activity.

1.5.14 “COST ACTUAL” or ‘ACTUAL COST” shall mean all direct and indirect cost which has been incurred by a contractor for services rendered, supplies delivered or construction built, as distinguished from forecasted or estimated cost.

1.5.15 “COST ANALYSIS” shall mean evaluation of cost data for the purpose of establishing estimates of costs to be incurred, prices to be paid, costs to be reimbursed or costs actually incurred.

1.5.16 “COST DATA” shall mean factual information concerning the cost of labor, materials, overhead and other cost components which are expected to be incurred, or which have been actually incurred by a contractor in performing a contract.

1.5.17 “COST OBJECTIVE” shall mean a function, organizational subdivision, contract or any other work unit for which provision is made to accumulate and measure the cost of processes, products, jobs, capitalized projects and similar items.

1.5.18 “COST REIMBURSEMENT CONTRACT” shall mean a contract under which the Board reimburses the contractor for those actual contract costs, within a stated ceiling, which are allowable and allocable in accordance with the cost principles provided in these regulations, and a fee, if any. The fee, if any, can be a stated sum, or a stated percentage of the contract costs.

1.5.19 “DATA” shall mean recorded information regardless of form or characteristic.

1.5.20 “DEBARMENT” shall mean the disqualification of a person to receive invitations for bids or requests for proposals from the Board, or the award of a contract by the Board, for a specified period of time.

1.5.21 “DESIGNEE” shall mean a duly authorized representative of a person holding a superior position. The term “designee” as used, for example, in the phrase “the Superintendent or his designee-” may include one or more officials or employees.

1.5.22 “DETERMINATION AND FINDINGS” shall mean a written document stating both a determination and findings.

“**DETERMINATION**” shall mean a written statement that sets forth a decision that was made as required or permitted by these regulations, the legal authority for the decision, and any other information required by these regulations or applicable law. A determination must be prefaced by the following wording : “I determine”.

“**FINDINGS**” shall mean a clear and logical written statement of the reason or reasons for the determination.

1.5.23 “DOCUMENT” shall mean any compilation or aggregation of words and/or numbers whether the content thereof is printed on paper or is stored, distributed and displayed solely in electronic form.

1.5.24 “FILE” and “FILING” shall mean any method or process that permits the storage and retrieval of documents, including without limitation the physical storage of printed documents or the storage of documents in the form of electronic data.

1.5.25 “DIRECTOR OF PURCHASING” shall mean the person responsible and appointed by the Superintendent to administer the Board function in the area of procurement as defined by his or her job description, regardless of his or her current actual title.

1.5.26 “DIRECTOR OF SUPPLY SERVICES” shall mean the person responsible and appointed by the Superintendent to administer the Board function in the area of supply management as defined by his or her job description, regardless of his or her current actual title.

1.5.27 “EMERGENCY” shall mean a relative condition of insufficiency of service or of facilities resulting in disturbance or distress within the procurement system of the Board. An emergency can be declared only if the Superintendent or his designee determines that an emergency exists and files a copy of his determination and findings with the Chief Financial Officer and Treasurer or his designee.

1.5.28 “EMPLOYEE” shall mean an individual drawing a salary from the Board, and any nonsalaried individual performing professional or personal services for the Board.

1.5.29 “ESTABLISHED CATALOG PRICE” shall mean the price included in the most current catalog, price list, schedule or other form that:

- (a) Is regularly maintained by the manufacturer or vendor of an item;
- (b) Is either published or otherwise available for inspection by customers; and

(c) States prices at which sales are currently or were last made to a significant number of buyers constituting the general buying public for that item.

1.5.30 “EVALUATED BID PRICE” shall mean the dollar amount of a bid after bid price adjustments are made pursuant to objective measurable criteria, set forth in the invitation for bids, which affect the economy and effectiveness in the operation or use of the product, such as reliability, maintainability, useful life, residual value, and time of delivery, performance or completion.

1.5.31 “EXECUTIVE DIRECTOR OF FACILITIES AND TRANSPORTATION” shall mean the person responsible and appointed by the Superintendent to administer the Board function in the area of Facilities and Transportation as defined by his or her job description, regardless of his or her current actual title.

1.5.32 “EXHIBIT” shall mean a document attached to and/or expressly incorporated by reference in any procurement document.

1.5.33 “FINANCIAL INTEREST” shall mean (a) ownership of any interest or involvement in any relationship from which, or as a result of which, a person has, within the past three years, received or is presently or in the future entitled to receive more than \$1,000 per year, or its equivalent; or (b) ownership of more than 10% in any business; or (c) holding a position in a business such as an officer, director, trustee, partner, employee, or the like, or holding any position of management.

1.5.34 “FOREIGN PURCHASING ACTIVITY” shall mean any buying organization not located in the Commonwealth of Kentucky, which, if located in the Commonwealth would qualify as a public purchasing unit. An agency of the United States government is a foreign purchasing activity.

1.5.35 “GOVERNMENTAL BODY” shall mean any department, commission, council, board, bureau, committee, institution, legislative body, agency, government corporation, or other establishment of the executive branch of the Kentucky state government.

1.5.36 “GRATUITY” shall mean a payment, loan, subscription, advance, deposit of money, services, or anything of more than \$50 in value, present or promised, unless consideration of substantially equal or greater value is received.

1.5.37 “IMMEDIATE FAMILY” shall mean a spouse, children, grandchildren, parents, grandparents, brothers and sisters.

1.5.38 “INCLUDES” shall mean, unless the context otherwise clearly requires, “includes but is not limited to”.

1.5.39 “INVITATIONS FOR BIDS” shall mean all documents, whether attached or incorporated by reference, utilized for soliciting bids in accordance with the procedures set forth in these regulations and KRS 45A.365 (Competitive Sealed Bidding), as implemented by these regulations.

1.5.40 “LOCAL PUBLIC AGENCY” shall mean a city, county, urban-county, consolidated local government, school district, special district or any other agency formed by a combination of such agencies under KRS Chapter 79, or any department, board, commission, authority, officer or other subunit of a political subdivision which shall include the offices of the county clerk, county sheriff, county attorney, coroner and jailer. The Board is a local public agency.

1.5.41 “MAIL” shall mean, unless otherwise specified herein, any method of transmission of documents to another party, including without limitation the U.S. Postal Service, or similar delivery service, or electronic mail.

1.5.42 “MAY” shall mean permissive. However, the words “no person may . . .” shall mean that no person is required, authorized or permitted to do the act prescribed.

1.5.43 “NEGOTIATION” shall mean contracting by either the method set forth in KRS 45A.370 (Competitive Negotiation), 45A.375 (Negotiations After Competitive Sealed Bidding When All Bids Exceed Available Funds) or 45A.380 (Noncompetitive Negotiation), as implemented by these regulations.

1.5.44 “NONCOMPETITIVE NEGOTIATION” shall mean informal negotiation with one or more vendor, contractor or individual as permitted by these regulations and KRS 45A.380, as implemented by these regulations.

1.5.45 “OBJECTIVE MEASURABLE CRITERIA” shall mean sufficient information in the invitation for bids as to weight and method of evaluation so that the evaluation may be determined with reasonable mathematical certainty. Criteria which are otherwise subjective, such as taste and appearance, may be established when appropriate.

1.5.46 “OFFICIAL RESPONSIBILITY” shall mean direct administrative or operating authority, whether intermediate or final, either exercisable alone or with others, either personally or through subordinates, to approve, disapprove, or otherwise direct action by or on behalf of the Board.

1.5.47 “PERSON” shall mean any business, individual, union, committee, club or other organization or group of individuals.

1.5.48 “PRICE ANALYSIS” shall mean the evaluation of price data without analysis of the separate cost components and profits which may assist in arriving at prices to be paid and costs to be reimbursed.

1.5.49 “PRICE DATA” shall mean factual information concerning prices for supplies, services or construction, substantially identical to those being procured. Prices for purposes of this definition may include offered or proposed selling prices, historical selling prices and current selling prices.

1.5.50 “PROCUREMENT” shall mean the purchasing, buying, renting, leasing or otherwise obtaining any supplies, services or construction. It also includes all functions that pertain to the obtaining of any Board procurement, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

1.5.51 “PROCUREMENT ACTIVITY” shall mean any activity which is undertaken for or in connection with procurement.

1.5.52 “PROCUREMENT AUTHORITY” shall mean decision-making authority over the procurement activity of the Board in any particular proceeding, application, request for ruling or determination, claim, controversy or other matter.

1.5.53 “PUBLIC PURCHASING UNIT” shall mean either (a) any county, city, urban-county, consolidated government, governmental entity and other subdivision of the Commonwealth of Kentucky or public agency thereof, public authority, public educational, health, or other institution, any other entity which expends public funds for the acquisition or leasing of supplies, services and construction, and any nonprofit corporation operating a charitable hospital, or (b) any purchasing unit of any governmental body.

1.5.54 “PURCHASE REQUEST” shall mean that document whereby the Board requests that a contract be obtained for a specified need, and may include, but is not limited to, the technical description of the requested item, delivery schedule, transportation, criteria for evaluation of solicitees, suggested sources of supply, and information supplied for the making of any written determination and finding required by these regulations.

1.5.55 “REQUEST FOR PROPOSALS” shall mean all documents, whether attached or incorporated by reference, utilized for soliciting proposals in accordance with the procedures set forth in these regulations and the provisions of KRS Chapter 45A applicable to the Board.

1.5.56 “RESPONSIBLE BIDDER OR OFFEROR” shall mean a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.

1.5.57 “RESPONSIVE BIDDER” shall mean a person who has submitted a bid under KRS 45A.365 (Competitive Sealed Bidding) as implemented by these regulations which conforms in all material respects to the invitation for bids, so that all bidders may stand on equal footing with respect to the method and timeliness of submission and as to the substance as to any resulting contract.

1.5.58 “SERVICES” shall mean the rendering, by a contractor, of its time and effort rather than the furnishing of a specific end product, other than reports which are merely incidental to the required performance of service. It does not include labor contracts with employees of the Board.

1.5.59 “SHALL” shall mean imperative or mandatory.

1.5.60 “SIGNATURE” or **“SIGNED”** shall mean either a signature manually placed on a paper document by the signer, or an electronic signature transmitted by the signer using any procedure approved by the Director of Purchasing.

1.5.61 “SPECIFICATIONS” shall mean any description of a physical or functional characteristic of a supply, service or construction item. It may include a description of any requirement for inspection, testing or preparing a supply, service or construction item for delivery.

1.5.62 “STATE PUBLIC PURCHASING UNIT” shall mean any procuring unit of any department or agency of the Commonwealth of Kentucky.

1.5.63 “SUPERINTENDENT” shall mean the person contracting with the Board to serve as the Superintendent of the Jefferson County Public Schools.

1.5.64 “SUPPLEMENTAL AGREEMENT” shall mean any contract modification which is accomplished by the mutual action of the parties.

1.5.65 “SUPPLIES” shall mean all property, including but not limited to; leases on real property, printing and insurance, except land or a permanent interest in land.

1.5.66 “SUSPENSION” shall mean the disqualification of a person to receive invitations for bids or requests for proposals from the Board, or to be awarded a contract by the Board, for a temporary period, pending the completion of an investigation and any legal proceedings that may ensue.

1.5.67 “WRITING” OR **“WRITTEN”** shall mean any method of recording words and/or numbers on or into a document or other medium from which the words and/or numbers can be retrieved and displayed, including without limitation paper, computer data file, CD, diskette or other electronic medium.

1.6 Applicable Provisions of KRS Chapter 45A

As permitted by KRS 45A.343(1), the Board has adopted the provisions of KRS 45A.345 to KRS 45A.460. As provided in KRS 45A.343(1), no other statutes governing purchasing shall apply to the Board upon adoption of such provisions. As permitted by KRS 45A.360, the Board has adopted these regulations, which are intended by the Board to be not inconsistent with KRS 45A.345 to KRS 45A.460. If any provision in these regulations is directly inconsistent with a provision in KRS 45A.345 to KRS 45A.460, the provision in the statute shall take precedence over the provision in these regulations, but only to the extent of the direct inconsistency.

Article II

Procurement Organization

2.1 Scope of Superintendent's Authority

The Superintendent shall manage all procurement activity of the Board, subject to the direction and control of the Board, and shall be the Board's senior contracting officer.

2.2 Specific Powers of the Board

In addition to all other powers set forth in these regulations, the Board shall have the power, which may be exercised in any particular case at the direction of the Board by the Superintendent or his designee:

2.2.1 Acquire Land

To acquire land in the name of the Board or in such other name as is required or permitted by applicable law, by purchase or eminent domain proceedings, in fee simple, or such right, title, interest or easement as the Board may deem necessary for any contract or construction project as specifically authorized in a capital budget, Board resolution or legislation.

2.2.2 Convey Easements

With appropriate approvals by state or federal authorities, to transfer and convey any easements or licenses necessitated by any contract or construction project which has previously been authorized in a capital budget, Board resolution or legislation.

2.2.3 Enter into Contracts

To enter into contracts of all kinds and to execute any and all instruments and/or documents necessary or convenient to carry out any such contract.

2.2.4 Purchasing Methods

To determine the methods to be used for purchasing supplies, materials, equipment, construction and other items for the Board, as provided for in the applicable provisions of KRS Chapter 45A, and the procedures to be used in making such purchases, including, but not limited to, delivery, acceptance or rejection, and storage.

2.2.5 Grants and Contracts with Other Governments or Entities

To accept grants and subsidies from, and enter into inter-local agreements or other transactions, with any federal agency, governmental body of the Commonwealth of Kentucky, any local public agency or any other entity.

2.2.6 Acceptance of Grants, Gifts and Like Items

To accept grants in aid, gifts, donations, legacies or usages of money made or extended by individuals, organizations, public or private corporations, governmental bodies of the Commonwealth of Kentucky, or of the federal government,

and to return money advanced for its usage not otherwise required for its purposes.

2.2.7 Intergovernmental Body Property Transfers; Disposal of Property

Subject to the applicable provisions of KRS Chapter 45A; and any other applicable law, to transfer to or between governmental bodies of the Commonwealth of Kentucky, including local public agencies, or to sell, trade or otherwise dispose of supplies, surplus, obsolete or unused, and to make proper adjustments in the accounts of the Board.

2.2.8 Economical Operation of Procurement

To establish criteria, including objective measurable criteria where applicable, and procedures to obtain more economical operations of all procurement activity of the Board.

2.2.9 Common Item Procurement

To determine the aggregate amount for common item procurement, and to publish rules and regulations governing the procurement of common items used by more than one unit of the Board, including, but not limited to, the time, manner and form of making such procurement.

2.2.10 Submission of Bids and Terms and Conditions

To establish, consistent with the applicable provisions of KRS Chapter 45A, the form, time and manner of submission of bids and proposals for contracts, and the terms and conditions which shall be used in such contracts.

2.2.11 Testing and Inspection

To establish and maintain a program of testing and inspection to insure that materials, supplies, services, equipment, construction, insurance and other items contracted for meet specifications. The Board may employ inspectors and make contracts for testing. If any using department or function of the Board determines that any supplies, materials, services, equipment, construction or insurance received do not meet specifications, it shall promptly notify the Superintendent in writing, detailing the reasons why the specifications were not met. The Superintendent shall immediately determine whether or not the reported supplies, materials, services, equipment, construction or insurance meet the specifications, and his decisions shall be final. When the Superintendent finds that contract specifications or conditions have not been complied with, he shall take such action, if necessary, against the defaulting contractor as he may determine to be just and appropriate.

2.2.12 Statistics

To direct that usage figures on the consumption and use of materials, supplies, services, equipment, construction, insurance and other items purchased be compiled for the Board from time to time. The Superintendent shall supply all such statistics so requested by the Board, and the Superintendent shall also insure compliance with any reporting procedures established under the applicable provisions of KRS Chapter 45A. The Superintendent may establish statistical compilation activities, acquire necessary equipment by rental, lease or purchase, and employ the necessary trained personnel to carry out the provisions of this paragraph.

2.3 Issuance and Amendment of Procurement Regulations

2.3.1 Procurement Regulations

The Board has published these regulations as permitted by KRS 45A.360, to be consistent with the applicable provisions of KRS Chapter 45A, and these regulations shall have the force of law. Notice of the availability of these regulations shall be given reasonable public dissemination in accordance with the applicable provisions of KRS Chapter 45A.

2.3.2 Changes to Regulations

All additions, deletions or other modifications of these regulations shall be made only by a resolution approved by a majority of the Board.

2.3.3 Board Internal Policies and Procedures

The Board may issue internal policies and procedures for the implementation of these regulations.

2.3.4 Board Shall Not Delegate Regulation Issuance or Amendment Power

The Board shall not delegate its power to issue or amend these regulations to the Superintendent or any other person or agency.

2.3.5 Regulations Shall Not Change Existing Contract Rights

These regulations, or any amendment to these regulations, shall not affect any contract or commitment by the Board, nor of a contractor to the Board, which was in existence on the effective date of the applicable regulation or amendment.

2.3.6 Incorporation of Regulations into Contracts

These regulations shall be deemed incorporated by reference into each invitation for bids, and each contract entered into between the Board and any contractor. All applicable provisions of KRS Chapter 45A regarding notice to and disclosure by contractors shall be complied with.

2.3.7 Compliance with KRS Chapter 45A

(a) All applicable provisions of KRS Chapter 45A regarding notice to and disclosure by contractors shall be complied with. Without limitation of the foregoing, every contract entered into by the Board shall require the contractor and all subcontractors performing work under the contract to:

(i) Reveal any final determination as such term is used in KRS 45A.343 of a violation by the contractor or subcontractor within the previous five year period pursuant to KRS Chapters 136, 139, 141, 337, 338, 341 and 342 that apply to the contractor or subcontractor; and

(ii) Be in continuous compliance with the provisions of KRS Chapters 136, 139, 141, 337, 338, 341 and 342 that apply to the contractor or subcontractor for the duration of the contract.

(b) A contractor's failure to reveal such a final determination of a violation by the contractor of KRS Chapters 136, 139, 141, 337, 338, 341, and 342 or to comply with these statutes for the duration of the contract shall be grounds for the Board's:

(i) Cancellation of the contract: and

(ii) Disqualification of the contractor from eligibility for future contracts awarded by the Board for a period of two years.

(c) A subcontractor's failure to reveal such a final determination of a violation by the subcontractor of KRS Chapters 136, 139, 141, 337, 338, 341, and 342 or to comply with these statutes for the duration of the contract shall be grounds for the disqualification of the subcontractor from eligibility for future contracts for a period of two years.

Article III

Source Selection And Contract Formation

3.1 Scope

The provisions of this Article III shall apply to every Board procurement made by competitive sealed bidding, competitive negotiation and noncompetitive negotiation.

3.2 Competitive Sealed Bidding

Competitive sealed bidding is the preferred method for the procurement of supplies, services or construction by the Board. All Board contracts shall be awarded by competitive sealed bidding, unless authorized by law, or except as provided in the following subparts of these regulations.

3.2.1 Competitive Negotiation.

3.2.2 Negotiations after Competitive Sealed Bidding when all bids exceed available funds.

3.2.3 Noncompetitive Negotiation.

3.2.4 Small Purchases.

3.2.5 Emergency.

3.3 The Invitation for Bids

3.3.1 Use

The invitation for bids shall be used to initiate a competitive sealed bid procurement.

3.3.2 Content

The invitation for bids shall include the following:

(a) Instructions and information to bidders concerning the bid submission requirements, including but not limited to the time and closing date for submission of bids, the address of the office to which the bids are to be delivered, the maximum time for bid acceptance by the Board, whether the award shall be made on the basis of the lowest bid price or the lowest evaluated bid price, the objective measurable criteria for evaluation if the award will be based on the lowest evaluated bid price, and any other special information; and

(b) The contract terms and conditions, including but not limited to purchase description, delivery or performance schedule, inspection and acceptance requirements, and warranty and bonding or other security requirements, as applicable.

3.3.3 Incorporation by Reference

The invitations for bids may incorporate documents by reference, and shall incorporate these regulations as provided in paragraph 2.36.

3.4 Bidding Time

3.4.1 Minimum Bidding Time

Bidding time is the period of time between the date of distribution of the invitation for bids and the date set for opening of bids. A minimum of seven days bidding time shall be provided, unless the contracting officer makes a written determination and findings that there is an urgent need for procurement that does not permit delay.

3.4.2 Setting Bidding Time

Bidding time shall be set to provide prospective bidders with a reasonable time to prepare their bids, subject to the minimum bidding time set forth in paragraph 3.4.1 and the publication requirements in paragraph 3.6.2. Factors to be considered in establishing bidding time include, but are not limited to:

- (a) Time constraints involved in meeting the Board's needs;
- (b) Complexity of the procurement; and
- (c) If mail is used, the time for transmission by mail to and from prospective bidders.

3.5 Bidder Submissions

3.5.1 Bid Form

The invitation for bids shall provide a form, which may be supplied in print and/or electronic format, which shall include space(s) in which the bid price(s) shall be inserted and which the bidder shall sign and submit along with all other necessary submissions. The bid form shall also include space(s) in which to place alternate bids if such bids are allowed. In any event, the bid form shall provide that the base bid must be supplied, and any alternate bid may be supplied at a later time.

3.5.2 Bid Samples and Descriptive Literature

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

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

(c) Bid samples or descriptive literature may be required when it is necessary to have either or both to evaluate required characteristics of the items bid. In such event, the invitation for bids shall fully describe the samples required, including quantity and size, as appropriate; the descriptive literature to be furnished; and identify the characteristics for which the samples or literature will be examined.

(d) The invitation for bids may provide for the grant by the Board of a waiver of the requirement for bid samples or descriptive literature when the Board already has information that a particular item bid by a particular bidder meets the Board's needs; for example, when the item is currently being supplied to the Board.

(e) When a bidder offers an item which the Director of Purchasing determines must or should be evaluated to determine if it meets Board requirements, the Board may request a sample or descriptive literature even if the invitation for bids did not include such requests.

(f) The invitation for bids shall state that bid samples or descriptive literature shall not be submitted unless expressly requested. Regardless of any attempt by a bidder to condition the bid by such a submittal, unsolicited bid samples or descriptive literature submitted at the bidder's risk shall not be examined or tested, and will not be deemed to vary any of the provisions of the invitation for bids.

3.6 Public Notice

3.6.1 Distribution

Invitations for bids or notices of the availability of invitations for bids shall be mailed or otherwise furnished, including without limitation by electronic distribution, to a sufficient number of bidders for the purpose of securing competition. Notices of availability shall indicate where, when and for how long invitations for bids may be obtained, generally describe the supply, service or construction desired; and may contain other appropriate information. (See also section 3.7, Bidder Mailing List.) Where appropriate, the contracting officer may require payment of a fee, filing of a bond or a deposit for the supplying of invitations for bids.

3.6.2 Advertisement by Internet Posting or Newspaper Publication

The invitation for bids shall be posted on the Internet and/or published in a newspaper of general circulation in Jefferson County. Bids must be advertised by means of such posting or publication not less than seven days before the date set for the opening of the bids, subject to paragraph 3.4.1. The posting or publication shall include the time and place the bids will be opened, and the time and place where the specifications may be obtained.

3.6.3 Posting at the Board's Offices

A copy of the invitation for bids shall be posted or otherwise made available for public inspection at the office of the Director of Purchasing, or the Board's public information until the date set forth for the submission of bids.

3.7 Bidder Mailing Lists

3.7.1 Purpose

Bidder mailing lists may be compiled to provide the Board with the names of businesses that may be interested in competing for various types of Board contracts. Inclusion or exclusion of the name of a business on a bidder mailing list does not indicate that the business is responsible in respect to a particular procurement or otherwise capable of successfully performing a Board contract. Bidder mailing lists may include but not be limited to, prequalified bidder lists prepared in accordance with Article XII (Prequalification, Disbarment and Suspension) of these regulations. Any person may submit a bid whether or not the person is on any bidder mailing list.

3.7.2 Compilation

Bidder mailing lists will be compiled by categories and for recurring classes of procurement. The Director of Purchasing may include on any bidder mailing list businesses that he or she considers capable of performing, and shall include other prospective bidders that have requested in writing to be informed of any procurement involving the types of supplies, services or construction that may be or are being procured. When it is known that the request to be included on a bidder mailing list was made by a person or an organization that is not a prospective bidder, that person or organization need not be informed of any procurements involving the types of supplies, services or construction that may be or are being procured. The Director of Purchasing may deny any application for inclusion on any applicable bidder mailing list if he or she makes a determination and findings that such inclusion is not in the Board's best interest and supplies the applicant with a copy of the determination and findings.

3.7.3 Use

Except as provided, in this Section 3.7, the invitation for bids or a notice of the availability of the invitation for bids shall be distributed as provided in paragraph 3.6.1 to the businesses listed on any applicable bidder list, or such businesses shall be notified pursuant to paragraph 3.6.2 by posting on the Internet or publication in a newspaper of general circulation in Jefferson County. If any person requests a copy of an invitation for bids, it shall be provided whether or not the person is on the applicable bidder mailing list and/or indicates an intention to submit a bid.

3.7.4 Deletion of Bidders

Businesses that fail to submit bids in response to two (2) consecutive invitation for bids of similar items may be removed from the applicable bidder mailing list. However, any business that currently meets the criteria for inclusion on any applicable bidder mailing list shall be reinstated on any such list upon request.

3.7.5 Public Availability

All bidder mailing lists shall be available for public inspection upon request. A copy may be made available to any person upon request in accordance with applicable open record laws and policies.

3.8 Pre-Bid Conferences

A pre-bid conference may be conducted to explain the procurement requirements for any particular procurement. The conference shall be open to the public, and the date, place and time of the conference shall be announced to all prospective bidders known to have received the invitation for bids, or a notice of availability of the invitation for bids. The conference shall be held long enough after the invitation for bids has been issued to allow bidders to become familiar with it, and sufficiently before the bid opening to allow consideration of the conference results in preparing their bids. When possible, the notice of the pre-bid conference shall state that bidders' questions shall be submitted in advance of the conference, in writing. Nothing stated at the pre-bid conference shall change the invitation for bids unless the change is made by written amendment as provided in section 3.9 (Amendments to Invitation for Bids) and the notice of the pre-bid conference shall so provide.

3.9 Amendments to Invitations for Bids

3.9.1 Form

Amendments to any invitation for bids shall be distributed as provided in paragraph 3.6.1 to all prospective bidders known to have received the invitation for bids.

3.9.2 Use

Amendments shall be used to:

- (a) Make any changes in the invitation to bids such as changes in quantity, purchase descriptions, delivery schedules and opening dates;
- (b) Correct defects or ambiguities; or
- (c) Furnish to other bidders information given to one bidder, if such information will assist the other bidders in submitting bids, and the lack of such information would prejudice the other bidders.

3.9.3 Timeliness

Amendments shall be distributed within a reasonable time to allow prospective bidders to consider them in preparing their bids. Subject to paragraph 3.4.1, if the time set for bid opening will not permit such distribution, the time set

for bid opening shall be extended in the amendment, or, if necessary, by facsimile or telephone notice, and confirmed in the amendment.

3.10 Modification or Withdrawal of Bids Prior to Bid Opening

3.10.1 Procedure

Bids may be modified or withdrawn by a bidder by written notice received in the office designated in the invitation for bids prior to the time set for bid opening. The notice may be hand delivered, mailed or sent by any method of electronic transmission.

3.10.2 Disposition of Withdrawn Bids

Withdrawn bids shall be returned to the bidder when requested in the notice of withdrawal, or otherwise disposed of.

3.10.3 Records

All documents relating to the modification or withdrawal of bids shall be made a part of the appropriate procurement file, including, but not limited to; the envelope or other data that shows evidence of the date of mailing, filing or delivery and receipt.

3.11 Late Bids, Late Withdrawals and Late Modifications

3.11.1 Definition

Any bid, withdrawal or modification received after the time and date set for opening of bids at the place designated for opening, is late.

3.11.2 Treatment

No late bid or late modification will be considered. A late withdrawal will be considered if received before the date the contract is awarded, and:

- (a) The late withdrawal would have been timely but for the action or inaction of Board personnel; or
- (b) The Director of Purchasing makes a determination and finding that the notice of withdrawal was released from the control of the bidder and should have arrived at the place designated for opening of bids at the time set therefor, prior to bid opening.

3.11.3 Notice

Bidders submitting late bids that will not be considered for award shall be so notified in writing as soon as practicable.

3.11.4 Records

Records equivalent to those required in paragraph 3.10.3 (Modification or Withdrawal of Bids Prior to Bid Opening) shall be made and kept for each late bid, late modification or late withdrawal.

3.12 Receipt, Opening and Recording of Bids

3.12.1 Receipt

Upon receipt, all bids and modifications will be manually and/or electronically dated and time-stamped, but not opened publicly. They shall be stored using a secure method until the bid opening time.

3.12.2 Opening and Recording

Bids and modifications shall be opened publicly, by the contracting officer, or his designee, in the presence of one or more witnesses, at the time and place designated in the invitation for bids. The names of the bidders, the bid amounts, and such other information as is deemed appropriate by the contracting officer, shall be read aloud or otherwise made available and recorded. The opened bids and bid records shall then be available for public inspection, except to the extent the bidder has designated a portion of a bid as confidential trade secrets or other proprietary data as permitted by applicable law. Any materials so designated shall be part of the bid but shall be readily separable from the remainder of the bid in order to facilitate public inspection of the non-confidential portion of the bid. Makes and models or catalog numbers of the items offered, deliveries and terms of payment shall be publicly available at the time of bid opening regardless of any designation to the contrary.

3.13 Responsiveness of Bids

A bid shall be “responsive” if it has been submitted by a “responsive bidder” as defined in paragraph 1.5.57 of these regulations.

3.14 Mistakes in Bids

3.14.1 General

The Board may allow the correction or withdrawal of a bid where there is a patent error on the face of the bid document, or where the bidder presents sufficient evidence, substantiated by bid worksheets, that the bid was based upon an error in the formulation of the bid price. Correction or withdrawal of a bid because of an inadvertent, nonjudgmental mistake in the bid requires careful consideration to protect the integrity of the competitive bidding system, and to insure fairness. A mistake may be corrected or a bid withdrawn as permitted under this section, only if such correction or withdrawal is in the best interest of the Board. If the mistake is attributable to an error in judgment by the bidder, the bid may not be corrected or withdrawn. A non-responsive bid may not be corrected.

3.14.2 Mistakes Discovered Before Opening

A bidder may correct mistakes discovered by the bidder before bid opening by withdrawing or correcting the bid as provided in section 3.10. (Modification or Withdrawal of Bids Prior to Bid Opening).

3.14.3 Confirmation of Bid After Opening

When it appears from the Board’s review of the bid after bid opening that a mistake has been made, the bidder may be requested to confirm the bid. The situations in which confirmation shall be requested are patent errors on the face of the bid, or a bid unreasonably lower than the other bids submitted. If the bidder upon receipt of a request for confirmation alleges a mistake, the bid may be corrected or withdrawn if one or more of the conditions set forth in subparagraphs (a) through (d) of paragraph 3.14.4 (Mistakes Discovered After Opening, Prior to Award) are met.

3.14.4 Mistakes Discovered After Opening, Prior to Award

This paragraph lists the four conditions under which mistakes in bids that are discovered after opening but before award may be corrected or withdrawn as provided in paragraph 3.14.3:

- (a) A minor mistake exists in the bid;
- (b) A material mistake in the intended bid is evident on the face of the bid document;
- (c) A material mistake in the intended bid is evident either on the face of the bid document or from proof of an error in the formulation of the bid price within the bid document; or
- (d) A material mistake in the intended bid is only evident from proof of an error in the formulation of the bid price outside the bid document.

3.14.5 Mistakes Discovered After Award

When a contractor discovers a bid mistake after award, a request for corrections shall be subject to the provisions for modification set forth in Article VI (Contract Modification and Termination); provided, however, that the modification shall not cause the contract price to exceed that of the next-lowest responsive bid.

3.14.6 Determination and Finding Required

When a bidder’s request for correction or withdrawal is granted or denied under the provisions of this Article, the contracting officer shall prepare a written determination and finding showing that the relief was granted or denied in accordance with these regulations and the reasons therefor.

3.15 Bid Evaluation and Award

3.15.1 Award

The contract shall be awarded with reasonable promptness with written notice to the responsive and responsible bidder whose bid is either the lowest bid price or the lowest evaluated bid price, as applicable. The invitation for bids shall set forth the manner in which the requirements and criteria will be used to determine the lowest responsive and responsible bidder. No award shall be made on the basis of any requirements or criteria that are not disclosed in the invitation for bids.

3.15.2 Product Acceptability

The invitation for bids shall set forth the objective measurable criteria to be used in determining product acceptability, if the award shall be made on the basis of the lowest evaluated bid price. As provided in paragraph 3.5.2, the invitation for bids may require the submission of bid samples, descriptive literature, technical data or other material, where it is deemed necessary to inspect or test a product prior to award for such characteristics as quality or workmanship, or to examine such elements as appearance, finish, taste or feel, or to determine whether it conforms with any other purchase description requirements. The evaluation shall not be conducted for the purpose of determining whether one bidder's item is superior to another, but only to determine that a bidder's offering is acceptable. Any bidder's offering which does not meet the acceptability requirements; shall be rejected.

3.15.3 Determination of Lowest Bidder

Bids will be evaluated to determine which bidder offers the lowest cost to the Board in accordance with the criteria set forth in the invitation for bids. If price is the only criterion, the lowest price bid from a responsive, responsible bidder whose product is acceptable shall be the lowest cost bidder. If an evaluated bid price is used, the lowest cost bid will be determined by the dollar amount of the bid after bid price adjustments are made pursuant to objective measurable criteria set forth in the invitation for bids, which affect the economy and effectiveness in the operation or use of the product, such as reliability, maintainability, useful life and residual value. Evaluation factors need not be precise predictions of actual future cost, but to the extent possible such evaluation factors shall:

- (a) Be reasonable estimates based upon information the Board has available concerning future use; and
- (b) Treat all bids equitably.

3.15.4 Restrictions

Nothing in this section shall be deemed to permit a contract award to a bidder submitting a higher quality item than required by the invitation for bids if such bidder is not also the lowest cost bidder as determined under paragraph 3.15.3. Further, this section does not permit negotiation with any bidder.

3.16 Tie Bids

3.16.1 Tie bids are low responsive bids from responsible bidders that are identical in price or evaluated price and which meet all other requirements and criteria set forth in the invitation for bids.

3.16.2 Award

Should any bid result in a tie bid, as defined in paragraph 3.16.1, the award of the contract shall be determined in the following manner:

- (a) A local bidder (a bidder with its principal place of business in Jefferson County) shall be awarded the contract if all other tie bids are from bidders with their principal place of business outside Jefferson County;
- (b) If all bidders submitting tie bids have their principal place of business outside Jefferson County, and any one of the tie bidders has a local representative or agent with an office in Jefferson County, the tie bidder with the local representative or agent with an office in Jefferson County shall be awarded the contract; or
- (c) If all bidders submitting tie bids have their principal place of business in Jefferson County, or, alternatively, if all bidders submitting tie bids have their principal place of business outside Jefferson County and do not have a local representative or agent with an office in Jefferson County, the Board shall award the contract by lot to be drawn by the Board at a designated time and place.

3.17 Documentation of Award

Following award, a determination and findings showing the basis for determining the successful bidder shall be made a part of the procurement record.

3.18 Publicizing Awards

Written notice of the award shall be sent to the successful bidder as soon as possible. The notice of award shall be available to the public upon request.

3.19 Competitive Negotiation Procedure

3.19.1 General

The competitive negotiation procedure is a method of procurement designed to obtain the benefits of competitive sealed bidding by award of a contract to the lowest responsive, responsible bidder, and at the same time obtain the benefits of the competitive sealed proposals procured through the solicitation of technical offers and the conduct of discussion to evaluate and determine the acceptability of technical offers. It may consist of a technical first phase in which bidders submit unpriced technical offers to be evaluated by the Board, and a second phase in which those bidders whose technical offers are determined to be acceptable during the first phase have their price bids or technical offers and price bids considered.

3.19.2 Conditions for Use

The competitive negotiation procedure will be used when the contracting officer makes a written determination and finding that:

- (i) Specifications cannot be made sufficiently specific to permit award on the basis of either the lowest bid price or the lowest evaluated bid price, including, but not limited to, contracts for experimental or developmental research work, or highly complex equipment which requires technical discussions, and other non-standard supplies, services, or construction; or
- (ii) Sealed bidding is inappropriate because the available sources of supply are limited, the time and place of performance cannot be determined in advance, the price is regulated by law, or a fixed price contract is not applicable; or
- (iii) The bid prices received through sealed bidding are unresponsive or unreasonable as to all or part of the requirements, or are identical or appear to have been the result of collusion; provided each responsible bidder is notified of the intention to negotiate and is given a reasonable opportunity to negotiate, and the negotiated price is lower than the lowest rejected bid by any responsible bidder

Competitive negotiation may thus be used:

- (a) To invite and evaluate technical offers to determine their acceptability to fulfill the purchase description requirements;
- (b) To conduct discussions for the purposes of facilitating understanding of the technical offer and purchase description requirements and where appropriate, obtain supplemental information, permit amendments of technical offers or amend the purchase description;
- (c) To accomplish subsections (a) and (b) above prior to soliciting priced bids; and
- (d) To award the contract to the lowest responsive and responsible bidder in accordance with the competitive sealed bidding procedures.

3.20 Procedure for Phase One of the Competitive Negotiation**3.20.1 Solicitation of Proposals**

Proposals shall be solicited by advertisement of a request for proposals through posting on the Internet and/or by publication in a newspaper of general circulation in Jefferson County or any other means which, as determined by the Superintendent or his designee, will notify an adequate number of qualified sources to permit reasonable competition consistent with the nature and requirement of the procurement.

3.20.2 Form

The competitive negotiation procedure shall be initiated by the issuance of a request for proposals, which shall state:

- (a) That priced or unpriced technical offers are requested;
- (b) That it is a competitive negotiated procurement, and initial proposals will be considered only if they fall within the competitive range after the evaluation phase;
- (c) The weighted criteria which is to be used in the evaluation of the initial proposals to place them in the competitive range;
- (d) If more than one factor is to be considered in the evaluation, the relative importance of the factors;
- (e) That the Board, to the extent the contracting officer finds necessary, may or may not conduct oral or written discussions of the initial proposals;
- (f) If the price is to be submitted with the initial proposal, that such submission shall be in a separate sealed envelope;
- (g) That prospective bidders may designate those portions of the initial proposal which contain trade secrets or other proprietary data which are to remain confidential to the extent provided by applicable law; and
- (h) That the item being procured shall be furnished generally in accordance with the offeror's initial proposal as found to be finally acceptable and shall meet the requirements of the request for proposals.

3.20.3 Amendments to the Request for Proposal

After receipt of initial proposals, amendments to the request for proposal shall be distributed only to prospective offerors who submitted initial proposals. If the request for proposal is amended after initial proposals are received, all prospective offerors who submitted initial proposals shall be allowed to submit new proposals or amend those submitted. If, in the opinion of the contracting officer, a contemplated amendment will significantly change the nature of the procurement, the request for proposal may be cancelled by written notice to all offerors submitting proposals, and a new request for proposal issued.

3.20.4 Receipt and Handling of Proposals

- (a) Initial proposals shall not be opened publicly nor be disclosed to unauthorized persons prior to the award of the contract.

(b) If any offeror has requested nondisclosure of trade secrets and other proprietary data identified in writing as provided in subparagraph 3.20.2 (g), the contracting officer shall examine such request and make a determination. After the award of the contract, all proposals shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data to the extent provided by applicable law. If the parties do not agree as to the disclosure of data, the contracting officer shall inform the offeror in writing what portions of the proposal will be disclosed and that unless the offeror protest his determination in the manner designated in Article IX (Legal and Contractual Remedies) of these regulations or unless the offeror withdraws his proposal as provided in paragraph 3.10.1, the proposal will be so disclosed.

3.20.5 Evaluation of Proposals

Proposals submitted by offerors shall be evaluated solely in accordance with the criteria set forth in the request for proposals. All proposals shall be categorized as;

- (a) Acceptable;
- (b) Potentially acceptable; that is, reasonably susceptible of being made acceptable; or
- (c) Unacceptable.

The contracting officer may make an award without discussion if, in the contracting officer's opinion, there are sufficient acceptable proposals to assure effective price competition. If the contracting officer finds that such is not the case, the contracting officer shall engage in technical and/or price discussions as set forth in paragraph 3.20.6.

3.20.6 Discussions of Proposals

Discussions of technical aspects of the proposals and/or prices may be conducted by the contracting officer with any offeror who submits an acceptable, or potentially acceptable, proposal. During the course of such discussions, the contracting officer shall not disclose any information derived from one proposal to any other offeror. Once discussions are begun, any offeror who has not been notified that its proposal has been finally found unacceptable, may submit supplemental information amending its proposal at any time until the closing date established by the contracting officer. Such submission may be made at the request of the contracting officer or upon the offeror's own initiative. Discussions need not be conducted:

- (a) With respect to prices, where such prices are fixed by law or regulation except that consideration shall be given to competitive terms and conditions; or
- (b) Where time of delivery or performance will not permit discussions; or
- (c) Where it can be clearly demonstrated and documented from the existence of adequate competition or accurate

prior cost experience with that particular supply, service, or construction item that acceptance of an initial offer without discussion would result in fair and reasonable prices and the request for proposal notifies all offerors of the possibility that award may be made on the basis of initial offers.

If discussions pertaining to the revision of the specifications or quantities are held with any potential offeror, all other potential offerors shall be afforded an opportunity to take part in such discussions. A request for proposals based on revised specifications or quantities shall be issued as promptly as possible, shall provide for an expeditious response to the revised requirements and shall be awarded upon the basis of the lowest bid price or lowest evaluated bid price submitted by any responsive and responsible offeror. No discussion shall be conducted with offerors after submission of revised proposals except for a compelling reason as determined in writing by the local public agency. The request for proposals shall state that an award is to be made without discussion except as herein provided.

3.20.7 Notice of Unacceptable Proposals

When the contracting officer determines a proposal to be unacceptable, he or she shall promptly notify the offeror in writing. The offeror shall not be afforded an additional opportunity to supplement the proposals.

3.20.8 Award

Upon ascertaining that the proposals received from the offerors constitute a competitive range within which the best interests of the Board shall be served, the contracting officer shall determine the offeror who submitted the lowest evaluated cost proposal and shall make an award to that offeror. After the contracting officer makes the award, the offeror shall be promptly notified of the contract award in writing.

3.21 Mistakes During Competitive Negotiation Procedure

3.21.1 Mistakes may be corrected or proposals may be withdrawn;

- (a) Before proposals are considered;
- (b) After any discussions have commenced under section 3.20 (Procedure for Phase One of Competitive Negotiation) ;or
- (c) When responding to any amendment of the request for proposals.

3.21.2 Other mistakes may be corrected or withdrawal permitted in accordance with section 3.14 (Mistakes in Bids).

3.22 Pre-Bid Conferences in Competitive Negotiation Procedure

Prior to the submission of proposals, a pre-bid conference as contemplated by section 3.8 (Pre-Bid Conferences) may be conducted by the contracting officer. The contracting officer may also hold a conference of all offerors at any time during the evaluation of the proposals.

3.23 Negotiation After Competitive Sealed Bidding

3.23.1 Determination

In the event that all bids submitted pursuant to competitive sealed bidding under sections 3.2 through 3.19 of this Article result in bid prices in excess of the funds available for the procurement, the Director of Purchasing may enter into negotiations after competitive sealed bidding if he or she makes a determination and finding:

- (a) That there are no additional funds available from any source so as to permit an award to the lowest responsive and responsible bidder; and
- (b) The best interests of the Board will not permit the delay attendant to a resolicitation under revised specifications, or for revised quantities and competitive sealed bidding.

3.23.2 Procedure for Negotiation After Competitive Sealed Bidding

(a) Where there is more than one bidder, competitive negotiations pursuant to section 3.19 (Competitive Negotiation Procedure) of this Article shall be conducted with the three, or two if there are only two, bidders determined in writing by the Director of Purchasing to be the lowest responsive and responsible bidders to the competitive sealed bid invitation. Such competitive negotiations shall be conducted under the following restrictions:

(i) If discussions pertaining to the revisions of the specifications or quantities are held with any potential offeror, all other potential offerors shall be afforded an opportunity to take part in such discussions; and

(ii) A request for proposals, based upon revised specifications or quantities shall be issued as promptly as possible, and shall provide for an expeditious response to the revised requirements, and shall be awarded on the basis of the lowest bid price or the lowest evaluated bid price submitted by any responsive and responsible offeror. No discussion shall be conducted with offerors after submission of proposals except for a compelling reason as determined in writing by the contracting officer. The request of proposals shall state that the award is to be made without discussions except as herein provided.

(b) Where, after competitive sealed bidding, it is determined that there is only one responsive and responsible bidder, a noncompetitive negotiated award may be made to such bidder.

3.24 Noncompetitive Negotiation

3.24.1 Determination

The Director of Purchasing may contract or purchase through noncompetitive negotiation only after a written determination is made by a designee of the Superintendent that competition is not feasible and that:

(a) An emergency, as defined in paragraph 1.5.27, exists which will cause harm to the Board as a result of delay in competitive procedures; or

(b) There is a single source within a reasonable geographical area of the products or services to be procured; or

(c) The contract is for the services of a licensed professional, such as attorney, physician, psychiatrist, psychologist, certified public accountant, registered nurse or educational specialist; a technician such as a plumber, electrician, carpenter or mechanic; or an artist such as a sculptor, aesthetic painter, or musician, provided, however, that this provision shall not apply to architects or engineers; providing construction management services rather than professional architectural or engineering services; or

(d) The contract is for the purchase of perishable items purchased on a weekly or more frequent basis, such as fresh fruits, fresh vegetables, fresh fish or fresh meat; or

(e) The contract is for replacement parts where the need cannot be reasonably anticipated and stockpiling is not feasible; or

(f) The contract is for proprietary items for resale; or

(g) The contract relates to an enterprise in which the buying or selling by students is a part of the educational experience; or

(h) The contract or purchase is for expenditures made on authorized trips outside of Jefferson County; or

(i) The contract is for the purchase of supplies which are sold at public auction or by receiving sealed bids; or

(j) The contract is for group life insurance, group health and accident insurance, group professional liability insurance, Worker's Compensation insurance and unemployment insurance; or

(k) The contract is for a sale of supplies at reduced prices that will afford a purchase at savings to the Board; or

(l) An invitation for bids has been made in accordance with KRS 45A.365 as implemented by these regulations and no bids have been received from responsive and responsible bidders.

3.25 Cost Reimbursement Contracts

3.25.1 Use

Procurement may be made by use of a cost reimbursement contract only if the Director of Purchasing makes a determination and findings that such contract is likely to be less costly to the Board than any other type of contract, or that it is impracticable to obtain supplies or services of the kind or quality required except under such a contract.

3.25.2 Requirements

In addition to all other requirements of these regulations applicable to the type of procurement by which a cost reimbursement contract is entered into, the following requirements shall apply to any such contract: (a) each contractor under a cost reimbursement type contract shall give notice to the Director of Purchasing, as provided in the contract, before entering into either a cost reimbursement type subcontract or any type of subcontract which involves more than \$10,000 or more than ten percent (10%) of the estimated cost of the contractor's contract with the Board, and (b) the Director of Purchasing shall make a determination and finding before making the contract award that the proposed contractor's accounting system will permit timely development of all necessary cost data in the form required by the contract and that the contractor's accounting system is adequate to allocate costs in accordance with the requirements of the contract and these regulations.

3.25.3 Right to Audit

The Board shall have the right to audit the books and records of a contractor or any subcontractor under any cost reimbursement contract or subcontract. The contractor or subcontractor shall maintain all books and records reasonably connected with cost or pricing data for a period of five years from the date of final payment under the contract or subcontract.

3.26 Multiyear Contracts

3.26.1 Use

Unless otherwise provided in the Board resolution approving the expenditure, multiyear contracts for supplies and services may be entered into for periods extending beyond the end of the fiscal year in which the contract was made, if funds for the first fiscal year of the contract are available at the time of contracting. Payment and performance obligations for succeeding fiscal years shall be subject to the availability of funds.

3.26.2 Requirements

Before the Board may enter into a multiyear contract, the Director of Purchasing shall make a determination and findings that (a) the Board's estimated requirements cover the period of the contract and are reasonably firm and continuing, and (b) the contract will serve the best interests of the Board by encouraging effective competition or otherwise promoting economies in the Board's operations.

3.26.3 Availability of Funds

When funds are not included in the Board's budget or otherwise made available to support continuation of performance of a multiyear contract in any subsequent fiscal year, the contract for that subsequent fiscal year may be cancelled and the contractor shall be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies or services delivered under the contract. The cost of cancellation may be paid from (a) any funds currently available for performance of the contract, (b) any funds currently available for procurement of similar supplies or services and not otherwise obligated, or (c) funds specifically approved by the Board for the payment of such cancellation costs.

3.27 Small Purchase Procedures

3.27.1 Policy of Small Purchases

(a) Small purchase procedures may be used for the award of any contract or purchase for which a determination is made that the aggregate amount of the contract or purchase does not exceed \$20,000.00.

(b) Supplies, services or construction normally supplied as a unit cannot be artificially divided for the sole purpose of using small purchase procedures. Supplies, services or construction to be supplied over a period of time at the same unit price shall be considered a single purchase contract. A contract made under small purchase procedures may be for any period of time that will provide the most beneficial market price to the Board, provided no contract time period shall be fixed for a period of time exceeding two years nor shall any period be fixed for the sole purpose of avoiding the requirements of competitive sealed bidding or any negotiation procedures as set forth in this Article.

3.27.2 Procedures

(a) For all purchases which exceed \$10,000 in value but which do not exceed \$20,000.00 in value, the following procedure shall be followed by the authorized contracting officer;

(i) The contracting officer shall solicit a minimum of three potential bidders or suppliers and request written quotations for the supplies, services or construction which are to be procured. The requirement of written quotations may be dispensed with if the contracting officer makes a written determination that time does not permit the submission of written quotations, provided that any bids received in such manner shall be subsequently verified in writing by the bidder.

(ii) The solicitation by the contracting officer shall state the salient, desired criteria of the supplies, services or construction to be procured, and shall inform the potential bidders or suppliers that the contract will be awarded on the basis of the lowest bid.

(iii) Upon completion of the steps in subparagraphs (i) and (ii) of this paragraph, the contracting officer shall award the contract to the lowest responsible and responsive bidder.

(iv) The contacting officer shall, upon award of the contract, make a complete record of the manner in which he solicited the bid, such record to include the method of soliciting the bids, all written solicitations and responses thereto, the name of the person to whom the contract was awarded, a determination and findings to support the award, the written contract and the method of dispensing funds.

(v) The record required in subparagraph (iv) of this paragraph shall be retained by the Director of Purchasing for a period of five years.

(b)

(i) For all purchases which exceed \$5,000.00 in value but which do not exceed \$10,000.00 in value, the contacting officer shall use his best efforts to obtain the lowest price from a responsible and responsive bidder for the supplies, services or construction to be procured.

(ii) Upon award of the contract, the contracting officer shall make a record of the manner in which he solicited the bid, and such record shall account for, in reasonable detail, the reason for expending the funds, the manner of solicitation, the amount of money expended, the written contract and the method of dispensing the funds.

(c) For all purchases which do not exceed \$5,000 in value, the contracting officer shall use his best efforts to obtain the lowest price from a responsible and responsive bidder, for the supplies, services or construction to be procured.

Article IV

Specifications And Methods For Supplies And Services

4.1 Specification Standardization

4.1.1 Standardization Authority

The Director of Purchasing shall have the responsibility for issuing and maintaining the Board's contract specifications for supplies and services.

4.1.2 Duties

In order to maintain concise contract specification data, the Director of Purchasing shall:

- (a) Prepare and issue standard specifications for supplies and services commonly used by the Board and for supplies and services which must be aggregated under the small purchase procedures set forth in the applicable provisions of KRS Chapter 45A and these regulations;
- (b) Revise all standard specifications to conform to all technical and scientific advances pertaining to the supplies and services described in those specifications;
- (c) Standardize all specification to the greatest extent practicable; and
- (d) Establish and, as necessary, revise guidelines for drafting specifications, standards of measurement and sampling, testing and inspection procedures in order to maximize competition.

4.2 Maximum Practicable Competition

All specifications shall be drafted so as to assure the maximum practicable competition to fulfill the Board's requirements.

4.3 Prohibition Against Restrictive Specifications

No specification shall be drawn which describe in any way a product which is proprietary to one company unless:

- (a) No other kind of specification is practicable for the Board to describe its requirements; and
- (b) Such a specification includes language which specifically permits an equivalent product to be supplied. Such a specification shall include a description of the salient characteristics of the product.

4.4 Methods of Construction Contracting Management

The Executive Director of Facilities and Transportation shall take appropriate action to select as many alternative methods of management of construction contracting as he or she may determine to be feasible, setting forth criteria to be used in determining which method of management of construction is to be used for a particular project, and granting to the contracting officer the discretion to select the appropriate method of construction contracting for a particular project; provided, however, that the contracting officer shall make a determination and finding to support the selection of a particular method of management of construction contracting in each case. In fulfilling his or her duties under this section, the Executive Director of Facilities and Transportation may use any method set forth in regulations adopted under KRS 45A.180.

Article V

Architect-engineer Selection Procedures

5.0 Scope of Section

This article contains the general principles and procedures for the selection of architectural-engineering firms for contracts for the rendition of professional services and/or for the provisions of construction management services.

5.1 Selection Policy and Criteria

5.1.1 As permitted by KRS 45A.380 (3), it shall be the policy of the Board to enter into noncompetitive negotiations with architectural-engineering firms according to the procedures set forth below for contracts whereby architectural-engineering firms shall render professional architect or engineer services on construction projects, rather than construction management services.

5.1.2 Noncompetitive negotiation shall not be used for contracting with architectural-engineering firms for the rendition of construction management services. The selection of the architectural-engineering firms for the rendition of construction-management services shall be accomplished according to the procedures set forth below.

5.1.3 When the proposed contract is for the rendition of professional services, and shall be non-competitively negotiated, the selection of an architectural-engineering firm may be based, in part, on the following criteria:

- (a) Specialized experience of the firm in the type of work required;
- (b) Capacity of the firm to accomplish the work within the required time;
- (c) Past experience, if any, of the firm with respect to performance on Board construction contracts;
- (d) Location of the firm in the geographical area of the project; provided that there is an appropriate number of qualified firms therein for consideration; and
- (e) The volume of work previously awarded the firm by the Board with the object of effecting an equitable distribution of architectural-engineering firms, including minority-owned and small business firms that have not had prior contracts with the Board.

5.1.4 When the proposed contract is for the rendition of construction management services, which shall be competitively bid on the basis of the lowest bid or the lowest evaluated bid, the criteria for the selection of an architectural-engineering firm shall be the lowest bid price or the lowest evaluated bid price received from a responsive and responsible bidder.

5.2 Selection Procedures

5.2.1 The selection procedures set forth below shall be used in the selection of architectural-engineering firms for architectural-engineering contracts to be awarded by the Board.

5.2.2 All selection procedures, including preselection, shall be under the cognizance of the Executive Director of Facilities and Transportation.

5.2.3 Any contracts estimated to cost in excess of \$20,000.00 shall establish the criteria to be used to evaluate the qualifications of the architectural-engineering firms in advance. Such criteria should include the general criteria set forth in paragraph 5.1.3, and more specific criteria, such as desired qualifications, size and expertise of staff, required staff experience, and as appropriate, aesthetic considerations, special conceptual or design elements and related factors, should be included as necessary.

5.2.4 When the contract is for the rendition of construction management services and the architectural-engineering firm shall be selected on the basis of either the lowest bid price or the lowest evaluated bid price, the following selection procedure shall be followed:

- (a) The criteria for selection of the architectural-engineering firm shall be developed in accordance with paragraphs 5.1.3, 5.1.4 and 5.2.3;
- (b) The criteria and bid specifications for the construction project shall be mailed or distributed electronically to all architectural-engineering firms which have complied with the standards set forth for prequalification in Article XII of these regulations;
- (c) Notice of Invitations to Bid on the construction project shall be advertised by posting on the Internet or publication in a newspaper of general circulation in Jefferson County, a minimum of seven days before the date set for the opening of the bids. The advertisement shall include the time and place the bids shall be opened and the times and places where the criteria and specifications may be obtained;
- (d) The bids shall be retained by the Executive Director of Facilities and Transportation until such time that they shall be opened publicly at the time and place designated in the invitation for bids. Each bid shall then be recorded, with the name of the bidder, and shall be open for public inspection;

(e) The architectural-engineering contract shall be awarded with reasonable promptness by written notice to the responsive and responsible bidder whose bid was either the lowest bid price or the lowest evaluated bid price.

5.2.5 When the contract is for the rendition of professional services, and the architectural-engineering firm shall be selected on the basis of noncompetitive negotiations, the following selection procedure shall be followed:

(a) The Executive Director of Facilities and Transportation shall make a written determination that competitive bidding procedures are not practicable for the selection of an architectural-engineering firm and that the procurement is for the services of an licensed professional and the grounds therefor;

(b) The criteria for selection of the architectural-engineering firm shall be developed in accordance with paragraphs 5.1.3 and 5.2.3;

(c) The criteria for selection shall be mailed or distributed electronically, with a request for proposals, to all architectural-engineering firms which have complied with the standards set forth for prequalification in Article XII of these regulations. The criteria shall set a date and time for the submission of proposals, and no proposals shall be accepted subsequent to the date and time so designated;

(d) A committee consisting of at least three persons shall be appointed by the Superintendent or his designee and shall evaluate the proposals submitted and select a list of at least three firms for each project, all of which are considered by the committee as qualified to do the work in question. The committee shall recommend to the Superintendent the firm to be awarded the contract, and shall rank the other firms in order of recommendation. Upon approval by the Superintendent, the Executive Di-

rector of Facilities and Transportation shall then enter into negotiations with the recommended firm and shall attempt to enter into a contract with the firm for the rendition of architectural-engineering services. In the event that the recommended firm does not enter into a contract with the Board, the Executive Director of Facilities and Transportation shall terminate the negotiations with the recommended firm and enter into negotiations with the next-recommended firm.

(e) When negotiations are completed, the proposed contract with the recommended architectural-engineering firm shall be submitted to the Superintendent for final approval.

5.3 Special Approval of Selections

5.3.1 When the estimated cost of a contract for architectural-engineering professional services exceeds \$100,000, the selection shall require the approval of the Superintendent or his designee.

5.3.2 When a firm, to which the Board has previously awarded contracts totaling over \$100,000 during the current calendar year, has been selected for an additional award to be made by the same contracting office, the selection shall require, prior to negotiation with the architectural-engineering firm, the approval of the Superintendent or his designee.

5.3.3 When supplemental work to be added to an existing contract will cause the total contract cost to exceed \$100,000 or exceed seven percent (7%) of the total contract cost, the selection for such work shall require the prior approval of the Superintendent or his designee.

Article V-A

Fiscal Agent Selection Procedures

5-A.0 Scope of Selection

This article contains the general principles and procedures for the selection of fiscal agents for the rendition of financial advisory services and bond financing.

5-A.1 Selection Policy and Criteria

5-A.1.1 It shall be the policy of the Board to enter into non-competitive negotiations with at least three firms according to the procedures set forth below for each contract under which a fiscal agent firm shall render professional services on bond financing projects.

5-A.1.2 It shall be the policy of the Board to make available to the public all requirements for the contracting of fiscal agent firms for the rendition of fiscal services.

5-A.1.3 When the proposed contract is for the rendition of fiscal services and shall be non-competitively negotiated, the selection of a fiscal agent firm may be based, in part, on the following criteria:

- (a) Specialized experience of the firm in the type of work required;
- (b) Capacity of the firm to accomplish the work within the required time;
- (c) Past experience, if any, of the firm with respect to performance on Board fiscal projects or other financing projects;
- (d) Location of the firm in which the geographical area of the Board; provided that there is an appropriate number of qualified firms therein for consideration;
- (e) The volume of work previously awarded the firm by the Board with the object of effecting an equitable distribution to fiscal agent firms, including minority-owned and small business firms that have not had prior contracts with the Board.

5-A.2 Selection Procedures

5-A.2.1 The selection procedures set forth below shall be used in the selection of fiscal agent firms for contracts to be awarded by the Board.

5-A.2.2 All selection procedures, including preselection, shall be under the cognizance of the Superintendent or his designee.

5-A.2.3 Any contracts estimated to cost in excess of \$20,000.00 shall establish the criteria to be used to evaluate the qualifications of the fiscal firms in advance. Such criteria shall include the general criteria set forth in paragraph 5-A.1.3 and more specific criteria, such as desired qualifications, size and expertise of staff, required staff experience, fee schedule, and appropriate considerations

which relate to the special expertise that may be needed in financing certain areas.

5-A.2.4 The fiscal agent firms shall be selected on the basis of noncompetitive negotiations, and the following selection procedure shall be followed:

(a) The Superintendent or his designee shall make a written determination that competitive bidding procedures are not feasible for the selection of fiscal agent firms and that the procurement is for the services of a licensed professional and other grounds therefor;

(b) The criteria for selection of the fiscal agent firm shall be developed in accordance with paragraphs 5-A.1.3 and 5-A.2.3 and Article XII of these regulations;

(c) The criteria for selection shall be mailed or distributed electronically and shall request fiscal agent firms to respond to the criteria for selection in order for the firms to prequalify under this regulation and Article XII of these regulations. The criteria shall set forth a date and time for fiscal agent firms to respond to the Board with the responses to the criteria for selection.

(d) A committee consisting of the Superintendent or his designee, the Chief Financial Officer and Treasurer, and an attorney selected by the Board shall evaluate the criteria submitted and in their sole discretion and according to the criteria sent to the fiscal agent firms will prequalify said firms. When services from the firms are needed, the committee may rank the firms in any order which they deem to be of advantage to the Board and then enter into negotiations with the firms being most preferred for that particular bond issue or other fiscal services, and shall attempt to engage said firms in a contract. In the event that a contract is not entered into with the most preferred fiscal agent firms, the committee shall terminate negotiation procedure with the most preferred fiscal agent firms and enter into negotiations with the next most preferred fiscal agent firms on the committee's list;

(e) When negotiations are completed, a determination and finding shall be made documenting the negotiation process and placed in the contract file. The contract shall be executed after approval by the Board.

5-A.3 Special Approval of Selections

When a firm to which the Board has previously awarded contracts totaling over \$20,000.00 during the fiscal year, has been selected for an additional award to be made by the same contracting office, the selection shall require, prior to negotiation with the fiscal agent firm, the approval of the Superintendent, and be subject to final approval by the Board.

Article VI

Contract Modification And Termination

6.1 Policy

6.1.1 Contract modifications shall be effective only by the delivery of written notice by the party seeking to modify the existing contract to the other party prior to the effective date the modification is sought.

6.1.2 Contract modifications shall be of three general types:

(a) Administrative changes which do not affect the substantive rights of the contracting parties and do not require the contractor's acceptance;

(b) Change orders;

(c) Terminations for convenience and for default.

6.1.3 Each contracting officer for the Board shall require appropriate modifications clauses in all contracts for the procurement of goods, services, professional services and construction which embody the policy set forth in section 6.1.

6.1.4 The Board policy regarding the pricing of contract modifications, including changes which may be issued unilaterally, is as follows:

(a) The price of contract modification shall be negotiated prior to the execution of the modification if this can be done without adversely affecting the interest of the Board. Should a cost increase exceeding seven percent (7%) of the total contract price possibly result from a modification and time does not permit negotiation of a price for the modification, at least a maximum price shall be negotiated unless to do so would be impracticable.

(b) If a cost increase exceeding ten percent (10%) of the total contract price may result from a proposed modification, the Board shall immediately institute the procurement procedure required by Article III of these regulations for the procurement of the increased amount of materials under the existing contract. In no event shall the Board enter into a modification agreement exceeding ten percent (10%) of the total contract price without proceeding through the required procurement procedures.

6.1.5 Only contracting officers acting within the scope of their authority are empowered to execute modifications on behalf of the Board. Other Board personnel shall not:

(a) Execute modifications;

(b) Act in any manner so as to cause the contractor to believe that they have the authority to bind the Board;

(c) Direct or encourage the contractor to perform work which should be the subject of a modification.

6.1.6 Availability of Funds

A contract modification involving an increase in funds shall not be executed unless a certification of fund availability has been obtained by the contracting officer. When a modification is issued prior to agreement as to price adjustment, the certification shall be made on the best available estimate of cost. However, in no event shall a modification be issued if the existing contract is conditioned upon the availability of funds.

6.2 Change Orders

6.2.1 Scope of Section

This section sets forth the policies and procedures governing the issuance, processing and adjusting of change orders:

(a) Pursuant to the changes clause of any contract for the procurement of services, goods, professional services, and construction; and

(b) Pursuant to any other clauses of said contracts invoking the changes clause procedures.

6.2.2 Change Order Procedure

All change orders shall be issued according to the following procedures:

(a) Either party to the existing contract may request a change in the terms of said contract. Such request shall be stated in writing and shall be sent to, or originate from, the office of the Director of Purchasing or the office of the Executive Director of Facilities and Transportation, as the case may require;

(b) If the request or change in the existing contract necessitates an increase in the total cost of the contract, the contractor shall submit and certify to any and all cost or pricing data in support of the adjustment;

(c) All segregable, direct costs for work in support of an adjusted claim shall be fully recorded and accounted for by the Director of Purchasing or the Executive Director of Facilities and Transportation, as the case may require;

(d) Any and all modifications by change order shall be effected by delivery of written notice as required by paragraph 6.1.1 and shall be signed by both parties to the existing contract;

(e) Upon issuance of a change order, there shall be an equitable adjustment of the contract price and time allowed for the completion of the contract by agreement of the parties to the existing contract.

6.2.3 Originating Engineering Change Proposals

(a) Engineering changes may be originated by either party to the contract. The Board shall obtain detailed information supporting and documenting the proposed change; to evaluate the technical, cost and schedule effects of implementing the change; and to price the change in advance when possible.

(b) No architectural-engineering change order shall exceed ten percent (10%) of a total contract price of the existing contract, nor shall any change order be submitted for less than two percent (2%) of the total contract price of the existing contract.

6.2.4 Controversies from Modification

(a) Any controversies arising due to the modification of an existing contract shall first be presented to either the Director of Purchasing or the Executive Director of Facilities and Transportation, as the case may require. Such officer shall attempt to make an equitable adjustment on the evidence of claim presented by the contractor. Upon equitable adjustment, the contractor and such officer shall execute a supplemental agreement releasing the Board from any and all claims.

(b) Should the contractor believe that the Board has failed to make an equitable adjustment in good faith, he may appeal the decision to the Superintendent or his designee.

6.2.5 Only the Director of Purchasing or the Executive Director of Facilities and Transportation, or their duly authorized agents, shall authorize the issuance of any change orders according to the procedures set forth in section 6.2.

6.3 Administrative Changes

6.3.1 All administrative changes shall originate from the office of the Director of Purchasing or the Executive Director of Facilities and Transportation, as the case may require.

6.3.2 The issuance of any administrative change shall have no binding effect on either the work project or the contract under which the contractor is operating; therefore, the contractor's acceptance is unnecessary to effect an administrative change.

6.4 Termination

6.4.1 Policy

All contracts entered into by the Board shall include appropriate contract clauses for the termination of the contract for reasons of default of the contractor and for the convenience of the Board.

6.4.2 Termination for Default

(a) Either the Director of Purchasing or the Executive Director of Facilities and Transportation, as the case

may require, may make a written determination that a contractor is in breach of any of the terms and conditions of an existing contract. The determination shall state that the contractor shall have a period of five working days within which to cure the breach. A copy of the determination shall be filed in the contract file, and another copy of said determination shall be forwarded to the contractor in breach of the contract.

(b) Upon receipt of the determination, the contractor shall make all good faith efforts to comply with all terms and conditions of the contract and to cure the breach. Alternatively, the contractor may submit a written statement admitting default in breach of the contract, and at such time, the contract shall be deemed immediately terminated, and all rights and obligations thereunder shall be terminated.

(c) Upon receipt of the contractor's admission of default and breach or upon the contractor's failure to cure said breach within five working days of the issuance of the written determination, the Board shall procure a substitute contractor which shall operate under the remainder of the existing contract breached by the contractor, and the original contractor shall be liable for any and all excess costs incurred in the procurement of the substitute contractor.

6.5 Termination for Convenience

6.5.1 The Director of Purchasing or the Executive Director of Facilities and Transportation may make a written determination at any time that a contract shall be terminated for the convenience of the Board and shall issue a notice of termination therewith. The notice of termination shall state the date and time upon which termination shall become effective and shall also state the extent to which the contract is terminated. A copy of the determination and a notice of termination shall be placed in the contract file, and a second copy of said documents shall be forwarded to the contractor.

6.5.2 The contractor shall cease performance of the contract upon the date and time set in the written notice of termination. Within 10 working days thereafter, the contractor shall issue an itemized statement of any and all services performed; or goods delivered; or construction completed, and the statement shall be paid by the Board according to the procedure set forth in the existing contract.

6.5.3 The determination made by either the Director of Purchasing or the Executive Director of Facilities and Transportation, as the case may require, shall be final and conclusive as to the necessity for termination for convenience, and no party to an existing contract shall have the right to appeal from the determination, as it shall be final and conclusive.

Article VII

Cost Principles

7.1 Definitions

The definitions of “Cost Actual,” “Cost Data,” “Cost Analysis,” “Cost Objective,” “Price Data” and “Price Analysis,” as set forth in section 1.5 of these regulations, shall apply to this Article VII.

7.2 Cost Principles

7.2.1 Application

(a) This Article contains cost principles and procedures to be used as guidance in:

- (i) establishment of contract cost estimates and prices under contracts made by competitive sealed proposals or sole source procurement where the award is not based on price competition, including but not limited to cost reimbursement contracts;
- (ii) establishment of price adjustments for contract changes;
- (iii) pricing of termination for convenience settlements; and
- (iv) any other situation in which cost analysis is required.

(b) The cost principles contained in this Article, as modified in a particular contract, shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions which provide for the reimbursement of costs.

(c) Proper administration and application of these cost principles will entail considering whether supplies, services or construction is being procured. Particularly in construction contracts, careful attention is necessary to ensure proper allocation of job-site and central office expenses while such action may not be necessary under most supply contracts.

7.2.2 Limitation

These cost principle regulations are not applicable to:

- (a) The establishment of prices under contracts made by competitive sealed bidding or otherwise based on adequate price competition rather than the analysis of individual, specific cost elements, except that this subpart may in the discretion of the Board apply to the establishment of adjustment of price for changes made to such contracts.
- (b) Prices which are fixed by law or regulation.
- (c) Prices which are based on established catalog or market prices.

7.3 Allowable Costs

7.3.1 General

Any contract cost proposed for estimating purposes or invoice or cost-reimbursement purposes shall be allowed as provided in the contract. The contract shall provide that the total allowable cost of a contract is the sum of the allowable direct costs actually incurred in the performance of the contract, in accordance with its terms, plus the properly allocable portion of the allowable indirect costs, less any applicable credits.

7.3.2 When Allowable

The contract shall provide that costs shall be allowed to the extent they are:

- (a) Reasonable, as defined in section 7.4.
- (b) Allocable, as defined in section 7.5.
- (c) Accounted for in accordance with generally accepted accounting principles and in a manner that is consistent with the contractor’s usual accounting practices in charging costs to its other activities;
- (d) Not made unlawful under any applicable law;
- (e) Not unallowable under section 7.6 (Treatment of Specific Costs) or any other cost regulation impliedly or explicitly requiring prior approval to be allowable, and
- (f) In the case of costs invoiced for reimbursement, actually incurred and accounted for in accordance with generally accepted accounting principles.

7.4 Reasonable Costs

7.4.1 Any cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by an ordinarily prudent person in the conduct of competitive business. In determining the reasonableness of a given cost, consideration shall be given to:

- (a) Whether the cost is of a type generally recognized as ordinary and necessary for the conduct of the contractor’s business or the performance of the contract;
- (b) The restraints inherent in and the requirements imposed by such factors as generally accepted sound business practices, arms’ length bargaining, federal and state laws and regulations, and contract terms and specifications;

(c) The action that a prudent businessman would take under the circumstances, considering responsibilities to the owners of the business, employees, customers, the Board and the general public;

(d) Significant deviations from the contractor's established practices which may unjustifiably increase the contract costs; and

(e) Any other relevant circumstances.

(c) Each indirect cost group shall be distributed to the cost objectives substantially in proportion to the benefits received by the cost objectives. The same method shall be used for distributing each particular indirect cost group to all pertinent cost objectives. For example, where cost is distributed on the basis of direct costs charged to a particular cost objective, it must be distributed on that basis to all cost objectives pertinent to that group. The means selected should not unduly complicate the indirect cost allocation where substantially the same results could be achieved through less precise methods. Once the appropriate cost objectives have been established for the distribution of an indirect cost group, the indirect cost group shall be distributed proportionately to all these cost objectives, and no cost shall be diverted from these cost objectives.

(d) The method of distributing indirect cost groups shall be in accordance with the contractor's established practices if these are consistent with generally accepted accounting principles, provided that such method is equitable to both the contractor and the Board in the particular circumstances involved. The following circumstances may indicate that the contractor's method of distribution should be examined:

(i) when any substantial difference exists between the nature of the work being performed under the contract and the other work of the contractor which results in a significant difference between the composition of costs on the contract work and on other work performed by the contractor;

(ii) when any significant change occurs in the nature of the business, the extent of subcontracting, the fixed asset improvement programs, the inventories, the volume of sales and production, the manufacturing process, the contractor's products or other relevant circumstances; or

(iii) when indirect cost groups developed for a contractor's primary location are applied to off-site locations because separate cost groups for cost allocable to off-site locations may be required to distribute the contractor's costs on the basis of the benefits accruing to the appropriate cost objectives.

(e) The base period for indirect cost allocation is the one in which such cost are incurred and accumulated for distribution to work performed in that period. Normally, the base period is the contractor's fiscal year. A different base period may be appropriate under unusual circumstances. In such cases, an appropriate period should be agreed to in advance.

7.5 Allocable Costs

7.5.1 General

A cost is allocable if it is assignable or chargeable to one or more cost objectives in accordance with relative benefits received. Subject to the foregoing, a cost is allocable to a contract if it is:

(a) Incurred specifically for the contract;

(b) Benefits both the contract and other work, or both the Board work and other work, and can be distributed to them in reasonable proportion to the benefits received; or

(c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown. A cost may be allocable to a contract as either a direct cost or indirect cost.

7.5.2 Direct Costs

A direct cost is any cost which can be identified specifically with a particular cost objective. A direct cost shall be allocated directly to its specific cost objective, and shall not otherwise be charged to the contract. To be allowable, a direct cost must be incurred in the course of performance of the contract in accordance with its terms.

7.5.3 Indirect Costs

(a) Costs not directly identified with any single objective, but rather identified with two or more cost objectives, are indirect costs. Indirect costs are those remaining to be allocated to the several cost objectives after direct costs have been determined and charged directly to the contract or other work as appropriate. Any direct costs of minor dollar amounts may be treated as indirect costs, provided that such treatment produces results which are substantially the same as those which would have been obtained if such cost had been treated as direct costs.

(b) Indirect costs shall be accumulated into logical cost groups with consideration of the reasons for incurring the costs. Each group should permit indirect costs to be distributed to cost objectives benefiting from the costs in the group. The number and composition of the groups should not unduly complicate indirect cost allocation where substantially the same results could be achieved through less precise methods.

7.6 Treatment of Specific Cost

7.6.1 Advertising

(a) Advertising costs are those incurred in using advertising media. Advertising media includes newspapers, magazines, radio, television, direct mail, trade papers, billboards, window displays, conventions, exhibits, free samples and the like. All advertising costs except those set forth in subparagraph (b) of this paragraph are unallowable.

(b) The only advertising costs which are allowable are those which are solely for:

(i) recruitment of personnel;

(ii) the procurement of scarce items;

(iii) the disposal of scrap or surplus materials; and

(iv) the listing of a business name and location in a classified directory.

COMMENTARY: Advertising costs are unallowable because government sales are generated by soliciting specific offers for specific requirements. The Board is not subject to impulse buying, and the advertising costs other than for those purposes set forth in subparagraph (b) are not allocable to Board contracts .

7.6.2 Bad Debts

Bad debts include losses arising from uncollectable accounts and other claims, such as dishonored checks, employee advances and related collection and legal costs. All bad debt costs are unallowable.

COMMENTARY: Bad debts are unallowable because it is presumed that government units always pay their legal debts, and thus these costs are not allocable to government contracts.

7.6.3 Contingencies

(a) Contingency costs are any contributions to a reserve account for any unforeseen costs. Contingency costs are unallowable except as provided in subparagraph (b) of this paragraph.

(b) For the purpose of establishing a contract cost estimate or price in advance of performance of the contract, recognition of uncertainties within a reasonable anticipated range of costs may be required and is not prohibited by this subsection. Further, contributions to a reserve for self-insurance in lieu of and not in excess of, commercially available liability insurance premiums are allowable as an indirect charge.

COMMENTARY: Contingency costs are unallowable because they are speculative in nature and represent a mere risk rather than an actual incurred cost.

7.6.4 Depreciation and Use Allowances

(a) Depreciation and use allowances are allowable to compensate contractors for the use of buildings, capital improvements and equipment. Depreciation is a method of allocating the acquisition cost of an asset to periods of its useful life. Useful life refers to the periods of economic usefulness in the particular contractor's operation as distinguished from physical life. Use allowances provide compensation in lieu of depreciation or other equivalent costs. Consequently, a combination of the two methods may not be used in compensating contractors for the use of any type of property.

(b) The computation of depreciation or use allowances shall be based on acquisition costs. When the acquisition costs are unknown, reasonable estimates may be used.

(c) Depreciation shall be computed using any generally accepted method, provided that the method is consistently applied and results in equitable charges considering the use of the property. The straight-line method of depreciation is preferred unless the circumstances warrant some other method. Investment tax credits taken advantage of by

a contractor may at the discretion of the Board be considered in computation of any depreciation or use allowance.

(d) In order to compensate the contractor for use of depreciated, contractor-owned property which has been fully depreciated on the contractor's books and records and is being used in the performance of a contract, use allowances may be allowed as a cost of that contract. Use allowances are allowable, provided that they are computed in accordance with an established industry or government schedule or other method mutually agreed upon by the parties.

COMMENTARY: When it is economical for contractors to continue using fully depreciated property and equipment, they should be encouraged to do so. Failure to allow contractors to charge the Board contracts with costs for the use of such property and equipment could serve to encourage wasteful scrapping and disposal and the incurrence of administrative and rental costs in excess of the otherwise allowable use allowance.

7.6.5 Entertainment

(a) Entertainment costs include costs of amusements, social activities and incidental costs relating thereto, such as meals, beverages, lodging, transportation and gratuities. Entertainment costs are unallowable. Refer to Article XI of these regulations entitled "Ethics and Standards of Conduct."

(b) Nothing herein shall make unallowable a legitimate expense for employee morale, health, welfare, food service or lodging costs, or make unallowable costs incurred for meetings or conferences, including but not limited to, costs of food, rental facilities and transportation, where the primary purpose of incurring such cost is the dissemination of technical information or the stimulation of production.

COMMENTARY: Entertainment costs are not allocable to the Board-contracts and thus are unallowable because like advertising, they are not necessary to obtain Board contracts, and because acceptance of entertainment from a contractor by a Board employee may be unethical and might constitute an apparent conflict of interest under the provisions of these regulations and applicable law.

7.6.6 Fines and Penalties

Fines and penalties include all costs incurred as the result of violations of or failure to comply with federal, state and local law and regulations. Fines and penalties are unallowable costs unless incurred as a direct result of compliance with a specific provision of the contract or direction of the Procurement Officer.

COMMENTARY: Fines and penalties are unallowable because incurrence of the costs is not a reasonably necessary cost of doing business. Furthermore, allowing these costs would be contrary to good public policy.

7.6.7 Gifts, Contributions and Donations

A gift is property transferred to another person without the other person providing return consideration of equivalent value. Reasonable costs for employee morale, health, welfare, food services or lodging are not gifts and are allowable. Contributions and donations are property transferred to a nonprofit institution which are not transferred in exchange for supplies or services of equivalent fair market value rendered by a non-profit institution. Gifts, contributions and donations are unallowable costs.

COMMENTARY: Contributions and donations are unallowable because allowing these costs would amount to an improper disposition of tax revenues by making a payment from the Board treasury to an institution or activity selected by a single private taxpayer without the consent of the taxpaying public or its elected representatives. Therefore, allowing these costs would be contrary to good public policy. An exception is provided for the bona fide purchase of supplies or services rendered by nonprofit, volunteer organizations.

7.6.8 Interest and Other Financing Costs

(a) Interest and other financing cost are all costs of borrowing, in whatever form represented, including bond discounts, all costs associated with financing or refinancing operations, and costs of preparing prospectuses and issuing stock rights. An example of a cost of borrow-

ing not explicitly represented as interest is the amount equivalent to interest included in any leasing agreement, including sale and lease-back and long-term leasing agreements. (The cost of borrowing in a lease agreement equals the present value of the costs of leasing less the value of any benefits attributable to the leasing agreement different from those associated with ownership, such as an option to cancel the lease, and less the present value of the costs of ownership.) Interests and other financing costs are not allowable except as provided in subsection 7.6.8 (b) of these regulations and at the option of the Board.

(b) Imputed interest costs, computed in accordance with the following concepts, are allowable. The amount of allowable imputed interest cost is computed by the application of an interest rate to the contractor's assets utilized in performing the contract. The interest rate shall be no greater than the average yield on United States Treasury Bonds for the 12 months preceding the date of the contract (Or the current prime interest rate being charged by the banks in this Commonwealth to their most favored borrowers if the Superintendent or his designee designates this rate in lieu of the Treasury Bond rate.) In determining which assets are utilized in performing the contract, the contractor's method of allocating assets to income-producing activities for financial planning purposes shall be used where it results in a fair and reasonable cost to the Board. Otherwise, the parties shall apply the interest rate to the contractor's total assets and negotiate the portion of this amount that will be allocated to the contract as imputed interest.

COMMENTARY: Financing represents a substantial cost incurred in the normal course of business. Because recognition of investments in contracts is proper in contract pricing, interest and other financial costs may be allowed as reasonable and necessary contract cost under the imputed interest cost approach. This imputed interest cost approach recognizes differing investments in contracts and the cost of capital without differentiating unfairly between borrowed and equity capital.

7.6.9 Losses Incurred Under Other Contracts

The excess of costs incurred over the income earned under a contract is an underrecovery and constitutes a loss. Losses may include both direct and indirect costs. A loss incurred under one contract may not be charged to any other contract.

COMMENTARY: Losses incurred on other contracts or jobs of any nature are unallowable because each contract is a separate agreement and the allowable costs must stand by themselves on their own merits as reasonable, necessary and allocable to the performance of each contract.

7.6.10 Material Costs

(a) Material costs are the costs of all supplies, including raw materials, parts and components (whether acquired by purchase from an outside source or acquired by transfer from any division, subsidiary or affiliate under the common control of the contractor), which are acquired in order to perform the contract. Material costs are allowable, subject to subparagraph 7.6.10 (b) and subparagraph 7.6.10 (c). In determining material costs, consideration shall be given to reasonable spoilage, reasonable inventory losses, and reasonable overages.

(b) The prices paid for supplies are allowable when the price is an established catalog price, as defined in paragraph 1.5.29 of these regulations, or represents the best price offered as a result of competitive bidding, or is otherwise justified in accordance with applicable contract provisions. Material costs shall include adjustments for all available discounts, refunds, rebates and allowances which the contractor reasonably should take under the circumstances, and for credits for proceeds the contractor received or reasonably should receive from salvage and material returned to suppliers.

(c) Allowance for all materials transferred from any division (including the division performing the contract), subsidiary or affiliate under the common control of the contractor shall be made on the basis of costs incurred by the transferor (determined in accordance with these cost principle regulations, except that double charging of indirect costs is unallowable), except the transfer may be made at the established price provided:

(i) the contractor's established practice is to price such materials at the transferor's current sales price to its most favored customer for a like quantity and quality under similar payment and delivery conditions; and

(ii) the price is established either by the established catalog price, as defined in paragraph 1.5.29 of these regulations, or by the lowest price offer obtained as a result of competitive sealed bidding or competitive sealed proposals conducted with other businesses that normally produce the item in similar quantities.

7.6.11 Taxes

(a) Except as limited by subparagraphs (b) and (c) of this section, all federal, state and local taxes incurred directly in the performance of the contract are allowable.

(b) The following costs are unallowable:

(i) federal, state and local income taxes and federal excess profit taxes;

(ii) all taxes from which the contractor could have obtained an exemption, but failed to do so, except where the administrative cost of obtaining the exemption would have exceeded the tax savings realized from the exemption; and

(iii) any interest, fines or penalties paid on delinquent taxes.

(c) Any refund of taxes which were allowed as a direct cost under the contract shall be under a contract shall be credited to the indirect cost group applicable to any contracts being priced or costs being reimbursed during the period in which the refund is made.

COMMENTARY: 1. Income taxes are levied on taxable income, which is total income less costs. As such, income taxes are considered to be a distribution of profit and are not allowable as a cost. To allow income taxes as a cost would have the inequitable result of paying higher prices to highly profitable contractors and lower prices to contractors who make little or no profit and higher prices to a single contractor in a highly profitable year and lower prices in an unprofitable year. Further, the higher prices paid by treating income taxes as an allowable cost would result in higher income and higher income taxes, which in turn would generate higher allowable costs and give rise to still higher prices, and so on to infinity; thus, treating federal income taxes as an allowable cost simply is impracticable.

2. Unlike federal taxes, which are levied on the same basis against all contractors regardless of where they are located, different states and localities tax at different rates, and others have levied relatively low taxes on contractors in order to attract businesses in their jurisdictions. Disallowing state and local income taxes and allowing the cost of alternative forms of state and local taxes would result in a bias against the use of income taxes by state and local governments. In the absence of an equitable tax allocation formula acceptable to all jurisdictions, all state and local government taxes must be treated in the same manner—either all are allowed or all are disallowed.

7.7 Costs Requiring Prior Approval to be Allowable

7.7.1 General

The costs described in sections 7.2, 7.3, 7.4 and 7.5 of these regulations are allowable as direct costs to cost-reimbursement-type contracts to the extent that they have been approved in advance by the Superintendent or his designee. In other situations, these costs are negotiable in accordance with general standards set out herein.

COMMENTARY: Some discretionary expenditures, incurred without the benefit of competitive pressure under cost-reimbursement-type contracts can give rise to very serious and difficult questions of reasonableness and allocability. Thus, specific advance approval by the Superintendent or his designee is required in order for these costs to be allowed.

7.7.2 Pre-Contract Costs

Pre-contract costs are those incurred prior to the effective date of the contract directly pursuant to, and in anticipation of, the award of the contract. Such costs are allowable as if they had been incurred after the date of contract; provided that in the case of a cost-reimbursement-type contract, a special provision must be inserted in the contract setting forth the period of time and maximum amount of cost which will be covered as allowable pre-contract costs.

COMMENTARY: Normally, only costs incurred for actions taken within the contract period are allowable. Costs incurred for actions prior to or after the period covered by the contract may be considered to be legally not allocable to the contract. In order to extend the contract period to cover actions taken prior to the date of contract execution a special provision setting forth the limits of this extension is required.

7.7.3 Bid and Proposal Costs

Bid and proposal costs are the costs incurred in preparing, submitting and supporting bids and proposals. Bid and proposal costs are allowable as direct costs only to the extent that they are specifically permitted by a provision of the contract or solicitation document. In other instances, reasonable ordinary bid and proposal costs are allowable as indirect costs. Where bid and proposal costs are allowable as direct costs, they shall not be allowed as indirect costs to avoid double accounting for these costs.

COMMENTARY:

1. When bids and proposals are used for market development purposes, the cost of preparing these bids and proposals are closely related to advertising costs.

2. In some cases, special bid and proposal efforts directly beneficial to the Board may have been expended in anticipation of the award. If this were encouraged knowingly by the Board, it may be equitable to allow these costs as a direct charge of the contract.

7.7.4 Insurance

(a) Insurance costs are the cost of obtaining insurance in connection with performance of the contract or contributions to a reserve account for the purpose of self-insurance, provided that such contributions may be approved only to the extent of the cost to the contractor to obtain similar insurance.

(b) Actual losses which could have been covered by permissible insurance or were expressly covered by self-insurance are unallowable unless the parties expressly agree otherwise in the terms of the contract.

7.7.5 Litigation Costs

Litigation costs include all filing fees, legal fees, expert witness fees, and all other costs involved in litigating claims in court or before an administrative board.

COMMENTARY: Costs of litigating claims generally are unallowable because they are properly allocable to the claim and not to the performance of the contract. Further, allowing costs incurred in the litigation of unsuccessful claims would encourage needless litigation which is contrary to public policy. These costs may be awarded to successful claimants only at the discretion of the court or the administrative board which hears the claim. This does not preclude the allowance of reasonable indirect costs for general counsel, incurred on a regular basis, whether provided by employees or outside counsel.

7.8 Applicable Credits**7.8.1 Definitions and Examples**

Applicable credits are receipts or price reductions which offset or reduce expenditures allocable to contracts as direct or indirect costs. Examples include purchase discounts, rebates, allowance, recoveries or indemnification for losses, sale of scrap and surplus equipment and materials, adjustments for overpayments or erroneous charges, and income from employee recreational or incidental services and food sales.

7.8.2 Reducing Costs

Credits shall be applied to reduce related expenditures.

7.8.3 Refund

The Board shall be entitled to a cash refund if the related expenditures have been paid to the contractor under a cost-reimbursement-type contract.

7.9 Advance Agreements**7.9.1 Purpose**

Both the Board and the contractor should seek to avoid disputes and litigation arising from potential problems by providing in the terms of the contract the treatment to be accorded special or unusual costs.

7.9.2 Form Required

Advance agreement may be negotiated either before or after the contract award, but shall be negotiated before a significant portion of the cost covered by the agreement has been incurred. Advance agreements shall be in writing, executed by both contracting parties, and incorporated into the contract.

7.9.3 Limitation on Costs Covered

An advance agreement shall not provide for any treatment of costs inconsistent with these cost principle regulations unless a written determination and finding has been made to deviate from cost principles.

7.10 Use of Federal Cost Principles

7.10.1 Cost Negotiations

In dealing with contractors operating according to federal cost principles, such as Defense Acquisition Regulation, section 15, or Federal Procurement Regulations, Part 1-15, the Board, after notifying the contractor, may use the federal cost principles as guidance in contract negotiations, subject to paragraph 7.10.2 of this section.

7.10.2 Incorporation of Federal Cost Principles: Conflicts Between Federal Principles and this Part

(a) In contracts not awarded under a program which is funded by federal assistance funds, the Board may explicitly incorporate federal cost principles into a solicitation and thus into any contract awarded pursuant to that solicitation. The Board and the contractor by mutual agreement may incorporate federal cost principles into a contract during negotiation or after award. In either instance, the language incorporating the federal cost principles shall clearly state that to the extent federal cost principles conflict with these regulations, these regulations shall control.

(b) In contracts awarded under a program which is financed in whole or in part by federal assistance funds, all requirements set forth in the assistance document, including specified federal cost principles, must be satisfied. Therefore, to the extent that the cost principles specified in the grant document conflict with the cost principles in these regulations, the cost principles specified in the grant shall control.

7.11 Authority to Deviate from Cost Principles

If the Board desires to deviate from the cost principles set forth in these regulations, a written determination shall be made by the Director of Purchasing or the Executive Director of Facilities and Transportation specifying the reasons for the deviation. A copy of such determination shall be filed promptly with the Superintendent and such determination shall be effective only upon approval by the Superintendent.

7.12 Right to Audit Books and Records

The Board may audit the books and records of any contractor, or any subcontractor or agent or accountant of any contractor, who has submitted to the Board any cost or pricing data in connection with a contract. The right to audit under this paragraph 7.12 shall extend only to those books and records reasonably connected with the submitted cost or pricing data. The contractor shall maintain, or shall cause the subcontractor or agent or accountant to maintain, the books and records for a period of five years from the date of final payment under the contract or subcontract.

Article VIII

Supply Management And Surplus Property Disposal Regulations

8.1 Quality, Assurance, Inspection and Testing

8.1.1 The Superintendent shall take such steps as deemed desirable to ascertain or verify that supplies, services or construction items conform to specifications. In performing this duty, the Superintendent shall establish such inspection and testing facilities as he shall deem necessary and appropriate in his discretion and may enter into arrangements for the joint or cooperative use of laboratories, other testing facilities as appropriate, and inspection personnel. The Superintendent may delegate responsibility for inspection, testing and verification to such other employees of the Board as he deems necessary.

8.1.2 Warehousing and Storage

The Director of Supply Services, or his designee, shall be responsible for procuring, establishing and maintaining, receiving, storage, and distribution facilities and services that will provide adequate protection and security for all supplies therein.

8.1.3 Inventory Control

All Supplies—The Director of Supply Services, or his designee, shall be responsible for establishing and maintaining an inventory control system with the objective of reporting the quantity and value of all supplies not allocated to a school or department. Such inventory control system shall maintain information as to unallocated stocks of supplies, and shall be used to fill requisitions from individual schools and/or departments. It shall also be capable of generating economical reorder quantities of supplies for general use. (Schools and various departments shall establish similar inventory control systems capable of reporting the quantity and value of all unused supplies allocated to that school or department.)

8.1.4 Supply Verification

On an annual basis, all supplies maintained in a warehouse or storage area that have not been distributed to a school or department shall be physically inventoried under the supervision of the Director of Supply Services, or his designee.

8.2 Disposition of Excess, Nonexpendable Supplies

Supplies in serviceable condition shall be reissued to other schools or departments by the Director of Supply Services, or his designee, and appropriate charges shall be made. Such supplies may be transferred to a storage facility for reissue, or they may be maintained at the original location until reissued, whichever is deemed to be less costly in the discretion of the Director of Supply Services, or his designee.

Supplies having additional, useful life but requiring refurbishment prior to reissue shall, where feasible, be repaired or rebuilt and reissued in accordance with this Article.

8.3 Disposition of Surplus Supplies

8.3.1 General Requirements

Supplies having no further foreseeable use to the Board shall be offered for sale by public auction, competitive sealed bidding or retail sale.

8.3.2 Notice Required

Adequate public notice of all sales of surplus supplies shall be given in accordance with paragraph 3.6.2 Such notice shall be posted on the Internet and/or published in a newspaper of general circulation in Jefferson County-

8.3.3 Public Auction

(a) When Used—An auction shall be used when a sizable accumulation of commercially desirable surplus supplies, desired by a sufficient number of buyers, is available. The demand for the available surplus supplies, the location of the supplies in relation to the potential buyers, and the adequacy of facilities for conducting an auction shall be considered in determining whether to conduct an auction.

(b) Procedures—An experienced auctioneer or auction company is necessary to conduct the sale and assist in preparation of the sale. The auction may be held by personal bidding at a specified site or with an Internet auction site approved by the Director of Supply Services. The solicitation to bidders should stipulate, at a minimum: All the terms and conditions of any sale; that the purchaser must remove all surplus supplies purchased within a stated time; and that the Board retains the right to reject any and all bids.

8.3.4 Competitive Sealed Bidding

(a) When Used—Competitive sealed bidding may be used when:

- (i) potential buyers are widely distributed;
- (ii) the surplus supplies attract a specialized list of buyers such as scrap or waste;
- (iii) the quantity, type and location of the surplus supplies will not encourage attendance at a sale;
- (iv) the surplus supplies are not immediately available, but will become so over a period of time.

(b) Procedures—When surplus supplies are to be sold by competitive sealed bidding, the procedures followed shall be in accordance with Article III (Source Selection and Contract Formation) of these regulations, except:

- (i) where the award shall be made to the highest responsive bidder; or
- (ii) if competitive sealed bidding is not practicable to use for the sale of surplus supplies, such supplies shall be sold by either auction or retail sales as specified in this paragraph 8.3 rather than by any of the other source selection methods listed in Article III (Methods of Source Selection) of these regulations.

8.3.5 Retail Sales

(a) When used—Retail sale of surplus supplies is appropriate for small quantities of various types of supplies which can be utilized by local individuals or noncommercial organizations.

(b) Procedures—Selling prices shall be established on the basis of demand, condition of supplies, past experience gained from auction or competitive sealed bid sales, and prevailing retail prices for similar supplies in the local market.

(c) Limitation on Use—Acquisition cost (actual or estimated) of individual supplies sold at retail should not exceed \$250.00. The total acquisition cost of any type of supply (e.g. shirts or shoes varying only in size) sold should not exceed \$5,000.00 during one quarter of a fiscal year. If these thresholds are exceeded, future sales of such supplies shall be made by auction or competitive sealed bidding.

8.3.6 Trade-In

Surplus supplies may be traded in only when it is determined by the Director of Purchasing in writing that the trade-in value is expected to exceed the value estimated to be obtained through sale of the supplies, less administrative expenses incurred during a sale.

Article IX

Legal And Contractual Remedies

9.0 Prelitigation Resolution of Controversies

9.1 Authority to Resolve Protested Solicitations and Awards

9.1.1 Any actual or prospective bidder, offeror or contractor who is aggrieved in connection with the solicitation or the award of a contract may protest to the Director of Purchasing or the Executive Director of Facilities and Transportation, as the case shall require. In each case provided in this Article IX in which an action may be taken by either such officer, the determination of which officer shall take the action shall be made by the Superintendent, or in the absence of such determination by the Superintendent the job descriptions of the two officers. The protest shall be submitted in writing, within 14 days after such aggrieved person knows, or should have known, of the facts giving rise thereto.

9.1.2 Either the Director of Purchasing or the Executive Director of Facilities and Transportation shall have the authority to settle and resolve a protest of an aggrieved bidder, offeror or contractor, actual or prospective, concerning the solicitation or award of a contract. This authority shall be exercised in accordance with these regulations and may be supplemented by regulations promulgated by the respective designee's office.

9.1.3 If the protest is not resolved by mutual agreement, either the Director of Purchasing or the Executive Director of Facilities and Transportation shall promptly issue a decision in writing. The decision shall state the reason for the action taken, and inform the protestant of its right to administrative review as provided in Article IX.

9.1.4 A copy of the decision under paragraph 9.1.3 shall be mailed or otherwise furnished immediately to the protestant and any other party intervening.

9.1.5 A decision under paragraph 9.1.3 shall be final and conclusive, unless modified pursuant to paragraph 9.3.7.

9.1.6 In the event of a timely protest under paragraph 9.1.1, the Board shall not proceed further with the solicitation or with the award of the contract until the Director of Purchasing or the Executive Director of Facilities and Transportation enters into consultation with the Superintendent or his designee, and thereafter makes a written determination that the award of the contract, without delay, is necessary to protect the substantial interests of the Board.

9.1.7 In addition to any other relief, when a protest is sustained and the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror shall be entitled to the reasonable costs incurred in connection with the solicitation, including the bid preparation costs, other than attorney's fees or profit.

9.2 Authority to Debar or Suspend

After reasonable notice to the party involved and reasonable opportunity for that party to be heard, the Director of Purchasing or the Executive Director of Facilities and Transportation shall have the authority to debar a party for cause from consideration for the award of contracts from the Board by the procedures set forth in Article XII of these regulations

9.3 Authority to Resolve Contract and Breach of Contract Disputes

9.3.1 This paragraph applies to disputes between the Board and the contractor, and which may arise under, or by virtue of, any executed written contract between them. This includes, without limitation, disputes based upon breach of contract, mistake, misrepresentation or any other cause for contract modification or rescission.

9.3.2 The Director of Purchasing or the Executive Director of Facilities and Transportation is authorized to settle and resolve the dispute described in paragraph 9.3.1. This authority shall be exercised in accordance with these regulations.

9.3.3 If such a dispute is not resolved by mutual agreement, the Director of Purchasing or the Executive Director of Facilities and Transportation shall promptly issue a decision in writing. The decision shall:

- (a) State the reasons for the actions taken; and
- (b) Inform the contractor of its right to administrative review as provided in this Article.

9.3.4 A copy of the decision under paragraph 9.3.3 shall be delivered, by certified mail, return receipt requested, or otherwise furnished immediately to the contractor.

9.3.5 The decision under paragraph 9.3.3 shall be final and conclusive unless modified pursuant to paragraph 9.3.7.

9.3.6 If the Director of Purchasing or the Executive Director of Facilities and Transportation does not issue the written decision required under paragraph 9.3.3 within thirty (30) working days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

9.3.7 Upon an adverse decision from the Director of Purchasing or the Executive Director of Facilities and Transportation, the contractor shall within ten (10) days, or such longer period as may be agreed upon by the Board and the contractor, file a written appeal to the Superintendent or his designee, who shall take the matter under submission upon time periods and oral or written requirements as may be agreed between the Board and the Contractor, and upon final submission and hearing of the facts in dispute, shall render a decision to the contractor by certified mail, return receipt requested, within thirty (30) days of final submission of all pertinent information, documentation and evidence needed to make a decision. The decision of the Superintendent or his designee shall be final and conclusive in regards to protests filed under section 9.1. In the case of disputes filed under paragraph 9.3, the decision of the Superintendent or his designee shall be final and conclusive, unless determined by a court of competent jurisdiction to have been fraudulent or clearly arbitrary and capricious or contrary to law.

9.4 Solicitations or Awards in Violation of the Law

9.4.1 The provisions of this paragraph apply where it is determined administratively that a solicitation or award of the contract is in violation of the law.

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

- (a) Cancelled; or
- (b) Revised to comply with the determination of law.

9.4.3 Remedies After the Award

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

- (a) If the person awarded the contract has not acted fraudulently or in bad faith:
 - (i) the contract may be ratified and affirmed; provided it is determined that doing so is in the best interests of the Board; or

- (ii) the contract may be terminated and the person previously awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.

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

- (i) the contract may be declared null and void; or
- (ii) the contract may be ratified and affirmed if such actions are in the best interests of the Board, without prejudice to the Board's right to such damages as may be appropriate.

9.5 Interest

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

9.6 Actions on Board Contracts

Any person having a contract with the Board may bring an action against the Board on the contract, including but not limited to actions either for breach of a contract or for enforcement of a contract, or both. Any such action shall be brought in the Jefferson Circuit Court and shall be tried by the court sitting without a jury. All defenses in law and equity, except the defense of governmental immunity, shall be preserved to the Board. If damages awarded on any contract claim under this section exceed the original amount of the contract, such excess shall be limited to an amount which is equal to the amount of the original contract.

9.7 Presumption of Correctness of Board Decisions

The decision of the Superintendent, the Director of Purchasing, the Executive Director of Facilities and Transportation or any other person appointed by the Board concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such person do not support the decision.

Article X

Intergovernmental Relations

10.0 Definitions

The definitions of “Cooperative Purchasing,” “Foreign Purchasing Activity,” “State Public Purchasing Unit” and “Public Purchasing Unit” in section 1.5 of these regulations shall apply to this Article X.

10.1 Cooperative Purchasing Authorized

The Board may either participate in or sponsor, conduct and/or administer a cooperative purchasing agreement for the acquisition of supplies, services, construction materials or any other matter or items with any other public purchasing unit or foreign purchasing activity, in accordance with an agreement entered into between said public purchasing unit and /or foreign purchasing activity and the Board.

10.2 Acquisition or Use of Property Owned by a Public Purchasing Unit or Foreign Purchasing Unit

Nothing in these regulations shall limit the Board from acquiring, or using, any property belonging to another public purchasing unit or foreign purchasing activity in any manner that is not inconsistent with the applicable provisions of KRS Chapter 45A.

10.3 Cooperative Use of Supplies and Services

Nothing in these regulations shall limit or restrict the Board from entering into an agreement with any other public purchasing unit or foreign purchasing activity for the cooperative use of supplies and services in any manner that is not inconsistent with the applicable provisions of KRS Chapter 45A.

10.4 Public Purchasing Units in Compliance with Source Selection Requirements

10.4.1 Where the procedures of the public purchasing unit or foreign purchasing activity are in accordance with the

applicable provisions of KRS Chapter 45A, or where the public purchasing unit or foreign purchasing activity administering a cooperative purchasing unit complies with the applicable provisions of KRS Chapter 45A, the Board’s participation in such a purchase shall be deemed to have complied with the applicable provisions of KRS Chapter 45A and these regulations.

10.4.2 Where the public purchasing unit does not follow the applicable provisions of KRS Chapter 45A, and where the public purchasing unit or the foreign purchasing activity administering a cooperative purchase does not follow the applicable provisions of KRS Chapter 45A, the Superintendent shall make a determination and findings that the Board has complied with the applicable provisions of KRS Chapter 45A.

10.5 Federal Grants

When Federal grant requirements differ from the applicable provision of KRS Chapter 45A, or from the regulations adopted by the Board, nothing in the applicable provisions of KRS Chapter 45A or these regulations shall absolve the Board from its obligation to fully comply with any and all terms and conditions of the Federal grant requirements.

10.6 Supplies Subject to Price Agreement with Commonwealth

Nothing in these regulations shall deprive the Board from negotiating with vendors for supplies where such supplies are the subject of a price agreement with the Commonwealth of Kentucky; provided, however, that no contract executed under this section would authorize a price higher than is contained in the price agreement with the Commonwealth of Kentucky for such specific supplies.

Article XI

Ethics And Standards Of Conduct

11.0 Statement of Policy

Public employment is a public trust. It is the policy and purpose of this Article to promote and balance the objective of protecting government integrity and to facilitate in the recruitment and retention of personnel needed by the Board by prescribing essential restrictions against conflicts of interest without creating unnecessary barriers to public service and by facilitating development of fair competitive access to public service purchasing by responsible suppliers.

Employees must discharge their duties and responsibilities fairly and impartially and do so through official channels. They should also maintain a standard of conduct that will inspire public confidence in the integrity of the Board.

11.1 General Standards of Conduct for Employees

Any effort to realize personal gain through public employment beyond remuneration provided by the Board is a violation of a public trust, as is any conduct which would create a justifiable impression to the public that such trust is being violated.

In order to fulfill the ethical standards prescribed by this Article, employees must meet the standards of conduct set forth in this Article, particularly as conspicuously set forth in the following paragraphs:

- 11.3 Conflicts of Interest
- 11.4 Employees Not to Benefit
- 11.4.3 Gratuities and Kickbacks Illegal
- 11.5 Restriction on Employment of Present and Former Board Employees
- 11.6 Use of Confidential Information
- 11.7 Public Access to Procurement Information Records

11.2 General Standards of Conduct for Nonemployees

Any effort by any person to influence any Board employee to violate the standards of ethical conduct set forth in this Article, or to engage in any conduct which could create a justifiable impression to the public that such trust is being violated, is also a violation of the ethical standards prescribed in this Article.

11.3 Conflicts of Interest

11.3.1 It shall be a breach of ethical standards for any employee with procurement authority to participate directly in any proceeding or application; request for ruling or other determination; claim or controversy; or other particular matter pertaining to any contract or subcontract, and any

solicitation or proposal therefor, in which to his knowledge:

(a) He, or any member of his immediate family, has a financial interest therein; or

(b) A business or organization in which he or any member of his immediate family has a financial interest as an officer, director, trustee, partner or employee, is a party; or

(c) Any other person, business or organization with whom he or any member of his immediate family is negotiating or has an arrangement concerning prospective employment is a party. Direct participation shall include, but not be limited to, involvement through decision, approval, disapproval, or directly influencing the content of any specification or purchase standard.

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

11.3.3 The prohibition against conflicts of interest, as set forth in this section 11.3 shall be conspicuously placed in every written contract and solicitation issued by the Board.

11.4 Employees Not to Benefit

11.4.1 Disclosure of Benefits Received

If an employee or member of his immediate family obtains any money, thing of value or financial benefit from any person in connection with any contract with the Board which might violate any of the prohibitions against conflicts of interest as set forth in section 11.3, the employee shall report the relevant facts to his immediate supervisor or to the Director of Purchasing, in writing, within 30 days after the award of the contract.

11.4.2 If any employee knows or should have known that he or any member of his immediate family received a benefit from a contract with the Board, and the employee fails to report the receipt of such benefit to his immediate

supervisor, or to the Director of Purchasing, as required by paragraph 11.4.1, he shall be in violation of the ethical standards of this Article

COMMENTARY: This section 11.4 requires employees to report what may be illegalities in the procurement process, so that the relevant facts can be investigated and appropriate action can be taken. It must not be assumed that the section allows procurement which would otherwise be illegal under law.

11.4.3 Gratuities and Kickbacks Illegal

(a) Gratuities—It shall be a breach of ethical standards for any person to offer, give or agree to give to any employee or former employee who has or had procurement authority, or for any such employee or former employee to solicit, demand, accept or agree to accept from another person, any gratuity for or because of:

- (i) an official action taken or to be taken or which could be taken; or
- (ii) a legal duty performed or to be performed, or which could be performed; or
- (iii) a legal duty violated or to be violated or which could be violated by such employee or former employee.

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

11.4.4 The prohibition against employees benefiting from contracts with the Board, or against receiving gratuities and/or kickbacks, as set forth in section 11.4, shall be conspicuously placed in every written contract and solicitation issued by the Board.

11.5 Restrictions on Employment of Present and Former Board Employees

11.5.1 Contemporaneous Employment Prohibited

It shall be a breach of ethical standards for any Board employee with procurement authority to be or to become, while so employed, an employee of or to receive compensation from any person contracting with the Board.

11.5.2 Disqualification of Former Employees in Matters Connected with Former Duties

(a) Permanent Disqualification of Former Employees - It shall be a breach of ethical standards for a former employee of the Board to knowingly act as an agent or as an attorney, or to act in any other capacity for any party other than the Board in connection with any judicial proceeding,

application, request for a ruling or other determination, or any contract, grant, claim, controversy, charge or other particular matter involving a contract with the Board as an opposing party wherein the former employee has a direct and substantial interest and in which he previously had procurement authority or participated personally as an employee of the Board in any decision, approval, disapproval, recommendation, investigation, or otherwise rendering of official opinions while so employed.

(b) Employment of Former Board Employees - It shall be a breach of ethical standards for any former employee of the Board to enter into any type of express, implied or tacit understanding or arrangement with any business which was a contractor to the Board for a period of 365 calendar days following the effective date of the employee's termination of employment with the Board if the employee personally and substantially dealt with such business or had official responsibility concerning a contract between the Board and such business.

(c) Disqualification of Partners - It shall be a breach of ethical standards for any person being a partner of either an employee or a former employee of the Board to act as agent or attorney for anyone other than the Board in connection with any judicial proceeding, application, request for a ruling or other determination or any contract, claim, controversy, charge or other particular matter involving a contract where the Board is a party or has a direct and substantial interest and in which such employee of the Board has or had procurement authority or participates or has previously participated personally as a Board employee through decision, approval, disapproval, recommendation, investigation or otherwise rendering official opinions which is or was the subject of his official responsibility.

11.6 Use of Confidential Information

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

11.7 Public Access to Procurement Information Records

It shall be a breach of ethical standards for an employee of the Board to deny public access to procurement information and records as required by the provisions of the applicable open records laws and policies.

11.8 Civil and Administrative Remedies Against Employees Who Violate Ethical Standards

11.8.1 Existing Remedies Not Impaired

Civil and administrative remedies against employees for violations of the ethical standards of this Article or any other statutes or regulations shall not be impaired.

11.8.2 Supplemental Remedies

In addition to existing remedies for violations of the ethical standards of this Article, or any other statutes or regulations, the Superintendent may impose any or all of the following penalties:

- (a) An oral or written warning or reprimand;
- (b) Forfeiture of pay without suspension;
- (c) Suspension without pay for specified periods of time; and
- (d) Termination of employment.

11.8.3 Right to Recover From Employees Value Received in Violation of Ethical Standards

The value of anything received by an employee for violations of the ethical standards of this Article or any other statutes or regulations shall be recoverable by the Board as provided in KRS 45A.460.

11.8.4 Due Process

All procedures under this section shall be in accordance with other Board policies and due process requirements.

11.9 Civil and Administrative Remedies Against Nonemployees

11.9.1 Existing Remedies Not Impaired

Civil and administrative remedies against non-employees for violation of the ethical standards of this Article or any other statutes or regulations shall not be impaired.

11.9.2 Supplemental Remedies

In addition to existing remedies for violation of the ethical standards of this Article or any other statutes or regulations, the Superintendent or his designee may impose any or all of the following penalties:

- (a) Oral or written warning or reprimands;
- (b) Cancellation or debarment from being a contractor or subcontractor under Board contracts; or
- (c) Cancellation of transactions.

11.9.3 Right to Recover From Non-Employee Value Transferred In Violation of Ethical Standards

The value of anything transferred in violation of the ethical standards of this Article or any other statutes or regulations by any person, other than a Board employee, shall be recoverable by the Board from such person as provided in KRS 45A.460.

11.9.4 Right of Board to Suspend or Debar

Suspension under this Article and under Article XII of these regulations may be imposed during an investigation of charges of a serious and compelling nature based on

adequate evidence indicating a violation of this section or other irregularities which, if true, would affect the person's integrity as a contractor. Debarment under this section may be imposed by reason of a violation of this section, or for other causes of a serious and compelling nature affecting the person's integrity as a contractor.

11.9.5 Due Process

All procedures under this section shall be in accordance with other Board policies and due process requirements.

11.10 Recovery of Value Transferred or Received in Violation of Ethical Standards

11.10.1 General Provisions

The value of anything received in violation of the ethical standards of this Article or any other statutes or regulations by an employee may be recovered from the employee. In addition, said value may also be recovered from the non-employee transferor.

11.10.2 Recovery of Kickbacks by the Board

Upon a showing that a subcontractor or subgrantee made a kickback to a prime contractor or a higher-tiered subcontractor in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the amount thereof was included in the price of the subcontract or order and ultimately borne by the Board, and will be recoverable hereunder from the recipient. In addition, said value may also be recovered by the subcontractor or subgrantee making such kickbacks.

11.11 Criminal Penalties for Violations

11.11.1 Existing Penalties Not Impaired

This Article or any other statutes or regulations which are in existence on the effective date of this code shall not be impaired.

11.11.2 Supplemental Penalties

Any person who knowingly violates, or solicits the violation of any of the provisions of this Article wherein such action or inaction is deemed unlawful, shall be punished in a manner consistent with the penalties provided for such unlawful actions or inaction in KRS 45A.990 and any other applicable statutes.

11.12 Reporting of Suspected Collusion

When for any reason collusion is suspected among any bidders or offerors, a written notice of the facts giving rise to such suspicion shall be transmitted to the Commonwealth's Attorney and the Attorney General. All documents involved in any procurement in which collusion is suspected shall be retained until the Commonwealth's Attorney and Attorney General give notice that they may be released. All such documents shall be made available to the Commonwealth's Attorney and Attorney General upon request.

Article XII

Prequalification, Disbarment And Suspension

12.0 Prequalification

12.1 Authority

The Director of Purchasing and the Executive Director of Facilities and Transportation shall establish prequalification procedures for their respective departments. The purpose of establishing such procedures shall be to determine the responsibility of all bidders on all contracts derived from competitive bidding, competitive negotiations and noncompetitive negotiations prior to award of the contract. Either of said designees shall designate the form to be used for the examination of qualifications of any and all prospective bidders for the provision of the services or of the goods which they desire to supply or provide respectively.

12.2 Duties

To establish the qualifications of a prospective bidder, the Director of Purchasing or the Executive Director of Facilities and Transportation, as the case shall require, may establish standards based, in whole or in part, upon the following criteria:

- (a) Specialized experience of the prospective bidder and the type of work for which it desires to be considered;
- (b) The ability and capacity of the prospective bidder to perform such work or to supply such goods on a timely basis;
- (c) The general reputation, experience, integrity and good character of the prospective bidder in his trade, business or industry;
- (d) The present credit standing of the prospective bidder;
- (e) Past experience, if any, of the prospective bidder with the Board;
- (f) Past experience, if any, with other governmental units such as the Commonwealth of Kentucky or any local governmental unit.
- (g) The ability, capacity, and demonstrated experience of the prospective bidders to demonstrate good faith effort in complying with the district's Affirmative Action Program.

12.3 Refusal to List Prospective Bidder

The Director of Purchasing or the Executive Director of Facilities and Transportation, as the case shall require, may refuse to list any prospective bidder failing to meet

the minimum qualifications established under section 12.1 on the qualified bidder's list. It shall be the responsibility of the prospective bidder to establish his qualifications for inclusion on the prequalification list.

12.4 Prompt Notification

The prospective bidder shall be notified promptly whether his application for prequalification is approved or disapproved; and, if disapproved, the grounds therefore.

12.5 Appeal of Disapproval of Application

The prospective bidder may appeal the disapproval of its application to the Superintendent or his designee. Such an appeal shall be taken by issuing a written statement of the prospective bidder's qualifications within two weeks after the date of the notice of disapproval. The Superintendent or his designee shall render a decision in writing on the issue of qualifications, which shall be conclusive and binding on both parties, and neither party may appeal therefrom.

12.6 Re-Application for Qualification

Any prospective bidder having its applications disapproved by either the Director of Purchasing or the Executive Director of Facilities and Transportation shall be allowed to reapply for qualification one-year after final disapproval of its previous application.

12.7 Conditions for Accepting Bid from Non-Prequalified Bidder

The Director of Purchasing or the Executive Director of Facilities and Transportation may accept a bid from a bidder which has not prequalified; provided, however, that such a bidder submits all information required by either designee for the purpose of determining the bidder's qualifications and responsibility prior to the award of the contract.

12.8 Establishment and Maintenance of Records and Lists of Firms or Individuals Debarred or Suspended

12.8.1 General

The Director of Purchasing and the Executive Director of Facilities and Transportation shall maintain a joint record of firms and individuals which have been debarred or suspended to whom contract awards of any character, including sales, shall not be made and from which bids or proposals shall not be solicited as provided in this Article.

12.8.2 Information Contained in Departmental Records

Each department record shall show, as a minimum, the following information:

- (a) Names and addresses of those firms and/or individuals debarred, ineligible or suspended;
- (b) The basis of authority for each action and a brief description of the violation charged;
- (c) The extent of the restriction imposed; and
- (d) The termination date for each debarred listing.

12.8.3 Protection of Records

Records relating to the debarment and suspension shall be protected to prevent inspection of the contents by personnel who are not required to have access to such information. All reports and related internal correspondence shall be marked "for office use only".

12.8.4 Limitation

No firm or individual will be listed on a consolidated list for causes or under conditions other than those set forth in this Article.

12.8.5 Inquiries from Debarred or Suspended Individuals and Firms

- (a) All inquiries relating to debarred or suspended firms and individuals shall be referred or forwarded to the offices of the Director of Purchasing or the Executive Director of Facilities and Transportation, as the case may require.
- (b) All inquiries from contractors or individuals listed as ineligible or disqualified shall be answered in writing and by indicating the nature of the prohibition.

12.9 Grounds for Debarment and Suspension, and Treatment to be Accorded Debarred or Suspended Parties

12.9.1 A firm or individual may be listed as debarred or suspended for any of several reasons. The particular reason for listing determines the consequences thereof. The various types of listings and treatment to be accorded each type are set forth below:

- (a) Violation of any applicable federal or state statute;
- (b) Violation of the applicable ethical provisions of KRS Chapter 45A and of these regulations as set forth in Article XI (Ethics and Standards of Conduct);
- (c) Violation of the applicable disclosure and compliance provisions of KRS 45A.343 (3) or (4) and of paragraph 2.3.7 of these regulations.

(d) Commission of fraud or criminal offense which is an incident to the obtaining, attempting to obtain or to the performance of a public contract;

(e) Any violation of federal or state statute arising out of the submission of bids or proposals;

(f) The commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty which seriously and directly affects the question of present responsibility of the contractor for the Board. If the conviction or judgment is reversed on appeal, the debarment shall be removed upon receipt of notification thereof. The foregoing does not necessarily require that a firm or individual be debarred. The decision to debar is discretionary.

(g) Clear and convincing evidence of violation of contract provisions as set forth below when the violation is of a character so serious as to justify debarment action:

(i) willful failure to perform in accordance with the specifications or delivery requirements in a contract;

(ii) a history of failure to perform, or of unsatisfactory performance, in accordance with the terms of one or more contracts; provided, however, that such failure or unsatisfactory performance is within a reasonable time preceding the determination to debar. (Failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered as a basis for debarment);

(iii) violation of the contractual provision against contingent fees or kickbacks; or

(iv) violation of the conflicts of interest clause as determined by either the Director of Purchasing or the Executive Director of Facilities and Transportation in accordance with the provisions of Article XI (Ethics and Standards of Conduct) of these regulations.

(h) For any other cause of such serious and compelling nature affecting responsibility as a contractor with the Board as may be determined by either the Director of Purchasing or the Executive Director of Facilities and Transportation, so as to justify debarment.

(i) Debarment for any of the above clauses by some other executive agency of Jefferson County or of the Commonwealth of Kentucky. (Such debarment may be based entirely upon the record of facts obtained by the original debarring agency, or upon the combination of additional facts with the record of facts obtained by the original debarring agency.)

12.9.2 Contract shall not be awarded to, nor bids or proposals solicited from, nor invitations for bid or requests for proposals furnished to, any or all of the concerns which are listed as debarred or suspended on the grounds set forth above.

12.10 Debarment

12.10.1 Scope and Period of Debarment

(a) Period of Debarment—All Debarment shall be for a reasonable specified period of time, commensurate with a seriousness of the cause therefore. As a general rule, a period of debarment shall not exceed three years. Debarment for a violation of KRS 45A.343 (3) or (4) shall be for the period specified in the applicable statute. In the event debarment is preceded by suspension, consideration shall be given to such period of suspension in determining the period of debarment. Prior to the expiration of the debarment period, the department or agency which imposed the debarment should review all of the facts and circumstances relating to the debarment. The debarment shall be removed at the expiration of the specified period unless it is determined that the debarment for an additional period is required in order to protect the interest of the Board. However, a debarment shall not be extended for an additional period solely on the basis of the facts and circumstances on which the initial debarment action was based. When debarment for an additional period is considered necessary, notice of the proposed debarment shall be furnished to the individual or firm concerned in accordance with paragraph 12.10.2. The debarment of an individual or firm may be modified by reducing the period thereof when the circumstances justify such action.

(b) Scope of Debarment—Debarment may include all known affiliates of a concern or individual. Business concerns are considered affiliates of each other when, either directly or indirectly, one concern or individual controls or has the power to control another or a third controls or has the power to control both. A decision to include known affiliates in a proposed debarment is an individual determination which must be made on a case-by-case basis. The fraud or criminal conduct of an individual may be imputed to the business firm for which he is connected when the impropriety involved was performed in the course of official duty or with the knowledge or approval of the business firm.

12.10.2 Notice of Debarment

(a) The firm or individual and its known affiliates concerned shall be furnished with a written notice of the proposed debarment stating as a minimum:

- (i) the fact that debarment is being considered;
- (ii) the reasons for proposed debarment; and
- (iii) the period of time to be afforded to present information for consideration.

(b) Information in opposition to a proposed debarment may be presented in person, in writing, or through representation. The period of time to be afforded to present information for consideration shall be limited to 30 days unless the subject of the proposed debarment requests additional time. When no additional time is requested, the debarment determination, including notice to the firm or individual and known affiliates involved, shall be completed within 90 days. If the subject of the proposed debarment requests additional time to present information, the ninety-day period shall be extended commensurately. When no suspension is in effect under section 12.11 (Suspension), the notice of proposed debarment shall state that no contracts will be awarded pending the debarment determination. If debarment is effected, the firm or individual shall be notified in writing within 10 days after the determination of the debarment has been made. This notice shall:

- (i) reference the earlier notice of proposed debarment;
- (ii) specify the reasons for debarment; and
- (iii) state the period for debarment, including any and all effective dates.

If, following the notice to proposed debarment, a determination is made that debarment will not be effected, the firm or individual shall be notified in writing accordingly.

12.11 Suspension of Firm or Individual

Suspension of a contractor, bidder or offeror is a drastic action which must be based upon adequate evidence rather than mere accusation. In assessing adequate evidence, consideration shall be given to how much credible information is available, its reasonableness in view of surrounding circumstances, corroboration or lack thereof as to important allegations and inferences which may be drawn from the existence or absence of affirmative facts. This assessment should include an examination of basic documents, such as contracts, inspection reports and correspondence. Placing the name of an individual or firm on the consolidated list will be for the purpose of protecting the interest of the Board and not for punishment. Suspension is an administrative determination which may be modified when determined to be in the best interest of the Board.

12.12 Causes for Suspension

The Director of Purchasing or the Executive Director of Facilities and Transportation or their authorized representative may in the interest of the Board suspend a firm or individual suspected upon adequate evidence of:

- (a) Commission of fraud or a criminal offense as an incident to attempting to obtain or in the performance of a public contract;

(b) Violation of any federal or state statutes arising out of the submission of bids and/or proposals;

(c) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which seriously and directly affects the question of present responsibility as a contractor for the Board; or

(d) For any other cause of such serious and compelling nature, affecting responsibility as a contractor for the Board as may be determined by the Director of Purchasing or the Executive Director of Facilities and Transportation, as the case shall require.

12.13 Period and Scope of Suspension

12.13.1 Coordination with the Prosecuting Attorney

Upon suspension, notice shall be furnished in accordance with section 12.17. Except as provided in paragraph 12.14.1, when a request for hearing is received, the formal advice of legal counsel shall be solicited concerning the possible impact of release of evidentiary material on possible civil or criminal action against the firm or individual. (If such advice is orally given, a request will be made that legal counsel promptly confirm it in writing.) Based on this advice, the Board's representative shall determine whether, and to what extent, a hearing should be held.

12.13.2 If a hearing is granted, it shall be held no later than 20 days after the receipt of request. Either the Director of Purchasing or the Executive Director of Facilities and Transportation, as the case shall require, shall promptly decide after the hearing whether to continue or terminate the suspension and notify the firm or individual accordingly.

12.13.3 If it is determined, based upon the advice received from legal counsel, that to hold a hearing would adversely affect possible civil or criminal prosecution against the firm or individual, this determination shall be reduced to writing and shall be made a part of a formal record. Notice shall then be furnished to the firm or individual within 20 days after receipt of the request for a hearing that a substantial interest of the Board would be prejudiced if a hearing were held but that any information or argument in opposition to the suspension may be presented in person, in writing or through representation by counsel. Any information or argument submitted shall be promptly considered by the appropriate designee and, if such action is deemed warranted, the suspension shall be terminated.

12.14 Exceptions

12.14.1 When the basis for suspension is an outstanding indictment against the firm or individual, the granting of a hearing is not required, and it is unnecessary to consult legal counsel.

12.14.2 When the basis for suspension does not involve possible civil or criminal prosecution against the firm or individual, it is unnecessary to consult legal counsel, and a hearing shall be granted if requested.

12.15 Period of Suspension

All suspensions shall be for a temporary period pending the completion of an investigation and such legal proceedings as may ensue. In the event prosecutive action is not initiated by the Board within 12 months from the date of the notice of suspension, the suspension shall be terminated unless an authorized prosecuting attorney requests continuance of the suspension. If such a request is received, the suspension may be continued for an additional six months. Notice of the proposed removal of the suspension may be given to the prosecuting attorney 30 days prior to the expiration of the twelve-month period. In no event will a suspension continue beyond 18 months unless the prosecutive action has been initiated within that period. When prosecutive action is initiated, the suspension may continue until the legal proceedings are completed. Upon removal of the suspension, consideration may be given to debarment in accordance with section 12.10 (Debarment).

12.16 Scope of Suspension

The scope of suspension shall be the same as that for debarment as stated in paragraph 12.10.1 (b).

12.17 Notice of Suspension

12.17.1 Upon suspension, the firm or individual concerned shall immediately be furnished a written notice of the suspension by either the Director of Purchasing or the Executive Director of Facilities and Transportation, as the case shall require.

12.17.2 The notice of suspension shall state that:

(a) The suspension is based on adequate evidence that the firm or individual has committed irregularities of a serious nature in business conducted with the Board, or that the suspension is based on irregularities which seriously reflect on the propriety of further dealings of the firm or individual with the Board, together with a description of the nature of those irregularities, in general terms, without disclosing the Board's evidence;

(b) The suspension is for a temporary period pending the completion of an investigation and such legal proceedings as may ensue;

(c) Bids and proposals shall not be solicited from the firm or individual and if received shall not be considered, and awards of contracts shall not be made to said firm or individual; and

(d) A request for hearing will be considered, or a reference will be made to an indictment, as appropriate.

(e) The status of vouchers;

(f) Whether the contract has been assigned, and if so assigned, the name and address of the assignee and a copy of the assignment;

(g) Whether any other contracts are outstanding with the contractor or any of his affiliates, and if so, the amount of such contracts, whether they are signed, and the amounts paid or due on such contracts;

(h) A complete summary of all pertinent evidence;

(i) A recommendation as to the administration of all current contracts with a full explanation of the reason for such recommendation, or if no recommendation is made, the reason therefore;

(j) An estimate of damages, if any, sustained by the Board as a result of the action of the contractor including an explanation of the method used in making the estimate;

(k) The comments and recommendations of the Director of Purchasing or the Executive Director of Facilities and Transportation, as the case shall require, as to whether the contractor should be suspended or debarred, whether any limitations should be applied to such action, and the periods of any debarment; and

(l) As an enclosure, a copy of the contracts or pertinent excerpts therefrom, appropriate exhibits, testimony or statements of witnesses, copies of assignments, and any other relevant documentation.

12.18 Reporting

12.18.1 Situations Where Reports are Required

A report incorporating the information required in paragraph 12.18.2 shall be prepared when a contractor has committed or is suspected of having committed any of the acts described in this Article; or an individual or firm is suspected of attempting to evade the prohibitions or debarments or suspensions imposed under this Article by changes of address, multiple addresses, formation of new companies or by any other devices.

12.18.2 Contents of Reports

Each report prepared shall include substantially the following information, where available:

(a) Name and address of the bidder or offeror, contractor or subcontractor;

(b) Names of the principal officers, partners, owners or managers;

(c) All known affiliates, subsidiaries or parent firms and the nature of the affiliation;

(d) Description of the contract or contracts concerned, including the contract number and all office identifying numbers or symbols, the amount of each contract, the degree of completion, the amount paid to the contractor, the amount still due, and the percentage of work to be completed.

Index

<p>Acceptance of Grants, Gifts and Like Items 2.2.6</p> <p>Acquire Land, Specific Power To 2.2.1</p> <p>Aggregate Amount</p> <p style="padding-left: 20px;">Definition of 1.5.1</p> <p>Agreement, Supplemental</p> <p style="padding-left: 20px;">Definition of 1.5.64</p> <p>Amendments to Invitations for Bids 3.9</p> <p style="padding-left: 20px;">Form 3.9.1</p> <p style="padding-left: 20px;">Timeliness 3.9.3</p> <p style="padding-left: 20px;">Use 3.9.2</p> <p>Applicable Provisions of KRS Chapter 45A 1.6</p> <p>Architect-Engineer Selection Procedures Article V</p> <p style="padding-left: 20px;">Scope of Section 5.0</p> <p style="padding-left: 20px;">Selection Policy and Criteria 5.1; 5.1.1–5.1.4</p> <p style="padding-left: 20px;">Selection Procedures 5.2; 5.2.1–5.2.5</p> <p style="padding-left: 20px;">Special Approval of Selections 5.3; 5.3.1–5.3.3</p> <p>Award 3.15.1</p> <p>Bids, Bidding, Bidder Article III</p> <p style="padding-left: 20px;">Award 3.15.1; 3.16.2; 3.17; 3.18</p> <p style="padding-left: 20px;">Competitive Negotiation 3.19; 3.20; 3.21; 3.22; 3.23</p> <p style="padding-left: 20px;">Competitive Sealed 3.2</p> <p style="padding-left: 20px;">Definition of, “Evaluated Bid Price” 1.5.30</p> <p style="padding-left: 20px;">Definition of, “Invitations for Bids” 1.5.39</p> <p style="padding-left: 20px;">Determination of Lowest Bidder 3.15.3</p> <p style="padding-left: 20px;">Evaluation and Award 3.15</p> <p style="padding-left: 20px;">Form 3.5.1</p> <p style="padding-left: 20px;">Mailing Lists 3.7</p> <p style="padding-left: 20px;">(SEE: Index for Bidder Mailing Lists)</p> <p style="padding-left: 20px;">Minimum Bidding Time 3.4.1</p> <p style="padding-left: 20px;">Mistakes in Bids 3.14</p> <p style="padding-left: 20px;">(SEE: Index for Same Topic)</p> <p style="padding-left: 20px;">Modification or Withdrawal of Bids</p> <p style="padding-left: 40px;">Prior to Bid Opening 3.10</p> <p style="padding-left: 40px;">(SEE: Index for Same Topic)</p> <p style="padding-left: 20px;">Product Acceptability 3.15.2</p> <p style="padding-left: 20px;">Public Notice 3.6; 3.6.1–3.6.3</p> <p style="padding-left: 20px;">Receipt, Opening and Recording of Bids 3.12</p> <p style="padding-left: 20px;">(SEE: Index for Same Topic)</p> <p style="padding-left: 20px;">Responsiveness of Bids 3.13</p> <p style="padding-left: 20px;">Restrictions 3.15.4</p> <p style="padding-left: 20px;">Samples and Descriptive Literature 3.5.2</p> <p style="padding-left: 20px;">Setting Bidding Time 3.4.2</p> <p style="padding-left: 20px;">Submissions 3.5</p> <p style="padding-left: 20px;">The Invitation For Bids 3.3.2</p> <p style="padding-left: 20px;">Tie Bids 3.16</p> <p style="padding-left: 20px;">Time 3.4</p>	<p>Bidder Mailing Lists 3.7</p> <p style="padding-left: 20px;">Compilation 3.7.2</p> <p style="padding-left: 20px;">Deletion of Bidders 3.7.4</p> <p style="padding-left: 20px;">Public Availability 3.7.5</p> <p style="padding-left: 20px;">Purpose 3.7.1</p> <p style="padding-left: 20px;">Use 3.7.3</p> <p>Board</p> <p style="padding-left: 20px;">Changes to Regulations 2.3.2</p> <p style="padding-left: 20px;">Definition of 1.5.2</p> <p style="padding-left: 20px;">Issuance and Amendment of</p> <p style="padding-left: 40px;">Procurement Regulations 2.3</p> <p style="padding-left: 20px;">Incorporations of Regulations</p> <p style="padding-left: 40px;">Into Contracts 2.3.6</p> <p style="padding-left: 20px;">Internal Policies 2.3.3</p> <p style="padding-left: 20px;">Procurement Regulations 2.3.1</p> <p style="padding-left: 20px;">Shall Not Change Existing</p> <p style="padding-left: 40px;">Contract Rights 2.3.5</p> <p style="padding-left: 20px;">Shall Not Delegate Regulation</p> <p style="padding-left: 40px;">Issuance Power 2.3.4</p> <p style="padding-left: 20px;">Specific Powers of 2.2</p> <p style="padding-left: 40px;">Acceptance of Grants, Gifts and Like Items 2.2.6</p> <p style="padding-left: 40px;">Acquire Land 2.2.1</p> <p style="padding-left: 40px;">Common Item Procurement 2.2.9</p> <p style="padding-left: 40px;">Convey Easements 2.2.2</p> <p style="padding-left: 40px;">Economical Operation of Procurement 2.2.8</p> <p style="padding-left: 40px;">Enter into Contracts 2.2.3</p> <p style="padding-left: 40px;">Grants and Contracts with Other</p> <p style="padding-left: 80px;">Governments or Entities 2.2.5</p> <p style="padding-left: 40px;">Intergovernmental Body Property Transfers;</p> <p style="padding-left: 80px;">Disposal of Property 2.2.7</p> <p style="padding-left: 80px;">Statistics 2.2.12</p> <p style="padding-left: 40px;">Submissions of Bids and Terms and</p> <p style="padding-left: 80px;">Conditions 2.2.10</p> <p style="padding-left: 80px;">Testing and Inspection 2.2.11</p> <p>Business</p> <p style="padding-left: 20px;">Definition of 1.5.3</p> <p>Change Order</p> <p style="padding-left: 20px;">Definition of 1.5.4</p> <p>Common Item Procurement 2.2.9</p> <p>Competitive Negotiation</p> <p style="padding-left: 20px;">Procedure 3.19; 3.20; 3.21; 3.22</p> <p style="padding-left: 20px;">Amendments to the Request for Proposal 3.20.3</p> <p style="padding-left: 20px;">Award 3.20.8</p> <p style="padding-left: 20px;">Compliance with KRS Chapter 45A 2.3.7</p> <p style="padding-left: 20px;">Conditions for Use 3.19.2</p>
---	---

Discussion of Proposals	3.20.6	Allocable Costs	7.5
Evaluation of Proposals.....	3.20.5	Direct Costs	7.5.2
Form	3.20.2	General	7.5.1
General	3.19.1	Indirect Costs.....	7.5.3
Mistakes During Competitive Negotiation		Allowable Costs	7.3
Procedure.....	3.21; 3.21.1–3.21.2	General	7.3.1
Notice of Unacceptable Proposals	3.20.7	When Allowable.....	7.3.2
Pre-Bid Conferences in Competitive Negotiation		Applicability of Cost Principles.....	7.2
Procedure	3.22	Application	7.2.1
Procedure for Phase One of the		Limitation	7.2.2
Competitive Negotiation	3.20	Applicable Credits.....	7.8
Receipt and Handling of Proposal	3.20.4	Definitions and Examples.....	7.8.1
Competitive Sealed Bidding.....	3.2	Reducing Costs.....	7.8.2
Conflict of Interest.....	11.3; 11.3.1–11.3.3	Refund	7.8.3
Contract(s)		Authority to Deviate from Cost Principles.....	7.11
Definition of	1.5.9	Costs Requiring Prior Approval	
Enter into.....	2.2.3	To Be Allowable.....	7.7
Existing Rights.....	2.3.5	Bid and Proposal Costs	7.7.3
Formation	Article III	General	7.7.1
Incorporation of Regulations Into	2.3.6	Insurance	7.7.4
Modification, Definition of	1.5.10	Litigation Costs	7.7.5
Modification and Termination	Article VI	Pre-Contract Costs	7.7.2
(SEE: Index for Same Topic)		Reasonable Costs	7.4
With Other Governments.....	2.2.5	Right to Audit Books and Records	7.12
Contract Modification and Termination.....	Article VI	Treatment of Specific Costs	7.6
Administrative Changes	6.3; 6.3.1–6.3.2	Advertising	7.6.1
Change Orders	6.2	Bad Debts	7.6.2
Authorization.....	6.2.5	Contingencies	7.6.3
Controversies from Modification	6.2.4	Depreciation and Use Allowances	7.6.4
Originating Engineering Change Proposals	6.2.3	Entertainment	7.6.5
Procedure.....	6.2.2	Fines and Penalties	7.6.6
Scope of Section	6.2.1	Gifts, Contributions and Donations	7.6.7
Policy.....	6.1; 6.1.1–6.1.5	Interest and Other Financing Costs.....	7.6.8
Availability of Funds	6.1.6	Losses Incurred Under Other Contracts	7.6.9
Supplemental Agreement.....	1.5.64	Material Costs	7.6.10
Termination	6.4	Taxes	7.6.11
For Convenience.....	6.5; 6.5.1–6.5.3	Use of Federal Cost Principles.....	7.10
For Default.....	6.4.2	Cost Negotiations	7.10.1
Policy	6.4.1	Incorporation of Federal Cost Principles:	
Contractor		Conflicts Between Federal Principles	
Definition of	1.5.12	and This Part.....	7.10.2
Convey Easements, Specific Power To.....	2.2.2	Cost Reimbursement Contracts.....	3.25
Cost Principles.....	Article VII	Requirements	3.25.2
Advance Agreements	7.9	Right to Audit.....	3.25.3
Form Required.....	7.9.2	Use.....	3.25.1
Limitation on Costs Covered.....	7.9.3	Data	
Purpose.....	7.9.1	Definition of	1.5.19

Definitions		
Aggregate Amount.....	1.5.1	
Board.....	1.5.2	
Business.....	1.5.3	
Change Order.....	1.5.4	
(SEE ALSO: Contract Modifications and Termination)		
Chief Financial Officer and Treasurer.....	1.5.5	
Compensation.....	1.5.6	
Confidential Information.....	1.5.7	
Construction.....	1.5.8	
Contract.....	1.5.9	
Contract Modification.....	1.5.10	
Contracting Officer.....	1.5.11	
Contractor.....	1.5.12	
Cooperative Purchasing.....	1.5.13	
Cost, Actual.....	1.5.14	
Cost Analysis.....	1.5.15	
Cost Data.....	1.5.16	
Cost Objective.....	1.5.17	
Cost Reimbursement Contracts.....	1.5.18	
Data.....	1.5.19	
Debarment.....	1.5.20	
Designee.....	1.5.21	
Determinations and Findings.....	1.5.22	
Director of Purchasing.....	1.5.25	
Director of Supply Services.....	1.5.26	
Document.....	1.5.23	
Emergency.....	1.5.27	
Employee.....	1.5.28	
Established Catalog Price.....	1.5.29	
Evaluated Bid Price.....	1.5.30	
Executive Director of Facilities and Transportation.....	1.5.31	
Exhibit.....	1.5.32	
“File” and “Filing”.....	1.5.24	
Financial Interest.....	1.5.33	
Foreign Purchasing Activity.....	1.5.34	
Governmental Body.....	1.5.35	
Gratuity.....	1.5.36	
Immediate Family.....	1.5.37	
Includes.....	1.5.38	
Invitations for Bids.....	1.5.39	
Local Public Agency.....	1.5.40	
Mail.....	1.5.41	
May.....	1.5.42	
Negotiation.....	1.5.43	
Noncompetitive Negotiation.....	1.5.44	
Objective Measurable Criteria.....	1.5.45	
Official Responsibility.....	1.5.46	
Person.....	1.5.47	
Price Analysis.....	1.5.48	
Price Data.....	1.5.49	
Procurement.....	1.5.50	
Procurement Activity.....	1.5.51	
Procurement Authority.....	1.5.52	
Public Purchasing Unit.....	1.5.53	
Purchase Request.....	1.5.54	
Requests for Proposals.....	1.5.55	
Responsible Bidder or Offeror.....	1.5.56	
Responsive Bidder.....	1.5.57	
Services.....	1.5.58	
Shall.....	1.5.59	
Signature or Signed.....	1.5.60	
Specifications.....	1.5.61	
State Public Purchasing Unit.....	1.5.62	
Superintendent.....	1.5.63	
Supplemental Agreement.....	1.5.64	
Supplies.....	1.5.65	
Suspension.....	1.5.66	
Writing or Written.....	1.5.67	
Disbarment and Suspension.....	Article XII	
Documentation of Award.....	3.17	
Emergency		
Definition of.....	1.5.27	
Established Catalog Price		
Definition of.....	1.5.29	
Ethics and Standards of Conduct.....	Article XI	
Civil and Administrative Remedies Against Employees Who Violate Ethical Standards.....	11.8	
Due Process.....	11.8.4	
Existing Remedies Not Impaired.....	11.8.1	
Right to Recover from Employees Value Received in Violation of Ethical Standard.....	11.8.3	
Supplemental Remedies.....	11.8.2	
Civil and Administrative Remedies Against Non-employees Who Violate Ethical Standards.....	11.9	
Due Process.....	11.9.5	
Existing Remedies Not Impaired.....	11.9.1	
Right of Board to Suspend or Debar.....	11.9.4	
Right to Recover from Non-employee Value Transferred in Violation of Ethical Standards.....	11.9.3	
Supplemental Remedies.....	11.9.2	
Conflicts of Interest.....	11.3; 11.3.1–11.3.3	
Criminal Penalties for Violations.....	11.11	
Existing Penalties Not Impaired.....	11.11.1	
Supplemental Penalties.....	11.11.2	
Employees Not to Benefit.....	11.4	

Disclosure of Benefits Received.....	11.4.1–11.4.2	Supplies Subject to Price Agreement	
Gratuities and Kickbacks Illegal.....	11.4.3	With Commonwealth.....	10.6
Placement of Notice.....	11.4.4	Invitation for Bids	
General Standards of Conduct for Employees.....	11.1	Amendments to Invitations for Bids.....	3.9
General Standards of Conduct for		Form.....	3.9.1
Non-employees.....	11.2	Timeliness.....	3.9.3
Public Access to Procurement Information		Use.....	3.9.2
Records.....	11.7	Bidder Submissions.....	3.5
Recovery of Value Transferred or		Bid Form.....	3.5.1
Received in Violation of Ethical standards.....	11.10	Bid Samples and Descriptive Literature.....	3.5.2
General Provisions.....	11.10.1	Bidding Time.....	3.4
Recovery of Kickbacks by the Board.....	11.10.2	Minimum Bidding Time.....	3.4.1
Reporting of Suspected Collusion.....	11.12	Setting Bidding Time.....	3.4.2
Restrictions on Employment of Present		Content of the Invitation for Bids.....	3.3; 3.3.2
And Former Board Employees.....	11.5	Incorporation by Reference.....	3.3.3
Contemporaneous Employment Prohibited.....	11.5.1	Use.....	3.3.1
Disqualification of Former Employees in		Definition of.....	1.5.39
Matters Connected with Former Duties.....	11.5.2	Public Notice.....	3.6
Statement of Policy.....	11.0	Advertisement by Internet Posting or	
Use of Confidential Information.....	11.6	Newspaper Publication.....	3.6.2
Fiscal Agent Selection Procedures.....	Article V-A	Distribution.....	3.6.1
Scope of Selection.....	5-A.0	Posting at the Boards Offices.....	3.6.3
Selection Policy and Criteria.....	5-A.1; 5-A.1.1–5-A.1.3	Jefferson County Board of Education	
Selection Procedures.....	5-A.2; 5-A.2.1–5-A.2.4	(SEE: “Board” this Index)	
Special Approval of Selections.....	5-A.3	Late Bids, Late Withdrawals and	
General Provisions.....	Article I	Late Modifications.....	3.11
Application of these Regulations.....	1.2	Definition of.....	3.11.1
Definitions.....	1.5	Notice.....	3.11.3
Determinations and Findings.....	1.4	Records.....	3.11.4
Liberal Construction.....	1.1.1	Treatment.....	3.11.2
Purposes, Rules of Construction.....	1.1	Legal and Contractual Remedies.....	Article IX
Purposes and Policies.....	1.1.2	Actions on Board Contracts.....	9.6
Severability.....	1.3	Prelitigation Resolution of Controversies.....	9.0
Singular-Plural and Gender Rules.....	1.1.3	Authority to Debar or Suspend.....	9.2
Title.....	1.0	Authority to Resolve Contract and	
Gratuities and Kickbacks.....	11.4.3	Breach of Contract Disputes.....	9.3; 9.3.1–9.3.7
Intergovernmental Body Property Transfers;		Authority to Resolve Protested	
Disposal of Property.....	2.2.7	Solicitations and Awards.....	9.1; 9.1.1–9.1.7
Intergovernmental Relations		Interest.....	9.5
Acquisition or Use of Property Owned		Presumption of Correctness of Board Decisions.....	9.7
By a Public Purchasing Unit.....	10.2	Solicitations or Awards in Violation	
Cooperative Purchasing Authorized.....	10.1	of Law.....	9.4; 9.4.1–9.4.2
Cooperative Use of Supplies and Services.....	10.3	Remedies After Award.....	9.4.3
Definitions.....	10.0	Local Public Agency	
Federal Grants.....	10.5	Definition of.....	1.5.40
Public Purchasing Units in Compliance		Mistakes in Bids.....	3.14
With Source Selection		Confirmation of Bid.....	3.14.3
Requirements.....	10.4; 10.4.1–10.4.2	Determination and Finding Required.....	3.14.6
		General.....	3.14.1
		Mistakes Discovered After Award.....	3.14.5

Mistakes Discovered After Opening, Prior to Award.....	3.14.4	Grounds for Debarment and Suspension and Treatment to be Accorded Debarred or Suspended Parties.....	12.9; 12.9.1–12.9.2
Mistakes Discovered Before Opening.....	3.14.2	Prequalification.....	12.0
Method of Construction Contracting Management	4.4	Appeal of Disapproval of Application.....	12.5
Modification or Withdrawal of Bids		Authority	12.1
Prior to Bid Opening.....	3.10	Conditions for Accepting Bid from Non-Prequalified Bidder	12.7
Disposition of Withdrawn Bids	3.10.2	Duties	12.2
Procedure	3.10.1	Prompt Notification.....	12.4
Records.....	3.10.3	Re-Application for Qualification	12.6
Multiyear Contracts.....	3.26	Refusal to List Prospective Bidder	12.3
Availability of Funds.....	3.26.3	Reporting.....	12.18
Requirements	3.26.2	Contents of Reports.....	12.18.2
Use.....	3.26.1	Situations Where Reports Required	12.18.1
Negotiate and Negotiation(s)		Suspension of Firm or Individual.....	12.11
After Competitive Sealed Bidding When		Causes for Suspension	12.12
All Bids Exceed Available Funds.....	3.2.2; 3.23	Notice of Suspension.....	12.17; 12.17.1–12.17.2
Determination.....	3.23.1	Period and Scope of Suspension	12.13; 12.15; 12.16
Procedure.....	3.23.2	Coordination with the Prosecuting Attorney.....	12.13.1
Competitive Negotiation,		If Hearing Granted.....	12.13.2
Mistakes During Procedure.....	3.21	If Hearing Not Granted.....	12.13.3
Definition of	1.5.43	Exceptions	12.14; 12.14.1–12.14.2
Noncompetitive Negotiation	3.24	Procurement, Organization of.....	Article II
Definition of.....	1.5.44	Common Item Procurement.....	2.2.9
Determination.....	3.24.1	Definition of	1.5.50
Pre-Bid Conferences in Competitive Negotiation Procedure.....	3.22	Definition of “Procurement Activity”	1.5.51
Negotiations After Competitive Sealed Bidding.....	3.23	Economical Operation of.....	2.2.8
Determination	3.23.1	Issuance and Amendments of Procurement Regulations	2.3
Procedure for Regulations After Competitive Sealed Bidding.....	3.23.2	Product Acceptability.....	3.15.2
Noncompetitive Negotiations	3.2.3; 3.24	Property	
Determination	3.24.1	Acquisition or Use of Property Owned by a Public Purchasing Unit.....	10.2
Person		Intergovernmental Transfers Of; Disposal of.....	2.2.7
Definition of	1.5.47	Power to Acquire Land	2.2.1
Pre-Bid Conferences.....	3.8	Power to Convey Easements.....	2.2.2
Prequalification, Disbarment and Suspension.....	Article XII	Publicizing Awards.....	3.18
Debarment.....	12.10	Purchase Request	
Notice of Debarment	12.10.2	Definition of	1.5.54
Scope and Period of Debarment.....	12.10.1	Purchases	
Establishment and Maintenance of Records and Lists of Firms or Individuals Debarred Or Suspended	12.8	Emergency.....	3.24.1
General	12.8.1	Small.....	3.27; 3.27.1–3.27.2
Information Contained in Departmental Records.....	12.8.2	Purchasing	
Inquiries from Debarred or Suspended Individuals and Firms	12.8.5	Director of, Definition.....	1.5.25
Limitation	12.8.4	Methods.....	2.2.4
Protection of Records	12.8.3		

Receipt, Opening and Recording of Bids.....	3.12	Superintendent	
Opening and Recording.....	3.12.2	Definition of.....	1.5.63
Receipt.....	3.12.1	Scope of Authority.....	2.1
Regulations		Supply Management and Surplus Property Disposal	
Changes to.....	2.3.2	Regulations.....	Article VIII
Existing Contract Rights Not Changed By.....	2.3.5	Disposition of Excess, Nonexpendable Supplies.....	8.2
Incorporation into Contracts.....	2.3.6	Disposition of Surplus Supplies.....	8.3
Internal Rules and Procedures for the		Competitive Sealed Bidding.....	8.3.4
Preparation of.....	2.3.3	General Requirements.....	8.3.1
Issuance and Amendments of		Notice Required.....	8.3.2
Procurement Regulations.....	2.3	Public Auction.....	8.3.3
		Retail Sales.....	8.3.5
Procurement Regulations.....	2.3.1	Trade-In.....	8.3.6
Issuance Power Shall Not Be Delegated.....	2.3.4	Quality, Assurance, Inspection and Testing.....	8.1; 8.1.1
Regarding Competitive Sealed Bidding,		Inventory Control.....	8.1.3
Competitive Negotiation and Noncompetitive		Supply Verification.....	8.1.4
Negotiation.....	3.1	Warehousing and Storage.....	8.1.2
Responsible Bidder or Offeror		Supplies	
Definition of.....	1.5.56	Definition of.....	1.5.65
Responsive Bidder		Surplus Supplies Disposition.....	8.3
Definition of.....	1.5.57; 3.13	Supply Services	
Services		Director of, Definition.....	1.5.26
Definition of.....	1.5.58	Tie Bids.....	3.16
Small Purchase Procedures.....	3.27	Award.....	3.16.2
Policy of Small Purchase.....	3.27.1	Definition of.....	3.16.1
Procedures.....	3.27.2		
Source Selection and Contract Formation.....	Article III		
Specifications			
Definition of.....	1.5.61		
Specifications and Methods For			
Supplies and Services.....	Article IV		
Maximum Practicable Competition.....	4.2		
Prohibition Against Restrictive Specifications.....	4.3		
Specification Standardization.....	4.1		
Duties.....	4.1.2		
Standardization Authority.....	4.1.1		