



SAN FRANCISCO

BAY AREA RAPID TRANSIT DISTRICT

PROCUREMENT MANUAL

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CHAPTER I

GENERAL

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I-1 INTRODUCTION

The Procurement Policy and Instruction Manual of the San Francisco Bay Area Rapid Transit District (District) is designed to set forth the standards for processing all contracts and purchase orders. As such, it supersedes previous editions of the District's Procurement Manual and General Manager direction related to Procurement. These standards are furnished to ensure that materials and services are obtained timely, efficiently and economically, while adhering to principles of good public policy and practices and sound business judgment. This manual is organized to allow the user maximum flexibility to initiate, develop, execute and administer third-party contracts within the parameters of Federal, State, local and District requirements. However, this manual does not supersede Board rules, contract provisions or existing laws applicable to BART.

Procurement procedures shall not restrict or eliminate competition. Examples of what is considered to be restricting competition include, but are not limited to: (1) placing unreasonable requirements on firms in order for them to qualify to do business, (2) organizational conflicts of interest, and (3) unnecessary experience and bonding requirements. The District will not implement any procurement practices which give local or in-State Bidders/Proposers preference over other Bidders/Proposers.

This manual recognizes four basic contracting methods:

- Sealed Bid (Chapter III);
- Competitive Negotiation (Chapter IV);
- Small Purchases (Chapter V); and
- Non-competitive Procurement (Chapter VI).

These methods encompass third-party contracts currently utilized by the District in procuring supplies, services, equipment and construction for District locally funded and Federally-assisted programs or projects. These procedures are not intended to apply to the following areas: (i) Interagency agreements; (ii) fund transfer agreements or grant contracts; (iii) real estate related procurements; (iv) legal services. Procedures have been developed for each method from inception of a project to its close out, and the person or office responsible for completing each specified action is designated. Particular emphasis has been placed on certain aspects of the procurement process where warranted by the importance of the subject matter.

Procuring goods and services for the District must be a cooperative effort, and it shall be the responsibility of all District staff involved in procurement to employ sound judgment and appropriate standards of ethics and fairness to procure in a manner most advantageous to the District.

NOTE: THESE PROCEDURES ARE SET FORTH FOR THE ADMINISTRATIVE CONVENIENCE OF THE DISTRICT AND NOT FOR THE BENEFIT OF PROSPECTIVE CONTRACTORS OR CONSULTANTS. THEY CREATE NO SUBSTANTIVE RIGHTS OR OBLIGATIONS.

I-2 AUTHORITY

1.0 **LEGISLATIVE AND REGULATORY AUTHORITY:** The procurement policies and procedures discussed in the Manual have been developed in conformance with the standards and limitations established by State and Federal law, and District rules and policies as follows:

- California Public Contract Code
- California Statutory and Case Law
- Board of Directors' Resolutions and Board Rules
- District Policies and Instructions (P/I)

The applicable Federal laws, regulations and agreements affecting the procurement practices of the District are as follows:

- Federal Transit Act (FTA) (formerly Urban Mass Transportation Act of 1964), as amended, through June 1992, 49 USC Sec. 1601 et seq.
- Department of Transportation, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, 49 CFR Part 18.
- FTA Master Agreement.
- FTA Circular 5200.1A, Full-Funding Grant Agreements Guidance, December 5, 2002.
- FTA Circular 4220.1F, Third Party Contracting Guideline, November 1, 2008.
- FTA Circular 5010.1C, Grant Management Guidelines, October 1, 1998.
- Participation by Disadvantaged Business in Department of Transportation Programs, 49 CFR Part 26

1.1 Attached as Exhibits 1-4 are selected statutory references and District documents regarding the District's Procurement Policy.

2.0 **REQUIREMENTS FOR COMPETITION IN THE PROCUREMENT PROCESS:** Pursuant to State law and District policy, with limited exceptions, full and open competition is required for all procurement actions over \$2,500.

2.1 **APPLICABILITY:** For all procurement actions estimated to be \$2,500 or more, Contract Administration/Purchasing Division shall use the Department's Bidders Files, recommendations from the User Departments/Project Managers and the Office of Civil Rights' appropriate business registers, and other directories as appropriate to assist in identifying sources.

I-3 DEFINITIONS

ACCEPTANCE: The formal written acceptance of the Work by the District, and in the case of public works contract, effective upon the date of recordation pursuant to State Civil Code 3093.

ACQUISITION: The acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the District through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when District needs are established and includes the description of requirements to satisfy District needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling District needs by contract.

ADDENDUM/ADDENDA: Written errata, interpretations of or revisions to Bid Documents or Contract Documents issued by the District before the Bid opening. In the case of Request for Proposals, issued by the District before Proposal receipt.

ADDITIONAL WORK ORDER (AWO): Orders to add or delete work in contracts where the District has the unilateral right to direct the Contractor to do so in accordance with a Change Order clause of the basic contract. AWOs are a type of modification that involve only changes to schedules and/or specifications. Such changes must be within the general Scope of Work and are so considered if they do not constitute a cardinal change from the original purpose of the work or the intended method of achievement.

ASSISTANT GENERAL MANAGER - OPERATIONS: The individual responsible for directing and administering the Transportation, Maintenance Engineering, Rolling Stock and Shops activities.

BID: The proposal of offer of the Bidder for the Work when completed and submitted on the prescribed Bid Form, properly signed and guaranteed and which includes the Bid Schedule with all applicable Bid Items priced by the Bidder.

BIDDER: Any individual, firm, partnership, joint venture, corporation, or combination thereof, submitting a Bid for the Work contemplated, acting directly or through a duly authorized representative.

BIDDERS FILES: A compilation by the District of prospective Bidders, the names and addresses of which are recorded according to subject matter, obtained from requests for inclusion in the Bidders Files, listings of bid package holders and Bidders of previous procurements, minority business directories, other directories as appropriate, and sources suggested by technical staff and Consultants.

BIDDERS LIST: A compilation of names of prospective Bidders for a particular solicitation consisting of firms that requested and/or were sent a copy of the Bid Documents.

BID DOCUMENTS: The Invitation to Bid, Instructions to Bidders, the documents which when executed comprise the Contract Documents, and Forms for the submittal of Bids. In the case of Request for Proposals, the appropriate terms and conditions and Proposal Forms.

BID OPENING OFFICER: Individual to whom authority has been delegated by the District to receive and open bids and proposals. The overall responsibility resides with the District Secretary.

BID SAMPLES: Sample required by the District to be furnished by a Bidder as part of its bid to show the characteristics of a product offered in its bid to assure procurement of an acceptable product. These samples are required only when there are certain characteristics of the product which cannot adequately be described in the Specifications.

BIDDER'S SECURITY: The cash, cashier's check, certified check, or Bidder's Bond accompanying the Bid submitted by the Bidder, as a guaranty that the Bidder will enter into the contract with the District for the performance of the Work and obtain acceptable bonds and insurance if the Contract is awarded to the Bidder.

BID TABULATION: The written record of prices and other relevant information pertaining to the bids submitted in response to a solicitation.

BOARD OF DIRECTORS: The governing body of the District, consisting of a President and eight members who exercise and perform all powers, duties, functions, rights, and privileges vested in the San Francisco Bay Area Rapid Transit District pursuant to Public Utilities Code Section 28500, et. seq.

BRAND-NAME PRODUCT: A commercial product described by brand name and make, model number, or other appropriate nomenclature by which the product is offered for sale to the public by the particular manufacturer, producer or distributor. The brand name is used by the District only for the purpose of establishing identification and a general description of the item and to establish the essential, salient characteristics of an item to be acquired.

CAPITAL EQUIPMENT: Equipment having a useful life of at least one (1) year which costs a minimum of \$1,000.

CAPITAL PAYMENTS OFFICE (CONTROLLER): The office responsible for processing of partial and final payments.

CHANGE NOTICE: For public works contracts, a written notice issued to the Contractor by the Engineer specifying a proposed change to the Contract Documents. Unless otherwise expressly stated in the Change Notice, a Change Notice is a request for Contractor's proposal which may result in a Change Order.

For service agreements, a written unilateral document authorized by the District and issued to the Consultant directing the Consultant to perform changed work with cost negotiations to follow.

CHANGE ORDER: A written order authorized by the District and issued to the Contractor amending the Contract Documents with or without the Contractor's signature.

COMPARATIVE RFP PROCESS: Term used to describe the competitive selective process for Personal Service Agreements.

COMPETITIVE NEGOTIATION: The procurement process by which a Request for Proposals is publicized and proposals are solicited from a number of sources. Negotiations are normally conducted with more than one of the sources submitting offers, and either a fixed-price or cost-reimbursable type contract is awarded.

CONSULTANT: A firm or individual with whom a Personal Services agreement is entered into for design, inspection or other specialized type of service.

CONSULTANT AGREEMENT (INCLUDING ALL MODIFICATIONS AND SUPPLEMENTS THERETO): An agreement that the District enters into for professional services; i.e., Professional Engineering and Special Services, for Design, Construction Management and/or Technical Inspection of Facilities, including modifications and supplements to the agreement.

CONTRACT: The written agreement executed by the District and the Contractor/ Consultant covering the performance of the Work/Service and the furnishing of labor, materials, tools, and equipment in the construction and testing of the Work or performance of service, which incorporates by express reference the Contract Documents.

CONTRACT ADMINISTRATION: A system for ensuring that Contractors conform to the terms, conditions, and specifications of the contract and for ensuring adequate and timely follow-up.

CONTRACT CLOSE-OUT: A formal process whereby a settlement of the contract with the District by the Contractor is consummated. The close-out indicates that required services have been rendered to the District and that all payments for such services have been received. It does not release the Consultant from any claim which the District may have for negligence, malpractice, or breach of contract.

CONTRACT DOCUMENTS: The applicable Contract Drawings; Contract Book, containing the executed Contract; Contract Bonds; Addenda; Change Orders; General Conditions, Supplementary Conditions; those portions of the Standard Specifications referenced in the Contract Specifications; additional documents incorporated by express reference into the Contract Documents.

For agreements, it may also include the Standard Terms and Conditions.

CONTRACT DRAWINGS: The official plans, profiles, typical cross sections, general cross sections, elevations, and details listed or referenced in the Contract Documents or amendments thereto, and supplemental drawings approved by the Engineer, which show the locations, character, dimensions, and details of the Work to be performed.

CONTRACT ADMINISTRATOR: See Chapter I-6 (2.0).

CONTRACT MODIFICATIONS: Any in-scope, written alteration in the specifications, delivery point, rate of delivery, contract period, price, quantity, or other contract provision of an existing contract, whether accomplished by unilateral action in accordance with a contract provision or by a mutual action of the parties to the contract. It includes both bilateral actions and also unilateral actions such as change orders and notices of the exercise of an option. Sometimes referred to as a "contract amendment". (See also Supplemental Agreement for out of scope changes.)

CONTRACT SCOPE: Brief narrative of the objectives of the contract which is then expanded in the Scope of Work.

CONTRACTED PROCUREMENT SUPPORT: [Also see BART Contract Administrator's responsibility, Chapter I-6 (2.0).] A Consultant performing services for the District in an agency capacity, under the direction of a BART Project Manager, with the responsibility for Contract Administration of the "Extensions", System Renovation Programs and other District activity as appropriate. These special programs are the responsibility of either Transit Systems Development, West Bay Extensions, etc. As such, these Consultants report directly to BART Project Managers. BART Project Managers and their Consultant Contract Administrators rely upon functional guidance from BART's Contract Administration Division through active participation and oversight.

CONTRACTING OFFICER: The General Manager, or such person(s) as shall be designated in writing to act on the General Manager's behalf, having authority to approve contract actions. Whenever the term "Contracting Officer" shall appear in this document, the term shall also include the General Manager's authorized designee(s). The authority of the designee(s) varies significantly depending on the value and type of procurement action.

CONTRACTOR OR CONSULTANT (ALSO "THIRD PARTY"): The person or persons, firm, partnership, joint venture, corporation, or combination thereof, or other entity, private, municipal, or public, which, as an independent contractor, has entered into a Contract with the District, and which is referred to throughout the Contract Documents by singular number and neuter gender.

COST: The amount of money (estimated before award, actual after award) incurred for performance in accordance with contract terms and conditions. (See also "Total Cost" this glossary.)

COST ANALYSIS: Review and evaluation of a Contractor's cost or pricing data and of the judgmental factors applied in projecting from the data to the estimated costs in order to form an

opinion of the degree to which Contractor's proposed costs represent what performance of the contract should cost.

DESCRIPTIVE LITERATURE: Information such as catalog cuts, illustrations, drawings, and brochures which show the characteristics or construction of a product or explain its operation, furnished by a Bidder as part of its Bid to describe the products offered in its Bid and required only when the District deems such literature is needed to enable it to determine whether the products offered meet the specifications and to establish exactly what the Bidder proposes to furnish.

DESIGN-BUILD CONTRACT As defined in 49 U.S.C. Section 5325(d)(1), design-build contract means (1) a contract under which the District enters into a contract with a seller, firm, or consortium of firms to design and build a public transportation system, or an operable segment of such system, that conforms to specific performance criteria; and (2) may include an option to finance, or operate for a period of time, the system or segment or any combination of designing, building, operating, or maintaining such system or segment. Apart from the definition at 49 U.S.C. Section 5325(d)(1), a "design-build contract" also means a construction contract under which the District enters into a contract with a seller, firm, or consortium of firms both to design and construct a public transportation facility that is the subject of the contract.

DISTRICT or BART: The San Francisco Bay Area Rapid Transit District.

EXECUTIVE DECISION DOCUMENT (EDD): Document prepared by appropriate District personnel requesting authority to award a contract or agreement over \$100,000 or to execute a supplemental agreement over \$100,000, or to notify Executive Staff and seek approval for various contractual changes, etc.

FORMAL ADVERTISING (ALSO "SEALED BIDDING"): The procurement process by which sealed bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible Bidder whose bid, conforming with all the material terms and conditions of the Invitation for Bids, is lowest in price.

FULL AND OPEN COMPETITION: As used in this Manual, "full and open" competition is the process by which all responsible offerors are allowed to compete.

GRANTEE: The District in its role as a recipient of an outside source of funds, usually Federal funding.

INFORMATION FOR BIDDERS: The portion of the solicitation documents which provides prospective Bidders with instructions for submitting bids.

INVITATION FOR BIDS (IFB): The complete assembly of related documents furnished prospective Bidders for the purpose of competitive bidding, based on a clear and accurate description of the technical requirements for the material, product, or service to be procured.

LIQUIDATED DAMAGES: An amount fixed in the contract on a per unit-time basis which is assessed a Contractor when it fails to complete delivery, installation, services, or the work

specified in a contract within the contract period of performance or schedule, for those projects in which the extent of actual damages would be difficult or impossible to determine. Liquidated damages may be assessed even if, because of unrelated mitigating circumstances, no ascertainable damage appears to result from the Contractor's failure to perform in accordance with contract requirements.

MISCELLANEOUS PROCUREMENT CONTRACTS: Contracts other than purchase or public works contracts, including those involving a lease of equipment with or without an option to purchase.

MODIFICATION: An agreement negotiated between the parties to make changes to the contract that are considered within the general Scope of Work and do not constitute a change from the original purpose of the work or the intended method of achievement. For the purposes hereof, Additional Work Orders are considered modifications, even though the District may have a unilateral right to issue such orders.

NON-COMPETITIVE NEGOTIATION: The procurement process by which a proposal is solicited from only one source (either a sole source or a source providing critical advantages) or, after solicitation of multiple prospective sources, only one source is located; negotiations are held with the source; and a contract is awarded.

NOTICE OF ACCEPTANCE: A notice required by State Law that final payment of a construction or construction-related contract is to be made.

NOTICE OF AWARD (NOA): The written notice by the District to the successful Bidder/ Proposer stating that upon compliance by the successful Bidder/Proposer with the conditions precedent enumerated therein, within the time specified, the District will sign and deliver the Contract/Agreement.

NOTICE TO PROCEED: Written notice from the District to the Contractor/Consultant to proceed with the Work, in whole or in part as expressed therein.

OR EQUAL: A substitute to a brand name product identified in the specifications which is offered by a prospective Bidder and which is accepted by the District, in accordance with procedures stipulated in the Solicitation Documents, as equal to or better than a manufacturer's brand-name product.

ORIGINATING DEPARTMENT: See "User Department/Project Manager".

OVERHEAD OR INDIRECT COSTS: The necessary costs which cannot be specifically identified by a Contractor as directly attributable to contract work, usually the general costs of running the business.

PAYMENT BOND (LABOR AND MATERIAL): A bond required by law assuring payment by the prime Contractor of all Subcontractors supplying labor and material in the execution of a public work under a contract which exceeds \$25,000.

PERFORMANCE BOND: A bond securing fulfillment of all the Contractor's obligations under a contract, generally by paying a penal amount specified or by completion of the work.

PERIOD OF PERFORMANCE: The period of performance is the period of time allowed in the Contract Documents for completion of the work.

PERSONAL SERVICES AGREEMENTS: An agreement under which a person or a firm is hired for the primary purpose of obtaining the benefit of its professional knowledge, skills, or expertise.

PRE-BID OR PRE-PROPOSAL CONFERENCE: Conference during which representatives of Contract Administration Division or Purchasing Division, User Department/Project Manager, Office of Civil Rights, and (if needed) Legal Department to discuss questions posed by prospective Bidders or Proposers regarding the preparation of their bids or proposals. Responses to questions raised (if any) are formalized in an addendum to the contract and distributed to all holders of Solicitation Documents.

PRECONSTRUCTION MEETING (ALSO "KICKOFF MEETING"): For a construction project, a meeting with representatives of the Contractor and the District after award and before beginning the construction work. "Kickoff meeting" is also used to mean a meeting convened by the Procurement Department and attended by the Selection Committee which will include a brief presentation by the Project Manager on the project Scope of Work for an upcoming Consultant procurement.

PRICE: The cost paid to the contractor plus any fee or profit applicable to the contract type (e.g., award or incentive fees for cost-reimbursable contracts).

PRICE ANALYSIS: Process of examining and evaluating the reasonableness of a Bidder's or Proposer's price without evaluation of the separate cost elements and proposed profit of the Bidder/Proposer.

PRICE RELATED FACTORS: Considerations which, in addition to price, may be applicable in evaluation of proposals or bids such as (i) Foreseeable costs or delays to the District resulting from such factors as differences in inspection, locations of supplies, and transportation, (ii) Changes made or requested by a bidder in any of the provisions of an IFB, if the change does not constitute a ground for rejection, (iii) Advantages or disadvantages to the District that might result from making more than one award, (iv) Federal, state, and local taxes, (v) Origin of supplies and, if foreign, application of the Buy American Act or any other prohibitions on foreign purchases, (vi) Support and in-house costs over the system life for installing, operating, and disposing, where quantifiable and when these costs may differ for offers received, (vii) Conversion costs.

PRIME CONTRACTOR: See "Contractor".

PRIME CONTRACTOR PARTICIPATION: The minimum amount or percent of work to be performed by the Contractor on site with its own staff.

PROGRESS PAYMENTS: Reimbursement to a Contractor for costs incurred by it at a percentage or stage of completion of the work, primarily used when the contract requires a long time-period for completion of contract performance and there are definitive milestones.

PROGRESS REPORTS: Periodic reporting of progress. Specific requirements are set forth in the contract document.

PROJECT MANAGER: See Chapter I-6 (3.0).

PROPOSER AND PROPOSAL: Any individual, firm, partnership, corporation or combination thereof submitting a proposal for the work contemplated.

PUBLIC WORKS: For purposes of this Procurement Manual, any work for the District where either the District or the Contractor supplies material or goods and then the Contractor enters District property to apply or install it with such installation requiring affixing it to District property in such a manner to make it a fixture, i.e., more than just a "plug-in".

PURCHASE CONTRACT: Any contract or purchase order for the purchase of supplies, materials or equipment.

PURCHASE ORDER: A contractual agreement in which a promise to pay is offered in exchange for an acceptance effectuated by performance, e.g., the delivering of goods; generally used for inventory replenishment items or other acquisitions for which the District assumes a minimum exposure to liability, thereby negating the need for extensive non-standard terms and conditions. In some cases, a Purchase Order is bilaterally executed.

PURCHASE REQUISITION (P/R): A form used to initiate procurement action for materials, supplies, and/or services.

REQUEST FOR PROPOSALS (RFP): The solicitation format used to obtain proposals when an agreement is to be competitively negotiated.

REQUIREMENTS: A description of the attributes of the resource that the District needs. They can be stated in various forms as specifications, purchase descriptions, or statements of work. These can describe functions, performance, or design requirements. Requirements in an IFB or RFP shall state only the District's actual minimum needs and be designed to promote full and open competition.

RESIDENT ENGINEER: The individual responsible for managing public works contracts and as appropriate, purchase contracts so that the completion thereof, may be accomplished in accordance with contractual requirements. The Resident Engineer functions as the District's primary representative with the Contractor in all matters of the Contract including but not limited to performance of the Work, clarification of all discrepancies, resolution of question of fact, functioning as the focal point for all questions regarding utilities, etc. The procedures and policies which indicate how these activities are to be performed consistent with the District's procurement manual are contained in a separate document, the Resident Engineer's Manual.

RESPONSIBLE BIDDER/PROPOSER: A Bidder/Proposer having the financial resources, judgment, skill, integrity, experience and ability to fulfill successfully the requirements of the contract in the opinion of the District.

RESPONSIVE BID: A bid which conforms to all technical, business and legal requirements of the Bid Solicitation Package.

Revenue Contracts: A revenue contract is a contract in which the District provides access to the District's assets for the primary purpose of either producing revenues in connection with an activity related to public transportation, or creating business opportunities with the use of District property.

SCOPE OF WORK: Complete description clearly defining the supplies or services being procured, either through performance specifications setting forth the minimum acceptable performance standards expected of the end product, or through a description of tasks to be performed.

SEALED BIDDING: Sealed bidding is a method of contracting in which the District solicits competitive bids for requirements stated in an Invitation for Bids (IFB) and awards the contract to the responsible bidder whose bid, determined by price and price-related factors alone, is most advantageous to the District. Generally, no discussions or negotiations are allowed. The contract type must be firm-fixed-price or, under special circumstances, fixed-price with economic price adjustment. The sealed bidding process entails opening the bids in public to allow public inspection, evaluating them to ensure they meet the requirements of the IFB, making a determination of bidders' responsibility, and awarding a contract. Chapter III of this Manual describes sealed bidding policies and procedures in detail.

SITE VISIT (ALSO "INSPECTION OF PROJECT SITE"): District conducted tour of project site to acquaint prospective Bidders with the existing conditions at the site of the proposed work.

SOLE SOURCE CONTRACT: A contract for the acquisition of goods or services from the only Contractor/Vendor/Consultant capable, authorized, or available to provide the goods or services. A type of non-competitive contract.

SOLICITATION: As used in this Manual, means a written statement of the District's requirements for an acquisition as either an IFB or RFP.

SOURCE: A potential supplier of products and/or services to the District. Examples of sources are public corporations, private firms, non-profit organizations, states, and municipalities. However, sources for sealed bids and negotiated contracts are almost always public corporations or private firms. Vendor is the everyday term for source. After a solicitation is issued, the Manual refers to responding vendors as offerors in contracting by negotiation and bidders in sealed bidding. After the contract is awarded, the winning offeror or bidder is referred to as the contractor.

SOURCE SELECTION: Source selection as used in this Manual, applies only to contracting by negotiation. The term is not applied to sealed bidding since the award is made on price and price-related factors alone. It is the process of choosing the offeror whose proposal is most advantageous to the District, total cost and other factors considered. It involves evaluating offerors' proposals on both total cost and quality-related factors (e.g., technical quality, corporate experience, experience of proposed personnel). Chapter IV describes source selection procedures which apply to all competitively negotiated acquisitions. These procedures involve evaluating proposals according to factors stated in the Source Selection Plan (SSP) and the solicitation, requesting clarifications, holding discussions and negotiations, and selecting the source for contract award. This Manual also identifies two specific types of source selection procedures that may be used for selected acquisitions: (i) Formal source selection procedures -- These involve boards or other groups specifically established by the SSP for the purpose of proposal evaluation and selecting a contractor/consultant and (ii) alternative source selection procedures which limit discussions with offerors during the competition. Whether formal or alternative source selection procedures are chosen for a particular acquisition usually depends on the acquisition's dollar value.

SPECIAL TERMS AND CONDITIONS: A part of the Contract Documents. These clauses set forth legal, business and technical requirements that are particular to a specific contract.

SPONSORING DEPARTMENT: For purposes of this manual only, "Sponsoring Department" is to be used synonymously with "User Department".

STANDARD CONTRACT TERMS AND CONDITIONS: A part of the Contract Document. These clauses set forth the rights and responsibilities of the contracting parties and are standard in all contracts of a specific type, e.g. construction, purchase or repair.

SUPPLEMENTAL AGREEMENT: A written bilateral document which amends the contract to cause a change in the nature or magnitude of the contract but where there is sufficient justification to have the work performed by the original Contractor.

TECHNICAL EVALUATION MEMORANDUM: A document prepared by the User Department/Project Manager supporting the analysis of the Bidders'/Proposers' technical qualifications and responsiveness to the Solicitation Documents.

TECHNICAL SPECIFICATIONS: The technical requirements of a contract which stipulate what work is to be performed, how the work is to be performed, and technical standards the Contractor must meet.

THIRD-PARTY: Synonymous with the term "Contractor" or "Consultant"; usually used with respect to projects which include Federal funding.

THIRD-PARTY CONTRACT: Any contract or contract modification between the District and another person or firm. Frequently used more specifically to refer to a contract which is to be funded in whole or in part by the Federal Government (the original agreement as to the work to be performed is entered into by the Federal Government or other body and its grantee; if the grantee then contracts to have the work performed by another individual or firm, that contract is a "third-party contract").

TOTAL COST: Total cost includes (i) All prices for third party resources, including the basic and all optional quantities and contract periods, and optional resources, (ii) Support and in-house costs over the system life for installing, operating, and disposing, where quantifiable and when these costs may differ in offers and (iii) Conversion costs.

UNIT ITEM OVERRUN: Requirements for materials that are listed and bid on as a line item in the price schedule of a contract but that ultimately exceed the anticipated requirements originally specified in the contract document thereby increasing the cost of the contract. Substantial unit item overruns are considered a form of contract modification and must be approved in accordance with the standard procedures for the approval of modifications.

USER DEPARTMENT/PROJECT MANAGER (USER): The term used for any organizational entity within the District that initiates a request for procurement action and that will ultimately benefit from the goods or services acquired.

U.S. DEPARTMENT OF TRANSPORTATION - FEDERAL TRANSIT ADMINISTRATION: Federal grantor agency referred to in the contract documents as "FTA", under whose grants of financial assistance and grant contracts, work or services are performed or materials are provided by third parties.

WORK: The completed performance required by the contract documents, and includes all necessary labor and materials and equipment incorporated or to be incorporated in such performance.

WORK DIRECTIVES/TASK ORDERS (WD or TO): Scheduled or unscheduled orders to perform specific services, or provide goods, etc. over a specified contract period, for filling the District's requirements and used where the District anticipates recurring requirements but cannot predetermine precise quantities or services to be provided and it is inadvisable for the District to commit itself to a minimum quantity or compensation. Funds are obligated by each order (WD or TO), and not by the contract itself. Such orders must be within the general Scope of Work.

I-4 DELEGATIONS OF AUTHORITY

1.0 GENERAL MANAGER'S DELEGATION OF AUTHORITY FOR APPROVAL OF PURCHASE REQUISITIONS, CONTRACTS, PURCHASE ORDERS, MODIFICATIONS AND SUPPLEMENTAL AGREEMENTS

Pursuant to the authority granted to the General Manager by either the District Act, the Public Contract Code or the Annual Operating Budget Resolution, the General Manager has retained or has delegated authority and responsibility for the approval-in-concept, approval-for execution, and execution of Agreements, Contracts, Purchase Orders, Modifications and Supplemental Agreements, as shown in the tables that follow:

1.1 APPROVAL-IN-CONCEPT FOR MAJOR PROCUREMENTS

Unless otherwise approved by the Department Manager of Procurement, all proposed major procurements which are not identified as a line item in an approved operating or capital budget must receive Approval-in-Concept prior to commencement of procurement activity.

Major procurements consist of the following:

- Any procurement action with an award expected to exceed \$100,000 in total cost, or modification requiring Board action with the following specific exceptions:
 1. Inventory replenishment;
 2. Non-inventory replenishment, for commodity buys such as uniform items;
 3. Recurring support services, e.g. fuel, lubricants, or maintenance agreements for existing equipment or facilities;
 4. Requirements contracts applied as cost-effective alternatives to inventory stockage under reorder control; and
 5. Sale contracts for scrap, surplus or obsolete equipment, surplus non-hazardous material and inventory.

Major procurements, except those specifically identified by line and approximate cost in an approved operating or capital budget, must be approved in concept by the General Manager. An EDD must be submitted by the User Department/Project Manager through the management supervisory chain to the General Manager for signature.

Specifically budgeted procurements or other procurements falling outside the above definition of major procurements do not need the General Manager's Approval-in-Concept. Signatures of Departmental Managers authorized to request such procurements by requisition or memorandum must be filed with the Department Manager of Procurement, prior to initiating the contract execution process.

1.1.1 **COMPETITIVE SOLICITATIONS UNDER THE "BEST-VALUE" SOURCE SELECTION**

METHOD: Sponsoring Departments requesting source selections using the "Best-Value" method require General Manager approval prior to the initiation of the procurement. The Sponsoring Department shall submit written notification to the General Manager, or his designee, which addresses aspects of the procurement such as the following:

- (i) Nature/description of services or scope of effort;
- (ii) Rationale for the desire to utilize the Best-Value approach over other available procurement methods;
- (iii) Evaluation criteria or aspects related to the selection process which would be considered as part of a best value "trade-off"; and
- (iv) Range of prices (expressed as a percentage over the lowest priced, acceptable offer) within which the best value trade-offs would be applied.

A copy of the written notification and General Manager's concurrence shall be provided to the Department Manager of Procurement along with other initiating documents related to the procurement.

1.2 **ADVANCE PROCUREMENT PLANNING:** In order to ensure that the District meets its needs in the most effective, economical and timely manner, the use by District personnel of advance procurement planning and market research is strongly encouraged. The plan should address the technical, business, management, and other significant elements that will impact the procurement from its inception through its completion. Given the various elements of the plan, Sponsoring Departments should develop the plan based upon input from other appropriate organizational elements. The plan may be coordinated and developed orally or in writing depending upon the complexity of the procurement. Written plans are encouraged for procurement actions in excess of \$1,000,000 and when prepared, shall be provided to the Department Manager of Procurement prior to initiating the contract execution process.

1.3 **APPROVAL OF FORMAL PURCHASE REQUISITIONS:** Formal Purchase Requisition (P/R) is a request for material, supplies, equipment, or services that is issued by a District Department and approved by the Department Manager or designee. Authority to approve P/Rs over \$25,000 may only be approved by the Department Manager or designee. Notice of all delegations must be submitted to the Department Manager of Procurement.

1.4 **REJECTION OF BIDS AND PROPOSALS:** The District may reject any and all bids or proposals and readvertise at its discretion. The reason for rejection of a bid may be stated, for example the item/service is no longer needed, the User's needs have changed in such a manner as to require changes to the technical specifications, the solicitation was flawed in a material manner, or the low Bidder/Proposer is found to be not responsible or the bid/proposal is not responsive.

The final determination with respect to responsiveness, responsibility and the rejection of any and all bids/proposals shall be made by the individual within the limits of his or her authority to contract subject to the Legal Department's concurrence. For purchase contracts and public works

contracts, only the Board of Directors may reject bids in excess of \$100,000. For service agreements and miscellaneous procurement contracts, the General Manager, or his designee may reject any or all bids/proposals regardless of dollar level.

- 1.4.1 **APPROVAL TO WITHDRAW MISTAKE IN BID/PROPOSAL**: A Bidder for a sealed bid public works contract shall not be relieved of the Bid unless the District consents nor shall any change be made in the Bid because of mistake, but, in accordance with Section 5100 et seq. of the Public Contract Code, the Bidder may bring an action against the District in a court of competent jurisdiction in the county in which the Bids were opened for the recovery of the amount forfeited without interest or cost. If the plaintiff fails to recover judgment, the plaintiff shall pay all costs incurred by the public entity in the suit, including a reasonable attorneys' fee to be fixed by the court. The Bidder is cautioned that, pursuant to Public Contract Code Section 5105, a Bidder who claims a mistake or who forfeits his or her Bid Security shall be prohibited from participating in further bidding on the project in which the mistake was claimed or security forfeited.

If a mistake is made, it shall be the responsibility of the bidder to give the District a written notice of the mistake within five (5) calendar days after the opening of the bids. The notice shall specify in detail how the mistake occurred.

- 1.5 **APPROVAL FOR EXECUTION**: The matrices that follow indicate to whom authority to approve contract actions, execute contracts and contract changes, and terminate contracts has been delegated. The official who approves a contract becomes the Contracting Officer for that contract.

PROCUREMENT APPROVAL DEFINITIONS AND MATRIX

Definitions:

Competitive Procurement: Transactions conducted in a manner that provides maximum open and free competition consistent with applicable statutes and policies. This type of procurement includes contracts and purchase orders awarded by sealed bid for purchase contracts with an estimated expenditure of above \$100,000 and for public works contracts with an estimated expenditure above \$10,000. For miscellaneous procurement contracts with an estimated expenditure of above \$5,000, competitive procurements may be conducted by sealed bid or competitive negotiation. In those instances where the procurement is Federally-funded, the threshold for obtaining competitive quotes shall be \$2,500. In addition, small purchase procedures will be used for competitive procurements under the applicable \$10,000 or \$100,000 thresholds.

- **Purchase Contract** - Any contract or purchase order for the purchase of supplies, materials or equipment. Such contracts involving expenditures estimated to be above \$100,000 must be competitively bid unless there is a statutory exception. For purchase contracts under \$100,000, competitive procurement will be conducted using small purchase procedures.
- **Public Works Contract** - For purposes of this Procurement Manual, any contract for the construction of facilities and works involving an expenditure estimated to be above \$10,000. These requirements must be competitively bid unless there is a statutory exception, i.e., emergency. District property in such a manner to make it a fixture, i.e., more than just a "plug-in". Such contracts involving expenditures estimated to be above \$10,000 must be competitively bid unless there is a statutory exception, i.e., emergency.
- **Services Agreements** - Contracts for professional (including architectural/ engineering services) and technical services. The competitive procurement method used for these procurements is the Request for Proposal (RFP) process.
- **Miscellaneous Procurement Contract** - Any contract other than purchase, public works, or Personal Services contracts. Miscellaneous contracts include, but are not limited to, the lease or rental of equipment and non-professional/ non-Personal Services such as repair or maintenance services. Miscellaneous procurement contracts may be either competitively bid or competitively negotiated.

Non-Competitive Procurements - Procurements conducted by methods other than the competitive methods listed above for the various types of contracts.

- **Purchase Contract** - For purchase contracts estimated to involve the expenditure of more than \$100,000, non-competitive procurement methods may be used only where

there is statutory authority. Exceptions to public bidding requirements are permitted in the following circumstances:

- The existence of an emergency (Public Contract Code Section 20224) or a public calamity (Public Contract Code Section 20223).
- Sole Source. The item to be purchased is available only from a single responsible source and the purchase is to duplicate or replace supplies, equipment or materials in use (Public Contract Code Section 20227).
- Purchase at lower price on the open market (Public Contract Code Section 20222).
- Prototype equipment. The District wishes to conduct and evaluate operational testing of a product or technology, or a new source for it, or evaluate its service or reliability (Public Contract Code Section 20226).

For more detailed discussion, see Chapter VI - NON-COMPETITIVE PROCUREMENT.

- **Public Works Contract** - For public works contracts estimated to involve the expenditure of more than \$10,000, non-competitive procurement methods may be used only where there is statutory authority. For more detailed discussion, see Chapter VI - NON-COMPETITIVE PROCUREMENT.
- **Service Agreements And Miscellaneous Procurement Contracts** - For services estimated to cost over \$100,000, the criteria for using non-competitive procedures (i.e., forgoing the RFP) for Personal Services contracts are as follows:
 - (1) The services are obtainable from one source only,
 - (2) The provider of the services has unique qualifications,
 - (3) An emergency or other circumstances exist which make competition impractical or inappropriate, or
 - (4) Legal services, including retention of experts.

EXHIBIT "A"

Authorization Limits For Approving Contract Actions By Procurement Type

| Who Approves | Type of Action | Authorization Limit |
|--|--|--|
| Board of Directors | Competitive or non-competitive procurement actions related to Purchase Contracts, Public Works Contracts, Services Agreements and Miscellaneous Procurement Contracts. Modifications/change orders to procurement and construction contracts. Modifications/change orders to service agreements. | Actions above \$100,000 Actions exceeding \$200,000 or 10% of original commitment amount. Actions exceeding \$100,000 |
| General Manager/Deputy General Manager | Competitive or non-competitive procurement actions related to Purchase Contracts, Public Works Contracts, Services Agreements and Miscellaneous Procurement Contracts. Modifications/change orders to procurement and construction contracts. Modifications/change orders to service agreements. | Actions below \$100,000 Actions at or below \$200,000, not to exceed 10% of original commitment or those that do not constitute substantial alterations of the contract. Actions below \$100,000 |
| Department Manager of Procurement | Competitive or non-competitive procurement actions related to Purchase Contracts, Public Works Contracts, Services Agreements and Miscellaneous Procurement Contracts. | Actions below \$50,000 |
| Manager of Purchasing | Competitive contracts and modifications for purchases and miscellaneous procurements. Single bid or single brand name purchases and non-competitive awards. | Below \$50,000 Below \$25,000 |
| Manager of Contract Administration | Competitive contracts and modifications for services, miscellaneous procurements and public works. Single bid or single brand name procurements and non-competitive awards. | Below \$50,000 Below \$25,000 |
| Department Managers | Services, letter agreements and miscellaneous procurement contracts. | Below \$5,000 |

EXHIBIT "B"

Authorization Limits For Signing and Executing Contract Actions By Procurement Type

| Who Approves | Type of Action | Authorization Limit |
|--|--|--|
| Board of Directors | Competitive or non-competitive procurement actions related to Purchase Contracts, Public Works Contracts, Services Agreements and Miscellaneous Procurement Contracts. | Unlimited |
| | Modifications/change orders to contracts. | Unlimited |
| | Modifications/change orders to service agreements. | Unlimited |
| General Manager/Deputy General Manager | Competitive or non-competitive procurement actions related to Purchase Contracts, Public Works Contracts, Services Agreements and Miscellaneous Procurement Contracts. | Unlimited for actions approved by or noticed to the Board of Directors, and other actions below \$100,000. |
| | Modifications/change orders to procurement and construction contracts. | Unlimited for actions approved by or noticed to the Board of Directors, and other actions at or below \$200,000, not to exceed 10% of original commitment or those that do not constitute substantial alterations of the contract. |
| | Modifications/change orders to service agreements. | Unlimited for actions approved by or noticed to the Board of Directors, and other actions below \$100,000. |
| Department Manager of Procurement | Competitive or non-competitive procurement actions related to Purchase Contracts, Public Works Contracts, Services Agreements and Miscellaneous Procurement Contracts. | Unlimited for actions approved by or noticed to the Board of Directors, and other actions below \$100,000. |
| | Modifications/change orders to contracts. | Unlimited for actions approved by or noticed to the Board of Directors, and other actions below \$200,000, not to exceed 10% of original commitment or those that do not constitute substantial alterations of the contract. |
| | Modifications/change orders to service agreements. | Unlimited for actions approved by or noticed to the Board of Directors, and other actions below \$100,000. |

EXHIBIT "B", Continued

Authorization Limits For Signing and Executing Contract Actions By Procurement Type

| Who Approves | Type of Action | Authorization Limit |
|------------------------------------|--|---------------------|
| Manager of Purchasing | Competitive contracts and modifications for purchases and miscellaneous procurements. | Below \$100,000 |
| | Single bid or single brand name purchases and non-competitive awards. | Below \$50,000 |
| Manager of Contract Administration | Competitive contracts and modifications for services, miscellaneous procurements and public works. | Below \$100,000 |
| | Single bid or single brand name procurements and non-competitive awards. | Below \$50,000 |
| Department Managers | Services, letter agreements and miscellaneous procurement contracts. | Below \$5,000 |

PROCUREMENT: APPROVAL FOR EXECUTION
(continued)

EXHIBIT "C"

Approval of Construction Contract Modification and Change Order

| Who Approves And Executes | Limit |
|---|--|
| Resident Engineer - Operations Resident Engineer - Development | Modification/Change Orders to \$10K not to exceed 10% of original commitment. (2) |
| Chief Engineer - Operations Project Manager - Development | (1) Modification/Change Orders to \$50K not to exceed 10% of original commitment. (2) |
| AGM - Operations | (1) Modification/Change Orders to \$100K not to exceed 10% of original commitment or those that do not constitute substantial alterations of the contract. (2) |
| Executive Managers, Transit System Development and West Bay Extensions | (1) Modification/Change Orders to \$200K not to exceed 10% of original commitment or those that do not constitute substantial alterations of the contract. (2) |
| Department Manager of Procurement | Modification/Change Orders to \$200K not to exceed 10% of original commitment with bimonthly notice to the General Manager for Modification/Change Orders exceeding 7% of the original commitment on contracts exceeding \$2 million. |
| General Manager Deputy General Manager | Modification/Change Orders to \$200K not to exceed 10% of original commitment; Modification/Change Orders to \$200K exceeding 10% of original commitment and not constituting a substantial alteration of the contract with 7 calendar days notice to the Board of Directors prior to execution. |
| Board of Directors | Modification/Change Orders exceeding \$200K or 10% of original commitment. |

NOTES: (1) Authority pertains only to those contracts managed by subordinate Project Managers.
(2) Subordinate Authority may be revoked or modified to a lower amount by senior action as appropriate.

I-5 THE CODE OF ETHICS, DISTRICT CONTACT WITH CONTRACTORS/VENDORS, AND PUBLIC RECORDS ACT INQUIRIES

- 1.0 **GENERAL:** The importance of demonstrating constant and attentive sensitivity to ethics policies cannot be overemphasized. District employees are expected to demonstrate the highest standards of personal integrity, honesty, and truthfulness in all their public activities in order to inspire public confidence in the District.
- 2.0 **CODE OF ETHICS OVERVIEW:** All District employees must comply with the applicable Federal, State and local laws and rules pertaining to ethical conduct as well as all applicable District rules governing such conduct.
- 2.1 This Code of Ethics incorporates in their entirety the guidelines and prohibitions reflected in the District's Code of Conduct", contained in Section 2 as Attachment A.

The Code of Conduct incorporates the prohibitions of California law concerning conflicts of interest. Among them are the prohibitions against employees being "financially interested in any contract made by them in their official capacity" or being "purchasers at any sale or Vendors at any purchase made by them in their official capacity" (Government Code Section 1090 et. seq.) and the prohibitions and reporting requirements of the Political Reform Act of 1974. (See Government Code Section 87100 et. seq. and implementing regulations at Title 2 California Code of Regulations Section 18700 et. seq.) See Memorandum from the General Counsel to All District Employees dated August 12, 2010 discussing the breadth of these prohibitions, contained in Section 2 as Attachment B.

The Code of Conduct incorporates all applicable Federal requirements concerning ethical conduct, including the requirements of FTA Circular 4220.1F concerning real or apparent conflicts of interest on the part of employees who participate in the selection, award or administration of contracts supported by Federal funds and concerning solicitation or acceptance of gratuities, favors or anything of monetary value from Contractors, potential Contractors or parties to subagreements. (See excerpt contained in Section 2, Attachment B)

The Code of Conduct requires that Department Managers as well as employees involved in the award and administration of contracts review the proposed Scope of Work of their contracts and bring any potential "organizational conflicts of interest" to the attention of the Contract Administration Division. An organizational conflict of interest occurs when any of the following circumstances arise: (1) the contractor is unable, or potentially unable, to provide impartial and objective assistance or advice to the District due to other activities, relationships, contracts, or circumstances; (2) the contractor has an unfair competitive advantage through obtaining access to non public information during the performance of an earlier contract; (3) during the conduct of an earlier procurement, the contractor has established the ground rules for a future procurement by developing specifications, evaluation factors, or similar documents.

The Code of Conduct also contains guidelines and prohibitions concerning Political Activity, Use of Confidential Information, Use of District Employment and Facilities for Private Gain, Non-Discrimination and Affirmative Action, Incompatible Employment, Activities and Enterprises, Discussion of Future Employment, Activities Incompatible with Official Duties, the Report of Improper Government Activities, and Penalties for Non-Compliance.

2.2 This Ethics Code incorporates the "District Policy on Outside Employment" reflected in the General Manager's memorandum to All Employees, dated November 1, 1993, contained in Section 2 as Attachment C.

2.3 This Ethics Code incorporates the District's "Conflict of Interest Code" adopted by resolution of the Board of Directors pursuant to California Government Code Section 87300 et. seq., contained in Section 2, as Attachment D. This Code imposes additional financial interest disclosure, reporting and disqualification requirements upon employees in designated positions.

2.4 This Ethics Code incorporates the District's Operations Rules and Procedures Manual General Rules 133 and 109, which provide:

"Employees shall not solicit or accept any gift, gratuity or fee where there is any direct or indirect connection between the solicitation or acceptance and District employment." (Rule 133)

"Employees shall not commit any act tending to bring reproach or discredit upon the District." (Rule 109)

3.0 **VENDOR/CONTRACTOR CONTACTS**

3.1 **GUIDELINES:** To avoid misunderstandings with Vendors and Contractors, the following guidelines shall govern all District staff contacts with Vendors and/or Contractors:

3.2 **CONTACTS PRIOR TO ISSUANCE OF A SOLICITATION (IFB OR RFP):** Informational and market research contacts with prospective Contractors/Vendors are a valuable source of data to the District. These contacts are clearly necessary but should be guided by the exercise of good judgment. The primary pitfalls to be avoided are promises or implications of a future contract and requests for complimentary services or supplies which may create the impression of an obligation on the part of the District and may, in some instances, present conflict of interest problems. Some specific services or assistance from potential Vendors which should be avoided are:

- a. testing services
- b. custom drawings
- c. special investigations
- d. major demonstrations
- e. furnishing significant samples
- f. free trips to view products

If any of the above are required, coordinate the contact with the Department Manager of Procurement who will consult with the Office of the General Counsel concerning the potential for conflict of interest problems.

Vendors'/Contractors' requests for price histories or the opportunity to examine a part should be directed to the appropriate Supervisor or Manager in the Procurement Department. A Vendor's request will be honored except in the circumstances stated in Section 3.3 below.

Parts are not to be loaned/sold to Vendors as part of this process.

- 3.3 **CONTACTS DURING SOLICITATION, EVALUATION, NEGOTIATION AND AWARD:** All contacts with Contractors/Vendors that relate to a procurement that is in the acquisition planning, solicitation, evaluation, negotiation or award phase should be conducted through the Contract Administration Division or Purchasing Division. Technical questions, such as those relating to "or equals," will be directed by the Contract Administration Division or Purchasing Division to the Project Manager for evaluation, but under no circumstances may a District employee provide legal, business or technical guidance, interpretations or advice to the prospective Contractor/Vendor without the Contract Administration Division or Purchasing Division issuing that information in writing to all prospective Bidders/Proposers as an addendum. Any communication reflecting legal analysis or conclusion will be done only after consultation/consensus concerning such specific communication with the Office of the General Counsel.

It is Procurement Department policy that requests for pricing history will be handled in accordance with the provisions of the California Public Records Act. (see below). Once sealed bids have been opened for a new procurement however, the new bid prices may be made public to anyone who inquires after bid opening.

- 3.4 **PUBLIC RECORDS ACT REQUESTS:** Board Resolution No. 2267 provides that public records requests should be presented in writing to the District Secretary (see Section 3, Attachment E). However requests for procurement-related information which can be satisfied easily, e.g. bid summaries, should receive a response as soon as possible and without requiring an excessively formal petition from the requestor (a phone call or a brief note should usually suffice).

If there is a question as to whether certain types of procurement information may or must be released to a requestor, the inquiry should be raised at least to the level of the Department Manager of Procurement. Contract Administration/Purchasing Division will consult with the Office of the General Counsel prior to responding to any formal, i.e., written, Public Records Request and prior to honoring any request for information obtained from proposers or contractors which may constitute proprietary information. Any requests for documents related to matters in litigation shall be cleared through the Office of the General Counsel. All requests for public records should be expedited because there are legal time limits.

- 3.5 **CONTRACTOR/VENDOR ACCESS TO OPERATING FACILITIES:** With only a few exceptions, Contractors and Vendors are not allowed in the work area of any District operating facility. This includes Contractors/Vendors who are already supplying materials to the District, as well as those who are seeking initial orders. All such Contractors/Vendors should be referred to the Department Manager of Procurement.

Except for Contractors/Vendors who have a contractual responsibility to monitor their work, services or stocking levels at a facility, employees should not volunteer any information to a Contractor or Vendor concerning their product, the product of a competitor, or the workings of the District.

I-6 CONTRACTING OFFICER, CONTRACT ADMINISTRATOR/BUYER, AND PROJECT MANAGER

- 1.0 **CONTRACTING OFFICER**: Authority and responsibility to contract for authorized supplies and services are vested in the General Manager by either the Public Contract Code or the annual operating budget resolution (see Chapter I-4, Exhibit A). The General Manager may establish contracting activities and delegate broad authority to manage the District's contracting functions. Contracts or Agreements may be entered into and signed on behalf of the District only by contracting officers.

Contracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings. Contracting officers may bind the District only to the extent of the authority delegated to them.

No contract shall be entered into unless the contracting officer ensures that all requirements of law, regulations, and all other applicable procedures, including clearances and approvals, have been met.

- 1.1 **RESPONSIBILITIES**: Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the San Francisco Bay Area Rapid Transit in its contractual relationships.

Contracting officers shall also:

- (a) Ensure that sufficient funds are available for obligation;
- (b) Ensure that contractors receive impartial, fair, and equitable treatment; and
- (c) Request and consider the advice of specialists in audit, law, engineering, transportation, and other fields, as appropriate.

- 1.2 **REDELEGATION OF PROCUREMENT AUTHORITY BY THE DEPARTMENT MANAGER OF PROCUREMENT**: The Procurement Department shall establish and maintain a system for the selection, appointment, and termination of appointment of contracting officers. The Department Manager of Procurement or his designee, may select and act as an appointing official to appoint contracting officers and terminate their appointments. Procurement authority redelegated by the General Manager to others independently of the Procurement Department's authority, may not be modified or revoked by the Department Manager of Procurement

- 1.2.1 In selecting contracting officers, the appointing official shall consider the complexity and dollar value of the acquisitions to be assigned and the candidate's experience, training, education, business acumen, judgment, character, and reputation. Examples of selection criteria include:
- (i) Experience in District contracting and administration, commercial purchasing, or related fields;

- (ii) Education or special training in business administration, law, accounting, engineering, or related fields;
- (iii) Knowledge of acquisition policies and procedures, including this Procurement Manual and other applicable regulations;
- (iv) Specialized knowledge in the particular assigned field of contracting; and
- (v) Satisfactory completion of acquisition training courses.

Contracting officers shall be appointed only when a valid organizational need can be demonstrated. Factors to be considered in assessing the need for a contracting officer include volume of actions, complexity of work, and organizational structure.

- 1.2.2 Contracting officers whose authority will be limited to micro-purchases (see Chapter V) shall be appointed in writing in accordance with Procurement Department procedures. Other contracting officers shall be appointed in writing on a "Certificate of Appointment" herein referred to as a Warrant which shall state any limitation on the scope of authority to be exercised. The Procurement Department shall maintain files containing copies of all Certificates of Appointment that have not been terminated.
- 1.2.3 Termination of a contracting officer appointment or modification of their authority will only be in writing by the appointing official or a more senior official, unless the Certificate of Appointment contains other provisions for automatic termination or modification. Terminations or modifications may be for reasons such as reassignment, termination of employment, or abuse of procurement practices. No such action by the appointing official shall operate retroactively.

1.3 RATIFICATION OF UNAUTHORIZED COMMITMENTS

- 1.3.1 "Ratification," as used in this Procurement Manual, means the act of approving an unauthorized commitment by an official who has the authority to do so.

"Unauthorized commitment," as used in this Procurement Manual, means an agreement that is not authorized solely because the District representative who made it lacked the authority to enter into that agreement on behalf of the District

- 1.3.2 **IT IS DISTRICT POLICY THAT SPONSORING/USER DEPARTMENTS SHOULD TAKE POSITIVE ACTION TO PRECLUDE, TO THE MAXIMUM EXTENT POSSIBLE, THE NEED FOR RATIFICATION ACTIONS. ALTHOUGH PROCEDURES ARE PROVIDED IN THIS SECTION FOR USE IN THOSE CASES WHERE THE RATIFICATION OF AN UNAUTHORIZED COMMITMENT IS NECESSARY, THESE PROCEDURES MAY NOT BE USED IN A MANNER THAT ENCOURAGES SUCH COMMITMENTS BEING MADE BY DISTRICT PERSONNEL.**
- 1.3.3 The Sponsoring Department Manager may ratify contracting actions within his/her authority (up to \$5,000) subject to the following limitations:

- (i) Supplies or services have been provided to and accepted by the District or the District otherwise has obtained or will obtain a benefit resulting from performance of the unauthorized commitment;
- (ii) The resulting contract would otherwise have been proper if made by an appropriate contracting officer;
- (iii) The price of the unauthorized commitment has been determined to be fair and reasonable;
- (iv) The Sponsoring department/User department recommends payment and if necessary the General Counsel's office concurs in the recommendation;
- (v) Funds are available and were available at the time the unauthorized commitment was made; and
- (vi) The ratification is in accordance with any other limitations prescribed under District procedures.

The Department Manager of Procurement may ratify actions over the Sponsoring Department Manager's authority up to \$25,000.

- 1.4 DETERMINATIONS AND FINDINGS:** This Subpart prescribes general policies and procedures for the use of determinations and findings ("D&F's"). Requirements for specific types of D&F's can be found with the appropriate subject matter (See also Chapter VII).

"Determination and Findings" means a special form of written approval by an authorized official that is required by this manual, statute, or regulation, as a prerequisite to taking certain contracting actions. The "determination" is a conclusion or decision supported by the "findings." The findings are statements of fact or rationale essential to support the determination and must cover each requirement in the manual, statute or regulation.

A Determination and Findings shall ordinarily be for an individual contract action but may also may be executed for classes of contract actions. The approval granted by a D&F is restricted to the proposed contract action(s) reasonably described in that D&F. D&F's may provide for a reasonable degree of flexibility. Furthermore, in their application, reasonable variations in estimated quantities or prices are permitted, unless the D&F specifies otherwise.

While the contracting officer is normally responsible for preparing D&Fs, requirements and technical personnel from the Sponsoring departments are responsible for the accuracy and adequacy of the supporting factual information, which shall be furnished to the contracting officer in writing and may be requested in the form of a draft D&F.

- 2.0 CONTRACT ADMINISTRATOR/BUYER:** (Also CONTRACTED PROCUREMENT SUPPORT) A duly appointed individual who is subordinate to the District's Contracting Officer and Department Manager of Procurement and is responsible for all contractual actions less those specified elsewhere in the District's procedures.

The Contract Administrator and the Buyer to the extent that such activities are consistent with the District's collective bargaining agreements, may act as the Contracting Officer's business representative and are responsible, under the direction of the Department Manager of Procurement for soliciting bids and proposals; and with the Project Manager host the pre-bid and pre-proposal conferences, qualification reviews, proposal evaluation meetings; may conduct contract negotiation sessions; manage the non-technical aspects of post-award contract administration and as requested by the Project Manager, negotiate modifications and supplemental agreements. The Contract Administrator is responsible for retaining all official contract files.

The Contract Administrator and the Buyer to the extent that such activities are consistent the District's collective bargaining agreements, may also perform such tasks as writing, preparing and assembling contract documents; obtaining necessary pre-solicitation approvals; advertising RFPs and IFBs; issuing amendments; obtaining post-bid opening approvals for award; conducting investigations of proposed Contractors' past performance; conducting Consultant selection meetings for negotiated contracts and conducting negotiations; consulting with Project Managers to monitor Contractor's performance; and managing termination for default or convenience procedures whenever the need arises.

- 3.0 **PROJECT MANAGER**: A duly appointed individual, familiar with the procedures and requirements of the User Department/Project Manager who will be directly responsible for reviewing the technical specifications or scope of work, the technical administration of a contract including monitoring the Contractor's performance and performing those functions as specified by District procedures. The Project Manager has technical expertise at his or her disposal to assist in ensuring Contractor compliance with technical requirements of the contract. The Project Manager or his or her designee, approves or disapproves the technical acceptability and timeliness of the work completed and the invoices submitted by the Contractor.

The Project Manager or designee is also the person to whom reports of warranted equipment malfunctions or failures or any problems with the Contractor's performance are submitted, pursuant to the specific authority granted by the User Department/Project Manager. The Project Manager makes the initial request for Contractor remedial action. The Project Manager enters a record of the incident and actions taken in his files; the Contract Administrator or Buyer becomes involved when and if the lapse constitutes a serious, i.e., life-threatening, repetitive or unresolved, breach of Contractor's civil or contractual responsibility.

Should the Contractor fail to respond in a timely or adequate manner to rectify any problem, the Project Manager notifies the Contract Administrator or Buyer as appropriate that an apparent breach of the contract exists. After investigating the situation, the Project Manager takes any steps necessary and available to enforce the District's rights under the contract, to include withholding payment, imposing liquidated damages, negotiating and recommending a settlement, terminating the Contractor for default, or referring the matter for legal action.

TYPICAL TASKS: The Project Manager performs such tasks as:

- Familiarizes himself or herself with all terms and conditions of the contract, and seeks clarification from the Contract Administrator or Buyer of any contract provision which is not understood or subject to more than one interpretation;
- Monitors contract performance to insure that the requirements of the contract are satisfactorily executed by the Contractor;
- Brings to the attention of the Contractor all performances which are not in compliance with contract requirements, issues guidance on corrective action necessary to bring performance in line with contract requirements and thoroughly documents all performance problems;
- When deficient performance is not corrected, notifies the Contract Administrator or Buyer promptly in writing and provides sufficient documentation directing appropriate action;
- Maintains complete records of all actions taken pursuant to the Project Manager designation. These records include documentation of all inspections (announced and unannounced) and should be properly annotated to indicate the Contractor's acknowledgment of any notifications of deficiencies;
- Ensures that the Contractor performs no work outside the scope of the contract;
- Ensures that the Contractor understands and complies with District regulations pertaining to traffic, safety, and fire prevention;
- If District furnished property is to be provided, monitors the progress of the contract to assure that the District has met its contractual obligations and the Contractor is meeting his or her responsibilities for the care of the property;
- Informs the Contract Administrator or Buyer whenever a condition exists which may call for a decision resulting in a change in unit price, total contract price, quantity, quality or delivery schedule;
- Makes final technical inspection of work done by the Contractor and submits appropriate acceptance certificates when the specifications of the contract have been properly fulfilled;
- Makes unannounced spot checks to the job site to verify compliance with applicable labor standards.

The Project Manager and the Contract Administrator host the pre-bid and pre-proposal conferences and conduct investigations of proposed Contractor's past performance, and question prospective Contractors at the Qualification review or Consultant interview as to their technical capability to perform the contract.

I-7 REQUIREMENTS FOR LEGAL DEPARTMENT REVIEW

- 1.0 **GENERAL:** All terms and conditions covering all sealed bids, requests for proposals and negotiated contracts shall be reviewed by the Legal Department for legal sufficiency. The legal review shall include consideration of Federal, State, and local laws, rules and regulations as well as compliance with Board Rules and Resolutions and District policy.

The legal review should not be used to substitute judgment on non-legal matters. Wherever feasible, and as recommended by the User Department/Project Manager, deference to industry custom and language usage should be permitted. Procurement Department staff is responsible for exercising informed, sound business judgment in the development and approval of contract documents.

Standardized solicitation and contract forms will be developed and maintained by the Procurement department as procurement forms with concurrence by the Legal department and other District offices as appropriate.

- Where procurement actions are contemplated with (i) awards estimated to be less than \$50,000, and (ii) standardized forms are being used without substantive changes and (iii) no significant legal issues are raised, legal review will not be necessary.
- Where the estimated award will be \$50,000 or greater, regardless of the use of standardized procurement forms or legal issues, legal review will be necessary.

Chapter IV contains two tables which depict how certain of the responsibilities for the District's negotiated procurements are divided between the Legal department and the Divisions of the Procurement Department.

- 2.0 **LEGAL REVIEW OF DRAFT DOCUMENTS AND APPROVAL AS TO FORM:** The results of the Legal Department's review of proposed solicitation or contract documents are sent to the Contract Administration Division or Purchasing Division in the form of a memorandum or notations on the draft. The Contract Administration or Purchasing Division as appropriate is responsible for making all changes which are made a condition of legal approval as to form.
- 3.0 **REVIEW OF CONTRACT CHANGES PRIOR TO EXECUTION OF THE CONTRACT:** Occasionally, in the case of negotiated procurements, after negotiations have been concluded and the proposed contract has been approved as to legal form and sent to the Contractor for signature, the Contractor may suggest or insert changes to the proposed contract, errors may be found, or further negotiations may be necessary. If this occurs after Contractor execution of the contract, the contract should usually be returned to the Legal Department with appropriate notations referring to the problem(s) to ensure that the legal integrity of the documents has not been affected. If the changes clearly do not affect the legal integrity of the document (such as typographical or simple technical or simple business changes), this review is not required.

Approval of such simple Contractor's changes will be accomplished by initialing of corrections by both the Contractor and the Contracting Officer. Both sets of initials must be verified by the Contract Administrator or Buyer in all appropriate places before final distribution of the contract copies. If the changes substantially affect the scope or terms of the contract, further negotiations may be necessary. If further negotiations are unsuccessful, the procurement may be canceled. Substantive changes by the Contractor should be reviewed by Legal and if accepted by the District, incorporated into a clean document before execution by the District.

I-8 DISADVANTAGED BUSINESS ENTERPRISE POLICY

- 1.0 **GENERAL POLICY**: It is the policy of the District, pursuant to the provisions of Federal and State laws and regulations, as implemented by directives of the Board, to promote the utilization of Disadvantaged Business Enterprises ("DBEs") to the maximum extent feasible in all aspects of the District's third-party procurement and contracting processes.

In furtherance of this DBE policy, the District requires that all requests for proposals ("RFPs") and other proposed contracts and agreements be forwarded to the Office of Civil Rights for the establishment of DBE goals, if appropriate, prior to the release of the RFP or advertisement of the contract.

All procurement actions with no DBE participation will require a written determination prepared by the User Department/Project Manager, approved by the Contracting Officer and the Office of Civil Rights. (See Chapter II)

Specific responsibility for developing and implementing a DBE program is delegated to the Department Manager of the Office of Civil Rights. Responsibility for creating and maintaining a climate that will foster and promote DBE participation is shared by all the employees of the District.

The procedures for establishing DBE goals will be coordinated through the District's Office of Civil Rights.

A written Disadvantaged Business Enterprise Program is on file in the Office of Civil Rights at 300 Lakeside Drive, 18th Floor, Oakland, California 94612, telephone no. (510) 464-6100. The Program will be available for review upon request from Monday through Friday between 8:15 A.M. to 5:00 P.M.

- 2.0 **OFFICE OF CIVIL RIGHTS STEPS**: Affirmative action steps taken by the District include, but are not limited to the following:

1. Making lists of RTCC-certified DBEs available to Bidders;
2. Encouraging or requiring that Bidders include DBE participation or make good faith efforts to do so in their contracts and agreements;
3. Encouraging Bidders to divide work, where appropriate, into economically feasible tasks or quantities so as to permit maximum DBE participation;
4. Targeting advertisement notices in minority owned newspapers such as the Sun Reporter, Philippine news, California Voice, El Mundo Spanish Weekly in addition to other newspapers of general circulation.

3.0 **SUPPLEMENTAL AGREEMENTS, MODIFICATIONS AND CHANGE ORDERS:** In order to speed up coordination, all EDDs requesting approval for a supplemental agreement to an existing contract shall contain the following information on DBE firms:

- Name of DBE(s) participating in the original contract
- Total amount awarded to the DBE in the original contract
- Impact of this change on the total DBE participation in the Contract

If there were no DBE goals in the original contract, the EDD should have a statement to that effect.

I-9 NON-DISCRIMINATION PROGRAM FOR SUBCONTRACTING FOR NON-FEDERALLY ASSISTED CONTRACTS

- 1.0 **GENERAL POLICY:** It is the policy of the District to ensure that bidders in non-federally funded contracts and agreements do not discriminate or give a preference in the award of subcontracts on the basis of race, national origin, color, ethnicity or gender.

Under the Non-Discrimination Program for Subcontracting (“NDP”), a bidder is not required to subcontract any portion of the work. If the bidder does subcontract a portion of the work a determination is first made as to whether the bidder has listed subcontracts in dollar amounts which reflect the availability of MBEs and the availability of WBEs, i.e., the result that would be expected in the absence of discrimination. IF this result is achieved, the bidder is presumed not to have discriminated. If the result is not achieved, the bidder must supply information from which it can be determined if the bidder has discriminated. A bidder can be found non-responsive only if a finding is made, after a hearing, that the bidder has discriminated. A bidder cannot be found non-responsive simply because it did not select subcontractors in a manner which reflects MBE and WBE availability. Nor can the bidder be found non-responsive because it did not undertake specified good faith efforts to obtain MBE or WBE subcontractors.

- 2.0 **OFFICE OF CIVIL RIGHTS:** Specific responsibility for developing and implementing the NDP is delegated to the Department Manager of the Office of Civil Rights including establishing the MBE and WBE availability percentages for contracts and agreements.

I-10 ISSUANCE OF NOTICE TO PROCEED PRIOR TO AGREEMENT EXECUTION

For all agreements other than for purchase contracts and public works contracts, it is the policy of the District to issue Notices to Proceed only after agreement execution. For purchase contracts and public works contracts, see Chapter I-4. In those situations where it is in the best interests of the District, the Department Manager of Procurement is authorized to issue a Notice to Proceed for an agreement which is not yet fully executed, provided that Board Approval-for-Award, if required, has already been obtained and/or that neither the Contract Administrator nor any other District personnel is aware of any substantive reason why the agreement would not ultimately be executed. The Notice to Proceed may, if appropriate, establish limitations on the period of time for which the Notice is effective or the permissible level or rate of expenditures by the Consultant, e.g., ninety (90) days and \$100,000, in the absence of an executed document.

I-11 LEASE VS. PURCHASE ALTERNATIVES

It is usually less economically advantageous for the District to lease equipment than to purchase it. There are, of course, exceptions to this rule. For example, short term leases of equipment required for a unique task may, in fact, be reasonable and economically sound. In some cases, it is easier to have equipment maintained if it is leased, not bought. However, long term leases and leases of items that should be capitalized but cannot because of budget rigidities are often not prudent from an economic perspective. In view of the above, a Purchase Requisition for leasing equipment must include an analysis addressing the economics of lease vs. purchase. The extent of the analysis should be appropriate to the size and complexity of the procurement.

I-12 RELEASE OF INFORMATION

See Chapter I-5 regarding requests for information under the Public Records Act.

I-13 **CONTRACT TYPES**

There are two basic categories of contract types: the fixed-price category and the cost-reimbursement category. The fixed-price category is the only type of pricing arrangement that can be used in sealed bid procurements.

In negotiated procurements, either the fixed-price or the cost-reimbursement type contract can be used.

The primary difference between the two categories of contract types is risk.

- In the fixed-price category, the risk of performing the contract for a lump sum falls on the Contractor. If there is an unanticipated cost overrun, the Contractor -- not the District -- must pay for it.
- In the cost-reimbursement category, the burden of risk falls on the District, which must not only pay the Contractor any guaranteed fee, but must also pay allowable and allocable costs - - whether they exceed or fall short of original estimates -- but not to exceed the ceiling specified in the contract.

The District shall not use a cost-plus-a-percentage-of-cost-contract where Federal funds are utilized.

The following list includes the most commonly used contract types. The Contract Administration Division will identify which contract type is most appropriate for a specific procurement. For additional information on other types of contracts and procurements where they are appropriate, see generally Federal Acquisition Regulations (FAR) Part 16.

Firm Fixed-Price (FFP)

This contract type is characterized by a lump-sum price not subject to adjustment on the basis of the Contractor's cost experience in performing the contract. The risk of performance falls on the Contractor. This type of contract should be used for buying commercial/commercial-type products or other supplies or services where reasonably definite functional or detailed specifications exist and the Contracting Officer can establish fair and reasonable prices at the outset, that is:

- There is adequate price competition;
- There are reasonable price comparisons with prior purchases of the same or similar supplies or services made on a competitive basis or supported by valid cost or pricing data;

- Available cost or pricing data permits realistic estimates of the probable cost of performance; or
- Performance uncertainties can be identified and reasonable estimates of their cost impact can be made, and the Contractor is willing to accept a firm fixed price representing assumption of the risks involved.

(NOTE: Adjustment to the lump-sum price can be made if based on the terms and conditions of the contract, i.e., Changes, Changed Conditions, etc.)

Fixed-Price with Escalation (FP)

This contract type is characterized by a lump-sum price subject to upward or downward adjustment depending on contingencies specified in the contract. Economic price adjustments are of three general types:

- Adjustments based on established prices.
- Adjustments based on actual costs of labor or material.
- Adjustments based on cost indexes of labor or material.

See generally the guidelines set forth in 48 CFR 16 for application, limitation and recommended contract clauses.

Cost Sharing

The Contractor receives no fee and is reimbursed for only a portion of its costs. This type of contract is used where the benefits of the undertaking accrue to both parties.

Cost-Plus-A-Fixed Fee (CPFF)

The Contractor receives a set fee and is reimbursed for all costs allowable under established cost principles. This type should be used only when uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed price contract.

No cost-plus-fixed-fee contract shall be awarded unless:

- The Contractor's accounting system is adequate for determining cost applicable to the contract; or
- Appropriate District surveillance during performance will provide reasonable assurance that efficient methods and cost controls are used.

Time-and-Materials (T&M)/Labor-Hour (L-H)

These are contracts for providing supplies or services on the basis of direct-labor hours at specified fixed hourly rates and materials at cost. It is the least preferred method of contracting. This type of contract shall be used with caution and only with approval of the Department Manager of Procurement, or his designee and generally for compensation limits under \$100,000.

This type of contract may be used only when it is not possible at the time of contract execution to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence. The same requirements for adequate accounting and surveillance systems as indicated above for CPFF contracts apply to the T&M and L-H types. (NOTE: The Labor-Hour contract differs from the T/M contract in that no materials are supplied by the Contractor.)

Letter of Intent Contract

This is an interim type of contractual arrangement for use in contracts other than purchase contracts and public works contracts (see Chapter I-4) which gives the Contractor a limited Notice to Proceed. It is used in negotiated procurements only when a definitized fixed-price or cost-reimbursement contract cannot be negotiated in sufficient time to meet the District's needs. Without Board approval, such Letters of Intent may not exceed \$100,000. It shall contain appropriate provisions to protect the expenditure of funds, such as the following:

- The date that the Contractor will have to commence performance;
- The extent and method of payment in the event of termination either for the convenience of the District or for default;
- The provision that the Contractor is not authorized to expend monies or incur obligations in excess of the stated amount;
- The type of contract anticipated;
- As many definitive contract provisions as possible;
- The Contractor's obligation to provide such price and cost information as may reasonably be required by the District; and
- The prompt entry into good faith negotiations by the Contractor and the District to reach agreement and execute a definitive contract.

Normally this time period will be 60 days and in no event longer than 90 days without approval of the Contracting Officer.

This type of agreement may be used only after approval pursuant to Chapter I-4 hereof and shall not --

- Commit the District to a definitive contract in excess of the funds available at time of issue; or
- Be amended to satisfy a new requirement unless that requirement is inseparable from the existing letter contract. Any such amendment shall be subject to the same requirements and limitations as a new letter contract.

I-14 PROTESTS

- 1.0 **GENERAL:** Protests based upon restrictive specification or alleged improprieties which are apparent prior to bid opening will only be accepted from prospective Bidders or Proposers whose direct economic interest would be affected by the award of a contract or by failure to award a contract. Except for protests on: (a) competitively negotiated contracts subject to Public Contract Code Section 20229.1; (b) competitively bid design and construction contracts under Section 20221.1 of the California Public Contract Code; (c) design-build contracts, pursuant to California Public Contract Code Section 20209.5 et seq.; and contracts pursuant to California Government Code Section 5956 et seq., such protests must be received by the District Secretary between seven (7) and twenty one (21) calendar days prior to bid opening as indicated in the solicitation document. The Department Manager of Procurement will decide all pre-bid protests. He/she may submit the decision to the General Manager for approval when in his/her discretion, the General Manager should be advised of significant or critical issues. For contracts requiring Board approval, if the pre-bid protest is denied, the EDD shall include a short description of the pre-bid protest and its resolution.

Protests filed after the Board has authorized the General Manager to award a contract (agreement), subject to the protest procedures, must be received by the District Secretary within seven (7) calendar days after receipt of the notice of the Board action by the protester. The General Manager will decide any such protest.

Protest submissions should be concise, logically arranged and clearly state the grounds for the protest. Protests must include at least the following information:

- Name, address, and telephone number of protester.
- Identification of the solicitation or contract number.
- A detailed statement of the legal and factual grounds of protest including copies of relevant documents.
- A statement as to what relief is requested.

Additional information required by FTA for Federally funded contracts:

- Project number.
- Contain a statement of the grounds for protest and any supporting documentation. This should detail the alleged failure of the District to have written protest procedures, alleged failure of the District to follow those procedures, the alleged failure of the District to review a protest, or the alleged violation of Federal law or regulation and be fully supported to the extent possible.

- Include a copy of the local protest filed with the District and a copy of the District's decision, if any.

1.1 **NOTIFICATION REGARDING RECEIPT OF PROTESTS:** In accordance with the provisions of FTA Circular 4220.1F, as revised, the Department Manager of Procurement or his/her designee, will be responsible for collecting, consolidating and providing information regarding protests of Federally funded procurements on a quarterly basis for inclusion as a part of the FTA quarterly Progress Report process.

2.0 **PROTESTS FILED BEFORE BID OPENING (Generally Specification challenges):** Any timely pre-Bid protest will be resolved by the District which will issue a written decision specifying the grounds for allowing or denying the protest prior to Bid opening. If the protest is allowed, the Bid opening date will be postponed and an addendum issued to the Solicitation documents or at the sole discretion of the District, the advertisement may be canceled. If the protest is denied, Bids will be received and opened on the scheduled date unless in a Federally funded contract a protest is filed with the FTA within five (5) working days after a final decision is rendered under the District's protest procedure.

3.0 **PROTEST FILED AFTER AUTHORIZATION TO AWARD:** When the Board has authorized the General Manager to award a contract (agreement) subject to the protest procedures, the Department Manager of Procurement shall promptly notify all Bidders of the Board action. The notification will be transmitted by such means as will provide verification of the time of receipt. If a timely protest is received from a Bidder, the protest will be transmitted to the Bidder or Proposer recommended for award.

The Board will be advised in writing of the grounds of any protest on any award authorized by the Board, and the decision. The decision of the General Manager will become final ten (10) days after mailing to the Board, unless there is a request made pursuant to the protest procedures that the protest be reconsidered by the full Board. If the protest is brought before the Board, the Board will hear the parties, consider all issues raised and take such action on the merits as it considers appropriate.

4.0 **PROTESTS ON NEGOTIATED PROCUREMENT UNDER CALIFORNIA PUBLIC CONTRACT CODE 20229.1:** Any person who submits, or plans to submit, a proposal for negotiated procurement under California Public Contract Code Section 20229.1, may protest. Any protest shall contain a full and complete written statement specifying in detail the grounds of the protest and the facts supporting the protest. Protestors shall have an opportunity to appear and be heard before the District Board of Directors prior to the opening of proposals in the case of protests based on the content of the Request for Proposals, prior to final award in the case of protests based on other grounds or the renewal of a protest based on the content of the Request for Proposal.

- Protests regarding RFP content:** Protests based on the content of the RFP must be filed with the District Secretary within ten (10) calendar days after notice of the RFP is first advertised. The District will issue a written decision on the protest prior to opening of proposals. A protest

may be renewed by refiling the protest with the District within fifteen (15) calendar days after the mailing of the notice of the recommended award.

- b. Protest on grounds other than RFP content: Any Proposer may protest the recommended award on any ground not based on the content of the RFP by filing a protest with the District Secretary within fifteen (15) calendar days after the mailing of the notice of recommended award.

5.0 **PROTESTS FILED AFTER AWARD**: A protest received after award should be reviewed by the Department Manager of Procurement and the office of the General Counsel. The Contractor will at any event be furnished with the notice of the protest and the basis therefor. Also, when it appears likely that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the District's interest, the Department Manager of Procurement should consider a mutual agreement with the Contractor to suspend performance on a no-cost basis.

6.0 **PROTESTS TO FTA**:

- a. FTA will only review protests regarding the alleged failure of the District to have written protest procedures or alleged failure to follow such procedures.
- b. Alleged violations on other grounds are under the jurisdiction of the appropriate State or local administrative or judicial authorities. Alleged violations of a specific Federal requirement that provides an applicable complaint procedure shall be submitted and processed in accordance with that Federal regulation. See, e.g., Buy America Requirements, 49 CFR Part 661 (Section 661.15); Participation by Minority Business Enterprise in Department of Transportation Programs, 49 CFR Part 26.

Protests must be filed with the District in accordance with the District's protest procedures and requirements. Following an adverse decision by the District, the protester may file a protest with FTA. Protests should be filed with the San Francisco FTA Region IX Office in San Francisco and concurrent copies sent to the District. To expedite handling within FTA, the address should include "Attention: Bid Protest." See Section 1.0 herein for information to be provided to FTA when submitting a protest.

6.1 **TIME FOR FILING WITH FTA**:

- 6.1.1 Protesters shall file a protest with FTA not later than five (5) working days after a final decision is rendered under the District's protest procedure. In instances where the protester alleges that the District failed to make a final determination on the protest, protesters shall file a protest with FTA not later than five (5) working days after the protester knows or should have known of the District's failure to render a final determination on the protest.
- 6.1.2 The District shall not award a contract earlier than five (5) working days following its decision on a bid protest except in accordance with the provisions and limitations of Section 6.2.1

herein. After five (5) working days, the District shall confirm with FTA that FTA has not received a protest on the contract in question.

- 6.1.3 Refer to FTA Circular 4220.1F, as revised, for a full discussion of FTA's requirements and procedures pertaining to protests.

6.2 **OTHER FTA PROTEST PROCEDURES:**

6.2.1 Withholding of Award: When a protest has been timely filed with the District before award, the District will not make an award prior to five (5) working days after the resolution of the protest, and if a protest has been filed with FTA, during the pendency of the protest, unless the District determines that:

- a. The items to be procured are urgently required; or
- b. Delivery or performance will be unduly delayed by failure to make the award promptly; or
- c. Failure to make prompt award will otherwise cause undue harm to the District or the Federal Government.

In the event that the District determines that the award is to be made during the five (5) working days following the local protest decision or if a protest has been filed with the FTA, during the pendency of a protest, the District will notify FTA prior to making such award. FTA will not review the sufficiency of the District's determination to award during the pendency of a protest prior to FTA's bid protest decision. FTA reserves the right not to participate in the funding of any contract awarded during the pendency of a protest to FTA.

7.0 **PROTESTS ON: COMPETITIVELY BID DESIGN AND CONSTRUCTION CONTRACTS UNDER SECTION 20221.1 OF THE CALIFORNIA PUBLIC CONTRACT CODE; DESIGN-BUILD CONTRACTS, PURSUANT TO CALIFORNIA PUBLIC CONTRACT CODE SECTION 20209.5 et seq.; CONTRACTS PURSUANT TO CALIFORNIA GOVERNMENT CODE SECTION 5956 et seq.**

Protests on above contracts will be processed in accordance with the procedures specified in the District Protest Procedures.

Pages 51 through 59 are reserved.

CHAPTER II

INITIATING A PROCUREMENT

CHAPTER II INITIATING A PROCUREMENT

II-1 GENERAL

- 1.0 **PURCHASE REQUISITION (P/R) REQUIREMENT:** Outside of inventory replenishment, there will be no procurement action taken other than that provided for in Chapters VII through IX, until a properly executed, fully or contingently funded, formal purchase requisition (P/R) and adequate supporting documentation ("Initiating Documents") are physically received by the Procurement Department which then will forward it to the Contract Administration Division or Purchasing Division as appropriate. See Chapter II-2, Section 6.0 herein for guidance on lead time required to complete a procurement action.

The only exceptions to the fully funded P/R requirement pertain to those procurements that are intended for (i) Task Orders, (ii) requirements contracts, (iii) other than the first year of a multi-year operating budget contract or agreement and (iv) any other contingently funded procurement approved by the Department Manager, Procurement.

- 1.1 **INVENTORY REPLENISHMENT REQUIREMENTS:** Replenishment of District inventory will not be initiated until a properly executed, fully or contingently funded, formal inventory requisition ("Reorder Notice") and adequate supporting documentation ("Initiating Documents") are physically received by the Procurement Department which then will forward it to the Contract Administration Division or Purchasing Division as appropriate.
- 2.0 **APPROVAL-IN-CONCEPT REQUIREMENTS:** Any procurement that is considered a Major Procurement and is not a Pre-Approved Procurement, as summarized in Chapter I-4, Section 1.1, must be submitted to the General Manager for Approval-in-Concept before the procurement process can begin. The Executive Decision Document ("EDD") (contained in Section 3, as Attachment F) on which the General Manager grants Approval-in-Concept must accompany any request for procurement action.

II-2 PURCHASE REQUISITION PROCEDURES

- 1.0 **PURPOSE:** The purpose of this part is to outline the method by which materials and supplies (other than those available in the District's inventory), public works, and services will be requested and to indicate the manner in which purchase requisitions will be prepared and controlled.
- 2.0 **SCOPE:** Subject to the requirements of Chapter II-1 above, properly executed Formal Purchase Requisitions (P/Rs) (contained in Section 3, as Attachment G) are required throughout the District to initiate procurement action for materials, public works, supplies, services and all modifications thereto. The User Department/Project Manager shall complete the P/R using the standard form and providing all information requested thereon. The P/R must be signed by the Head of the User Department/Project Manager, or designee (authority to approve P/Rs over \$25,000 cannot be delegated below the Department Manager level). All Formal Purchase Requisitions must contain information concerning the intended end use of all items being requisitioned.

Detailed Technical Specifications, Purchase Descriptions or Scope of Work (as applicable) as well as cost estimates must accompany Formal Purchase Requisitions submitted to the Procurement Department (see II-4 of this Chapter). Requirements that preclude any DBE participation will require justification at this time.

- 3.0 **USER RESPONSIBILITIES:** The individual in the User Department/Project Manager initiating the P/R is responsible for the accuracy and adequacy of information supporting the request. Requests should be submitted early enough (see Chapter II-2, Section 6.0) to have a purchase order or contract prepared, reviewed, and issued in time for the material or service to be obtained when needed. Requests for procurement action may be returned to the User if the necessary documentation is missing or incorrect, e.g. inadequate technical specifications, no EDD or budget reference granting approval-in-concept, no non-competitive procurement justification, etc. Users should keep copies and a log to help themselves in following up on the status of their requests.
- 3.1 **USERS' APPROVAL REQUIREMENTS:** The User Department/Project Manager shall complete the P/R in accordance with the standard forms, providing all information requested thereon. The requisition must be signed by the Head of the User Department/Project Manager or designee(s). Each Department Manager must formally designate those persons authorized to sign P/Rs, if other than himself/herself, indicating if there is any dollar level limitation to this authority, and submit their designations to the Department Manager of Procurement. All requisitions must contain information concerning the intended end use of all items being requisitioned.
- 3.2 **ADDITIONAL APPROVAL REQUIREMENTS:** Any User Department/Project Manager requesting the procurement of chemicals or safety equipment (e.g. solvents, oils, cleaners, epoxies, or welding rods) must submit the requisition to the System Safety Department for review and approval prior to sending the request to the Procurement Department.

Similarly, any User Department/Project Manager requesting reproduction equipment must have the Real Estate Department approve the procurement requisition.

For testing or computer equipment, software or computer services, Department of Information Technology (IT) approval is required on the purchase requisition.

For the leasing of, or acquisition of, any real property or directly related services such as parking charges, etc., Department Manager, Real Estate, or his/her designee, approval is required on the purchase requisition.

All purchase requisitions for capital-funded procurements, including FTA-funded procurements, must be approved by the Capital Program Control Division of the Executive Office of Budget and Project Management prior to submission to the Procurement Department. To preclude incurring ineligible costs, bids or proposals usually should not be solicited prior to grant approval.

3.3 **PROCUREMENT DEPARTMENT PROCEDURES:** All P/Rs must be sent by the User Department/Project Manager to the Procurement Department to be logged in. The Procurement Department will forward the P/R to either the Contract Administration Division or the Purchasing Division which will procure the required materials, supplies, or services as specified on the P/R and in accordance with District policies.

4.0 **PREPARATION GUIDELINES:**

4.1 **REQUISITION NUMBER** - Any combination of 1 through 9 characters (alpha or numeric) selected by the User Department/Project Manager.

4.2 **PREPARATION DATE** - Enter date requisition was prepared.

4.3 **SPONSORING DEPARTMENT** - The Department which initiates the requisition and whose Department Manager certifies that the expenditure is appropriate.

4.4 **SPONSORING COST CENTER** - The cost center number must be assigned according to intended budget use.

4.5 **REFERENCE CONTRACT/AGREEMENT NUMBER** - This field is used to reference the proposal/contract or agreement number that underlies the purchase order number assigned to the requisition. The information is entered by the Buyer.

4.6 **PURCHASE ORDER TYPE** - To be selected by the Procurement Department.

TYPE 1: **STANDARD PURCHASE ORDER**

Characteristics - Fixed Price, Fixed Quantity, Single Delivery Date

TYPE 2: SCHEDULED DELIVERY PURCHASE ORDER

Characteristics - Fixed Price, Fixed Quantity, Multiple Scheduled Delivery Dates

Note: Used by the sponsoring department to establish multiple scheduled delivery dates.

| | | |
|----------|-------------|-------------------|
| Example: | 200 widgets | June 1, 1994 |
| | 200 widgets | July 1, 1994 |
| | 200 widgets | August 1, 1994 |
| | 100 widgets | September 1, 1994 |
| | 100 widgets | October 1, 1994 |

TYPE 3: ITEMIZED BLANKET PURCHASE ORDER

Characteristics - Estimated Quantity, Fixed Price, Fixed Number and Description of Items.

TYPE 4: OPEN ITEM BLANKET PURCHASE ORDER

Characteristics - Estimated Quantity, Various Prices, Various Number and Descriptions of Items, Various Delivery Schedules.

4.7 CORP CODE - The corp code is used to identify the funding that will be used on the purchase order. Sponsor's department enters 030 for operating budget and Capital Program Control Division enters all Federally funded codes.

4.8 ACCOUNT NUMBER - If funded from the Operating Budget, the sponsoring cost center will enter the appropriate account number for procurement. If capitally funded, the account number will be entered by Capital Program Control Division personnel.

4.9 CHARGE TO COST CENTER - If operating funds are used, the charge to cost center number and the sponsoring cost center number will be the same. If capital funds are used, the charge to cost center will be 499 and will be entered by Capital Program Control Division personnel.

NOTE: The Distribution Account Number is the combination of the Corp Code, Account Number and Charge to Cost Center Number.

4.10 C/W - This is a work order number indicator which indicates whether the work order is capital or operating. The indicator for operating is a "W" and will be entered by the sponsoring department if a work order number is appropriate. The indicator for capital is a "C" and will be entered by Capital Program Control Division personnel.

- 4.11 WORK ORDER - If an operating budget work order number is appropriate, an eight digit number will be entered by the sponsoring department. If capially funded, a nine digit work order number will be entered by Capital Program Control Division personnel.
- 4.12 CAPITAL INDICATOR - This field is used if capital funds are used to fund the procurement. The appropriate indicator will be entered by Capital Program Control Division personnel. A fixed asset is marked as "FA" and a repairable is marked as "R".
- 4.13 TERMS - This section is used to document terms of payment that are established as a result of bids or negotiations between the Supplier and Buyer.
- 4.14 F.O.B. POINT - This section is used to document the freight terms. This section is entered by the Procurement Department.
- 4.15 DELIVERY SCHEDULE - This section is used to establish required delivery dates or blanket expiration dates.
- 4.16 IF OTHER THAN GENERAL FUND IDENTIFY - Used by Capital Program Control Division to identify the fund title, number and grant total and percentage when Federally funded.
- 4.17 NAME OF REQUESTOR - The name(s) and extension number(s) of person(s) who can be contacted to obtain additional information about the requirement, if necessary.
- 4.18 DEPARTMENT HEAD - The department manager who is sponsoring the procurement.
- 4.19 MANAGEMENT & BUDGET - This space is used for sign off by 1) the Manager of Operating Budgets when Procurement is funded from the professional and technical operating budget accounts (551010, 551020, 680350, and 680360 only). 2) The Manager of Capital Program for all capially funded procurements except the Improvement Allowance.
- 4.20 CONTROLLER OR DELEGATE - This space is used for sign off by:
- 1) The sponsoring department delegate (usually the Budget Coordinator) when procurement is funded from the Operating Budget.
 - 2) The Manager of Capital Program Control Division when procurement is funded from Improvement Allowance.
 - 3) The Assistant Controller for all capially funded procurements except Improvement Allowance.

- 5.0 **COMMITMENTS TO INCUR COSTS IN EMERGENCIES:** Only authorized members of the District (see Chapter I-4) may obligate the District to incur costs for the purchase of goods and services. Under State law, the rules regarding competitive bidding for procurements may be waived for emergencies, i.e., when life or property are in immediate danger. Public Contract Code Sections 20223 and 20224 require either 2/3 vote of the Board or General Manager report to the Board, respectively for emergency procurements. In such instances, established purchasing procedures cannot be followed and non-procurement personnel may be required to obligate the District to incur costs. In these emergencies, no more than \$2,500 may be spent for purchases of goods and up to \$25,000 may be spent for services (other than construction or Public Works) without GM approval, the Head of the User Department/Project Manager must approve the emergency expenditure, and the Department Manager of Procurement must be notified within twenty-four (24) hours of the occurrence of the emergency. A Purchase Requisition (P/R) should be delivered to the Procurement Department the next working day following the emergency. Only the GM can declare the existence of an emergency and authorize the expenditure for non-competitive agreements above these thresholds.
- 6.0 **PLANNING FOR PROCUREMENTS:** Users must think through their upcoming procurement needs thoroughly. This means planning for new and renewed procurements 12 to 18 months ahead. Procurements for which a contract will have to be written by the Contract Administration Division (essentially any procurement that involves more than a straightforward purchase) take a substantial amount of time to consummate due to lengthy preparation, review, evaluation, and execution processes. Any procurement over \$100,000, whether a contract or purchase order, requires a minimum of 4-6 weeks after the bid opening to award due to the time involved in obtaining Board approval. Procurements of any value may take an extended amount of time to award if unforeseen problems arise in qualifying the low Bidder, if insurance problems arise, etc. After award, if an item must be manufactured, a lead time of a year or more may be necessary before it is received. P/Rs should be submitted to the Procurement Department no less than six (6) months before the anticipated contract or purchase order award date and nine (9) months would be advisable. Obviously, very simple procurements may require less time and complex ones will require more.
- 7.0 **PRIORITY REQUIREMENTS:** Priority requirements are those which need expeditious service due to a work stoppage, increased or abnormal parts usage, an erroneous inventory count, a need for new inventory items, new maintenance procedures, campaigns, retrofits and material specification changes. A P/R should be provided to the Procurement Department as soon as the specific priority condition is discovered indicating the reason for the priority.
- 8.0 **CHANGES TO PURCHASE REQUISITIONS:** From time to time, there may be a need to make changes to a Purchase Requisition between the time it is initiated and the time it reaches the Procurement Department for action. If any change in estimated dollar amount or Scope of Work is made to the P/R, the person making the change should obtain the concurrence of previous signatories prior to forwarding the P/R to the next level of approval. This concurrence may be in

the form of either initialing the change or by the preparation of a new Purchase Requisition and voiding the old. Purchase Requisitions that need to be changed after submittal to the Procurement Department will be returned to the originator for reissue or revision and initialing.

II-3 DEVELOPMENT OF REQUESTS FOR SERVICES OR MISCELLANEOUS PROCUREMENTS

- 1.0 **GENERAL:** The sponsoring department may elect to source their requirements for either services or miscellaneous procurements by using either the sealed bid or competitive negotiation procurement methodology, subject to the concurrence of the Procurement Department.

Sealed bidding generally involves less expense to the District and the contractor than contracting by negotiation. District policy requires use of sealed bidding if all of the following four conditions exist: (See Chapter III for further guidance.)

- (i) Time permits the solicitation, submission, and evaluation of sealed bids; Sealed bidding requires sufficient time to carry out the formalities of preparing the IFB; receiving, opening, and evaluating bids; and determining the responsibility and responsiveness of the low bidder. Sealed bidding is not necessarily faster than other contracting methods. Each acquisition must be examined individually.
- (ii) The award can be made on the basis of price and price-related factors alone. Award is made to the responsible responsive bidder, considering only price and price-related factors.
- (iii) Conducting discussions with the responding bidders about their bids is not necessary, this implies that definitive specifications can be written and bidders will offer essentially identical products or services without the need for discussions or clarifications.
- (iv) There is a reasonable expectation of receiving more than one sealed bid. The District must anticipate adequate price competition to ensure that the sealed bidding process results in a contract award at a fair and reasonable price. Past experience with a similar acquisition is often a good indicator of whether these conditions exist for a contemplated acquisition. However, the sponsoring department should confirm that the conditions still exist by conducting a market survey.

Negotiated contracts should be used when one or more of the above conditions for sealed bidding do not exist and statutory authority exists. Otherwise, sealed bidding methods should be used which do not require any authorization.

In practice, contracting by negotiation is best used for acquisitions in which:

- (i) Non price-related factors (e.g., quality or experience) are important to the District, and;
- (ii) The sponsoring department's requirements are complex or difficult to define, making discussions helpful and appropriate.

- 1.1 **AUTHORITY TO CONDUCT COMPETITIVE NEGOTIATIONS:** The District's authorization to negotiate contracts either competitively or, particularly, non-competitively is governed by Chapters IV and VI respectively. Federal regulations recognize competitive negotiation as an acceptable alternative to formal advertising (sealed bidding).
- 2.0 **APPROVAL TO UTILIZE CONSULTANT:** The User Department/Project Manager or the Engineering and Construction Department must obtain Approval-in-Concept for any Consultant contract, unless identified as a line item in the Operating or Capital budget.
- 3.0 **REQUEST PROCEDURE - ARCHITECTURAL/ENGINEERING SERVICES**
- 3.1 The User Department, or Engineering and Construction Department will prepare a "Request for Consultant Services," which will include the pertinent details, a project summary and Scope of Work for inclusion in the Request for Proposal (RFP) and Consultant agreement. A copy will be sent to the Office of Civil Rights. For those requirements under \$100,000, Procurement may recommend that the User Department use existing requirements agreements for architectural/engineering services if appropriate.
- 3.2 The Office of Civil Rights will send its DBE requirements or M/WBE Non-Discrimination in Subcontracting Availability Percentages to the Contract Administration Division with a copy to Engineering and Construction.
- 4.0 **REQUEST PROCEDURE - NON-ARCHITECTURAL/ENGINEERING SERVICES AND REVENUE CONTRACT**
- 4.1 **NON-ARCHITECTURAL/ENGINEERING SERVICES:** The User Department/Project Manager will prepare a "Request for Consultant Services," with a copy to the Office of Civil Rights, to retain a Consultant including pertinent details, a project summary, Scope of Work and evaluation criteria for inclusion in the Request for Proposal (RFP) and Consultant contracts. For those requirements under \$100,000, Procurement may recommend that the User Department use existing requirements agreements for the identified services if appropriate.
- 4.2 **REVENUE CONTRACTS:** The User Department/Project Manager will prepare a "Request for Franchisee Services" with a copy to the Office of Civil Rights, to retain a Franchisee including pertinent details, a project summary, scope of engagement, and evaluation criteria for inclusion in the Request for Proposal (RFP) and Franchise Services Agreement.
- 5.0 **REQUEST PROCEDURE - NON-COMPETITIVE A/E AND NON-A/E AGREEMENTS:** To initiate a non-competitive Consultant agreement, regardless of value, the User sends to the Contract Administration Division either the EDD providing the General Manager's Approval-in-Concept of the non-competitive contract or Purchase Requisition indicating that the action is a line item in an approved budget. At the same time, the User sends the Scope of Work, cost estimate, the name

and address of the selected Consultant, and any other information relevant to the negotiation of the contract. The agreement will be developed, negotiated and awarded in accordance with the procedures established in Chapter VI-6. (See 8.0 below)

- 6.0 **REQUEST PROCEDURE - WORK DIRECTIVE OR TASK ORDER**: To initiate a work directive or task order requires the use of the procedures in Chapter VIII. (See 8.0 below)
- 7.0 **REQUEST PROCEDURE - MODIFICATION OR ADDITIONAL WORK ORDER**: To initiate a modification or additional work order requires the use of the procedures in Chapter VIII. (See 8.0 below)
- 8.0 **COST ESTIMATES FOR ALL REQUESTS**: All cost estimates prepared pursuant to this Chapter II-3, shall be prepared on the basis of a detailed analysis of the required work as though the District were submitting a proposal and shall state the basis for the cost estimate, i.e. previous cost experience, other procurements by BART or other public agencies, etc.

II-4 TECHNICAL SPECIFICATIONS AND SCOPES OF WORK

- 1.0 **POLICY:** Purchase descriptions, specifications, or scopes of work for solicitation of offers for competitively bid or negotiated procurements shall describe accurately and in clear, concise language the technical requirements to be met by a Contractor in satisfying the District needs. These documents shall be in a format that describes, in logical steps, the complete service or item to be delivered for each milestone of the total requirement from inception to 100% completion.
- 1.1 **PROCEDURES:** Except as provided for below in Subsections 1.2 through 1.4, purchase descriptions, specifications, or scopes of Work shall not be biased toward any particular prospective Contractor. Descriptive literature from one prospective Contractor shall not be used as the sole basis for writing specifications/scopes. Solicitation/contractual language shall not be included in the technical specifications/Scope of Work. These requirements are set forth in the Information for Bidders/Proposers and the Standard and Special Terms and Conditions. Descriptions shall not contain features that unduly restrict competition.
- 1.2 Except as noted below in Subsection 1.2.1, specifications for public works contracts for the construction, alteration, or repair of Public Works shall not unduly restrict the competition, or otherwise unreasonably limit the bidding, either directly or indirectly, to any one specific concern, organization, product, or service. In those unusual instances where there is a novel or unique product application, or where there is only one brand name known to the District, only one brand name may be listed; subject to the documentation requirements of Chapter VII, Section 9.9.
- 1.2.1 Where a product is designated to match others (herein referred to as "designated matching product", or "DMP") in use on a particular public improvement, either completed or in the course of completion, the specification may identify the designated material, product, thing, or service by specific brand or trade name. (The User Department/Project Manager shall comply with the documentation requirements of Chapter VII, Section 9.9.)
- 1.3 Purchase descriptions for purchase contracts for supplies, may not identify a specific brand, mark, patent apparatus, or appliance so as to unduly restrict the competition on the part of vendors and supplies of equal value, utility, or merit. In those circumstances where the District is compelled in certain procurement actions, to use certain brand, then the solicitation documents should identify at least two brand names or trade names followed by the words "or equal".
- In those unusual instances including but not limited to novel or unique product application, or where there is only one brand name known to the District, only one brand name may be listed; subject to the documentation requirements of Chapter VII, Section 9.8.
- 1.4 **BASIC QUANTITIES, OPTIONS, AND DESIRABLES:** In addition to resources that it will definitely acquire, the District's requirements may include (i) optional quantities and periods, (ii) evaluated optional items/features, and (iii) desirables. Additional quantities, time periods, or

items/features are appropriate when: (1) the District may need to acquire resources beyond the basic contract period; (2) funds are not currently available for the entire life cycle of the procurement, but a reasonable certainty exists that such funds will be available in the future; or (3) competition for the additional quantities, time periods, or items/features will be impracticable after the contract is awarded.

Solicitations should clearly identify and distinguish basic, optional, and desirable requirements and explain how the District will evaluate them.

- 1.4.1 **BASIC QUANTITIES AND PERIODS**: The quantity of a resource that the District will definitely acquire is called the basic quantity. The base period is the initial contract term. These establish the District's minimum obligation under a contract. Offerors must be responsive to these requirements.
- 1.4.2 **OPTIONAL QUANTITIES AND PERIODS**: The District may also need to acquire additional quantities of the basic resources or to acquire resources beyond the base period. Offerors must be responsive to these requirements. Optional quantities and periods are mandatory for the offeror to propose, but not mandatory for the District to buy.
- 1.4.3 **EVALUATED OPTIONAL ITEMS/FEATURES**: These differ from optional quantities and periods because they have no basic quantity that the District will definitely acquire. The District has no obligation to acquire any quantity of an evaluated optional item/feature. Evaluated optional items/features are mandatory for the offeror to propose, but not mandatory for the District to buy.

For example, in an acquisition for microcomputers, a tape backup drive might be a possible evaluated optional item. Although users can backup files to floppy disks, a tape backup is faster for large volumes of data since users do not have to switch tapes as often as they would switch floppy disks. Also, tapes are less easily damaged than disks. The District currently does not have the funds to purchase the tape backup drives, but expects to get additional funding during the life of the contract. Therefore, it specifies the drives as an evaluated optional item.

- 1.4.4 **DESIRABLE ITEMS/FEATURES**: The District may identify items/features not essential for meeting its requirements, but that may represent some merit or value to the District. These are commonly referred to as desirable items/features. They are not mandatory for the offeror to propose, nor is the District obligated to buy them. If a solicitation includes desirable items/features, the District must explain how it will evaluate them. The District cannot reject proposals that do not offer desirable items/features. However, offerors must know in advance, how offering or not offering desirables will affect the District's evaluation of their proposals.

One way to evaluate desirables is to give additional technical credit to offeror's proposals for each desirable item/feature proposed when technical proposals are scored. Another, is for the District to add costs to an offeror's price proposal for each desirable item/feature not proposed. Any

method used must reflect the value to the District of the desirable. Using desirables can help increase competition when only one or a limited number of vendors provide items/features that the District may find useful. If a solicitation identifies such items/features as mandatory, then it would exclude other vendors whose products may satisfy the District's needs. By including the items/features as desirable and explaining the value the District will assign to them, the District can consider offers with and without the desirable. This allows the District to evaluate which proposal provides the most advantageous offer to the District, price and other factors considered.

1.4.5 **SPECIAL REQUIREMENTS FOR FEDERALLY FUNDED ROLLING STOCK PROCUREMENTS – FIVE YEAR LIMITATION**

The District may enter into a multi-year contract to buy rolling stock with an option not exceeding five (5) years to buy additional rolling stock or replacement parts, 49 U.S.C. Section 5325(e)(1). The District may not exercise that option later than five (5) years after the date of its original contract.

FTA interprets this five-year period as covering the District's "material requirements" for rolling stock and replacement needs from the first day when the contract becomes effective to its "material requirements" at the end of the fifth year. In the case of rolling stock, which frequently cannot be delivered expeditiously, FTA recognizes that the District's "material requirements" for rolling stock will necessarily precede its actual need to put that rolling stock to use in public transportation service. This means that the contract may not have options for more rolling stock and replacement parts than the District's material requirements for a five-year period. The five-year rule does not mean the District must obtain delivery, acceptance, or even fabrication in five years. Instead it means only that FTA limits a contract to purchasing no more than the District's material requirements for rolling stock or replacement parts for five years based on the effective date of the contract.

2.0 **DEVELOPMENT OF TECHNICAL SPECIFICATIONS FOR SERVICE/EQUIPMENT/MATERIALS:**

- 2.1 Technical Specifications should be prepared by District staff or, depending upon the type of service/equipment/materials, may be prepared by a Consultant retained in accordance with these instructions.
- 2.2 The User or Engineer shall coordinate closely with those persons in the User Department/Project Manager(s) who need and will benefit from the procurement to determine the detailed requirements for the work, service or piece of equipment/material required. The description should:
 - a. Include a statement of the qualitative nature of service/equipment/material to be procured including form, fit, and function;

- b. Set forth those minimum essential characteristics and standards required to satisfy its intended use, e.g. no more than 2" wide; at least 3 hp; at least once per month.
- c. Indicate reliability and testing requirements;
- d. Include quality control and/or inspection provisions that provide a means of determining that the service/equipment material has met the District's requirements.

2.3 The technical specification shall be prepared for the service/equipment/material providing adequate detail to ensure that any potential source will be fully apprised of the District's requirements. Where possible, the specifications, including performance, form, fit and function, shall be broad enough to allow as many sources as possible to bid. The specification must, of course, reflect what you need to procure. While you might desire a particular firm to manufacture a certain item or know a company offers a special service, if it is not necessary that the particular firm provide the item or service -- and if specifying it unduly restricts competition and prohibits other firms from competing -- you should not state it in your specification. There are instances, however, when specifying a particular item is called for. The mere fact that only one potential Bidder may be able to supply an item or service does not necessarily make the specification unduly restrictive. If it's the case that only one item will, in fact, meet the District's minimum requirements, justify this specification and document your decision carefully and thoroughly (See Chapter II-4, Section 2.5 below).

Product specifications should be in sufficient detail to define District requirements, but not to inhibit competition. When it is impractical or uneconomical to develop a clear accurate description of the technical requirements, staff may wish to use a brand name in the description. In such instances, no less than two brand names should be used and always followed by the words "or equal". Where only one brand name is used, staff must affirm that a diligent search of available Suppliers and review of the market was conducted, and concluded no other brand name is known. The "brand name or equal" description may be used to define the performance or other salient physical or functional features of the requirement. When so used, the specific features which must be met by Proposers shall be clearly stated. Brand names that are known to meet the "or equal" requirements shall be listed. Contractors who then offer products that differ from the referenced brand name product are to be considered for the award where the District determines that the product is equal in all material respects as described in the contract. A bid should not be rejected because of minor differences in design, construction, or features which do not affect the suitability of the products for their intended use.

2.4 A market survey may be conducted to determine the source(s) that offer products which meet the requirements. Extreme caution must be exercised to avoid discussions of estimated quantities and budgeted dollar amounts with prospective Vendors (see Chapter I-5).

- 2.5 Other than the circumstances where single brands can be named, (see Section 1.0 above), where the service/equipment/material item can be procured from only one source because of patent or proprietary rights, the User Department/Project Manager shall prepare a sole source justification, in accordance with the procedures in Chapter VI, in addition to the specification.
- 3.0 **DEVELOPMENT OF SCOPES OF WORK:** Solicitations of offers for professional/consultant services shall clearly and accurately set forth all requirements which the offerors must fulfill, including the factors to be used in evaluating the proposals. The statement of work shall be developed by the requesting department or consultant and shall contain the appropriate information as follows:
- 3.1 A broad description of the services and project and program objectives. The description outlines the contractor's specific responsibilities and the items; i.e., property, materials, etc., that must be furnished by the contractor.
- 3.2 A description of all obligations the contractor must meet including District, federal, state and local standards that are applicable to the project.
- 3.3 A detailed list of all data, property, and services which will be provided to the contractor, by the District, for the use in the performance of the contract if applicable.
- 3.4 Detail all tasks the contractor must perform, and specify coordination requirements.
- 3.4.1 For procurements actions over \$100,000, scopes should be prepared using Work Breakdown Structure (WBS) techniques.
- 3.4.2 To the maximum extent practicable, the lowest level WBS elements should be deliverables such as reports, calculations, drawings, sketches, estimates, recommendations, etc.
- 3.5 Specific data that must be submitted for approval and the schedule requirements for submission and approval to assure the project progresses in a logical and expeditious manner.

NOTE: No Consultant that participates in the development of a scope of work may participate as a proposer on that particular procurement. (See Section 4.0 below for further guidance.)

- 4.0 **INDIVIDUAL AND ORGANIZATIONAL CONFLICTS OF INTEREST:** Participation in contracting activity, including the preliminary stages of contract specification development carries with it the potential for individual conflicts of interest under State law and Federal regulation when the contract may foreseeably affect the participants' financial interest, as defined under such law and regulation. This is true whether the work is performed by District employees or Consultants. See, e.g. District Code 1090, the Political Reform Act at District Code Section 87100 et seq., FTA Circular 4220.1F. See Section I-5 of these guidelines, concerning the District's Code of Ethics.

An "organizational conflict of interest" exists when the nature of the work to be performed under a proposed contract may, without some restriction on future activities, (a) result in an unfair competitive advantage to the Contractor or (b) impair the Contractor's objectivity in performing the contract work. (FTA Circular 4220.1F)

4.1 **APPLICABILITY:** The potential for these conflicts, particularly individual conflicts of interest, is not limited to any particular kind of acquisition. However, organizational conflicts of interest are more likely to occur in contracts involving:

1. Management support services;
2. Consultant or other professional services;
3. Contractor performance of, or assistance in, technical evaluations; or
4. Systems engineering and direction of technical work performed by a Contractor that does not have overall contractual responsibility for development or production.

4.2 **CONTRACT ADMINISTRATOR'S RESPONSIBILITIES:** With respect to individual conflicts, Contract Administration Division will review the proposed Scope of Work in all contracts for the potential for individual conflicts. The Contract Administrator shall analyze planned acquisitions in order to:

1. Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and
2. Avoid or neutralize potential conflicts before contract award.

Contract Administrators should obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts and in developing any necessary solicitation provisions, procedures and contract clauses.

Before issuing a solicitation for a contract that may involve a significant potential conflict, the Contract Administrator shall recommend to upper management a course of action for resolving the conflict.

In fulfilling their responsibilities for identifying and resolving potential conflicts, Contract Administrators should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation. The Contract Administrator's judgment need be formally documented only when a substantive issue concerning potential organizational conflict of interest exists.

II-5 REQUIREMENTS FOR ASSURANCE OF FUNDING

- 1.0 **CAPITAL FUNDED:** For all capital funded contracts, and all modifications, AWOs and WDs thereto, the Sponsoring Departments must obtain authorization to begin solicitation or other procurement action from the Capital Program Control Division, prior to placement of advertisements and distribution of bid or proposal solicitation documents. The Capital Program Control Division is responsible for ensuring that appropriate sources of funding and sufficient funds are identified prior to giving this authorization to solicit unless the procurement is to be contingently funded as in the case of requirements contracts.

- 2.0 **OPERATING FUNDED:** For all operating funded, and all modifications, AWOs and WDs thereto, that are to be reimbursed from the capital budget and for procurements funded from the capital revolving fund, the User Department/Project Manager must submit a Purchase Requisition signed by the Department Manager to the Capital Program Control Division. A copy of the approved Purchase Requisition must be submitted to the Sponsoring Departments before the contract/purchase order/work directive can be executed by the District.

- 3.0 **TASK ORDER CONTRACTS:** All Task Order contracts, however funded, will require assurance of funding only at the time of execution for the contract itself and not for execution of the individual task order.

II-6 PROCUREMENT AND QUALIFICATION OF NEW CHEMICAL COMMODITIES

1.0 **POLICY:** It is the policy of the District that the procurement of New Chemical Commodities, including Cleaners, Paints, Solvents, Lubricants, Adhesives and Graffiti Removers receive the review and concurrence of User Department/Project Managers and of Materials Management Division, as appropriate, for occupational and environmental safety requirements, and that these commodities be properly described with composition, use and labeling specifications, as appropriate, for the purposes of Commodity Classification and Purchasing.

1.1 STANDARDIZATION COMMITTEE

1.1.1 A committee made up of representatives of all User Department/Project Managers dedicated to discussing, sharing information and establishing procedures for the procurement and qualification of New Chemical Commodities.

1.1.2 To jointly review all newly qualified products to insure that the product has an established specification or explicit ordering description and that there is no duplication of an already existing product or commodity number.

1.2 INVENTORY MANAGEMENT, INVENTORY CONTROL SECTION

1.2.1 To establish a commodity number for products submitted by the User Department/Project Manager.

1.2.2 To verify authorized signatures on Chemical Commodity Requisitions.

2.0 DEFINITIONS:

2.1 **Chemical Commodities:** Materials generally covered by commodity number 10-, 49-, 68-, 79-, 80-, 87-, 91-, and which contain ingredients that meet the definition of a hazardous chemical as defined in the Title 8, California Code of Regulations, General Industry Safety Orders, Section 5194 as a chemical that may cause or contribute to serious negative health effects.

2.2 **Hazardous Chemical:** A chemical (or mixture of chemicals) that is either toxic; an irritant; corrosive; a strong oxidizer; a strong sensitizer; combustible; flammable; reactive; pyrophoric or pressure-generating; or that otherwise may cause substantial acute or personal injury or illness during, or as a direct result of, any customary or reasonably foreseeable handling or use.

2.2.1 **Flammable Substance:** Any substance having a flash point below 100 degrees Fahrenheit (37.8 degrees Celsius) when tested by (1) Taglabue Closed Tester in accordance with American National Standard Institute (ANSI/ASTM D56-79) or (2) Pensky Martens Closed Tester in accordance with ANSI/ASTM D93-80.

- 2.2.2 Toxic Chemical: Any substance listed in the most recent edition of the National Institute for Occupational Safety and Health "Registry of Toxic Effects of Chemical Substances".
- 2.2.3 Pressure-Generating Chemical: A chemical falling within one of the following categories:
- 1) A chemical that generates pressure unless protected from spontaneous polymerization by the addition of an inhibitor, or by refrigeration or other thermal control.
 - 2) A chemical that may decompose to release gas in its container.
 - 3) A chemical that comprises the contents of a self-pressurized container.
- 2.2.4 Pyrophoric Chemical: A chemical that will ignite spontaneously in dry or moist air at a temperature of 130 degrees Fahrenheit (54.4 degrees Celsius or below).
- 2.3 Patch test: Small scale field test of a product being considered for purchase. Test is performed by manufacturer, Vendor or District personnel in the presence of prospective User Department/Project Manager representatives who will evaluate effectiveness.
- 2.4 New Chemical Commodity: One which has not been qualified for intended use and/or one for which a new commodity number must be issued.
- 3.0 **PURPOSE**: To describe the steps necessary for the procurement of new Chemical Commodities, including Cleaners, Paints, Solvents, Lubricants, Adhesives, and Graffiti Removers and to control the numbers and types of such commodities within the system.
- 4.0 **PROCEDURE**:
- 4.1 The user Department/Project Manager will initiate inquiry regarding a new product by requesting the new Product Data Sheet and its accompanying Material Safety Data Sheet (MSDS) from the vendor. The User Department/Project Manager will also instruct the vendor to forward a copy of the MSDS to the Purchasing Division attention Manager of Purchasing for information.
- 4.2 The user Department/Project Manager shall forward the MSDS received from the vendor with the Chemical Evaluation Review Form (See Attachment J) containing necessary information, to BART System Safety for review. The user Department shall review the product data submitted by the vendor to determine its compliance with specifications or ordering description requirements. System Safety shall review MSDS to insure that the product is not an environmental or safety hazard and shall approve or reject its use in the District. If rejected, the user Department/Project Manager shall have no further connection with this product.

- 4.3 If the product satisfies the preliminary requirements listed in 4.2 and a "patch test" is required, the User Department/Project Manager shall have the option of having the manufacturer, the Vendor or the District personnel perform the "patch test." The Vendor shall provide: 1) the necessary samples for the test; 2) the personnel, if testing is to be performed by the Vendor.
- 4.4 If the product test is accepted or it otherwise shows promise for acceptance, the Vendor shall supply the appropriate amount of product samples to the User Department/Project Manager who shall perform necessary analysis as to content, to confirm the Vendor's product data. Laboratory results shall be submitted to System Safety.
- 4.5 The User Department/Project Manager shall submit the Laboratory Analysis, and all Vendor-provided data (such as dilution, handling methods and other specific use procedures) to System Safety.
- 4.6 System Safety shall complete the remainder of the Chemical Evaluation Form previously provided by the User Department/Project Manager (see Attachment J) and return it to the affected User Department/Project Manager indicating any occupational hazards and or safety measures required in the use, handling, storage and disposal of the product under consideration within sixty (60) days of receipt of the MSDS from the User Department/Project Manager.
- 4.7 If, after the review and approval of the MSDS, the product merits further consideration, the User Department/Project Manager shall submit a formal requisition to Purchasing Division, for an amount required for an Initial Field Test to be carried out by the User Department/Project Manager. Each Department will develop its own testing procedure.
- 4.8 Upon completion of the Initial Field Test, performance data shall be evaluated by the User Department/Project Manager, and if required, System Safety will reevaluate the environmental and safety aspects in field use.
- 4.9 If the Initial Field Test results are positive, an Extended Field Test may be scheduled at the option of the User Department/Project Manager. For the Extended Field Test, a formal requisition shall be prepared by the User Department/Project Manager and submitted to Purchasing Division for procurement of the required quantity
- 4.10 If the product successfully passes the Extended Field Test, or after the Initial Field Test (if further testing is not indicated as determined by the User Department/Project Manager) the aforementioned Hazardous Materials approval is obtained, the product shall be presented to the Standardization Committee for information and review by all potential users.
- 4.11 An Item Master Form (see Attachment K) shall be submitted to the Inventory Control Section of Inventory Management to either establish a new commodity number for the product (if it

represents a new functionality) or to add it to an existing commodity number. This form shall be submitted by the User Department/Project Manager and shall have the signature of an authorized person. Each product submitted to Inventory Control must be accompanied by either a specification reference or explicit ordering description (prepared by User or other source) and shall include labeling and container requirements as part of the ordering description.

5.0 **RESPONSIBILITY:**

5.1 **PURCHASING DIVISION:**

5.1.1 To receive Vendor inquiries and inform the Vendor of District procedures.

5.1.2 To assist Vendor in providing necessary information to User Department/Project Manager and to insure that the procedure is initiated by the User Department/Project Manager.

5.2 **USER DEPARTMENT/PROJECT MANAGER:**

5.2.1 To refer all Vendor inquiries to the Purchasing Division.

5.2.2 To review initial data submitted by Vendors and to respond indicating interest if any, with a copy to Purchasing Division.

5.2.3 To schedule a Patch Test, if applicable.

5.2.4 To submit analysis and Vendor data to System Safety for Chemical Evaluation review.

5.2.5 To arrange, if warranted, an Initial Field Test and an Extended Field Test (if necessary) to confirm approval or disapproval of the product.

5.2.6 To submit all information on an acceptable tested product to the Standardization Committee.

5.2.7 To present the product according to the standard procedures established by the District.

5.2.8 To submit a request to Inventory Control to assign a commodity number to the approved product. Included must be a specification reference and other necessary information.

5.3 **SYSTEM SAFETY:**

5.3.1 To assist the User Department/Project Manager in reviewing the data submitted by Vendor.

5.3.2 To approve or reject all chemical or hazard materials used in the District.

- 5.3.3 To evaluate the environmental/safety impact of the Initial Field Test (Chemical Evaluation review).

II-7 QUALIFIED PRODUCTS LIST AND BID SAMPLES

- 1.0 **PRODUCT TYPES ELIGIBLE FOR THE QPL:** The Board of Directors has authorized the General Manager under Public Contract Code (PCC) Article 8, Section 20225, to establish Districtwide purchasing standards, the purpose which is to ensure the necessary quality of supplies and equipment purchased by or under the supervision of the District, and to permit the consolidation of purchases in order to effect greater economy in District purchasing. For reasons of efficiency, economy, compatibility, or maintenance reliability, there is a need for standardization as to various supplies, materials, and equipment. In order to achieve this objective, the District may establish a Qualified Products List (QPL). The District's QPLs will be established and maintained as hereinafter set forth. Purchase contracts will be processed as outlined below.
- A. The Manager of Inventory Management (MIM) shall determine specific items(s) that, for reasons of efficiency, economy, compatibility, maintenance reliability or safety, need to be standardized.
 - 1. A specific written record for each item stating the necessity for establishing the QPL shall be kept by the MIM.
 - 2. A written record shall be kept by the MIM which details the requirements that shall be met for a product to become qualified and the procedures that must be followed.
 - B. Each QPL which may be established shall be reviewed periodically. The review process shall assess adequacy and effectiveness of the QPL and evaluate if additions or deletions from the QPL should be considered.
 - C. When the District undertakes creation of a QPL, a notice shall be published in a newspaper of general circulation which:
 - 1. Advertises the District's intent to create a QPL;
 - 2. States the nature of the items to be included under the QPL;
 - 3. Specifies the title and address of the District's office which may be contacted in regard to the procedure to be followed for submission of a product to be qualified under the terms of the QPL process;
 - 4. Lists time frames associated with the process;
 - 5. Lists prospective purchase quantities forecast for future requirements for each item in the QPL.

D. A contract for an item on the QPL may be awarded as follows:

1. Without competitive bidding if only one source for the item is specified on the QPL upon a finding by the Board pursuant to Public Contract Code, section 20227, that it is a sole source procurement.
2. By competitive sealed bidding after advertising whenever multiple products are identified by the QPL.

Each user department is responsible for submitting to the Procurement Department certain information for each item to be placed on the QPL such as stock number, description or specification (preferably generic rather than brand name), previously approved products, estimated annual requirements for the item and the rationale supporting nomination of the item to a QPL. User departments are also responsible for requesting any deletions from the QPL should item(s) no longer be needed or if vendor(s) no longer offer a product which has been qualified and for ensuring that listings they have requested are accurate.

The MIM is responsible for maintaining the QPL, e.g., adding and deleting items as requested and providing user departments with copies of the QPL, as requested. Items will be carried on the QPL as long as there is a bona fide need for the item and the product continues to meet the original test requirements used under the QPL process. QPLs shall be reviewed at least every five years for continuation or renewal.

2.0 **ALTERNATE PRODUCT CERTIFICATION PROCESS FOR QPL**: Vendors seeking to qualify their product may apply by submitting an independent laboratory certification concluding that the vendor's part is a product which has been analyzed and confirmed as meeting or exceeding the District's specifications and/or performance requirements. The certifying laboratory must be accredited by the American Council of Independent Laboratories, Inc. or be otherwise acceptable to the District. This independent certification must be submitted to the District, which will review the certification and make a sole determination as to their acceptability.

The District reserves the right in each case to independently confirm the certification or to obtain further independent lab certification that the vendor product does in fact meet the specifications and/or performance requirements.

The principal burden of providing certification and the expense thereof is to be borne by the vendor. In some instances, the District may consider assuming all or a portion of the burden of such expense.

Certifications prepared in support of QPL item qualification will only be considered if submitted independent of and prior to any pertinent solicitation. However, for purchases financed with

Federal funds, vendors will also be given the opportunity to provide QPL item qualifications during the solicitation period.

- 3.0 **AWARD RESTRICTED TO ITEMS ON THE QPL:** If the bid solicitation package calls for an item on the Qualified Products List, the Procurement Department shall verify that the product offered is so listed, and thereby deemed acceptable. A bid offering a product not listed on the QPL prior to the solicitation will be deemed non-responsive for that solicitation. However, if such offering is certified per Article 2.0, it will be included in the QPL for subsequent solicitations.
- 4.0 **BID SAMPLES:** "Bid sample" means a sample to be furnished by a bidder to show the characteristics of the product offered in a bid. Bidders shall not be required to furnish bid samples unless there are characteristics of the product that cannot be described adequately in the specification or purchase description. Bid samples will be used only to determine the responsiveness of the bid (see generally Chapter III-4, Section 5) and will not be used to determine a bidder's ability to produce the required items, e.g. responsibility.
- 4.1 Bids will be rejected as nonresponsive if the sample fails to conform to each of the characteristics listed in the invitation. Unlike the QPL procedure, vendors will not be given the opportunity to correct any deficiencies that could possibly result in their product sample being made acceptable to the District.
- 4.2 The use of bid samples would be appropriate for products that must be suitable from the standpoint of balance, facility of use, general "feel," color, pattern, or other characteristics that cannot be described adequately in the specification. Given the inability of vendors to correct any non-conformance with District established specifications under bid sample procedures, sponsoring departments are encouraged to investigate the qualified product list process. These procedures allow the District to ensure that the more complex aspects of a product, i.e. mechanical properties meet specifications. However, when acquiring non-commercial items, i.e. customized or largely fabricated items, sponsoring departments are encouraged to use First Article Test requirements available under bilateral procurement. Lastly, products may be acquired by two-step sealed bidding or negotiation, as appropriate.
- 4.3 The reasons why acceptable products cannot be acquired without the submission of bid samples shall be set forth in the contract file and supported by analysis of industry capabilities and acquisition history from either the District, or other transit agencies that support the sponsoring department's recommendation that bid samples are necessary.
- 4.4 The requirement for furnishing bid samples may be waived when a bidder offers a product previously or currently being contracted for or tested by the District and found to comply with specification requirements conforming in every material respect with those in the current invitation for bids.

Pages 85 through 94 are reserved.

CHAPTER III

SEALED BID CONTRACTS

CHAPTER III SEALED BID CONTRACTS

III-1 GENERAL

Readers are directed to Chapter I-2, Section 2.0 for essential guidance on the District's requirements for conducting competitive procurements. State laws applicable to the District require the use of sealed bidding, also known as Formal Advertising, under almost all circumstances for purchase contracts over \$100,000 and public work contracts above \$10,000 (see Chapter I-4). In order for sealed bidding to be most effective, the following conditions should be present.

- (1) A complete, adequate, and sufficiently generic specification can be developed;
- (2) Adequate competition is available in the marketplace; and
- (3) The procurement lends itself to a firm-fixed-price contract.

III-2 RESPONSIBILITIES FOR PROCEDURAL STEPS BY DEPARTMENT

1.0 PURCHASE CONTRACTS

| <u>RESPONSIBILITY</u> | | <u>ACTION</u> |
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| User Department/ Project Manager | 1. | Develops realistic technical specifications which do not restrict competition. |
| | 2. | Prepares and approves Purchase Requisitions (obtains approvals of "oversight" department if required). |
| | 3. | Transmits Purchase Requisition, Technical Specification, cost estimate, approval-in-concept, and other bid package input to Procurement Department. |
| Contract Administration or Purchasing Division | 4. | Reviews technical specification for completeness, or Purchasing Division clarity, and accuracy. To the extent possible, ensures that it is non-restrictive and generic. Identifies most appropriate contracting method/type of contract (almost always firm fixed price). |
| | 5. | Reviews Purchase Requisition for adherence to established procedure. |
| | 6. | Develops Invitation for Bids (IFBs) (coordinating with User, General Counsel, Office of Civil Rights, Insurance and, when appropriate, Labor Relations*). |
| | 7. | For FTA-funded procurements, insures that IFB contains required clauses and provisions. |
| User Department | 8. | Obtains authorization to advertise capital projects from Capital Program Control Division. |
| District Secretary | 9. | Advertises procurement as appropriate, in local newspapers, minority media trade journals, national media, e.g., <u>Passenger Transport</u> . |
| * (Does not usually apply to straightforward purchases accomplished by Purchase Order; pertains primarily to contract actions.) | | |
| Contract Administration | 10. | Compiles Advance Notice to Bidders (Purchase |

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| or Purchasing Division | Contracts only) and prepares mailing labels of prospective Bidders excluding names contained on the Debarred, Suspended and Ineligible Contractor List including sources obtained from Office of Civil Rights' RTCC Directory, those identified by requestor and any other known sources. |
| | 11. Mails copy of the Invitation For Bid (IFB) Notice directly to names on Bidders List. |
| Purchasing Division District Secretary | 12. Distributes IFBs to those requesting copies, carefully recording names and addresses of all holders of IFB. |
| Contract Administration or Purchasing Division/User Department/Project Manager | 13. Conducts Pre-Bid Conference and Pre-Bid Site Inspection, if required. |
| Contract Administration or Purchasing Division | 14. Receives requests from prospective Bidders for clarification or modification of IFB as well as requests for approved equals. |
| | 15. Coordinates the evaluation of requests from prospective Bidders for modification of terms and conditions and specifications. |
| User Department/ Project Manager | 16. Performs technical evaluation of all requests for approved equals and informs Contract Administration/ Purchasing Division of results in writing. Responds to requests for clarification of specifications received from Bidders and forwards information to Contract Administration/Purchasing Division. |
| Contract Administration or Purchasing Division | 17. Informs all prospective Bidders by addendum of any change to IFB. For newly approved "or equals", notification must be sent to all prospective Bidders. |
| Contract Administration or Purchasing Division | 18A. Receives Bids and provides for their security. Procurement opens bids below \$100,000 for purchase contracts, below \$10,000 for public works and all bids for services and miscellaneous procurements. |
| District Secretary's Office | 18B. Conducts public bid opening for purchase contract bids over \$100,000. Receives and conducts public bid opening for public works contracts over \$10,000. |

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| | Prepares bid opening form. Distributes low bid (for both operating and capital contracts) to General Counsel and Office of Civil Rights. Provides copy of all bids to Contract Administration/Purchasing Division. |
| Contract Administration/ Purchasing Division | 19A. Reviews bids for responsiveness to general terms and conditions of IFB and responsibility for compliance. |
| Project Manager/ User Department | 19B. Reviews bids received for technical responsiveness and notifies Contract Administration/Purchasing Division in writing of technical finding(s) (final decision may be withheld pending qualification hearing). |
| Office of Civil Rights | 19C. Reviews bids for compliance with DBE goals or Non-Discrimination Program Availability Percentages, as applicable. |
| Contract Administration or Purchasing Division | 19D. Evaluate need for additional price or cost data and secure from Contractor if needed. |
| Contract Administration or Purchasing Division | 19E. Performs price analysis as needed and the User Department/Project Manager will perform cost analysis if required. |
| Contract Administration or Purchasing Division | 20. Conducts Qualification meeting, as appropriate to determine if Bidder is technically and otherwise qualified to be awarded the contract. |
| | 21. Advises District Secretary to hold bid securities, if appropriate, until the contract has been fully executed, after which all Bidders' securities except any securities which have been forfeited, will be returned to the respective Bidders whose bid they accompanied, but in no event will Bidders' securities be held by the District beyond sixty (60) days from award of the contract. |
| Contract Administration or Purchasing Division/User Department/Project Manager | 22. Coordinates and circulates EDD to obtain authorization to award contract (see Chapter I-4) to responsible Bidder submitting the lowest responsive bid. |
| Subject to Contracting Officer Delegations and Board Limits | 23. Approve contract award subject to compliance with the District or both District and FTA protest procedures as appropriate. |

in Chapter I-4

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| Contract Awardee | 24A. | Submits bonds and insurance policies as appropriate to District Secretary. |
| District Secretary | 24B. | Forwards bonds and insurance policies to General Counsel and Insurance Department for review and concurrence. |
| District Secretary | 25A. | Arranges for contract execution. |
| Subject to applicable delegation of Authority to Contracting Officer or Designee | 25B. | Executes contract or Purchase Order. |
| Contract Administration/ Purchasing Division | 26. | Sends Purchase Order to Vendor or contract to Contractor. |
| District Secretary | 27. | Returns bid bonds or other forms of surety to all unsuccessful Bidders. |
| Contract Administration/ Purchasing Division/ District Secretary | 28. | Prepares Notice to Proceed, based upon User Department input. |
| Contract Administration/ Purchasing Division/ District Secretary | 29. | Executes Notice to Proceed and transmits to Contractor, if required. |

2.0 **PUBLIC WORKS CONTRACTS AND MISCELLANEOUS PROCUREMENT CONTRACTS**

| <u>RESPONSIBILITY</u> | <u>ACTION</u> |
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| User Department/ Project Manager | <ol style="list-style-type: none"> 1. Develops realistic technical specifications which do not restrict competition. 2. Prepares and approves Purchase Requisitions (obtains approvals of "oversight" department if required). 3. Transmits Purchase Requisition, Technical Specification, cost estimate, approval-in-concept, liquidated damages justification memo, and other bid package input to Procurement Department. 3A. If required, transmits DBE calculation sheet for DBE subcontracting opportunities to Office of Civil Rights Department for establishing DBE participation goal. 3B. Obtains funding approvals from other agencies such as CALTRANS, etc. |
| Contract Administration Division | <ol style="list-style-type: none"> 4. Reviews technical specification for completeness, clarity, and accuracy. To the extent possible, ensures that it is non-restrictive and generic. Identifies most appropriate contracting method/ type of contract (almost always firm fixed price). 5. Reviews Purchase Requisition for adherence to established procedure. |
| Contract Administration Division | <ol style="list-style-type: none"> 6. Develops Invitation for Bids (IFBs), and conducts in-house review meetings to ensure that the IFB is in compliance with standard requirements, etc. (coordinating with User, General Counsel, Office of Civil Rights, Insurance and, when appropriate, Labor Relations*). |
| <p>* (Does not usually apply to straightforward purchases accomplished by Purchase Order; pertains primarily to contract actions.)</p> | |
| | <ol style="list-style-type: none"> 7. For FTA-funded procurements, insures that IFB contains required clauses and provisions. |

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| User Department/Project Manager | 8. | Obtains authorization to advertise capital projects from Capital Program Control Division. |
| Contract Administration Division | 9. | Prepare and distribute Advance Notice to Bidders using mailing labels of prospective Bidders excluding names contained on the Debarred, Suspended and Ineligible Contractor List including sources obtained from Office of Civil Rights' RTCC Directory, those identified by requestor and any other known sources. Also distributes copies of IFBs to Builder's Exchange Plan Rooms and Minority Assistance Organizations. |
| District Secretary | 10. | Advertises procurement as appropriate, in local newspapers and, as appropriate, minority media trade journals. |
| | 11. | Distributes IFBs to those requesting copies, carefully recording names and addresses of all holders of IFB. |
| Contract Administration Division/User Department Project Manager | 12. | Conducts Pre-Bid Conference and Pre-Bid Site Inspection, if required. |
| Contract Administration Division | 13. | Receives requests from prospective Bidders for clarification or modification of IFB as well as requests for approved equals. |
| | 14. | Coordinates the evaluation of requests from prospective Bidders for modification of terms and conditions and specifications. |
| User Department/Project Manager | 15. | Performs technical evaluation of all requests for approved equals and informs Contract Administration/Purchasing Division of results in writing. Responds to requests for clarification of specifications received from Bidders, and forwards information to Contract Administration/Purchasing Division. |
| Contract Administration Division | 16. | Notifies all prospective Bidders by addendum of any change to IFB (drafts Addendum material for signature by District Secretary, if necessary with concurrence from Legal and sponsoring department, etc.). For newly |

approved "or equals", notification must be sent to all prospective Bidders.

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| District Secretary's Office | 17. | Receives public works bids over \$10,000 (Contract Administration receives all bids below \$10,000) and conducts public bid opening for all public works bids. Prepares bid opening form. Provides copy of all bids to Contract Administration/Purchasing Division. Distributes low bid (for both operating and capital contracts) to General Counsel, Office of Civil Rights and Insurance. |
| Contract Administration | 18A. | Reviews bids for responsiveness to general terms and conditions of IFB and responsibility for compliance. |
| User Department/ Project Manager | 18B. | Reviews bids received for technical responsiveness and notifies Contract Administration/Purchasing Division in writing of technical finding(s) (final decision may be withheld pending qualification hearing). |
| General Counsel | 18C. | As applicable, Legal review of bid and bid bond. |
| Office of Civil Rights | 18D. | Reviews bids for compliance with DBE Non-Discrimination Program requirements and conducts hearings as appropriate. |
| Insurance | 18E. | Reviews bids for compliance with District requirements. |
| Contract Administration Division | 18F. | Evaluate need for additional price or cost data and secure from Contractor, if needed. |
| | 18G. | Performs price analysis as needed and the User Department/Project Manager will perform cost analysis if required. |
| | 19. | Conducts Qualification meeting to determine if Bidder is technically and otherwise qualified to be awarded the contract. |
| | 20. | Advises District Secretary to hold bid securities until the contract has been fully executed, after which all Bidders' securities except any securities which have been forfeited, will be returned to the respective Bidders |

whose bid they accompanied, but in no event will Bidders' securities be held by the District beyond sixty (60) days from award of the contract.

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| Contract Administration Division/User Department/ Project Manager | 21. | Coordinates and circulates EDD to obtain authorization to award contract (see Chapter I-4) to responsible Bidder submitting the lowest responsive bid. |
| Subject to Contracting Officer Delegations and procedures as appropriate. | 22. | Approve contract award subject to compliance with the District or both District and FTA protest Board Limits in Chapter I-4 |
| Contract Awardee | 23A. | Submits bid bond and insurance policies as appropriate to District Secretary. |
| District Secretary | 23B. | Forwards bid bond to General Counsel and insurance policies to Insurance Department for review and concurrence. |
| Insurance | 23C. | Reviews bids for compliance with District requirements. |
| District Secretary | 24. | Returns bid bond or other form of surety to all unsuccessful Bidders. |
| District Secretary | 25. | Executes Notice to Proceed and transmits to Contractor, if required. |

III-3 IFB PREPARATION

1.0 **APPROVAL-IN-CONCEPT:** If the procurement is a Major Procurement and is not a Pre-Approved Procurement, the User Department/Project Manager obtains Approval-In-Concept from the General Manager (See Chapter I-4 for definitions and procedures).

1.1 For public works contracts, the User Department/Project Manager or the Engineering and Construction, or Development Department will prepare a project summary, cost estimate and Technical Specification for inclusion in the public works IFB. Refer to Chapter II-3 for guidance on initiating a Public Works IFB and preparing Technical Specifications. This material will be sent by the requesting department to the Procurement (Contract Administration Division) Department. Incomplete packages without reasonable explanation for the omissions, will be returned to the requestor without action.

For service agreements and miscellaneous procurement contracts, information similar to that contained in the request for public works IFBs should be provided by the Sponsoring Department/Project Manager to the Procurement Department.

1.2 **CIVIL RIGHTS:** For public works IFBs, a copy of the materials sent to procurement will be sent by the User Department/Project Manager to the Office of Civil Rights. The Office of Civil Rights will send to Contract Administration Division, with a copy to the User Department/Project Manager, the DBE goals or Non-Discrimination availability percentages. For purchase contracts, service agreements and miscellaneous procurements over \$50,000, the sponsoring department/Project Manager will send a copy of its independent estimate to the Office of Civil Rights. The Office of Civil Rights will send to Contract Administration Division, with a copy to the User Department/Project Manager, the DBE goals or Non-Discrimination availability percentages.

2.0 **PURCHASE CONTRACTS:** For purchase contracts, Invitations for Bids (IFBs) should contain the following information:

- A. Solicitation number (assigned by Contract Administration or Purchasing Division for operating budget commitments and capital programs for capital budget commitments).
- B. The District address or address of User or facility.
- C. Date of issuance.
- D. Date, hour, and place of bid opening. (Prevailing local time shall be used.)
- E. A description of supplies or services to be furnished under each item in sufficient detail to permit full and free competition.
- F. The time of delivery or performance requirements.

- G. Bid security, insurance, performance, and payment bond requirements, if any.
- H. A requirement that all bids must allow a period for acceptance such as a period of up to one hundred-twenty (120) calendar days from the date of bid opening.
- I. In unusual cases, where Bidders are required to have special technical qualifications due to the complexity of the equipment being procured or for some other special reason, a statement of such qualifications.
- J. If appropriate, state the number and, if applicable, the size of the samples to be submitted and otherwise fully describe the samples required; and list all the characteristics for which the samples will be examined.
- K. Any special provisions, necessary for the particular procurement, relating to such matters as progress payments, patents, liquidated damages, etc. For types of procurements in which offers of rebates or other incentives by Vendors are likely or not unusual, a requirement that Vendors formally notify the Accounting and Procurement Departments if ever any rebate or incentive is offered to the District.
- L. A statement that prompt payment discounts will not be considered in the evaluation of bids.
- M. Any additional contract provisions or conditions required by FTA, the State or local jurisdictions.
- N. Factors to be considered in the evaluation of bids.
- O. Directions for obtaining copies of any documents, such as plans, drawings, and specification, which have been incorporated by reference.
- P. The IFB must not include a ceiling or budget price, but may include a range or estimated cost; however, options or alternatives may be specified that effectively limit the amount of funds the District will spend.
- Q. Necessary provisions to ensure compliance with the District's DBE or Non-Discrimination Program requirements.
- R. A notice to Bidders that all bids, materials and correspondence will be subject to the California Public Records Act.

3.0 **PUBLIC WORKS CONTRACTS**: For public works contracts, Invitations For Bids (IFBs) should contain the following information:

- A. Solicitation number (assigned by Contract Administration or Purchasing Division for operating budget commitments and capital programs for capital budget commitments).
- B. The District address or address of User or facility.
- C. Date of issuance.
- D. Date, hour, and place of bid opening. (Prevailing local time shall be used.)
- E. Contract Milestones and schedule information
- F. Drawings, plans, and complete and realistic technical specifications that are not restrictive of competition in sufficient detail to permit full and free competition.
- G. Liquidated damages, if any.
- H. Bid security, insurance, performance, and payment bond requirements, if any.
- I. A requirement that all bids must allow a period for acceptance such as a period of up to one hundred-twenty (120) calendar days from the date of bid opening.
- J. State Prevailing Wage and apprenticeship requirements, as applicable and Federal requirements if financed with Federal funds.
- K. Any special provisions, necessary for the particular procurement, relating to such matters as progress payments, patents, etc.
- L. General and Supplementary Conditions and Form of Contract
- M. Notice to Bidders and Instructions to Bidders.
- N. Statement of Business and Financial Qualifications.
- O. Any additional contract provisions or conditions required by FTA, the State or local jurisdictions such as non-collusion declaration, fair employment practices certification, Buy America certification, certification regarding debarment, certification regarding lobbying, as required.
- P. Price Factors to be considered in the evaluation of bids.
- Q. Directions for obtaining copies of any documents, such as plans, drawings, and specification, which have been incorporated by reference.

- R. The IFB must not include a ceiling or budget price, but may include a range or estimated cost; however, options may be specified that effectively limit the amount of funds the District will spend.
 - S. Necessary provisions to ensure compliance with the District's DBE or Non-Discrimination requirements.
 - T. A notice to Bidders that all bids, materials and correspondence will be subject to the California Public Records Act.
- 4.0 **SERVICE AGREEMENTS AND MISCELLANEOUS PROCUREMENT CONTRACTS**: For service agreements and miscellaneous procurement contracts, the IFBs shall contain information similar to either purchase contract or public works IFBs including but not limited to prevailing wage data where appropriate.
- 5.0 **BIDDING TIME**: Consistent with the need for obtaining the supplies public works, services or miscellaneous procurements, all Invitation for Bids must allow sufficient bidding time, i.e., the period of time between the date of distribution of an Invitation for Bids and the date set for opening of bids, to permit prospective Bidders to prepare and submit bids.
- 5.1 **MINIMUM BIDDING TIME**: For purchase and public works IFBs, bidding time will be at least the time necessary to comply with the advertising requirements stated in Section 20221 of the Public Contract Code (10 calendar days). For Services and Miscellaneous procurement IFBs, similar guidelines will be used.
- 6.0 **PLACE AND METHOD OF DELIVERY OF SUPPLIES**: Invitation for Bids are to be solicited F.O.B. destination.
- 7.0 **BID SAMPLES AND QUALIFIED PRODUCT LIST REQUIREMENTS**: For purchase contract IFBs, bidders should not be required to furnish a bid sample of a product they propose to furnish unless there are certain characteristics of the product which cannot be described adequately in the applicable specification or purchase description, thus necessitating the submission of a sample to assure procurement of an acceptable product. (See generally Chapter II-7 for guidelines and Chapter VII-9.1 for documentation requirements.)
- 8.0 **DESCRIPTIVE LITERATURE**: For purchase contract or public works IFBs, bidders should not be required to furnish descriptive literature as a part of their bids unless the District deems that such literature is needed to enable it to determine before award whether the products offered meet the specification requirements of the Invitation for Bids and to establish exactly what the Bidder proposes to furnish.
- 9.0 **CONTRACT PRICING**: Pricing for IFBs is to be inclusive of any Federal, State or local taxes.

- 10.0 **CONTRACT DOCUMENTS**: Unless otherwise approved by the Office of the General Counsel, with the concurrence of Contract Administration Division, standardized District forms of IFB's and General Conditions should be used in the preparation of IFB's.

III-4 ADVERTISING AND SOLICITATION OF BIDS

- 1.0 **ADVERTISING:** Concurrent with any mailing of the Invitation for Bids or IFB Notices, the proposed procurement shall be advertised as is deemed appropriate for a specific solicitation; e.g., in local newspapers, minority media trade journals, national media trade journals, etc.
- 1.1 **ADVERTISING FOR PURCHASE CONTRACTS AND PUBLIC WORKS:** To advertise for purchase contracts estimated to involve the expenditure of more than \$100,000, public work contracts estimated to involve the expenditure of more than \$10,000, the following procedures apply:
- a. The advertisement shall be published at least once in a newspaper of general circulation;
 - b. The publication shall be no less than ten (10) calendar days prior to the announced bid opening date.
 - c. The advertisement must contain, as applicable, a statement of:
 - i) The time and place where bids received will be publicly opened and read;
 - ii) The name of the contracting agency;
 - iii) The contract solicitation identification number;
 - iv) A brief description of the public work, supplies, materials, or equipment sought, the location where work is to be performed, goods are to be delivered or services provided and the contract term;
 - v) The address where bids or proposals are to be submitted;
 - vi) The date and time when bids or proposals are due;
 - vii) A description of any eligibility or qualification requirement;
 - viii) A statement as to whether the contract requirement may be fulfilled by a subcontracting, joint venture, or co-production arrangement;
 - ix) Any other information which the District deems useful to potential Contractors; and
 - x) The name, address, and telephone number of the person to be contacted for additional information.

2.0 **MAILING OR DELIVERY TO PROSPECTIVE BIDDERS:** IFBs or notices to Bidders should be mailed or otherwise delivered to the maximum number of prospective Bidders deemed practicable and as many as is necessary to encourage open and free competition. Every effort should be made to notify the Vendor/Contractor that was awarded the contract for the same goods or services the previous time the solicitation was let. Nevertheless, the District has no obligation to notify any particular prospective Bidder. The advertisement(s) shall serve as the primary vehicle for notifying prospective Bidders regarding upcoming procurement.

3.0 **RECORDS OF INVITATION FOR BIDS AND RECORDS OF BIDS:** The Contract Administration/Purchasing Division must retain a record of every Invitation for Bid issued by it and of each abstract or record of bids, known as the Bid Tabulation Sheet or Bid Summary Sheet, so that this record can be reviewed at the time of each subsequent procurement action for the same and/or similar items, to ensure that the information available in the file can be utilized.

The contract file for each solicitation must show the distribution which was made and the date thereof. The names and addresses of prospective Bidders requesting the Invitation for Bids who were not included on the original solicitation list must be added and made a part of the record.

4.0 **AMENDMENT OF INVITATION FOR BIDS:** If, after issuance of Invitation for Bids but before the time set for opening of bids, it becomes necessary to make changes in quantities, specifications, delivery schedules, opening dates, etc., or to correct a defective or ambiguous Invitation, such changes will be accomplished by issuance of an addendum to the Solicitation Documents. The addendum will be sent to each prospective Bidder to whom the Invitation for Bids has been furnished.

Information given to any one prospective Bidder concerning Solicitation Documents must be issued simultaneously for all other prospective Bidders, as an addendum, if such information is necessary in submitting bids on the Documents or if the lack of such information would be prejudicial to uninformed Bidders. Addenda must be issued in sufficient time to permit prospective Bidders to consider the changes in submitting or modifying their bids.

5.0 **RESPONSIVENESS OF BIDS:** To be considered for award, a bid must comply in all material respects with the Invitation for Bids, both as to the method and timeliness of submission and as to the substance of any resulting contract, so that all Bidders may stand on equal footing and the integrity of the formal advertising system may be maintained.

Bids should be filled out, executed, and submitted in accordance with the instructions which are contained in the Invitation for Bids. Bidders must use the bid form furnished by the District to assure uniformity in bids.

6.0 **TIME OF BID RECEIPT:** Bids must be received in the office designated in the Invitation for Bids not later than the time of bid opening.

- 7.0 **LATE BIDS**: Bids are considered late when they are received by the Bid Opening Officer or other authorized representative of the District (as directed in the IFB) after the time of receipt for bids for the Solicitation and the lateness is not due solely to District mishandling. Late bids will not be accepted by the District.
- 8.0 **MODIFICATION OR WITHDRAWAL OF BIDS BEFORE BID OPENING**: A bid may be modified or withdrawn by written request submitted by mail or in person. The Contract Administrator/Buyer or Bid Opening Officer must have received the request prior to the exact time of bid opening; it must be possible to establish, to the satisfaction of the District, the authority of the person making the modification or withdrawal request; and the person must sign a receipt. A telegraphic modification or withdrawal of bid is not acceptable.

III-5 BID RECEIPT AND OPENING

- 1.0 **RECEIPT OF BIDS**: As bids are received, the Contract Administrator/Buyer shall secure and safeguard the bids until the established time for bid opening.
- 2.0 **OPENING OF BIDS**: The person designated as the Bid Opening Officer shall decide when the time set for bid opening has arrived and will so declare to those present. All bids over \$10,000 received prior to the bid opening will then be publicly opened, read aloud to the persons present, and recorded. If it is impracticable to read the entire bid, as where many items are involved, the total amount of each bid will be read.
- 3.0 **RECORDING OF BIDS**: The solicitation number, bid opening date, general description of the procurement item, names of Bidders and bid prices shall be entered on a Bid Summary Sheet at the time the bid is read. When the items are too numerous to warrant the recording of all bids completely, an entry should be made of the solicitation number, opening date, a general description of the procurement items, and the total bid price where definite quantities are involved. Any apparent or potential problem with any bid that is noted at the time of bid opening should be indicated on the Bid Summary Sheet. The District's Bid Opening Officer will certify the accuracy of the Bid Summary Sheet by placing his/her signature thereon.
- 4.0 **BID MISTAKE IN PUBLIC WORKS AND PURCHASE CONTRACTS AND CONTRACTS SOLICITED BY IFB**:
 - 4.1 A Bidder under competitive bidding requirements, may not be permitted to change its bid because of a mistake. However, a bidder may seek to rescind its bid due to mistake, but must notify the District in writing within five calendar days after public opening of the bids. Relief of bidders for bid mistake on public works, is governed by state law, Public Contracts Code sections 5100, et seq.
 - 4.2 **REQUIREMENTS**: A bidder shall not be relieved of the bid unless by consent of the District, nor shall any change be made in the bid because of mistake (Ref. Public Contracts Code section 5101).
 - 4.3 The District may consent to a bidder being relieved of its bid on the basis of the following grounds:
 - 4.3.1 A mistake was made;
 - 4.3.2 The bidder gave written notice within five days to the District of the mistake specifying in the notice in detail how the mistake occurred;
 - 4.3.3 The mistake made the bid materially different than he or she intended it to be; and

- 4.3.4 The mistake was made in filing out the bid and not due to error in judgment or to carelessness in inspecting the site of the work, or in reading the plans or specifications.

(Ref. Public Contracts Code, section 5103)

- 4.4 Contract Administration/Purchasing Division will prepare a report in writing to document the facts establishing the existence of each element required to establish a basis for relieving the bidder of its bid. The contractor will be requested to produce physical evidence (e.g., bid preparation documents) that will reasonably allow the District to make a determination that a mistake was made.
- 4.5 The bidder who claims a mistake or who forfeits its bid security shall be prohibited from participating in further bidding on the project on which the mistake was claimed or security was forfeited. (Ref. Public Contracts Code, section 5105)
- 4.6 See Chapter VII, section 10.0 for additional documentation requirements.
- 4.7 Although not required by statute, purchase contracts will use these procedures unless otherwise approved by the Office of the General Counsel and the Department Manager of Procurement.

5.0 **BID MISTAKE IN SERVICE AGREEMENTS AND MISCELLANEOUS PROCUREMENT CONTRACTS:** The following procedures may only be implemented when there is corresponding language in the solicitation.

A Bidder/Proposer who seeks to rescind its bid due to a mistake or error in preparation of its bid, must, within five business days of public opening, so notify the District in writing or orally with a written confirmation. The notice must include details of the error or mistake. In addition to a bid or proposal on which the Bidder claims a mistake, all bids must be examined for mistakes after receipt. In cases of apparent mistakes, and in cases where there is reason to believe that a mistake may have been made, the Bidder shall be requested to verify the bid or proposal, calling attention to the suspected mistake. If the Bidder or Proposer alleges a mistake, the matter shall be processed in the manner set forth below. Such actions shall be taken prior to award.

- 5.1 **APPARENT CLERICAL MISTAKES:** Any clerical mistake apparent on the face of a bid may be corrected by the Contract Administration/Purchasing Division prior to award, after obtaining from the Bidder or Proposer written or telegraphic verification of the bid actually intended. Examples of such apparent mistakes are obvious error in placing decimal point or obvious error in designation of unit. Correction of the bid/proposal will be effected by attaching the verification to the original bid. Correction will not be made on the face of the bid; however, it shall be reflected in the award document.

- 5.2 **OTHER MISTAKES:** The Contract Administration/Purchasing Division is authorized to make the following administrative determinations in connection with mistakes in bids/proposals, other than apparent clerical mistakes, alleged after opening of bids/proposals and prior to award.
- 5.2.1 When the Bidder requests permission to withdraw a bid and clear evidence establishes the existence of a mistake, a determination by the Assistant General Manager - Administration or his/her designee, permitting the Bidder to withdraw its bid may be made.
- 5.2.2 However, if the evidence is clear both as to existence of the mistake and as to the bid actually intended, and if the bid, both as uncorrected and as corrected, is the lowest received, a determination by the Assistant General Manager - Administration or his/her designee, may be made to correct the bid and not permit its withdrawal.
- 5.2.3 When the Bidder requests permission to correct a mistake in its bid and clear evidence establishes both the existence of a mistake and the bid actually intended, a determination permitting the Bidder to correct the mistake may be made, provided that, in the event such correction would result in displacing one or more lower bids, the determination shall not be made unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself. If the evidence is clear only as to the mistake, but not as to the intended bid, a determination by the Assistant General Manager - Administration or designee permitting the Bidder to withdraw its bid may be made.
- 5.2.4 When the evidence is not clear that the bid, as submitted, was not the bid intended, a determination by the Assistant General Manager - Administration or designee may be made requiring that the bid be considered for award in the form submitted.
- 5.3 **MISTAKE DISCOVERED AFTER AWARD:** A mistake in a bid discovered after award may be corrected by contract modification if such correction would make the contract more favorable to the District without changing the requirements of the contract.

III-6 EVALUATION OF BIDS

- 1.0 **POLICY:** Contract Administration/Purchasing Division shall participate with the District Secretary's office at public bid openings for all sealed bids. Contracts for which either formal bids or quotations are solicited shall be awarded to the Contractor who submits the lowest responsive bid, who is deemed responsible and whose price is determined to be reasonable.
- 2.0 **RESPONSIVENESS OF BID:** The responsiveness of the bid itself is determined by its conformance to the technical, legal, and commercial requirements of the bid documents. Generally, a bid is not responsive and may not be considered for award when it contains a deviation as to any material factor, defined as a circumstance which affects price, delivery, quality or quantity of the articles or services furnished. The essential or material requirements of an IFB would usually include those pertaining to bid execution and the specifications, among others. A bid will be rejected when the Bidder imposes conditions which would modify requirements of the Solicitation Documents. The District may waive minor errors or omissions. The Contract Administration/Purchasing Division may opt, at any point during the procurement process to submit a complicated bid to the Office of the General Counsel for interpretation and advice.
- 3.0 **RESPONSIBILITY OF BIDDER:** The term "responsible" refers to a Bidder's financial resources, judgment, skill, experience, moral worth, integrity and ability to fulfill successfully the requirements of the contract. The four principal criteria used to determine a Bidder's responsibility are:
1. Status as a manufacturer, service provider or construction Contractor;
 2. Financial situation (as appropriate, use Dun & Bradstreet Report, District form "Statement of Qualification and Financial Condition of Bidder");
 3. Skill, fitness, capacity and experience;
 4. Prior conduct and performance.

In most instances, a Qualification review will be held shortly after bid opening to discuss the Bidder's qualifications and understanding of the terms, conditions, and technical requirements of the contract. The meeting is coordinated by the Contract Administrator/Buyer and may be attended by the apparent low Bidder, the Project Manager and, as appropriate, representatives from the Accounting Department, the Office of Civil Rights, and the Office of the General Counsel. While such a meeting is not mandatory, it often serves as a useful method of gathering information to be used in making a responsibility determination.

As part of the award process, the Contract Administrator/Buyer shall prepare a written responsibility determination memorandum. The memorandum shall describe those steps undertaken to determine a Bidder's responsibility and shall become a part of the official contract file documentation.

4.0 **PRICE ANALYSIS:** See Chapter VII-2 for information on performing a price analysis. Any bid may be recommended for rejection if the Department Manager of Procurement determines in writing that it is unreasonable as to price and the determination is supported by review and analysis of the action.

5.0 **BID EVALUATION:** Evaluation of bids for responsiveness, responsibility, and acceptability of proposed price is coordinated by the Contract Administrator/Buyer and performed by representatives of the following departments:

1. User Department/Project Manager.
2. Engineering and Construction Department (as appropriate).
3. Office of Civil Rights.
4. Office of the General Counsel.
5. Accounting Department.

Results of the evaluation must be documented to provide clear justification for contract awards. A separate technical evaluation memorandum must be prepared for each IFB procurement. It must be prepared by the User Department/Project Manager and approved by the Department Manager or authorized designee and will state whether the apparent low Bidder is technically responsive and the apparent low Bidder is responsible. This memorandum should be supported by documentation, if appropriate.

6.0 **REJECTION OF INDIVIDUAL BIDS:** The procedure to be followed to reject the low bid if it is non-responsive or if a Bidder is found to be not responsible is as follows:

- The District proceeds to evaluate the second low bid for responsiveness.
- In the case of an initial finding on non-responsibility, the District will provide a hearing giving the apparent low Bidder an opportunity to rebut adverse evidence and to present evidence that it is qualified to perform the contract.
- The User Department/Project Manager shall prepare an EDD recommending rejection of the apparent low Bidder and recommending award to the next Bidder determined to be the low responsive, responsible Bidder.
- The person authorized to determine whether any bid is to be rejected is that person who would be authorized to approve the contract awarding it to the low responsive, responsible Bidder. For example, if the lowest bid is for \$22,000, but is non-responsive, and the next low bid is for \$26,000, and is responsive, the Department Manager of Procurement is authorized to make the final decision recommending whether the lower bid should be rejected and the contract awarded to the next lowest Bidder.

- The originals of any rejected bids, and any findings with respect to such rejections, will be preserved in the contract file.

6.1 **BIDDER NOT RESPONSIBLE:** A recommendation by authorized official(s) of the District is necessary for declaring a Bidder not responsible. Such recommendation shall specify whether the Bidder has also been, or is being, debarred by the Federal Government, i.e., rendered ineligible to act as Contractor, Vendor, Subcontractor or Supplier on any future contract for a period of time, or whether the Bidder is deemed not responsible solely with respect to the instant bid. The following examples are provided for guidance; however, since a body of case law has developed on the issue of bidder "responsibility", the Office of the General Counsel shall be consulted before a final determination is made:

- A. A Bidder convicted of bribing a District official may be deemed to be not responsible;
- B. A Bidder who has defaulted or is in arrears may be deemed to be not responsible;
- C. A Bidder with a poor performance record in past dealings with the District may be deemed not responsible with respect to a bid unless it can demonstrate positive steps taken to correct past problems;
- D. A Bidder with a good performance record on other past contracts (or any Bidder) may be deemed to be not responsible with respect to a specific contract under consideration, or for a particular product or class of products, if the Bidder is deemed not to possess the financial or technical resources to perform.

6.2 **BIDDER'S TRANSFER OF ASSETS:** If a Bidder transfers all of his assets or that part of his assets related to the bid during the period between bid opening and the award, the District may elect to allow the transferee to take over the bid. The District will undertake to determine the responsibility of the transferee before an award is made. Low bids received from transferee firms determined not to be responsible (or ineligible) for any reason by the District will be rejected.

7.0 **REJECTION OF ALL BIDS/CANCELLATION OF INVITATION AFTER OPENING:** Preservation of the integrity of the sealed bid system dictates that, after bids have been opened, award must be made to that responsible Bidder who submitted the lowest responsive bid unless there is a compelling reason to reject all bids and cancel the IFB. As a general rule, after opening, an Invitation for Bids should not be canceled and readvertised due solely to increased requirements for the items being procured. Award should be made on the initial Invitation for Bids and the additional quantity should be treated as a new procurement.

7.1 **REASONS FOR CANCELLATION/DETERMINING FOLLOW-UP ACTION:** Reasons when an IFB must be canceled and bids rejected include, but are not limited to:

- (1) All bids were non-responsive or at unreasonable prices;
- (2) There is evidence of collusion or bad faith; or
- (3) Competition was not adequate to assure a reasonable price. The Contract Administration/Purchasing Division will undertake a Vendor survey to determine if reissuance or modification of the Solicitation Documents would increase competition or if competitive negotiation or non-competitive procurement procedures should be undertaken (see Chapter IV, "Competitively Negotiated Contracts" and Chapter VI, "Non-Competitive Procurement"). In such instances, thorough documentation to support the action taken must be included in the files.

An Invitation for Bid (IFB) may also be canceled after opening but prior to award if the goods/services are no longer needed or when the Procurement Department, in coordination with the User Department/Project Manager and the Office of the General Counsel, determines that circumstances justify such action.

7.2 **PROCEDURES FOR REJECTING ALL BIDS:** Once a decision is made to recommend the rejection of all bids and after the Vendor survey has been performed (if appropriate), the following steps are to be taken:

1. The Sponsor/Project Manager in collaboration with the Contract Administrator/Buyer and the Office of Legal Counsel, will determine the recommended course of action, i.e., revise and reissue the solicitation, request authority to negotiate a non-competitive contract, cancel the entire procurement action.
2. The Sponsor/Project Manager will prepare an EDD recommending the rejection of all bids for the approval of the Board or authorized individual for the Board. The person who would have been authorized to award the contract to the low Bidder on the solicitation is authorized to reject all bids; e.g. if the low bid on a solicitation is \$26,000, the Department Manager of Procurement may reject all bids for that procurement.
3. Upon receiving authorization, the Department Manager of Procurement sends a letter to all of the Bidders advising them that all bids have been rejected, and usually also advising them whether they can expect a revised solicitation to be issued.
4. Complete written documentation must be maintained in the contract file including copies of original bids, written recommendations from the User Department (and the Office of the General Counsel, if appropriate), records of conversations with Vendors/Contractors, the EDD and a record of the basis for decisions made pertaining to the contract.

8.0 **RESTRICTIONS ON DISCLOSURE OF DESCRIPTIVE LITERATURE:** Unless the IFB provides for otherwise, when a bid is accompanied by descriptive literature and the Bidder imposes a restriction that such literature may not be publicly disclosed, such restriction renders the bid non-responsive if it prohibits the disclosure of sufficient information to permit competing Bidders to

know the essential nature and type of the products offered or those elements of the bid which relate to quantity, price and delivery terms.

Unless required otherwise, subject to the Public Records Act, descriptive literature restricted by a Bidder against public disclosure will not be disclosed in a manner which would contravene the restriction without permission of the Bidder (see Chapter I-5, Section 3.4).

- 9.0 **ALL OR NONE QUALIFICATIONS**: Unless the Invitation for Bids provides otherwise, a bid is not rendered non-responsive by the fact that the Bidder specifies that award will be accepted only on all or a specified group of the items included in the Invitation for Bids. However, Bidders will not be permitted to withdraw or modify "all or none" qualifications after bid opening since such qualifications are substantive and affect the rights of other Bidders.
- 10.0 **MINOR INFORMALITIES OR IRREGULARITIES IN BIDS**: A minor informality or irregularity is one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation of a bid from the exact requirement of the Invitation for Bids, the correction or waiver of which would not be prejudicial to other Bidders. Subject to the authorizations for award in Chapter I-4, the Department Manager of Procurement may waive such deficiency (see Chapter III-5, Section 4.0 and Chapter III-6, Section 2.0)
- 11.0 **EVALUATION OF A SINGLE BID**: In the event a single bid is received in a sealed bid procurement, it is advisable that the District staff conduct both a canvass of Vendors to determine why there were no other Bidders and also an analysis which documents that the price is fair and reasonable (see Chapter VII-2, Sections 7.0 and 9.4).
- 11.1 Where competitive bids are solicited and no responsive bids are received, an alternative procurement may be permissible under the non-competitive procedures set forth in Chapter VI.
- 11.2 If FTA funds are to be used in the procurement and approval is required, see Chapter VII-2, Section 9.0 for the documentation FTA requires.
- 12.0 **TIED BIDS**: The resolution of an apparent tie is performed as follows:
- Arithmetic calculations are checked to confirm that the bids are identical and the bids are reviewed for responsiveness.
 - If the bids are tied and responsive, the Contract Administrator/Buyer advises the tied Bidders, in writing, that a tie has occurred and they are invited to attend the determination of the winning Bidder. This will be done by the drawing of lots.
 - The date, time and method of this determination will be established by written notice but does not require the attendance of the Bidders.

This process will be witnessed by three (3) Procurement Department personnel.

- 13.0 **BID SAMPLES:** Bid samples should be furnished as part of the bid and must be received by the time specified in the solicitation for receipt of the bids. Failure to furnish samples on time will require rejection, except as otherwise provided for in the solicitation documents.

Bid samples will be tested or evaluated by appropriate District staff to determine compliance with all the characteristics listed for examination in the solicitation documents. Failure of any vendor's sample(s) to conform to the required characteristics will require rejection of the bid. Further, products delivered under any resulting award and contract must conform to (i) the approved sample for the characteristics listed for test or evaluation and (ii) the specifications for all other characteristics.

Bid samples furnished with a bid that are not required by the invitation generally will not be considered as qualifying the bid and will be disregarded. However, the bid sample will not be disregarded if it is clear from the bid or accompanying papers that the bidder's intention was to qualify the bid.

- 13.1 Samples that are not destroyed in testing will be returned to bidders at their request and expense, unless otherwise specified in the invitation. Disposition instructions shall be requested from bidders and samples disposed of accordingly. Samples ordinarily will be returned collect to the address from which received if disposition instructions are not received within 30 days. Small items may be returned by mail, postage prepaid.
- 13.2 Samples that are to be retained for inspection purposes in connection with deliveries shall be transmitted to the inspecting activity concerned, with instructions to retain the sample until completion of the contract or until disposition instructions are furnished.
- 13.3 Where samples are consumed or their usefulness is impaired by tests, they will be disposed of as scrap unless the bidder requests their return at its expense.
- 14.0 **DESCRIPTIVE LITERATURE:** If required by the solicitation documents, descriptive literature shall be used to establish, for purposes of evaluation and award, details of the product offered that are specified in the solicitation documents. This descriptive material shall pertain to significant elements such as (i) design, (ii) materials, (iii) components, or (iv) performance.

III-7 AWARD PROCESS

- 1.0 **AWARD:** Unless all bids are rejected, award must be made by the District by written notice, within the time for acceptance specified in the bid, e.g., within 120 days. Award will be made to the lowest responsive, responsible Bidder. Award will not be made until all required Executive and Board approvals have been obtained.

- 2.0 **DELAY OF AWARD:** Should administrative difficulties after bid opening threaten to delay award beyond Bidders' acceptance periods, the Contract Administrator/Buyer may ask the Bidder(s) to extend the bid acceptance period (with consent of sureties, if necessary) to avoid the need for readvertising.

- 3.0 **AUTHORITY TO APPROVE CONTRACTS:** The User Department prepares the EDD requesting approval to award a contract or purchase order, and then circulates it to obtain the concurrence (or non-concurrence) of affected Departments. The EDD is then submitted to the individual who has been delegated the authority to approve a procurement action at the dollar value of the action. If the action must be approved by the District Board, the EDD is sent to the General Manager, through the Deputy General Manager, for approval for submittal to the Board.

A notice of award, in the case of public works contracts, is sent by the District Secretary to the awardee, the successful bidder then must execute the contract within the designated time period, usually ten calendar days and then submit the required insurance and surety forms.

In the case of purchase contracts, a purchase order is executed by the authorized contracting officer and transmitted to the recommended vendor. Upon execution by the District, a binding contract is formed.

III-8 SEALED BID PROCUREMENT FILES

- All contractual documents and correspondence will be filed in reverse chronological order within the file.
- Contract Administrator/Buyer must keep a chronological record of all actions taken, conversations held and decisions made which affect the course of a procurement.
- All original documents are to be kept in the contract file; only photocopies are to be loaned or transferred.
- The Project Manager for each project must ensure that he or she forwards all original documents pertaining to a contract action to the Contract Administrator/ Buyer for maintenance in the official contract file.
- Documents to be kept in the contract file include, but are not limited to the following:
 - Document Authorizing the Project, e.g., Approval-in-Concept Staff Summary.
 - Purchase Requisition or Adoption Memo.
 - In-House Estimate.
 - User, General Counsel and Office of Civil Rights Concurrence Sign-off on Solicitation.
 - Approval to Advertise (Capital contracts).
 - Advertising Requests, Affidavits, Ad Copy.
 - Funding Commitment.
 - Original Addenda, Manifests, Log Book Pages.
 - Original Bids of Successful and Unsuccessful Bidders.
 - Bid Tabulation and Evaluation.
 - Price and, if appropriate, Cost Analysis.
 - Responsibility Determination.
 - Record of Qualification Hearing.
 - Technical, Office of Civil Rights, Financial, General Counsel Concurrence/Sign-offs.
 - EDD or other Recommendation for Award.
 - Executed Contract Document.
 - History Sheets.
 - Certification from Office of Civil Rights that DBE requirements, if any, have been met.
 - Requests for and Approval of Performance of Additional Work.
 - Records of Negotiations for Additional Work.
 - Funding Approvals for Additional Work.
 - Executed Supplemental Agreements and Additional Work Orders.

- Notice Directing Contractor to Proceed.
- Final Payment Memo.
- Certificate of Completion.
- Contractor Performance Evaluations.

III-9 DISPOSITION OF SCRAP AND OTHER DISPOSABLE ITEMS

1.0 POLICY

- 1.1 It is the policy of the District to dispose of obsolete capital equipment, surplus equipment, material, scrap and, both hazardous and non-hazardous waste products in the most expeditious and efficient manner.
- 1.2 To that end, District personnel shall follow the provisions of Board Resolution No. 4666 or any other succeeding resolution.

III-10 TWO-STEP SEALED BIDDING

- 1.0 **GENERAL:** Two-step sealed bidding is a combination of competitive procedures designed to insure qualified bidders and also to comply with the requirements of sealed bidding. This method is especially useful in acquisitions requiring technical proposals, particularly those for complex items.

Two-step sealed bidding is conducted in two steps:

Step one Consists of the request for the submission of both the technical proposal and price bid in separately sealed envelopes, evaluation, and (if necessary) discussion of a technical proposal. No pricing is involved. Solicitation may be publicized using the procedures in Chapter III-2 for public works or purchase contracts, or Chapter IV-2, Section 2.4 for services and miscellaneous procurement contracts.

The objective is to determine the acceptability of the products, equipment, services, etc. offered. As used in this context, the word 'technical' has a broad connotation and includes, among other things, the engineering approach, special manufacturing processes, and special testing techniques. It is the proper step for clarification of questions relating to technical requirements. Conformity to the technical requirements is resolved in this step, but not responsibility as defined in Chapter III-6 of the Procurement Manual.

Step two Involves the opening of sealed priced bids by those firms or individuals who submitted acceptable technical proposals in step one. Sealed Bids will be opened, read aloud, evaluated and the award made in accordance with Chapters III-5 through III-7.

- 1.1 **CONDITIONS FOR USE:** Unless other factors require the use of traditional sealed bidding, two-step sealed bidding may be used in preference to competitive negotiation when all of the following conditions are present:

- (1) Available specifications or purchase descriptions are not definite or complete or may be too restrictive without technical evaluation, and any necessary discussion, of the technical aspects of the requirement to ensure mutual understanding between each source and the District.
- (2) Definite criteria exist for evaluating technical proposals.
- (3) More than one technically qualified source is expected to be available.
- (4) Sufficient time will be available for use of the two-step method.
- (5) A firm-fixed-price contract or a fixed-price contract with economic price adjustment will be used.

None of the following precludes the use of two-step sealed bidding:

- (1) Multi-year contracting.
- (2) District-owned facilities or special tooling to be made available to the successful bidder.
- (3) A first or subsequent production quantity is being acquired under a performance specification.

- 1.2 The Contract Administrator/Buyer along with the User Department/Project Manager must be able to reduce the District's requirements into a set of technical minimums for evaluating each Proposer's technical proposal relative to the evaluation factors and subfactors set forth in the Two Step IFB to a Source Selection Plan, or "SSP" (see section 1.3 below).

The criteria and their aggregate weights, if any, must be stated in the Two Step IFB and may not be changed after proposals are received. If the weights, or the criteria as published in the Two Step IFB must be changed after the technical proposals have been received, the solicitation must be amended and Proposers must be permitted to submit new Technical proposals.

- 1.3 **SOURCE SELECTION PLAN:** Prior to publicizing the Two Step IFB , a source selection plan (SSP) should be prepared which addresses (i) District requirements, (ii) Acquisition background, (iii) prospective sources for these services, (iv) competition, (v) procurement methods, (vi) type and form of contract, (vii) compensation basis, (viii) source selection procedures, (ix) evaluation matrix, (x) cost estimate, (xi) selection committee, (xii) final ranking and recommendation for award.

This Source Selection Plan shall be submitted to the Department Manager, Procurement or his designee for approval prior to the Two Step IFB being issued in order to maintain the competitiveness and integrity of the process. This approved plan shall then be put into the file for use by the evaluation committee(s) when technical proposals are received.

2.0 **PROCEDURES**

- 2.1 **STEP ONE:** Requests for technical proposals shall be distributed in accordance with the requirements of Chapter III-4 of the Procurement Manual. The request must include, as a minimum, the following:

- (1) A description of the equipment, construction, supplies or services required.
- (2) A statement of intent to use the two step method.
- (3) The requirements of the technical proposal.
- (4) The evaluation criteria which must be developed along the lines of minimums. Technical proposals using this method are normally not scored.
- (5) A statement that the technical proposals shall not include prices or pricing information and that if any is included, the proposal will be returned to the Bidder.
- (6) The date, or date and hour, by which the proposal must be received.

- (7) A statement that (i) in the second step, only bids based upon technical proposals determined by BART to be acceptable, either initially or as a result of discussions, will be considered for awards and (ii) each bid in the second step must be based on the bidder's own technical proposals.
- (8) A statement that:
 - (i) offerors should submit proposals that are acceptable without additional explanation or information;
 - (ii) the District may clarify proposals that are apparently acceptable for purposes of verifying that information;
 - (iii) the District may make a final determination regarding a proposal's acceptability solely on the basis of the proposal as submitted, and;
 - (iv) the District may proceed with the second step without requesting further information from any offeror, or conducting clarifications.
- (9) A statement that a notice of unacceptability will be forwarded to the offeror upon completion of the proposal evaluation by the District and its final determination of unacceptability.
- (10) A statement either that only one technical proposal may be submitted by each offeror or that multiple technical proposals may be submitted.

When specifications permit different technical approaches, it is generally in the District's interest to authorize multiple proposals. If multiple proposals are authorized, see 48 CFR 14.201-6(s).

2.1.1 Information on delivery or performance requirements may be of assistance to bidders in determining whether or not to submit a proposal and will normally be included in the Two Step IFB.

2.1.2 Upon receipt, the Contract Administrator/Buyer shall:

- (1) Safeguard proposals against disclosure to unauthorized persons;
- (2) Accept and handle data marked in accordance with Chapter III of the Procurement Manual; and
- (3) Remove any reference in the Technical Proposal to price or cost, or if appropriate, request the Vendor to reformat it at the District.

The contract administrator/buyer shall establish a time period for evaluating technical proposals. The period may vary with the complexity and number of proposals involved. However, the evaluation should be completed in a timely fashion.

- 2.1.3 Evaluations of the technical proposals shall be based on the criteria in the Two Step IFB but not consideration of responsibility as defined in Chapter III-6. Such evaluation should be conducted in conformance with the requirements of competitive negotiations for non-architectural/engineering procurements in Chapter IV-2, section 3.0.

Proposals, shall be categorized as:

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

Consistent with the requirements of Chapter IV-2, any proposal which modifies, or fails to conform to the essential requirements or specifications of, the request for technical proposals should be considered nonresponsive and categorized as unacceptable.

- 2.1.4 The contract administrator/buyer may proceed directly with step two if there are sufficient acceptable proposals to ensure adequate price competition under step two, and if further time, effort and delay to make additional proposals acceptable and thereby increase competition would not be in the District's interest.

- 2.1.5 If this is not the case, the contract administrator/buyer shall request bidders whose proposals may be made acceptable to submit additional clarifying or supplementing information.

The contract administrator/buyer shall identify the nature of the deficiencies in the proposal or the nature of the additional information required. The contract administrator/buyer may also arrange discussions for this purpose. However, no proposal shall be discussed with any offeror other than the submitter.

- 2.1.6 In initiating requests for additional information, the contract administrator/buyer shall fix an appropriate time for bidders to conclude discussions, if any, submit all additional information, and incorporate such additional information as part of their proposals submitted.

Such time may be extended in the discretion of the Department Manager, Procurement if the additional information incorporated as part of a proposal within the final time fixed establishes that the proposal is acceptable, it shall be so categorized. Otherwise, it shall be categorized as unacceptable.

When a technical proposal is found unacceptable (either initially or after clarification), the contract administrator/buyer shall promptly notify the offeror of the basis of the determination and that a revision of the proposal will not be considered. Upon written request and as soon as possible after award, the contract administrator shall debrief unsuccessful offerors (see generally Chapter IV-2, Section 3.7).

- 2.1.7 Late technical proposals and late sealed bids in step two are governed by Chapter III-5.

3.0 **STEP TWO:** Sealed bidding procedures from Chapter III shall be followed except that price bids shall:

- (1) Be accepted only from those bidders submitting acceptable technical proposals in step one;
- (2) Prominently state that the bidder shall comply with the specifications and the bidder's technical proposal.

III-11 DESIGN-BUILD CONTRACTS

1. **GENERAL:** The design-build procurement method consists of contracting for design and construction simultaneously with contract award to a single contractor, consortium, joint venture, team, or partnership that will be responsible for both the project's design and construction. For Federally funded design-build contracts, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) expressly authorizes the use of FTA capital assistance to support design-build contracts "after the District complies with Government requirements," 49 U.S.C. Section 5325(d)(2). In addition the California Public Contract Code Section 20209.5 et seq. provides that the District conform with, among other things, a requirement for specific findings from the BART Board supporting the use of the design-build method, and other conditions detailed in the Code.

2. **PROCUREMENT METHOD DETERMINED BY VALUE.** For Federally funded design-build contracts, the District must first separate the various contract activities to be undertaken and classify them as design or construction, and then calculate the estimated total value of each. Because both design and construction are included in a single procurement, FTA expects the District to use the procurement method appropriate for the services having the greatest cost, even though other necessary services would not typically be procured by that method.

(a) **Construction Predominant.** The construction costs of a design-build project are usually predominant so that the District would be expected to use competitive negotiations or sealed bids for the entire procurement rather than the qualification-based Brooks Act procurement procedures. Specifically, when construction costs will be predominant, unless FTA determines otherwise in writing, the District may not use qualifications-based procurement procedures to acquire architectural engineering, program management, construction management, feasibility studies, preliminary engineering, design, architectural and engineering, surveying, mapping, or related A&E services unless required by State law adopted before August 10, 2005.

(b) **Design Services Predominant.** In the less usual circumstance in which the cost of most work to be performed will consist of costs for architectural and engineering, program management, construction management, feasibility studies, preliminary engineering, design, architectural engineering, surveying, mapping, or related A&E services, FTA expects the District to use qualifications-based procurement procedures based on the Brooks Act.

3. **SELECTION PROCESSES.** For Federally funded contracts, the selection process contained in this section shall be used when it has been determined that the design-build contract is construction predominant rather than design predominant. The District may structure its design-build procurement using one or more steps as described below:

(a) **One-Step Method.** The District may undertake its design-build procurement in a single step.

(b) **Two-Step Method.** Another procurement method the recipient may use for large design-build projects is a two-step selection process as authorized for Federal Government use by 41 U.S.C. Section 253m. This method consists of:

1. Review of Technical Qualifications and Approach. The first step is a review of the prospective contractors' technical qualifications and technical approach to the project. The District may then narrow the competitive range to those prospective contractors with satisfactory qualifications that demonstrate a technically satisfactory approach.

2. Review of Complete Proposals. The second step consists of soliciting and reviewing complete proposals, including price, submitted by prospective contractors first determined to be qualified.

By using this two-step method, it will not be necessary for the District to undertake extensive proposal reviews, nor will prospective offerors need to engage in expensive proposal drafting. This two-step selection procedure is separate and distinct from prequalification and is but one procurement method available to the District.

Pages 131 through 139 are reserved.

CHAPTER IV

COMPETITIVELY NEGOTIATED CONTRACTS

CHAPTER IV COMPETITIVELY NEGOTIATED CONTRACTS

- 1.0 This chapter outlines the District procedures for competitively negotiated procurements (also known as "comparative RFP process" or "competitive RFP" process) for contracts other than purchase and public works contracts (See Chapter I-4). For small purchases see Chapter V and for non-competitive procurements, see Chapter VI.

The chapter divides competitively negotiated procurements into three basic categories and examines the procedures used for each, namely:

1. Personal Services contracts for Architectural/Engineering Services;
2. Services contracts for Non-Architectural/Engineering Services; and,
3. The purchase of certain electronic and specialized rail transit equipment. (See also Chapter X, Price Negotiation Overview, for additional guidance.)

Unless precluded by statute, these competitive negotiation procedures are applicable to all procurements of Architectural/Engineering Services and to other procurements of services when it is not possible to use the sealed bid method because the scope or quantity of the services to be obtained cannot be fully detailed.

Negotiated contracts differ significantly from sealed bidding in the following ways:

- (i) Form of the request -- The District states its requirements in the form of a Request for Proposals (RFP) rather than an IFB, and vendors respond with proposals which may contain significantly more information than a bid.
 - (ii) Negotiations/discussions -- The District can negotiate with vendors whose proposals are acceptable or, in the District's opinion, can be made acceptable. Negotiations can apply to price, schedule, technical requirements, type of contract, or other terms of the proposal. They can be directed at achieving a mutual understanding of what is required or bargaining for more favorable terms. Discussions provide the offeror an opportunity to revise or modify its proposal.
 - (iii) Factors to consider in making the award -- the District has greater discretion in awarding a contract to an offeror whose proposal is most advantageous, considering all factors, not just total cost. Thus, in addition to total cost, technical quality can be a significant factor for award.
- 1.1 If the User Department/Project Manager wishes to deviate from these procedures for a given project, a written request justifying the deviation desired must be submitted to the Assistant General Manager - Administration or his/her designee, who subject to any legal restrictions, will exercise his/her judgment whether or not the deviation is permissible. Any requests that raise legal issues will require the concurrence of the Office of the General Counsel.

- 1.2 Proposals should be solicited from an adequate number of potentially qualified Proposers in order to obtain maximum open and free competition or where appropriate, adequate competition.
- 1.3 In all RFPs, the District reserves the right to reject all proposals and resolicit or cancel the procurement if deemed by the District to be in its best interest. The District also reserves the right to enter into a contract with any Proposer, based upon the initial cost proposal without conducting written or oral negotiations in conformance with the procedures of Chapter X, Price Negotiation Overview.
- 1.4 A Business Review Panel may be convened and constituted by the General Manager's office as necessary to review and resolve "business issues" as they arise, either before or after award. Every effort will be made to minimize the use of this procedure through the early identification of such issues and by bringing them to the attention of the departments concerned.

IV-1 PERSONAL SERVICES CONTRACTS FOR ARCHITECTURAL/ENGINEERING SERVICES

1.0 **APPROVAL-IN-CONCEPT**: If the project is a Major Procurement and is not a Pre-Approved Procurement, the User Department/Project Manager obtains Approval-In-Concept from the General Manager (See Chapter I-4 for definitions and procedures).

1.1 **ARCHITECTURAL/ENGINEERING SERVICES**: Architectural/Engineering services are defined as professional services of an architectural or engineering nature associated with research, development, design, construction, alteration, or repair of real property that are required to be performed by a registered or licensed architect or engineer and such other professional services which uniquely or to a substantial extent require performance by architectural, landscape architectural, engineering, environmental, land surveying, or construction project management firms such as program management, construction management, feasibility studies, environmental studies, preliminary engineering, design, survey and mapping.

The District will publicly announce all requirements for architectural-engineer services, and negotiate contracts for these services based on the demonstrated competence and qualifications of prospective Contractors to perform the services required at fair and reasonable prices. (See California Government Code 4526, et seq.) Sources for architect-engineer services shall be selected in accordance with the procedures in this Chapter IV-1, rather than the solicitation or source selection procedures prescribed in Chapter III, IV-2, or V of this manual. Source selections for architect-engineer services shall not use price as a factor in determining the best qualified proposer in conformance with California statutes, Federal regulations and FTA procurement guidelines. Further, these guidelines state, in general, that relative to conducting a procurement for A/E type services:

1. An offeror's qualifications will be evaluated;
2. Price be excluded as an evaluation factor;
3. Negotiations will be conducted with only the most qualified offeror; and
4. Failing to reach agreement on price, negotiations with the next most qualified offeror will be conducted until a contract award can be made to the most qualified offeror whose price is fair and reasonable.

Services that are not architectural or engineering services as defined above should be acquired pursuant to Chapters III, IV-2, or V as appropriate.

2.0 **SELECTION PROCEDURES - ARCHITECTURAL/ENGINEERING SERVICES**: The User Department/Project Manager will prepare a "Request for Consultant Services" which will include pertinent details, a project summary and Scope of Work for inclusion in the Request for Proposal (RFP) and Consultant contract. In addition, a cost estimate and staffing table shall be prepared (See Section 2.3.1). Refer to Chapter II-2 and II-3 for guidance on initiating a Request for Consultant Services and preparing a Scope of Work. A copy of the request will be sent by the requesting department to the Procurement (Contract Administration Division) Department.

Incomplete packages without reasonable explanation for the omissions, will be returned to the requestor without action.

- 2.1 **OFFICE OF CIVIL RIGHTS:** A copy of the Request for Consultant Services will be sent by the User Department/Project Manager to the Office of Civil Rights. The Office of Civil Rights will send to Contract Administration Division, with a copy to the User Department/ Project Manager, the Office of Civil Rights' determinations.
- 2.2 **MAINTENANCE OF CONSULTANT FILES:** The Procurement Department will maintain a data file of Architectural/Engineering Consultant firms. The file shall contain data supplied by the Consultants on forms such as the Federal General Services Administration Standard Forms 330 (SF 330, see for reference, Attachments N & O) and also prior District performance evaluations that have been provided to Procurement by Project Managers as required by Chapter IV-1, Section 3.7. Procurement shall review and update the file as necessary to maintain current information on such Consultants.
- 2.3 **RFP DEVELOPMENT:** As soon as the Procurement Department has determined that the information submitted by the User is complete, it will assemble the RFP and obtain the appropriate input from the User, Legal Department and Office of Civil Rights. Copies of the RFP should be sent to all requestors. The District is not obligated to solicit proposals from every firm which may be included in its source list but only from the number of qualified sources necessary to promote full and open competition and to take reasonable steps to try to insure that the procurement is made to the best advantage of the District. The fact, however, that a firm has not received a Request for Proposal does not mean that it cannot participate in a particular procurement. Any firm can request and receive a solicitation package. Any response to publicized requests for RFP shall be honored to the maximum extent practical.
 - 2.3.1 **COST ESTIMATE AND STAFFING TABLES:** When the scope and nature of the services are known with relative certainty in advance, the Sponsoring Department will transmit to Procurement a Cost Estimate and Staffing Table for the Consultant contract for use by both the Pre-Selection and Final Selection Committees and by Procurement during negotiations. The estimate shall be prepared on the basis of a detailed analysis of the required work as though the District were submitting a proposal. This Cost Estimate will be included in the "Request for Consultant Services" specified in paragraph 2.0. The overall amount of the District's estimate shall not be disclosed.
 - 2.3.2 Based on the information received from the User Department/Project Manager (see Section 2.0), the Procurement Department will prepare the RFP.
 - 2.3.3 Request for Proposals shall be prepared in a manner to accomplish the following:
 - a. Promote maximum free and open competition for the required services.

- b. Set forth the terms and conditions which are acceptable to the District in the performance of such services.
- c. Define all of the technical services required in a clear non-ambiguous manner. Unnecessary or unneeded services shall not be included in the work scope contained in a Request for Proposal.

2.3.4 **EVALUATION CRITERIA:** Each potential Proposer should be evaluated in terms of its:

- a. Professional qualifications necessary for satisfactory performance of required services;
- b. Specialized experience and technical competence in the type(s) of work required;
- c. Capacity to accomplish the work in the required time;
- d. Past performance on contracts with the District, other government agencies and private industry in terms of cost control, quality of work and compliance with performance schedules;
- e. Location in the general geographical area of the project and knowledge of the locality of the project; provided that application of this criterion leaves an appropriate number of qualified firms, given the nature and size of the project; and
- f. Acceptability under other appropriate evaluation criteria (these must be specifically identified in any Request for Proposals).

As previously noted, price shall not be used as a factor in determining the most qualified firm.

2.3.5 **EVALUATION WEIGHTS AND SCORING PROCEDURES:** The relative importance of all evaluation factors (including those set forth above) shall be set forth in each Request for Proposal issued by the District; either by ranking from highest to lowest or by assigned numerical value. Assigned number values must be documented in the file prior to issuing the RFP.

No other factors in addition to those set forth in the Request for Proposal shall be considered in the evaluation performed by the District, however, contracts shall be awarded to responsible, prospective Consultants only.

The User Department/Project Manager along with Contract Administrator reviews all criteria to be used to evaluate proposals, and the weight to be assigned to each as well as

the proposed scoring methodology and allocation of the scores between the evaluation of the technical proposal and that of the oral presentation as applicable. PROPOSERS WILL BE RANKED ON THE BASIS OF THE COMBINED WRITTEN AND ORAL SCORES.

The Contract Administrator along with the User Department/Project Manager will then reduce this system for evaluating and conducting the scoring of each Proposer's proposal relative to the evaluation factors and subfactors set forth in the RFP to a Source Selection Plan, or "SSP" (see Section 2.3.6 below).

The criteria and their aggregate weights must be stated in the RFP and may not be changed after proposals are received. If the weights, or the criteria as published in the RFP must be changed after proposals have been received, the solicitation must be amended and Proposers must be permitted to submit new proposals.

- 2.3.6 **SOURCE SELECTION PLAN:** Prior to publicizing the RFP, a source selection plan ("SSP") should be prepared which addresses (i) District requirements, (ii) acquisition background, (iii) prospective sources for these services, (iv) competition, (v) procurement methods, (vi) type and form of contract, (vii) compensation basis, (viii) source selection procedures, (ix) scoring matrix, (x) cost estimate, (xi) selection committee, (xii) final ranking and recommendation for award.

This Source Selection Plan shall be submitted to the Department Manager of Procurement or his designee for approval prior to the RFP being issued in order to maintain the competitiveness and integrity of the process. This approved plan shall then be put into the file for use by the evaluation committee(s) when proposals are received.

- 2.3.7 **CHANGES IN DISTRICT REQUIREMENTS:** (See Section 2.2 of Chapter IV-2)

- 2.4 **ADVERTISING PROCEDURES AND DEVELOPMENT OF LONG LIST:** Ordinarily when the estimated fee for the A/E project is fifty thousand dollars (\$50,000) or more, the Procurement Department will advertise for Consultants interested in receiving RFPs for a specific project or groups of projects. The ads will appear once in a daily newspaper published in the San Francisco Bay Area, and/or once in a nationally circulated weekly engineering publication.

- 2.5 **COMPOSITION OF PRE-SELECTION COMMITTEE:** A Consultant Pre-Selection Committee will be formed and chaired by the Manager, Contract Administration Division or his designee. The Committee will normally be comprised of at least five (5) voting members with four (4) members from the appropriate User Department, Project Manager organization or Executive staff group, and one (1) member from the Office of Civil Rights. The Chair of the Consultant Pre-Selection Committee shall have no vote except to break ties. The Project Manager will solicit the names of Pre-Selection and Final Selection Committee members from the appropriate User Department/Project Manager(s) and the Office of Civil Rights. Once the members for each

Committee are identified, the listing for both Committees will be submitted simultaneously to Contract Administration Division. The Project Manager shall advise the Procurement Department, in writing, of all changes to designated Committee Members.

2.5.1 **CONFLICT OF INTEREST RESTRICTION:** (Attachment P) In order to avoid even the appearance of a conflict of interest, members of the Pre-Selection or Final Selection Committees must disclose any present, prior or prospective affiliation (i.e., employment, source of income, financial interest or other affiliation) of themselves or members of their family with any Consultant firm or subconsultant or supplier or individual being considered for pre- or final selection or any firm or individual for whom the contract may have a foreseeable financial effect. In the event such affiliation existed or exists, the member is responsible for advising the Chair. The determination of whether affiliations are disqualifying will be made on a case by case basis. In no event will members with interests which are disqualifying under State or Federal law or regulations or under the District's Code of Ethics (Section I-5) herein be permitted to participate.

To accomplish that end and in order to avoid the necessity of having to adjourn and re-schedule Committee meetings, prior to the meetings the Contract Administrator shall inform the nominated Committee members of the names of the Consultants being considered for pre- or final selection, the names of potential subconsultants and suppliers, if known, and the scope of work of the proposed agreement.

2.6 **EVALUATION OF LONG LIST FIRMS AND DEVELOPMENT OF SHORT LIST:** If the "long list/short list" approach is being followed, the Contract Administrator will convene the Pre-Selection Committee. The Project Manager shall give a brief presentation on the project Scope of Work. The "long list" of Consultants will be transmitted by the Contract Administrator, along with the appropriate SF 254 and SF 255 forms (if available), Scope of Work, including the approximate construction cost(s), and prior District performance evaluations, to the Consultant Pre-Selection Committee members. In turn the Pre-Selection Committee will select a "short list" of Consultants, with a minimum of six (6) and a maximum as determined by the Committee, and will include at least four (4) alternates in accordance with the ratings given to each firm based on an initial screening. See NOTE after 2.3 if more than one Consultant is to be selected by the Committee. The Chair will collect the "Consultant Pre-Selection Committee Member Certifications" for inclusion in the official contract file.

2.6.1 **ALTERNATIVE APPROACH:** Depending upon the nature of the A/E services being requested, the District may choose not to follow the "short listing" approach described above. As an alternative, it may solicit proposals from all consultants known to be capable of providing the required services. If the District chooses to follow the alternative approach, then various elements of the process described below may be omitted.

2.7 **EVALUATION FORMS AND NOTIFICATION/MAILING OF RFPs:** The Pre-Selection Committee Chair will document the results of the members' evaluations. The Chair will ascertain that the

selected Consultant(s) do not appear on the Federal Government's list of debarred or ineligible Contractors or Consultants. Proof of the allocation of funding is obtained when Approval-in-Concept is received.

The Contract Administrator, with the approval of the Project Manager, will prepare and send the RFP packages to the Consultants selected for the shortlist. The list will be made available to anyone requesting it. The results of this process shall be adequately documented by the Contract Administrator.

- 2.8 **PRE-PROPOSAL CONFERENCE AND SITE VISIT/ISSUANCE OF ADDENDA:** The Contract Administrator, and the Project Manager, will host all pre-proposal conferences. The Project Manager, in consultation with the Contract Administrator, will arrange and lead all site inspections. The Project Manager will also prepare written responses to all technical questions arising from the Request for Proposal and submit them to the Contract Administrator. The Contract Administrator, in consultation with the Project Manager and Contract Administration Division management, will make determinations on the need for extensions or cancellations of the receipt of proposals. The Contract Administrator is also responsible for transmitting all written responses, time extensions or cancellations to the Consultants as addenda.

- 2.9 **EVALUATION OF PROPOSALS BY FINAL SELECTION BOARD:** The Contract Administrator will arrange to receive all responses to the District's RFP from the District Secretary's office and distribute the technical proposals to the members at the Final Selection Committee kickoff meeting (See Conflict of Interest Restriction, Chapter IV-1, Section 2.5.1). The Project Manager will give a brief presentation on the project Scope of Work. The Contract Administrator will establish the convening date and place for the kickoff meeting, usually three (3) working days after the receipt of proposals. Any cost data/element submitted with the initial proposal will be retained by Procurement to permit Procurement to perform a cost analysis after qualifications have been evaluated and ranked, but prior to commencing negotiations (See Chapter VII-2, Section 7.0). The cost proposals may be examined by the Project Manager for a technical review, as appropriate. The designated Committee members must attend all of their respective Committee meetings. If a Committee member is or expects to be absent for an extended period of time or an emergency precludes the Committee member's attendance, the meeting must be postponed or a new designee shall be chosen by the relevant department. The meeting shall be rescheduled allowing sufficient time for the new designee to become familiar with the project. There will be no alternates substituted for designated members, and the Chair will adjourn the meeting if a designated member is not in attendance.

NOTE: During the consideration of proposals, none of the information contained in them shall be made available to the public or to anyone in the District not having a legitimate interest or need to know unless otherwise required by law.

- 2.10 **COMPOSITION AND FUNCTION OF FINAL SELECTION COMMITTEE:** The Final Selection Committee will be hosted by the Contract Administrator and the Project Manager. The Committee

will be comprised of members from departments specified in paragraph 2.5. Other than the Project Manager, the Office of Civil Rights representative and the nonvoting Contract Administrator, the other members of the Final Selection Committee ordinarily will not have served on the Pre-Selection Committee.

Each Consultant will be evaluated separately on its technical proposal as well as on its oral presentation in accordance with the evaluation criteria set forth in the RFP. Conduct of the Committee will be governed by the Source Selection Plan approved by Procurement concerning interviews, ratings, voting, etc. (See 2.3.6 above and Attachment Q for reference.)

The Committee shall conduct oral presentations with at least three of the most highly qualified firms regarding concepts and the relative utility of alternative methods of furnishing the required services and other related matters. Architect-Engineer fees shall not be considered in these discussions. The Chair will collect the "Consultant Final Selection Committee Members' Certifications" and place them in the official contract file. (See Attachments R, S & T.) The result of this process should be documented adequately by the Contract Administrator.

2.10.1 EVALUATION VARIANCES: Individual evaluation scores which vary more than "10% from the average scores of the total Evaluation Committee on a particular proposal, an element of a proposal or evaluation criteria, or the ranking of Proposers in a significantly different order than other committee members shall be subject to challenge by any member of the Final Selection Committee. The purpose of the challenge is to discover the specific deficiency or significant characteristic that the evaluator considered to be of such magnitude that, when evaluated further by the entire Committee, could change the scores of the Committee or the individual evaluator. The result(s) of this process should be adequately documented by the Contract Administrator.

2.11 PREAWARD SURVEY: As defined in this manual, (i) "Preaward survey" means an evaluation by the District of a prospective contractor's capability to perform a proposed contract; (ii) "Responsible prospective contractor" means a consultant that meets the standards in Chapter III-6, Section 3.0.

A preaward survey is normally required when the information on hand or readily available to the Final Selection Committee is not sufficient to make a determination regarding responsibility. However, if the contemplated award will be for less than \$500,000, Contract Administration should not request a preaward survey unless circumstances justify its cost.

When the sponsoring department/user department becomes aware of information that may affect the status of a prospective contractor, and no preaward survey has been requested, it shall promptly obtain and transmit details to Contract Administration.

Before beginning any preaward survey by the District, Contract Administration shall ascertain whether the prospective contractor is debarred, suspended, or ineligible (see 48 CFR 9.4). If the prospective contractor is debarred, suspended, or otherwise ineligible, the preaward survey shall not proceed unless specifically requested to do so by the sponsoring department and/or Project Manager.

- 2.12 **SUBMITTAL OF FINAL SELECTIONS:** The Project Manager, through his or her Department Manager will submit the Final Committee's selections in preferential order and all appropriate documentation in the form of a Source Selection Recommendation (or SSR) to the respective Assistant General or Executive Manager. If the respective Assistant General or Executive Manager or Department Manager wish to discuss or receive further documentation on the submittal, the Project Manager will be responsible for same. The Department Manager of Procurement or designee will be informed of all such queries. The respective Assistant General Manager or Executive Manager will transmit the Committee's selection and all back-up documentation to the Assistant General Manager - Administration, directed to the attention of the Department Manager of Procurement.

The final selection action authorizes Contract Administration Division to begin negotiations, beginning with the firm deemed most qualified in the final selection.

- 2.13 **RESPONSIBILITIES FOR CONTRACT NEGOTIATION:**

- 2.13.1 **NEGOTIATION TEAM:** The negotiation team shall be composed of a member from the Contract Administration Division and the Project Manager and shall, as appropriate, appoint a team of experts in such fields as contracting, finance, contract audit, engineering, architecture and contract pricing to conduct the negotiations. The Legal Department may be asked for assistance as required.

The Project Manager will conduct negotiations of contract terms and price subject to the oversight and participation of the Contract Administrator (See generally Chapter X.).

The Chair of the negotiation team may assign responsibility to the negotiator(s) or price analyst(s) for:

- (1) Determining the extent of specialists' advice needed and evaluating that advice;
- (2) Coordinating a team of experts;
- (3) Consolidating pricing data and developing a pre-negotiation objective; and
- (4) Conducting negotiations.

Conflict of interest restrictions shall apply to negotiations team members (see Section 2.5.1.)

- 2.13.2 **PRE-NEGOTIATION OBJECTIVES**: The negotiation team shall establish pre-negotiation objectives before the negotiation of any pricing action. The scope and depth of the analysis supporting the objectives should be directly related to the dollar value, importance, and complexity of the pricing action.

Cost analysis shall address the cost and profit or fee objectives and any resulting issues to be negotiated. The District's cost objective and proposed pricing arrangement directly affect the profit or fee objective. Because profit or fee is only one of several interrelated variables, the negotiation team shall not agree on profit or fee without concurrent or previous agreement on cost and type of contract or agreement. Similarly, the negotiation team shall not agree on price without previous agreement on the technical requirements for the procurement. (See generally Chapter X.)

- 2.13.3 **PRICE AND COST ANALYSIS**: Price and cost analysis shall be performed for all architect-engineering contracts. The negotiation team shall, as appropriate, use the techniques and procedures outlined in Chapter VII-2, Section 7.0.

The negotiation team shall determine whether any cost or pricing data necessary to make the Proposer's proposal accurate, complete, and current have not been submitted by the Proposer. If there are such data, the negotiation team shall attempt to obtain them and negotiate, using them or making satisfactory allowance for the incomplete data.

The negotiating team shall perform a technical analysis of the cost proposals. This review will assess, as a minimum:

- a. The quantities and kinds of services proposed;
- b. The need for the number and kinds of labor hours and the labor mix;
- c. The special facilities proposed; and
- d. Any other data that may be pertinent to the cost or price analysis.

- 2.13.4 **PRICE NEGOTIATION MEMORANDUM**: At the conclusion of each negotiation of an initial or revised price, the Chair of the negotiation team shall promptly prepare a memorandum of the principal elements of the price negotiation. The memorandum shall be included in the contract file and shall contain the following minimum information:

- a. The purpose of the negotiation.
- b. A description of the acquisition, including appropriate identifying numbers (e.g., RFP No.).
- c. The name, position, and organization of each person representing the Proposer and the District in the negotiation.

- d. The extent to which the negotiation team:
 - (i) Relied on the cost or pricing data submitted and used by them in negotiating the price; and
 - (ii) Recognized as inaccurate, incomplete, or noncurrent any cost or pricing data submitted; the action taken by the negotiation team and the Contractor as a result; and the effect of the defective data on the price negotiated.
- e. A summary of the Contractor's proposal. Based on the cost analysis, the summary shall address the amount of each major cost element:
 - (i) Proposed by the Contractor,
 - (ii) Recommended by other pricing assistance reports (if any),
 - (iii) Contained in the District's negotiation objective, and
 - (iv) Considered negotiated as a part of the price.
- f. The most significant facts or considerations controlling the establishment of the pre-negotiation price objective and the negotiated price including an explanation of any significant differences between the two positions.
- g. The basis for determining the profit or fee pre-negotiation objective and the profit or fee negotiated.
- h. Each negotiation memorandum shall be prepared and signed by the Project Manager and approved by the Contract Administrator, the Contract Administrator's supervisor, and as appropriate the Department Manager of Procurement. This price negotiation memorandum shall as a minimum include a statement that the recommended price is considered to be fair and reasonable.

2.13.5 **RELEASE OF POTENTIALLY CONFIDENTIAL INFORMATION:** Proposers may be required to submit corporate financial data and labor rates which maybe considered by the Proposers to be proprietary information or trade secrets. See Chapter I-5, Section 3.0, for guidance on disclosure of such information to third parties.

3.0 **CONTRACT APPROVAL AND AWARD:** Upon completion of negotiations, Contract Administration Division will transmit a copy of the Consultant's final cost proposal to the Office of Civil Rights for their use. This is done so that the designated Office of Civil Rights Officer can ensure that the final cost proposal is reflective of the stated goals.

3.1 **NOTIFICATION:** Contract Administration Division will notify those firms not selected for the project.

- 3.2. **EDD PREPARATION**: The Project Manager will prepare the EDD for Board or General Manager approval as required including necessary technical and funding information.
- 3.3. **FUNDING APPROVAL REQUEST**: The User Department/Project Manager will transmit a request to obtain funding approval for Engineering/Architectural projects to the Capital Program Control Division.
- 3.4. **APPROVAL AND EXECUTION OF CONTRACT**: Contract Administration Division will transmit a copy of the contract to the Office of the General Counsel for review and approval as to form. Contract Administration Division will, upon receipt of the EDD approved by either the Board of Directors if over \$100,000, or the General Manager if under \$100,000, obtain District execution of the contract after Consultant execution along with receipt of any required bonds or insurance certificates. A duplicate original of the proposed contract will be returned to the Consultant.
- 3.5. **NOTICE TO PROCEED**: After execution of the Consultant contract, Contract Administration Division shall prepare the "Notice to Proceed" letter to the Consultant for signature by the Department Manager of Procurement. Procurement will also transmit a fully executed original of the contract to the Consultant and two conformed copies of the contract to the Project Manager for use in the administration of the contract.
- 3.6. **POST-AWARD RESPONSIBILITIES**: All further coordination on technical issues between the Consultant and the District, subsequent to the issuance of the "Notice to Proceed," will be conducted by the User Department/Project Manager or Engineering and Construction Department Project Manager. If, however, issues affecting the business or legal terms of the contract arise, or if the need for a change order, modification or supplemental agreement to the contract arises, the Project Manager must contact the Contract Administration Division and may ask that Contract Administration Division participate in the discussions with the Consultant. The official contract file will be maintained by Contract Administration Division.
- 3.7. **PERFORMANCE EVALUATIONS**: Each Consultant's performance shall be evaluated quarterly by the Project Manager. These quarterly evaluation forms will be sent to Procurement and to the User Department/Project Managers for Engineering/ Architectural projects in a timely manner. Upon completion of the Consultant's effort, a final evaluation report, in a narrative form, prepared by the Project Manager in conjunction with the User Department/Project Manager, will be sent to Procurement to be used for future evaluation of the Consultant. The Project Manager will obtain from the Office of Civil Rights, a report on the Consultant's compliance in meeting DBE goals for the project, for transmittal to Procurement.

IV-2 SERVICES CONTRACTS FOR NON-ARCHITECTURAL/ENGINEERING SERVICES OR REVENUE CONTRACTS

- 1.0 **APPROVAL-IN-CONCEPT**: If the project is a Major Procurement and is not a Pre-Approved Procurement, the User Department/Project Manager obtains Approval-In-Concept from the General Manager (See Chapter I-4 herein for definitions and procedures).
- 1.1 **NON-ARCHITECTURAL/ENGINEERING SERVICES**: Non-Architectural/Engineering services are defined as those services other than architectural or engineering services as set forth in Chapter IV-1.
- 1.2 **REVENUE CONTRACTS**: A revenue contract is a contract in which the District provides access to the District's assets for the primary purpose of either producing revenues in connection with an activity related to public transportation, or creating business opportunities with the use of District property. For revenue contracts funded by FTA grant, in order to ensure fair and equal access to District property and to maximize revenue derived from such property, if there are several potential competitors for a limited opportunity (such as advertising space on the side of a bus), the District should use a competitive process to permit interested parties an equal chance to obtain that limited opportunity.
- 2.0 **SOLICITATION PROCEDURE - NON-ARCHITECTURAL/ENGINEERING OR REVENUE CONTRACTS**: The User Department/ Project Manager will prepare the "Request for Contractor Services" or "Request for Franchisee Services", "Project Summary", and "Information Required for RFP Packages" forms needed to retain a Contractor or Franchisee. These provide the necessary details to be included in the Request for Proposal (RFP) such as the project summary, Scope of Work, and evaluation criteria and also provide the estimated costs of critical elements of the project to be used when performing the analysis of Proposers' costs or offers. Refer to Chapter II-3 and II-4 for guidance on initiating requests for Consultant services and preparing a Scope of Work. District personnel shall avoid providing prospective proposers with competitive advantage by the premature release of RFP contents such as the technical requirements, plan, drawings, etc., other than that already available to the industry.
- 2.1 **EVALUATION CRITERIA AND WEIGHTING**: The factors that will be considered in evaluating proposals should be tailored to each acquisition and include only those factors that will have an impact on the source selection decision.

The evaluation factors that apply to an acquisition and the relative importance of those factors are within the broad discretion of the User Department/Project Manager and Contract Administrator. However, price or cost or revenue (in revenue contracts) to the District should be included as an evaluation factor in every source selection. Quality also shall be addressed in every source selection. In evaluation factors, quality may be expressed in terms of technical excellence,

management capability, personnel qualifications, prior experience, past performance, and schedule compliance. Any other relevant factors, such as cost realism, may also be included.

Ordinarily, the lowest price or lowest total cost or the highest revenue (in the case of revenue contracts), to the District is properly the deciding factor in most source selections. In certain acquisitions the District may prefer the source whose proposal offers the greatest value to the District in terms of performance and other factors and award to other than the lowest cost proposal. This may be the case, for example, in the acquisition of technical or professional services of a non-architectural-engineering nature, or when cost-reimbursement contracting is anticipated.

In using the cost-reimbursement type of contracting, the cost proposal should not be controlling, since advance estimates of cost may not be valid indicators of final actual costs. There is no requirement that cost-reimbursement contracts be awarded on the basis of lowest proposed cost, lowest proposed fee, or the lowest total proposed cost plus fee. The award of cost-reimbursement contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns.

The primary consideration should be which offeror can perform the contract in a manner most advantageous to the District, as determined by evaluation of proposals according to the established evaluation criteria.

The RFP shall clearly state the evaluation factors, including price or cost or revenue (in revenue contracts), and any significant subfactors, that will be considered in making the source selection and their relative importance. Numerical weights, which may be employed in the evaluation of proposals, need not be disclosed in solicitations. However, the RFP shall indicate the relative order of importance for all evaluation factors listed. In addition, the RFP shall inform offerors of minimum requirements that apply to particular evaluation factors and significant subfactors. In general, price and price-related factors if scored, should never be less than 40% of the aggregate scoring.

In addition to other factors, offers may be evaluated on the basis of advantages and disadvantages to the District that might result from making more than one award. The Contract Administrator shall estimate the cost to BART for administering each contract awarded under a RFP allowing such awards. Individual awards shall be for the items or combination of items that result in the lowest aggregate cost to BART, including the assumed administrative costs.

- 2.2 **CHANGES IN DISTRICT REQUIREMENTS:** When, either before or after receipt of proposals, the District changes, relaxes, increases, or otherwise modifies its requirements, The Contract Administrator shall issue a written amendment to the RFP. When time is of the essence, oral advice of changes may be given if the changes involved are not complex and all Proposers to be notified are notified as near to the same time as possible. The Contract Administrator shall make a record of the oral advice and promptly confirm that advice in writing. (See Section 2.7 below)

In deciding which Proposers to notify of a change, the Contract Administrator shall consider the stage at which the change occurs and the magnitude of the change, as follows:

- a. If proposals are not yet due, an addendum shall be sent to all firms that have received a solicitation. (See Section 2.7 below)
- b. If the time for receipt of proposals has passed but proposals have not yet been evaluated, the addendum should normally be sent only to the responding offerors who shall, depending upon the nature of the change made in the addendum, be given a reasonable opportunity to submit new or amended proposals.
- c. If the competitive range has been established, only those offerors within the competitive range shall be sent the addendum. If the contents of the addendum warrant, they will be then given a reasonable opportunity to submit new or amended proposals.
- d. If a change is so substantial that it warrants complete revision of the RFP, the Contract Administrator in consultation with the Project Manager may cancel the original RFP and issue a new one, regardless of the stage of the RFP evaluation. The new RFP shall be issued to all firms originally solicited and to any firms added to the original list.
- e. If the proposal considered to be most advantageous to BART (as determined according to the established evaluation criteria) involves a departure from the stated requirements, the Contract Administrator shall provide all Proposers an opportunity to submit new or amended proposals on the basis of the revised requirements; provided however, that this can be done without revealing to the other Proposers the solution proposed in the original departure or any other information that is proprietary in nature.

2.3 **OFFICE OF CIVIL RIGHTS:** A copy of the Request for Consultant Services will be sent by the User Department/Project Manager to the Office of Civil Rights. The Office of Civil Rights send to Contract Administration Division, with a copy to the User Department/Project Manager, the Office of Civil Rights' determinations.

2.4 **RFP DEVELOPMENT AND ADVERTISING:** As soon as Contract Administration Division has determined that the information submitted by the User Department/ Project Manager is complete, it will assemble the RFP and obtain the appropriate input from the User Department/Project Manager, Legal Department and Office of Civil Rights. Incomplete packages without reasonable explanation for the omission(s) will be returned to the requestor without action. Contract Administration Division will normally advertise for Consultants interested in receiving a Request for Proposal. The advertisement ordinarily will be published once in a daily newspaper published in the San Francisco Bay Area, such as the Oakland Inter-City Express, the Oakland Tribune, the Contra Costa Times, and the San Francisco Chronicle, at least 10 calendar days prior to the date

for submission of proposals. As appropriate, advertisement may also be made in publications that circulate outside of the San Francisco Bay Area to increase potential competition.

Copies of the RFP are usually sent to all requestors. The District is not obligated to solicit proposals from every firm which may be included in our source list but only from the number of qualified sources necessary to promote effective competition and to take reasonable steps to try to ensure that the procurement is made to the best advantage of the District, price and other factors considered. The fact, however, that a firm has not received a Request for Proposal does not mean that it cannot participate in a particular procurement. Any firm can ask for information and may be offered the chance to participate.

- 2.5 **RFP FORMAT:** The RFP shall describe the required format for the submitted proposal. Documentation related to Office of Civil Rights and responsibility requirements may be submitted as a separate attachment, exclusive of the technical and cost proposal sections.
- 2.6 **PRE-PROPOSAL CONFERENCE AND SITE VISIT:** The Contract Administrator and the Project Manager are responsible for arranging all pre-proposal conferences. The Project Manager is responsible for arranging, and the Contract Administrator will normally attend, all site inspections.
- 2.7 **ISSUANCE OF ADDENDA:** The Project Manager will take the lead in preparing written responses to technical questions arising from the Request for Proposal to be issued as an addendum. The Contract Administrator, in consultation with the Project Manager and Contract Administration Division management, will make determinations on the need for extensions of time or cancellations of the receipt of proposals. The Contract Administrator will be responsible for receiving requests for and issuing any addenda to the RFP transmitting written responses, time extensions or cancellations.
- 2.8 **SOURCE SELECTION PLAN:** Prior to publicizing the RFP, a source selection plan should be prepared which addresses (i) District requirements, (ii) acquisition background, (iii) prospective sources for these services, (iv) competition, (v) procurement methods, (vi) type and form of contract, (vii) compensation basis, (viii) source selection procedures, (ix) scoring matrix, (x) cost estimate, (xi) selection committee, (xii) final ranking and recommendation for award.

The Contract Administrator along with the User Department/Project Manager will then reduce this system for evaluating and conducting the scoring of each Proposer's proposal relative to the evaluation factors and subfactors set forth in the RFP to a Source Selection Plan ("SSP"). This Source Selection Plan shall be submitted to the Department Manager, Procurement or his designee for approval prior to the RFP being issued in order to maintain the competitiveness and integrity of the process. This approved plan shall then be put into the file for use by the evaluation committee(s) when proposals are received.

3.0 **SELECTION PROCEDURE**

- 3.1 **BASIS OF REVIEW OF PROPOSALS:** Proposals are received and opened by the Contract Administration Division in accordance with instructions contained in the RFP.

NOTE: During the consideration of proposals, none of the information contained in them shall be made available to the public or to anyone in the District not having a legitimate interest or need to know unless otherwise required by law.

Proposals for services shall be evaluated and ranked solely on the basis of criteria prepared by the User Department/Project Manager and contained in the solicitation. Generally, emphasis will be placed on the technical expertise of the firm and, while price is a consideration, it is not normally the determining factor unless after negotiation and receipt of best and final offers, two or more proposals are equal with respect to all other factors. The objective is to select the firm or individual that can best provide the services, when technical ability, price and other factors have been considered.

- 3.2 **COMPOSITION OF SELECTION COMMITTEE:** The Selection Committee will normally be chaired by the Contract Administrator. In the case of Transit Systems Development or the West Bay Extensions, the Project Manager may chair the selection committee, with the oversight and participation of the Contract Administrator. The Committee will be comprised of at least four voting members: the Project Manager, two or more members from the User Department/Project Manager and one member from Office of Civil Rights. The Project Manager will solicit the appropriate User Department/Project Manager for Committee members and submit their names, titles and telephone numbers to the Contract Administrator prior to the due date for receipt of proposals. The Contract Administrator shall have no vote except to break ties.

The Contract Administrator and Project Manager will lead the deliberations and negotiations, advise the Committee on proper evaluation and scoring procedures and to ensure that the open and competitive nature of the process is maintained. The designated Committee members must attend all Committee meetings. If a Committee member is or expects to be absent for an extended period of time or an emergency precludes the Committee member's attendance, the meeting must be postponed or a new designee shall be chosen by the relevant department. The meeting shall be rescheduled allowing sufficient time for the new designee to become familiar with the project. There will be no alternates substituted for designated members and the Chair will adjourn the meeting if a designated member is not in attendance.

- 3.2.1 **CONFLICT OF INTEREST RESTRICTION:** In order to avoid even the appearance of a conflict of interest, members of the Selection Committee must disclose any present, prior or prospective affiliation (i.e., employment, source of income, financial interests or other affiliations) of themselves or of members of their families, with any firm or individual being considered for selection, with any proposed subcontractor or supplier or with any firm or individual for whom the contract may have a foreseeable financial effect. In the event such affiliation existed or exists, the member is responsible for advising the Contract Administrator. The determination of whether affiliations are disqualifying will be made on a

case by case basis. In no event will members with interests which are disqualifying under State or Federal law or regulation or the Code of Ethics herein (Section I-5) be permitted to participate.

To accomplish that end and in order to avoid the necessity of having to adjourn and re-schedule Committee meetings, the Contract Administrator shall inform the nominated Committee members of the names of the firms that submitted proposals, their proposed subcontractors and suppliers and the scope of work of the agreement prior to the first meeting.

3.3 **KICKOFF MEETING**: The Contract Administrator will convene the members for a Selection Committee kickoff meeting. The Project Manager will make a brief presentation on the project Scope of Work. The Contract Administrator will distribute the technical proposals and prior District performance evaluations, if available, to the Selection Committee members. The Contract Administrator advises the Committee members on the evaluation process including ensuring that the criteria are uniformly understood. (The technical criteria will be provided by the Project Manager to the Contract Administrator, well in advance of the kickoff meeting.) Procurement will establish the Committee convening date and place, usually a minimum of three (3) working days after the kickoff meeting.

3.4 **EVALUATION OF PROPOSALS**: Proposal evaluation is an assessment of both the proposal and the offeror's ability (as conveyed by the proposal) to successfully accomplish the prospective contract. Proposals shall be evaluated solely on the factors specified in the solicitation.

- a. Cost or Price Evaluation. The Contract Administrator shall use price analysis and the Project Manager shall perform cost analysis (see Chapter VII-2, Section 7.0) to evaluate the cost estimate or price, not only to determine whether it is reasonable, but also to determine the offeror's understanding of the work and ability to perform the contract. The Contract Administrator shall document the cost or price evaluation.
- b. Technical Evaluation. If any technical evaluation is necessary beyond ensuring that the proposal meets the minimum requirements in the RFP, the Project Manager or designee, in documenting the technical evaluation, shall include--
 - (i) The basis for evaluation;
 - (ii) An analysis of the technically acceptable and unacceptable proposals, including an assessment of each offeror's ability to accomplish the technical requirements;
 - (iii) A summary, matrix, or quantitative ranking of each technical proposal in relation to the best rating possible; and
 - (iv) A summary of findings.

Each other member of the Committee shall evaluate each firm's ability to provide the services as described in the Scope of Work based on the evaluation criteria included in the Request for Proposal. After a Selection Committee member has evaluated and ranked each proposal against each criterion, using any methodology adapted by the Committee specifically for the RFP, then the relative or absolute weight assigned to each criterion is applied to each Proposer's score on that criterion. Conduct of the Committee will be governed by the Source Selection Plan approved by Procurement concerning interviews, ratings, voting, etc. (See 2.8 above)

This ranking can be accomplished by other means as long as the criteria, weights and overall integrity of the competitive process is maintained. When the Selection Committee meets, each Committee member brings their scoring sheets, and the Committee's overall score for each Proposer is tabulated.

- 3.5 **COMMITTEE CERTIFICATIONS:** At the meeting of the Selection Committee to evaluate the proposals, the Chair collects the Committee Members' certified evaluation materials and they are placed in the contract file.
- 3.6 **EVALUATION VARIANCES:** Individual evaluation scores which vary more than "10% from the average scores of the total Evaluation Committee on any specific proposal or the ranking of Proposers in a significantly different order than other committee members shall be subject to challenge by the Selection Committee. The purpose of the challenge is to discover the specific deficiency or significant characteristic that the evaluator considered to be of such magnitude that, when evaluated further by the entire Committee, could change the scores of the Committee or the individual evaluator. The result(s) of this procedure should be adequately documented by the Contract Administrator.
- 3.7 **OPENING NEGOTIATIONS WITH FIRMS IN COMPETITIVE RANGE:** If, after all proposals have been evaluated, any proposal is determined to be acceptable without modification or negotiation, the District may award a contract to that Proposer if the RFP includes a provision authorizing this approach. (See Chapter X for guidance on when to accept initially priced offers.) If, however, no proposal is acceptable without modification, those firms whose proposals are determined to be within the competitive range are contacted by letter formally opening negotiations and they are invited to participate in individual oral and/or written negotiations. Competitive range is determined by the Contract Administrator in keeping with the recommendations of the Selection Committee members. (The determination shall be based on the evaluation criteria given in the RFP and shall include all proposals that have a reasonable chance of being selected for award.) Such competitive range determination must be based upon submitted cost or price proposals. When there is doubt as to whether a proposal is in the competitive range, the proposal should be included. In no event will the determination be made on the basis of a predetermined cut-off score.

The Contract Administrator shall notify in writing an unsuccessful Proposer at the earliest practicable time that its proposal is no longer eligible for award.

The Department Manager of Procurement or designee transmits the Committee's recommendations as to firms in the competitive range to the User Department/Project Manager. If the User Department/Project Manager wishes to discuss or receive further documentation on the submittal, the Project Manager will be responsible for providing same.

- 3.8 **INTERVIEWS WITH FIRMS:** If interviews are conducted, the Committee members will prepare a list of questions that they may ask those Proposers in the competitive range during the interviews. These questions generally address items that were not sufficiently covered by the Proposers in the proposals.

The format of the interviews is varied. Proposers are either asked to make formal presentations or to be prepared for a question and answer session. For each of the finalists, several telephone interviews may be conducted with clients listed as references in the proposal who have had experience with the Proposer. This information from references is utilized by the Evaluation Committee in the final selection process.

The initial number of proposals considered as being within the competitive range may be reduced when as a result of the written or oral negotiations any such proposal has been determined to no longer have a reasonable chance of being selected for award. A Proposer may be required to update its proposal in writing if clarification or additional information was provided.

- 3.9 **PREAWARD AWARD SURVEY:** Refer to Section IV-1, Paragraph 2.11 above.

- 3.10 **PRICE AND COST ANALYSIS:** Once the firms in the competitive range have been decided upon, the Procurement Department performs a thorough price analysis of each Proposer's price proposal and as appropriate, the User performs a cost analysis (see Chapter VII-2, Section 7.0). The analysis takes into account the estimate provided by the User Department/Project Manager but is much more detailed. Generally, the Proposer will be asked to submit pricing data. In some circumstances, the Proposers' accounting records may be examined (if the RFP provides for this or the Proposer otherwise permits it), the Proposer may be asked to provide a detailed breakdown of certain component costs in the proposal, and the Proposer may be asked for information on the assumptions used to arrive at those costs. These actions will permit the District to verify price or cost data, to evaluate the specific elements of the price or cost proposals, and to project the adjustments to the price or cost data onto the overall contract price.

Very generally, the following elements are considered in the evaluation of price or cost proposals:

- a. Clarity and visibility of proposed price or cost breakdown for the Proposer and its Subconsultants and Subcontractors.

- b. If cost analysis is required, credibility of labor hours and dollar cost estimates when related to the proposed project approach.
- c. Total price.

3.11 **ESTABLISHING NEGOTIATING STRATEGY:** The Committee uses the information gathered from its analysis of the technical proposals and either the Project Manager's or User's analysis of cost or the Procurement Department's analysis of the price proposals to establish the negotiating strategy and position on each issue it wishes to negotiate with each Proposer.

3.12 **NEGOTIATING PROCESS:** (See generally Chapter X.) The Project Manager or User will conduct negotiations of contract terms and price with the Consultants in the competitive range subject to the oversight and participation of the Contract Administrator.

The Contract Administrator and the Project Manager will participate at negotiation sessions to resolve issues of a technical nature. The General Counsel's Office may be asked for assistance when legal advice is required to finalize the contract terms and conditions. Legal terms may affect price. The Office of Civil Rights is contacted at this time regarding Proposers' planned use of subcontractors, if applicable.

The District may require Proposers in the competitive range to submit information which would indicate the Proposer's technical, financial and business capability to perform the effort required by the Request for Proposals.

For the sole purpose of eliminating minor uncertainties or irregularities, an inquiry may be made to a Proposer concerning its cost and/or technical proposal. Such inquiries and resulting clarification furnished by the Proposer shall not be considered to constitute negotiations. If the clarification prejudices the interest of other Proposers, award may not be made without discussion with all Proposers in the competitive range.

3.12.1 **NEGOTIATING CONTRACT PRICE:** Price negotiation is intended to permit the District and the Proposer to agree on a fair and reasonable price. Price negotiation does not require that agreement be reached on every element of price or cost.

- a. If price analysis alone is sufficient to support a written determination that the final, negotiated price is fair and reasonable (see Chapter VII) then the contract price shall be negotiated on a price basis, e.g. without considering cost separate from profit.
- b. If price analysis alone is insufficient to support the determination that a proposed price is fair and reasonable, then cost analysis is required (see Chapter VII-2, Section 7.0) and the contract price shall be negotiated on a cost basis, i.e. separately negotiating cost and profit.

- c. If cost analysis is required to support a determination that a proposed price is fair and reasonable then the Contractor's proposed profit or fee must also be analyzed using structured approaches and negotiated separate from cost. Negotiated profit or fee does not necessarily represent net income to the Contractor. Rather, it represents a portion of the total contract compensation that Contractors may receive for contract performance over and above allowable cost.

If price analysis alone is sufficient to establish the reasonableness of proposed price then the Project Manager is not required to analyze profit.

The Project Manager shall require Proposers to submit such price or cost data as is needed to support the negotiation of contract price.

Auction techniques are strictly prohibited; an example would be indicating to a Proposer a price which must be met to obtain further consideration, or informing him that his price is not low in relation to another Proposer. On the other hand, it is permissible to inform a Proposer that his price is considered by the District to be too high or unrealistic.

- 3.12.2 **PRE-NEGOTIATION OBJECTIVES:** The negotiation team shall establish pre-negotiation objectives before the negotiation of any pricing action for each proposer in the competitive range. The scope and depth of the analysis supporting the objectives should be directly related to the dollar value, importance, and complexity of the pricing action.

Cost analysis shall address the cost and profit or fee objectives and any resulting issues to be negotiated. The District's cost objective and proposed pricing arrangement directly affect the profit or fee objective. Because profit or fee is only one of several interrelated variables, the negotiation team shall not agree on profit or fee without concurrent or previous agreement on cost and type of contract or agreement. Similarly, the negotiation team shall not agree on price without previous agreement on the technical requirements for the procurement or business issues such as exceptions taken to the District's proposed form of agreement. (See generally Chapter X.)

- 3.12.3 **PRICE NEGOTIATION MEMORANDUM:** At the conclusion of each negotiation of an initial or revised price, the Chair of the negotiation team shall promptly prepare a memorandum of the principal elements of the price negotiation. The memorandum shall be included in the contract file and shall contain the following minimum information:

- a. The purpose of the negotiation.
- b. A description of the acquisition, including appropriate identifying numbers (e.g., RFP No.).

- c. The name, position, and organization of each person representing the Proposer and the District in the negotiation.
- d. The extent to which the negotiation team:
 - (i) Relied on the cost or pricing data submitted and used by them in negotiating the price; and
 - (ii) Recognized as inaccurate, incomplete, or noncurrent any cost or pricing data submitted; the action taken by the negotiation team and the Consultant as a result; and the effect of the defective data on the price negotiated.
- e. A summary of the Consultant's proposal. Based on the cost analysis, the summary shall address the amount of each major cost element:
 - (i) Proposed by the Consultant,
 - (ii) Recommended by other pricing assistance reports (if any),
 - (iii) Contained in the District's negotiation objective, and
 - (iv) Considered negotiated as a part of the price.
- f. The most significant facts or considerations controlling the establishment of the pre-negotiation price objective and the negotiated price including an explanation of any significant differences between the two positions.
- g. The basis for determining the profit or fee pre-negotiation objective and the profit or fee negotiated.
- h. Each negotiation memorandum shall be prepared and signed by the Project Manager with the concurrence of the Procurement Department.

3.13 **RELEASE OF POTENTIALLY CONFIDENTIAL INFORMATION:** Proposers may be required to submit corporate financial data and labor rates which maybe considered by the Proposers to be proprietary information or trade secrets. See Chapter I-5, Section 3.0, for guidance on disclosure of such information to third parties.

3.14 **BEST AND FINAL OFFERS:** Unless award is authorized without negotiation as provided in Chapter IV-2, Section 3.7, at the conclusion of negotiations, a final, common cut-off date which allows a reasonable opportunity for submission of written "best and final" offers shall be established and all Proposers in the competitive range so notified. If oral notification is given, it shall be confirmed in writing. The notification shall include information to the effect that:

- (1) Proposers are being given an opportunity to submit a best and final offer and,

- (2) If the firm wishes to submit any such modification to their proposal, it must be received by the date and time specified.

Once best and final offers are received, a letter is sent to the Proposers formally closing negotiations. Only in exceptional circumstances would negotiations be reopened. In the event this is necessary, all firms with which negotiations were being held are so advised in writing with some general indication of the point(s) open for further negotiation. Negotiations are then limited to this area of discussion. Although negotiations are reopened with all firms, each firm need not modify its offer.

- 3.15 **CONTRACT REVIEW PRIOR TO AWARD:** Unless the Project Manager and Contract Administrator decide for any reason to recommend that the District reject all proposals, they will, subject to approval by the Board of Directors when required, proceed with award to the firm(s) whose proposal(s) will be most advantageous to the District, price, qualifications, and other factors considered, using the evaluation criteria as the basis for the decision. Contract Administration Division will prepare the contract and submit it to the Legal Department for review and approval as to form.

The results of the Legal Department's review of proposed contract documents are sent to the Contract Administration Division in the form of a memorandum or notations on the draft. The Contract Administration Division is responsible for making all changes which are made a condition of Legal approval as to Form. (See Chapter I-7.)

- 4.0 **CONTRACT APPROVAL AND AWARD:** Upon completion of negotiations, the steps indicated below are taken.
- 4.1 **NOTIFICATION:** Contract Administration Division will notify those firms not selected for the project.
- 4.2 **FUNDING APPROVAL:** The User Department/Project Manager will transmit a request to obtain funding approval to the Budget Office, if not already completed.
- 4.3 **EDD PREPARATION:** The Project Manager will prepare and coordinate the EDD requesting execution approval. Following Board authorization, if required, the Contract Administrator sends copies of the proposed contract to the Contractor for execution and submittal of any policies required by the District. Procurement will, after receipt of the EDD endorsed with "Board Approved for Execution", the Contractor's insurance policies and the copies of the contract executed by the Contractor, proceed with obtaining the District's execution of the contract.
- 4.4 **AWARD AND NOTICE TO PROCEED:** After execution of the contract, Contract Administration Division shall prepare the "Notice to Proceed" letter to the firm for signature by the Department Manager of Procurement or designee. Procurement will transmit a fully executed original copy

and two conformed copies of the contract to the Contractor. Conformed copies of the contract will be sent to the Project Manager for use in the administration of the contract.

- 4.5 **POST-AWARD RESPONSIBILITIES:** All further coordination on technical issues between the Contractor and the District, subsequent to the issuance of the "Notice to Proceed," will be conducted by the User Department/Project Manager. If, however, issues affecting the business or legal terms of the contract arise, or if the need for a change order, modification or supplemental agreement to the contract arises, the Project Manager must contact the Contract Administrator immediately and the Contract Administrator may participate in any discussions with the Contractor. The official contract file will be maintained by Contract Administration Division.
- 4.6 **PERFORMANCE EVALUATION:** Each Contractor's performance shall be evaluated quarterly by the Project Manager. These quarterly evaluation forms will be sent to Procurement and to the User Department/Project Managers in a timely manner. Upon completion of the Contractor's effort, a final evaluation report, in a narrative form, prepared by the Project Manager, will be sent to Procurement to be used for future evaluation of the Contractor.

**LEGAL & PROCUREMENT DEPARTMENT
RESPONSIBILITIES FOR NEGOTIATED SERVICES
CONTRACTS AND CONTRACT CHANGES**

| CONTRACT ADMINISTRATION/ PURCHASING DIVISION | LEGAL DEPARTMENT |
|--|---|
| Prepare RFP | Review/Comment/Approve as to form |
| Advertise | |
| With Project Manager, Chair Pre-proposal Conference | |
| Review proposals | |
| With Project Manager, convene Selection Committee to review proposals | |
| Assist Project Manager in negotiating and obtaining Best and Final Offers | Input as requested |
| Prepare Contract Document/Changes | Review/Comment/Approve as to form |
| Assist Project Manager Coordinating EDD | Initial if Concur or Non-concur & Attach Comments |
| Issue Notice of Award letters | |
| Ensure observance of District and FTA protest periods | |
| Transmit contract to Contractor for Signature | |
| Receive Contractor's Signed contract | |
| Receive Bonds | Review/Approve |
| Obtain Approval to Execute and Proper Execution of contract | |
| Deliver contract to Contractor with Notice to Proceed | |
| Distribute contract document internally to User Department/Project Manager, Accounting, etc. | |

IV-3 COMPETITIVELY NEGOTIATED PROCUREMENT FILES: (Other than files related to procurements of electronic and specialized rail transit equipment under Public Contract Code Section 20229.1)

- All contractual documents and correspondence will be filed in reverse chronological order within the file.
- The Contract Administrator must keep a chronological record of all actions taken, conversations held, and decisions made which materially affect the course of a procurement.
- All original documents are to be kept in the contract file; only photocopies are to be loaned or transferred.
- The Project Manager for each project must ensure that he or she forwards all original documents pertaining to a contract action to the Contract Administrator for maintenance in the official contract file.
- Documents to be kept in the contract file include but are not limited to the following:
 - Document authorizing the project, e.g. Approval-in-Concept EDD, Purchase Requisition.
 - Request for services and all other appropriate forms.
 - Advertising requests, affidavits, and copy.
 - Original Addenda, mailing manifests, records of Proposers.
 - Original proposals.
 - Cost Analysis.
 - Record of Negotiation.
 - Legal Department and Office of Civil Rights comments.
 - EDD or other document requesting authorization to award.
 - Executed contract.
 - Notice to Proceed/Notice of Award.
 - Requests for and approval of performance of additional work.

- Records of negotiation and cost analysis for additional work.
- Notice directing Contractor to proceed on additional work.
- Executed supplemental agreements and additional work orders.
- Final payment memo.
- Certificate of completion.

IV-4 APPROVAL FOR AWARD OF COMPETITIVELY NEGOTIATED SERVICE, LEASE OR LICENSE CONTRACTS FROM \$5,000 TO \$100,000

- 1.0 **APPROVAL DOCUMENTS:** The Form 1153, "Justification for General Manager's Authorization of Service, Lease or License Agreement Between \$5,000 and \$100,000 or Change Orders Thereto", (See Attachment U) is used to provide justification for procurement activities between \$5,000 and \$100,000. Procurement activities between \$25,000 and \$100,00 require Board notification. Procurements in excess of \$100,000 require the completion of an EDD.
- 1.1 **PREPARATION OF FORM 1153:** Prior to the award of competitively negotiated or non-competitive contracts for services, leases or licenses, the User Department/Project Manager will complete Form 1153 and obtain all required signatures. The User Department/Project Manager will submit Form 1153, a completed Purchase Requisition, a Contract Justification Form (Form 0866, Attachment V), an independent cost estimate and a detailed Scope of Work to the Department Manager of Procurement for recording and forwarding to the Contract Administration Division.

The following information is required for completion of the form:

- Purpose of the proposed procurement action identifying the Vendor, the amount of the authorization and the objective;
- Justification for the required action;
- Acquisition history identifying past contractual commitments to the Vendor for related work and the anticipated use for future services;
- A description of the degree to which competition was a factor in the procurement action, i.e. full and open competition, less than full and open competition, or no competition.
- A statement addressing the performance of the proposed Vendor;
- Estimated costs for the procurement;
- A statement that the proposed price is fair and reasonable and the extent to which that determination is supported by written price and cost analysis;
- The proposed schedule;
- A summary of all modifications applicable to an ongoing agreement if applicable;
- A statement as to the extent to which DBE, MBE or WBE firms will participate in this procurement action, as applicable.

- A discussion of alternative actions; and
- A brief recommendation of the sponsoring department.

1.2 **FORM SIGNOFFS:** A completed 1153 form must be signed by the following divisions:

- Operating Budget or Capital Program Control Division as required by instructions on the form;
- Contract Administration Division will review and approve all determinations to the reasonability of price and their supporting documentation for all procurements over \$10,000.

1.3 **FORM CERTIFICATIONS:** The completed Form 1153 must be signed by the Sponsoring Department Manager. The form must include the following certifications:

- That no work has been performed on this proposed agreement or modification to date, and no costs have been incurred to date as a result of this proposed procurement action;
- That Form 0866, Contract Justification, has been completed and the union notified.

1.4 **APPROVAL OF FORM 1153 REQUESTS:** The Department Manager of Procurement has the authority to approve Form 1153 requests between \$5,000 and \$49,999, except as noted below.

The Deputy General Manager has the authority to approve Form 1153 requests between \$50,000 and \$100,000.

In addition, with regards to ratification actions (i.e., those actions which request approval of a procurement action after-the-fact), the Department Manager of Procurement's authority shall be limited to \$25,000. The Deputy General Manager shall approve all such actions between \$25,000 and \$100,000.

1.5 **BOARD NOTIFICATIONS:** On a bi-monthly basis, the Procurement Department Manager shall prepare a list of all Form 1153 actions previously approved between \$25,000 and \$100,000. The list will be transmitted to the Deputy General Manager for review. Upon completion of review by the Deputy General Manager, the bi-monthly report shall be signed off and forwarded to the Board of Directors to serve as formal notification of these actions.

1.6 **RELEASE FOR AWARD:** Unless otherwise directed by the General Manager, the Contract Administration Division will advise the User Department/Project Manager after the approval of any Form 1153 action and the process for award will proceed as described in Chapters IV-1, IV-2, V, VI, or VIII.

Pages 182 through 194 are reserved.

COMPETITIVE NEGOTIATION POLICIES AND PROCEDURES
(Refer to Attachment EE for all forms required for use with this subchapter,
except for Attachment 4)

Electronic and Specialized Rail Transit Equipment
Under Public Contract Code Section 20229.1

I. Introduction

The San Francisco Bay Area Rapid Transit District (the "District") is authorized by California Public Contract Code Section 20229.1 to purchase certain electronic and specialized rail transit equipment, as well as to contract for certain work related to the rehabilitation of transit vehicles, by competitive negotiation. The District's Board of Directors, by a two-thirds vote, may direct such a purchase upon a finding that purchasing the equipment or contracting for the work in compliance with the standard competitive bidding statutes is not adequate for the District's needs.

Public Contract Code Section 20216, which also governs the competitive negotiation process, requires among other things that the District maintain in writing and make available upon request the policies and procedures used in the competitive negotiation process for contracts subject to Section 20229.1. This document (the "Policies and Procedures") contains such policies and procedures, and supersedes the Interim Competitive Negotiated Procurement Procedure dated December 23, 1992, and Amendment No. 1 to such Procedure dated May 21, 1993.¹

In conducting the competitive negotiation process, the District will also follow a detailed Proposal Evaluation Procedure prepared for each procurement (the "Detailed Evaluation Procedure"). The Detailed Evaluation Procedure includes detailed evaluation criteria, scoring procedures, checklists and worksheets. It also identifies the District staff and consultants who will be participating in the evaluation process, and the committee and advisor structure for the procurement. The Detailed Evaluation Procedure will be completed prior to the issuance of the Request for Proposals, except under the following circumstances. First, the Detailed Evaluation Procedure for Contract No. 41MF-110A, Rehabilitation of Transit Vehicles, will be completed prior to the date for receipt of proposals. Also, in those procurements in which staff recommends that the Detailed Evaluation Procedure be completed on a date after the issuance of the Request for Proposals, the later date will prevail if the Department Manager of Procurement concurs in writing and sets forth the reasons for authorizing a later date. In no procurement shall the date for

¹ The Policies and Procedures will apply to the two outstanding competitive negotiations, Nos. 49GB-110 and 41MF-110A, as to actions taken by the District and proposers after the effective date of the Policies and Procedures.

completion of the Detailed Evaluation Procedure be later than the date for receipt of proposals. The Detailed Evaluation Procedure will remain a confidential document until such time as a staff recommendation for awarding the contract is made and considered at a meeting of the Board of Directors or a Board Committee.

All proposals received in response to a Request for Proposals or Invitation for Proposals for a competitively negotiated procurement will be evaluated by the District under the criteria and procedures set forth in the Request for Proposals and related Contract Documents, as revised by Addenda and Requests for Best and Final Offers (collectively referred to as the "RFP"), the Policies and Procedures, and the Detailed Evaluation Procedure established for the RFP. In the event of a conflict between the RFP and either the Policies and Procedures or the Detailed Evaluation Procedure, the provisions of the RFP will prevail. In the event of a conflict between the Policies and Procedures and the Detailed Evaluation Procedure, the Detailed Evaluation Procedure will prevail.

II. The Request for Proposals

A. Competition

The District will prepare a Request for Proposals (RFP) and encourage an adequate number of qualified sources to submit proposals in order to permit reasonable competition consistent with the nature and requirements of the procurement. In addition, a notice of the RFP will be published at least once in a newspaper of general circulation at least 10 days before the proposals are received. In order to maximize competition, and if feasible, staff should allow at least 30 days to elapse between the date of the RFP notice and the proposal due date. When less than 30 days is appropriate, staff will document the reasons for the shorter period. If only a single response to the RFP is received, the District shall make a finding in writing that it made every effort to generate the maximum feasible number of proposals from qualified sources. The finding shall include a listing of the steps taken to generate proposals.

B. Evaluation Factors

The RFP will identify significant evaluation factors, including price, and their relative importance. The evaluation factors will be listed in order of importance. Weights may be, but are not required to be identified in the RFP for the general categories of price and technical merit or to any subfactor of those general categories. Although the Detailed Evaluation Procedure may include more detail regarding a factor or a further breakdown of a factor, it must be consistent with the relative order of importance of factors set forth in the RFP. The Detailed Evaluation Procedure may assign the same number of points to evaluation criteria, but may not assign a higher number of points to a subsequently listed

criterion. For example, where criteria are listed in order of importance, criteria (d) and (e) may be assigned the same number of points, but (e) may not be assigned more points than (d). Where there is a clear conflict (rather than a difference in the level of detail) regarding evaluation factors between the RFP and the Detailed Evaluation Procedure, the provisions in the RFP will prevail.

C. Notification Regarding Proprietary Information, Availability of Proposals to the Public, and Ex Parte Communications

The RFP will notify proposers that it is their responsibility to identify proprietary information in their proposals, and to seek their own legal advice regarding proprietary information if necessary. The RFP will further notify proposers that submission of a proposal constitutes an agreement to defend and indemnify the District in the event of a California Public Records Act challenge of the proposer's designation of information as proprietary. The RFP will also notify Proposers that the District will make initial price proposals available upon the opening of such proposals, and that no information in price proposals will be treated as proprietary. The RFP will indicate that pursuant to Public Contract Code requirements, other than proprietary information or other information exempted from disclosure by law, the content of any RFP, any proposal received, and any other communications between the District and a potential proposer on a contract shall be made available to the public no later than the time that a recommendation for awarding the contract is made to and considered at a meeting of the Board of Directors or a Board Committee. The RFP will also inform proposers that ex parte communications between them and the General Manager or members of the Board are prohibited unless such communications are in writing, and provided that the communications shall be made available to the public.

A sample of language which may be used for the notifications is included as Attachment 1.

III. Receipt, Opening and Security of Proposals

A. Proposal Evaluation Facility

Prior to receiving proposals, proposal evaluation facilities will be made available for the secure storage of proposals. The facilities will be locked at all times when not in use and will include lockable cabinets.

B. Receipt of Proposals

Proposers are responsible for the delivery of the proposals in accordance with the instructions contained in the Notice Requesting Proposals. Price and Technical proposals will be logged in by the District Secretary or

designee with date and time of receipt noted. Upon receipt of proposals, the District Secretary or designee will notify the Evaluation Committee Chairperson who will arrange to have the Technical and Price proposals taken to the proposal evaluation facilities. Technical proposals will be opened on the same day established in the RFP for submission of proposals. The Evaluation Committee Chairperson will be responsible for ensuring that all copies of the Technical proposals, including all volumes in each copy, will be inventoried, identified, labeled and secured at the time of opening. Price proposals will be secured and will remain unopened until the initial technical scoring is complete. At that time, the Evaluation Committee Chairperson will arrange for the opening of such proposals.

IV. Evaluation of Proposals

A. Persons Participating in Evaluations

1. Committee Structure

- a. The proposals will be evaluated by the Proposal Evaluation Committee (the "Committee"), which is made up of the Price Evaluation and Technical Evaluation Subcommittees. The specific District departments which will be represented on the Committee are set forth in the Detailed Evaluation Procedure, along with the titles or departments of individuals (District staff or consultants) who will serve as non-scoring advisors. A sample of the committee and advisor structure is included as Attachment 2. The Detailed Evaluation Procedure may include committees or advisors other than those listed in Attachment 2.
- b. The District reserves the right to add, eliminate and/or replace staff members of or non-voting advisors to the Proposal Evaluation Committee at any time. The Evaluation Committee Chairperson or his/her Designee shall prepare a statement explaining the reasons for such change prior to the date the change becomes effective.

Such statement shall be retained in accordance with Section VII.A.1 below.

2. Confidentiality and Conflict of Interest Certification

All potential participants in the evaluation process will be required to complete a Proposal Evaluation and Award Confidentiality and Conflict of Interest Certification before receipt of proposals. A

sample Certification is included as Attachment 4, which supersedes previous Attachment 4. Attachment 3 is deleted.

B. Initial Technical Reviews and Technical, Price and Qualifications Evaluations

1. An RFP may provide for specified proposal forms and certifications to be submitted with Technical Proposals. Notwithstanding any contrary language in these Policies and Procedures, an RFP and/or Detailed Evaluation Procedure may provide for review of such forms and certifications by either the Technical Evaluation Subcommittee or the Price Evaluation Subcommittee.
2. The Technical Evaluation Subcommittee will begin its initial review of Technical proposals within fifteen (15) business days of the date for receipt of proposals.² During this review, the Subcommittee will determine whether each Technical proposal is responsive to the requirements of the RFP and is otherwise acceptable. There may be one or more reviews for responsiveness and acceptability. Technical proposals that are initially determined to be responsive and acceptable may be determined later during the review process to be non-responsive. If a proposal is not responsive and acceptable, the District will advise the proposer in writing that the proposer's Technical proposal is non-responsive and/or not acceptable and will not receive further consideration. The District also will return the proposer's Price proposal unopened. Such unopened Price proposal will not be subject to disclosure under No. 4 below.
3. Within fifteen (15) business days of the completion of the initial review of Technical proposals, the Technical Evaluation Subcommittee will begin evaluating responsive Technical proposals and scoring them in accordance with criteria set forth in the RFP.
4. Within fifteen (15) business days of the completion of the review of all Technical proposals, the Price Evaluation Subcommittee will open all Price proposals. The prices in such initial Price proposals will be made available to the public consistent with the District's Public Records Act policy as reflected in Board Resolution No. 2267. A copy of that resolution is included as Attachment 5.

² Any time limitation set forth in the Policies and Procedures in connection with the evaluation of proposals may be waived in writing by the Department Manager of Procurement prior to the expiration of such time limit, provided that such waiver is not inconsistent with the RFP. The reasons for the waiver shall be set forth.

The District may issue summaries which identify each proposer and the initial items and prices proposed by such proposer.

5. Within fifteen (15) business days of the opening of Price proposals, the Price Evaluation Subcommittee will begin evaluating them and determining scores based on the criteria set forth in the RFP.
6. Within fifteen (15) business days of the opening of Price proposals, the Technical and Price Evaluation Subcommittees will begin performing their respective Qualifications evaluations and scoring of responsive proposals based on the criteria set forth in the RFP. Each Subcommittee will perform the portion of the Qualifications evaluation assigned to it in the Detailed Evaluation Procedures. For example, the Price Evaluation Subcommittee may be assigned to conduct business reference checks and to score the results. The Technical Evaluation Subcommittee may be assigned to perform past technical performance and to score the results. The Detailed Evaluation Procedure might provide for other Qualifications criteria to be evaluated jointly by the Subcommittees.

C. Clarifications

1. Clarifications of Forms and Certifications

Appropriate Procurement staff may make written, telephone or e-mail inquiries to proposers and perform follow-up in order to obtain clarifications of forms and certifications at any time during the review of such forms and certifications.

2. Clarification Meetings

If the Committee determines that a clarification meeting is necessary for any of the proposals, the Committee will begin scheduling the first of such meeting(s) to occur within twenty-one (21) business days of the completion of all price, technical, and qualifications evaluations. A clarification meeting will be held with a proposer only for the following purposes:

- a. To discuss minor irregularities or informalities in a proposal;
or
- b. To discuss apparent clerical mistakes in a proposal.

No negotiations or discussions about other topics will occur during a clarification meeting.

At the conclusion of the clarification meetings, Price or Technical proposal scores may be adjusted, taking into account clarification meeting results. A written explanation of any such adjustments will be made and kept in accordance with Section VII.A.1 below.

D. Combining Scores; Determining Rankings and Competitive Range

Within fifteen (15) business days after the conclusion of all clarification meetings, or, if there are no clarification meetings, within fifteen (15) business days after the completion of all Technical, Price, and Qualifications evaluations, the Proposal Evaluation Committee will begin assigning a combined score to each responsive proposal. Based on these scores, the Committee will determine rankings. The Committee may recommend that award be made to the proposer whose proposal is most advantageous to the District, which will be the proposal receiving the highest combined score. Alternatively, the District may establish a competitive range and enter into negotiations with proposers in the competitive range. The District will notify any proposer whose proposal is outside of the competitive range that their proposal will not receive further consideration.

E. Negotiation Meetings and Requests for BAFOs

If the Committee decides to enter into discussions and negotiations with the proposers in the competitive range (short-listed proposers), the first of such meetings will be scheduled to occur within twenty-one (21) business days after the completion of assigning combined scores to the proposals. Typically, these proposers will discuss with the District, among other things, cost drivers that the proposers have identified in the contract and possible alternatives to such cost drivers. Any proposer-suggested changes to the RFP which are acceptable to the District, as well as any changes which the District wishes to incorporate in order to correct deficiencies in original proposals or in the RFP, will be issued in the request for Best and Final Offers (BAFOs). Proposers will modify their Technical and Price proposals only in response to the changes identified in the Request for BAFOs. The Request for BAFOs will notify proposers if changes in Technical proposals are not permitted.

The Committee will open BAFOs on the due date for submittal of BAFOs, and will begin evaluating them within fifteen (15) days. BAFOs will be evaluated in the same manner as the initial proposals. Following the evaluation, the Committee will either:

1. Continue further negotiations and issue a revision of the Contract Book and a request for a further round of BAFOs; or

2. Submit the evaluation findings to District management with one of the following recommendations for Board action:
 - a. Award the contract to the proposer whose proposal has received the highest score.
 - b. Reject all proposals.

In the Committee's discretion, the process involving negotiations, revision of the Contract Book, solicitation and evaluation of BAFOs may be repeated one or more times. After each set of BAFOs is evaluated, the Committee may further short-list proposers by establishing a new competitive range.

The Committee may elect to request BAFOs (the first or subsequent rounds) as to Price proposals only, thereby leaving Technical proposal submittals and scores unchanged.

A chart depicting the negotiated procurement process is included as Attachment 6.

V. Award

If the Proposal Evaluation Committee decides to forward a recommendation for award to management and the Board, staff will prepare an Executive Decision Document (EDD) that includes the recommendation. The EDD will be sent first to the General Manager. If the General manager concurs with the recommendation, the EDD will be forwarded to the Board first for information only, but not action, at a publicly noticed meeting. The award action, if any, will be at a subsequent publicly noticed meeting occurring at least 15 days after the staff recommendation has been made available to the public. If, at such subsequent meeting, the Board, by a majority vote, accepts the staff recommendation, Contract Management will send a Notice of Intent to Award to all proposers and the 15 calendar-day protest period will begin. Following Board consideration of all timely protests, a Notice of Award will be issued by the District Secretary to the recommended proposer unless a majority of the Board votes to grant a protest, reject all bids, or take other appropriate action.

VI. Protests

The protest procedures applicable to competitively negotiated procurements are set forth in the RFP for each such procurement. A sample of such provisions is included in Attachment 7.

VII. Retention of Records and Availability to Public

A. District Records

In addition to retaining copies of all technical and opened price proposals, the District will retain records related to a competitively negotiated procurement for a period of five years following the completion of the contract, including but not limited to the following:

1. The Detailed Evaluation Procedure; completed confidentiality and conflict-of-interest certifications; written statements from the Department Manager of Procurement authorizing and explaining the reasons for a later date for issuance of the Detailed Evaluation Procedure or for any time limitation in connection with the evaluation of proposals; written statements explaining the reasons for changes in individual staff members of or non-voting advisors to the Proposal Evaluation Committee; and written statements explaining the reasons for any adjustments of Price or Technical proposal evaluation scores following clarifications meetings.
2. Any written communications between proposers and the District regarding the procurement.
3. Any notes taken of oral communications (other than clarification or negotiation discussions) between proposers and the District regarding the procurement. At such time as such notes are incorporated into a recommendation or other summary written document, they need not be retained.
4. Any notes taken of discussions between proposers and the District during clarification and negotiation meetings. When the notes are incorporated into a recommendation or other summary written document, they need not be retained.
5. Any notes taken of the results of any reference or similar checks that were conducted as part of the proposal evaluation process, other than notes contained in the documents listed in No. 6 below. To protect confidentiality of sources, the District may use codes (e.g., numbers or letters) instead of the names of such sources when recording the results of reference checks. When the notes are incorporated into an recommendation or other summary written document, they need not be retained.
6. Checklists, worksheets, scoring summaries and similar documents that were completed in connection with the proposal evaluation process.

B. Availability of Records to Public

Other than proprietary information or other information exempted from disclosure by law, the content of any request for proposal, any proposal received, and any other communications between the District and a potential proposer or actual proposer on a competitively negotiated procurement under Public Contract Code Section 20229.1 will be made available to the public no later than the time when a recommendation for awarding the Contract is made to and considered at a meeting of the Board of Directors or a Board Committee. At that time, the District will make the documents available for inspection consistent with its policy regarding Public Records Act requests.

There are several documents which require disclosure prior to the time when an award recommendation is made to and considered at a meeting of the Board or Board Committee:

1. Any written ex parte communication between a proposer (or the proposer's representative) and the General Manager or a member of the Board of Directors regarding the procurement will be made available upon receipt of such communication by the District, subject to the District's policy regarding Public Records Act requests. In the context of these Policies and Procedures, an "ex parte communication" is any communication between a proposer (or the proposer's representative) and the General Manager or Board member regarding the procurement, regardless of who initiates the communication, after the Board of Directors has authorized, by a two-thirds vote, a procurement by competitive negotiation, and before the District has issued a Notice of Award.³ A "proposer or proposer's representative" includes all of the proposer's employees, officers, directors, consultants and agents, any subcontractors or suppliers listed in the proposer's proposal, and any individual or entity who has been requested by the proposer to contact the District on the proposer's behalf.
2. After the Board of Directors has authorized a procurement by competitive negotiation, proposers and proposers' representatives may not communicate orally with the General Manager or a member of the Board of Directors regarding the procurement until after a Notice of Award has been issued. Proposers and their representatives are not prohibited, however, from making oral statements or presentations regarding the procurement in public to the General Manager and the Board during a Board or Board Committee meeting.

³ The authorization for procurement by competitive negotiation occurs prior to the issuance of the RFP and should not be confused with Board authorization of an award.

ATTACHMENT 4
PROPOSAL EVALUATION AND AWARD
CONFIDENTIALITY AND CONFLICT OF INTEREST CERTIFICATION

This certification applies to individuals participating in the selection, negotiation or award of the San Francisco Bay Area Rapid Transit District's Contract No. _____ for _____ (title). I certify that I have reviewed the District's Code of Ethics requirements as provided in Chapter I-5 of the Procurement Manual (attached), which incorporates in its entirety the District's Employee Code of Conduct. This certification is to be completed by members of Proposal Evaluation Committee, Selection Panel, and by any Special Advisors or other personnel who may be assigned to assist in the procurement process for Contract No. _____.

1. I, the undersigned, a participant in the procurement process for Contract No. _____, certify that I will not discuss or reveal any information concerning these selection proceedings to anyone who is not also participating in the same selection, except on a need-to-know basis to individuals who require such information in connection with the selection proceedings.
2. I have not solicited a gift or favor of any value from an actual or potential proposer or any actual or potential party to a subagreement for Contract No. _____.
3. Since the date that is 12 months prior to the first date on which I began working on Contract No. _____, I have not received any gifts, favors, or income from an actual or potential proposer, or any actual or potential party to a subagreement for Contract No. _____.
4. I agree that if at any time I discover that I have either a real or an apparent interest in, or connection with, an actual or potential proposer for this Contract, or an actual or potential party to a subagreement, I shall promptly report, in writing, the fact of my interest or connection, and the nature of it, to the Proposal Evaluation Committee through the Price Evaluation Committee Chairperson. I recognize that a reportable interest or connection includes but is not limited to the following:
 - A. An ownership interest in an actual or potential proposer or an actual or potential party to a subagreement, including interests held by myself, a member of my immediate family, or anyone else with whom I have a financial relationship.
 - B. Employment in the past 12 months, or an offer of future employment with an actual or potential proposer, or an actual or potential party to a subagreement;
 - C. Present employment by a member of my immediate family, or anyone else with whom I have a financial relationship, with an actual or potential proposer, or an actual or potential party to a subagreement;
 - D. Receipt of gifts, favors, or income from an actual or potential proposer, or an actual or potential party to a subagreement;
 - E. Any other interest or connection with a company or individual which might tend to subject the District to criticism on the basis that such interest or connection would impair my objectivity in participating in the selection process for this contract.
5. In addition, I fully realize that any violations of District rules and regulations or applicable statutory provisions may subject me to discipline and/or expose me to civil or criminal penalties.

Participant's Signature

Date

Participant's Name and Title (Print)

Approved: _____

Date

Name and Title: _____

CHAPTER V

SMALL PURCHASES

AND

OTHER SIMPLIFIED PURCHASE PROCEDURES

CHAPTER V SMALL PURCHASES AND OTHER SIMPLIFIED PURCHASE PROCEDURES

V-1 INTRODUCTION

- 1.0 The purpose of this Chapter is to prescribe small purchase procedures herein referred to as “simplified acquisition procedures” in order to (i) reduce administrative costs, (ii) improve opportunities for small business and small disadvantaged business concerns to obtain a fair proportion of District contracts, (iii) promote efficiency and economy in contracting; and, (iv) avoid unnecessary burdens for the District and its contractors.

Simplified acquisition procedures shall be used to the maximum extent practicable for all purchases of supplies or services not exceeding the simplified acquisition threshold ; the specific limits of which are as set forth below. Simplified acquisition procedures shall not be used in the acquisition of supplies and services initially estimated to exceed the simplified acquisition threshold even though resulting awards do not exceed that threshold. Requirements aggregating more than the simplified acquisition threshold shall not be broken down into several purchases that are less than the threshold merely to permit use of simplified acquisition procedures.

All duly authorized District employees functioning as contracting officers using the procedures in this Chapter, shall establish deadlines for the submission of responses to solicitations which afford contractors a reasonable opportunity to respond. (See Subchapter I-6 for the definition of “contracting officer” as well as the process by which that authority is redelegated.)

Similarly, duly authorized individuals are encouraged to use innovative approaches in awarding contracts using the simplified acquisition procedures under the authority of this Chapter. For example, the procedures of other Procurement Manual Chapters may, as appropriate, be adapted for use in awarding contracts under this part. Other Chapters that may be adapted include, but are not limited to Chapter III, Sealed Bidding; Chapter IV Contracting by Negotiation and Chapter VI, Non-competitive Procurement.

Contracting officers shall make awards under this part in the simplified manner that is most suitable, efficient, and economical given the circumstances of each procurement action.

- 2.0 **REQUIREMENTS FOR COMPETITION**: This Chapter sets forth the procedures for the procurement of supplies and equipment, the estimated aggregate amount of which does not exceed \$100,000, for public works that do not exceed an aggregate amount of \$10,000 and for services and miscellaneous procurements that do not exceed an aggregate amount of \$25,000. These small purchases shall be made competitively except where it is clearly in the best interest of the District to accomplish such purchases by less formal methods.

3.0 **DEFINITIONS:**

"Bulk funding" means a system whereby a District employee (e.g. contracting officer) receives authorization from the District's Operating or Capital Budget offices and the Controller's office as appropriate to obligate funds on purchase documents against a specified lump sum of funds reserved for the purpose for a specified period of time rather than obtaining individual obligational authority on each purchase document.

"Delivery order" means an order for supplies or services placed against an established contract.

"District-wide commercial purchase card" means a purchase card, similar in nature to a commercial credit card, issued to authorized District employees for their use in acquiring supplies and services in support of District operations.

"Imprest fund" means a cash fund of a fixed amount established by an advance of funds, without charge to an appropriation, from the District's Controller's office to a duly appointed cashier, for disbursement as needed from time to time in making payment in cash for relatively small amounts of supplies.

"Micro-purchase" means an acquisition of supplies or services (except construction), the aggregate amount of which does not exceed \$2,500 inclusive of all taxes, shipping and handling, etc. (the "micropurchase threshold"). Micro-purchase techniques may not be used for procuring public works.

"Purchase order" means an offer by the District to buy supplies or services, including construction and research and development, upon specified terms and conditions, using simplified acquisition procedures.

"Simplified acquisition procedures" means the methods prescribed in this part for making purchases of supplies or services using imprest funds, purchase orders, blanket purchase agreements, District-wide commercial purchase cards, or any other appropriate authorized method.

V-2 SMALL PURCHASES UNDER THE MICRO-PURCHASE THRESHOLD (Currently \$2,500 for Purchases and \$2,000 for Construction)

- 1.0 This section applies to purchases of supplies or services (except for construction) at or below the micro-purchase threshold (currently \$2,500). Micro-purchase for construction are limited to \$2,000. Micro-purchases may be awarded using any of the procurement methods covered by other parts of this chapter.

It is widely recognized by the Federal government, the State of California and numerous private sectors corporations that purchase cards offer significant advantages over the traditional purchase order. Therefore, the Procurement Department will implement and maintain a District wide commercial purchase card program in order to allow the District to enjoy similar benefits. Departments are encouraged to participate in this District-wide commercial purchase card program, to the maximum extent practicable. The District-wide commercial purchase card called “Go Card” may be used to procure and pay for micro-purchases in accordance with District procedures. This is not intended to limit use of the purchase card to micro-purchases, if otherwise authorized under District procedures. The provisions relating specifically to the District’s Go Card Program are contained in a separate manual entitled “Go Card Procedures” which supplements this District Procurement Manual.

- 2.0 Consistent with the requirements of Chapter I of this Manual with respect to the re-delegation of procurement authority, the Procurement Department may re-delegate micro-purchase authority to qualified District employees who will be using the supplies or services being purchased. District employees delegated this authority are contracting officers within the meaning of Chapter I of this Manual and subject to the District Code of Ethics (Reference Chapter I-5) including but not limited to the reporting requirements of the California Fair Political Practices act as amended.

Only such District employees receiving this re-delegated procurement authority may participate in the District-wide purchase card “Go Card” program. Qualified District employees are those who have participated in the Training Program provided by Procurement Department designated staff. A refresher course is also provided every two years as governed by the State of California.

- 2.1 Sponsoring Departments that participate in this program will also be responsible for:
- (i) Their department’s contribution to the District’s overall DBE, MBE or WBE participation achieved; and
 - (ii) Supporting the Procurement Department and Office of Civil Rights in their efforts to increase DBE, MBE or WBE participation in BART’s purchase card program by participating in Vendor Fairs and other events and training as organized by these Departments.
- 3.0 Micro-purchases should be distributed by contracting officers equitably among qualified suppliers or merchants.

- 4.0 Requirements aggregating more than the micro-purchase threshold shall not be broken down into several purchases that are less than the threshold merely to permit purchase under this Subchapter. Contracting authority may be revoked if this direction is violated.
- 5.0 Micro-purchases may be awarded without soliciting competitive quotations if the contracting officer determines that the price is reasonable. Prompt payment discounts should be solicited, if appropriate.
- 6.0 The administrative cost of verifying the reasonableness of the price for purchases at or below the micro-purchase threshold may more than offset potential savings from detecting instances of overpricing. Therefore, action to verify price reasonableness need only be taken if: (1) The contracting officer suspects or has information to indicate that the price may not be reasonable (e.g., comparison to the previous price paid or personal knowledge of the supply or service); or (2) Purchasing a supply or service for which no comparable pricing information is readily available (e.g., a supply or service that is not the same as, or is not similar to, other supplies or services that have recently been purchased on a competitive basis).
- 7.0 The Procurement Management and Support Division of the Procurement Department conducts a monthly review of all purchases by individual contracting officers. Any discrepancies are immediately noted and contracting officers are notified to provide additional documentation or to cease purchases in the future. Continued discrepancies may result in the suspension of Go Card privileges. The Procurement Department's designated staff oversees the program and reports directly to the Procurement Department Manager (Agency Program Coordinator).

V-3 COMPETITION AND PRICE REASONABLENESS FOR SMALL PURCHASES EXCEEDING THE MICRO-PURCHASE THRESHOLD: (Currently \$2,500 for Purchases and \$2,000 for Construction)

- 1.0 Whenever the expected procurement exceeds \$2,500 and, in the case of the construction of facilities exceeds \$2,000 but does not exceed \$10,000, or in the case of the purchase of supplies, equipment, or materials does not exceed \$100,000, a minimum of three quotations, either written or oral, shall be obtained that permit prices and terms to be compared.
- 2.0 Even when not soliciting quotations electronically, maximum practicable competition is still required by soliciting quotations or offers from sources within as well as outside the local trade area. The local trade area is defined as the three counties of Alameda, Contra Costa and San Francisco which make up the District. Generally, solicitation of at least three sources may be considered to promote competition to the maximum extent practicable if the contract does not exceed \$100,000. If practicable, two sources not included in the previous solicitation should be requested to furnish quotations.
- 2.1 The following factors influence the number of quotations required in connection with any particular purchase: (i) The nature of the article or service to be purchased and whether it is highly competitive and readily available in several makes or brands, or is relatively noncompetitive, (ii) Information obtained in making recent purchases of the same or similar item, (iii) The urgency of the proposed purchase, (iv) The dollar value of the proposed purchase, (v) Past experience concerning specific dealers' prices.
- 2.2 Contract Administrators/Buyers may solicit from one source if the circumstances of the contract action are such that only one source is reasonably available (e.g., urgency). Such actions should be documented in the contract file.
- 2.3 Contract Administrators/Buyers shall not limit solicitations to suppliers of well known and widely distributed makes or brands, or solicit quotations on a personal preference basis. If it is necessary to maintain a list of sources, new supply sources disclosed through trade journals or other media shall be continuously reviewed and, if appropriate, added to the list.
- 2.4 For bid mistake in small purchases, see generally Chapter III, Section III-5, 4.0 and 5.0, as appropriate.
- 3.0 Quotations or offers may be evaluated based on price alone or price and other price related factors (e.g., past performance, or quality). Formal evaluation plans, conduct of discussions, and scoring of quotes or offers are not required. Evaluation of other price related factors does not require the creation or existence of a formal data base, but may be based on such information as personal knowledge, previous experience, or customer surveys.

- 3.1 Purchases of goods, equipment and supplies over the micropurchase threshold of \$2,500 may only be awarded to a responsible bidder with the lowest responsive bid (or lowest evaluated price where price and price related factors are used). Award may NOT be made for these items using non-price factors.**
- 3.2 Standing price quotations may be used in lieu of obtaining individual quotations each time a purchase is contemplated to the extent that such quotations are not more than 90 calendar days old. When using such quotations, the Buyer, Contract Administrator, or Employee shall ensure that the price information is current and that the District obtains the benefit of maximum discounts before award is made.
- 3.3 Quotations shall be evaluated inclusive of all applicable state and local taxes and any transportation charges from the shipping point of the supplier to the delivery destination.
- 4.0 Occasionally an item can be obtained only from a supplier who quotes a minimum order price or quantity that either unreasonably exceeds stated quantity requirements or results in an unreasonable price for the quantities required. In these instances, the contract administrator/buyer should inform the sponsoring department/user department of all facts regarding the quotation and ask it to confirm or alter its requirement. The file shall be documented to support the final action taken.
- 5.0 Notification to unsuccessful suppliers shall be given only if requested. When a supplier requests information on an award which was based on factors other than price alone, the notification shall include a brief explanation of the basis for the contract award decision. (See also Section 3.1 above.)
- 6.0 The determination that a proposed price is reasonable should be based on competitive quotations. If only one response is received, or the price variance between multiple responses reflects lack of adequate competition, a statement shall be included in the contract file giving the basis of the determination of fair and reasonable price. The determination may be based on a comparison of the proposed price with prices found reasonable on previous purchases, current price lists, catalogs, advertisements, similar items in a related industry, value analysis, the Contract Administrator/Buyer's personal knowledge of the item being purchased or any other reasonable basis.
- 6.1 The Procurement Department shall develop and implement a form to be used for these determinations. (See also Chapter VII, Price Analysis)
- 7.0 Consistent with the requirements of Chapter III, for awards to other than the low bidder, the Contract Administrator/Buyer shall document the file to support the final contract award decision.
- 8.0 If only one source is solicited, an additional notation shall be made to explain the absence of competition.

9.0 Simplified documentation practices should be used. The following guidance illustrates the extent to which quotation information should be recorded.

- (1) Oral solicitations: The Contract Administrator/Buyer should establish and maintain informal records of oral price quotations in order to reflect clearly the propriety of placing the order at the price paid with the supplier concerned. In most cases this will consist merely of showing the names of the suppliers contacted and the prices and other terms and conditions quoted by each.
- (2) Written solicitations: Written records of solicitations may be limited to notes or abstracts to show prices, delivery, references to printed price lists used, the supplier or suppliers contacted, and other pertinent data.

10.0 The Contract Administrator/Buyer shall retain data supporting awards using simplified acquisition procedures to the minimum extent and duration necessary for management review purposes

11.0 **SOLICITATION FORMS**: If a Procurement Department Form is not used for written solicitations, quotations may be requested using (i) other than a Procurement -designed form, (ii) any approved automated format, or (iii) electronically.

When using an unsigned electronic purchase order for transmission of a request for quotations, the provisions and clauses applicable to the solicitation shall be incorporated by reference.

12.0 **QUOTATIONS**: A quotation to provide goods may also include services. It will be subject to these requirements to the extent that such services do not exceed 50% of the total value of the quote.

If the District issues an order resulting from a quotation, the District may (by written notice to the supplier, at any time before acceptance occurs) withdraw, amend, or cancel its offer.

13.0 **DISTRICT USE OF INDEFINITE DELIVERY CONTRACTS**: Costs and processing time for acquisitions at or below the simplified acquisition threshold may be reduced through the use of indefinite delivery contracts (see Work Directive Task Order definition in Procurement Approval section in Subchapter I-4 to this Manual) that permit Work Directives or Task Orders to be placed by several Departments in the District. Therefore, Sponsoring Departments are encouraged to seek opportunities to cooperate with each other to achieve efficiency and economy through the use of these contracts.

14.0 Options may be included in acquisitions using simplified acquisition procedures provided that the aggregate value of the acquisition and all options does not exceed the dollar threshold for use of simplified acquisition procedures under this part.

V-4 BLANKET PURCHASE ORDERS (NOT USED IN THIS DISTRICT)

V-5 RESPONSIBILITIES FOR SMALL PURCHASES

| <u>RESPONSIBILITY</u> | | <u>ACTION</u> |
|---|----------|---|
| User Department/Project Manager or Computer Generation of Inventory Replenishment | 1. 2. | Develops Requirement. Processes appropriately approved Purchase Requisition. |
| Purchasing/Contracts Administration Division | 3. 4. | Reviews Purchase Requisition for completeness and proper signatures. Determines method of procurement. (a) If less than \$2,500, purchases item from appropriate source at a price determined as fair and reasonable. (b) If between \$2,000 and \$10,000, for public works; or, If between \$2,500 and \$100,000 for Purchase Contracts obtains a minimum of (3) three oral or written quotations. (c) If greater than \$100,000 for Purchase Contracts and \$10,000 for Public Works, competitive bids are solicited using procedures outlined in Chapter III. |
| | 5. | Prepares Purchase Order or other form as appropriate. |
| Purchasing/Contracts Administration Division | 6. | Obtains signatures on Purchase Order or other form as appropriate according to Delegation of Authority. |
| | 7. | Makes award to appropriate Vendor. |
| | 8. | Transmits Purchase Order or other form as appropriate to Vendor and makes internal distribution. |
| | 9. | Performs required expedite and administrative actions. |

User Department/Project Manager
or Storeroom

10. Receives material or service.
11. Prepares, signs and dates Goods and Services Authorization (GSA) or Material Receipt Report.
12. Forwards record of receipt to Accounting.

Accounting

13. Matches GSA Report/Material Receipt Report to Purchase Order.
14. Upon receipt of Vendor's invoice, processes payment to Vendor and files documentation in completed payments file

V-6 RESERVED

V-7 SMALL PURCHASE FILES

- Purchase Requisition - formal or informal.
- Tabulation Sheet to include, but not limited to, the following information for each Vendor quoting:
 - Vendor name, address, telephone number
 - Item(s) for which quote is offered
 - Price(s) quoted
 - Quantity
 - Freight terms and conditions
 - Delivery date
- Additional information that must appear on the Tabulation Sheet:
 - Reason for Vendor selection
 - Indication that User Department/Project Manager has been contacted if quote exceeds Purchase Requisition value, and of User Department/ Project Manager concurrence in selection
 - Buyer's signature
 - Unit Manager's approval signature
- Additional correspondence from User Department/Project Manager.
- Copy of each Vendor's written quotation.
- Copy of drawing/specification.
- Copy of signed Purchase Order.
- Copy of any subsequent correspondence between Procurement, User Department/Project Manager and Vendor.

Pages 211 through 219 are reserved.

CHAPTER VI

NON-COMPETITIVE PROCUREMENT

CHAPTER VI NON-COMPETITIVE PROCUREMENT

This Chapter discusses procedures which are excepted from competitive bidding.

VI-1 COMPETITIVE BIDDING REQUIREMENTS UNDER THE CALIFORNIA PUBLIC CONTRACT CODE

To "competitively bid" (the term "publicly bid" is also used as well) means that the District issues a notice requesting bids which is published in a newspaper of general circulation at least ten days before the bids are received. Bids are sealed until the date and time of opening and then publicly read; award is made to the lowest responsible Bidder.

Unless provided otherwise by statute, the District by law is required to competitively bid contracts for:

1. The purchase of all supplies, equipment, and materials when the expenditure required exceeds \$100,000, and
2. The construction of facilities and works when the expenditure required exceeds \$10,000.
(Public Contract Code Section 20221)

VI-2 EXCEPTIONS TO COMPETITIVE BIDDING REQUIREMENTS UNDER THE CALIFORNIA PUBLIC CONTRACT CODE

Under certain limited circumstances, exceptions to the public bidding requirements are permitted by law. These include:

1. Lower price on the open market. If after rejecting bids the Board determines and declares by a two-thirds vote that in its opinion supplies, equipment and materials may be purchased at a lower price in the open market, the Board may proceed to make the purchase in the open market without further observance of competitive bidding requirements. (Public Contract Code Section 20222)
2. Public calamity. In case of any great public calamity, such as extraordinary fire, flood, storm, epidemic, or other disaster, the Board may by two-thirds vote determine that the public interest requires the immediate expenditure of money to safeguard life, health or property and proceed to enter into a contract needed in such emergency without observance of competitive bidding requirements. (Public Contract Code Section 20223)
3. Emergencies. Upon determining that immediate remedial measures to avert or alleviate damage to property or to repair or restore damaged or destroyed District property the General Manager may authorize the expenditure of money for the direct purchase of goods and services without observance of competitive bidding requirements in order to insure that the facilities of the District are available to serve the transportation needs of the general public. The General Manager shall, after any such expenditure, submit to the Board a full report explaining the necessity for the action. (Public Contract Code Section 20224) The Board has authorized the General Manager, as required by the statute, by Board Resolution 2649 to expend such funds not to exceed \$1 million dollars. The current Budget Resolution further confirms the General Manager's authority. See Section VI-5 below for further discussion of emergency procurement procedures.
4. Prototype equipment. The Board may by two-thirds vote direct the procurement of prototype equipment or modifications in an amount sufficient to conduct and evaluate operational testing without further observance of competitive bidding requirements. (Public Contract Code Section 20226)
5. Sole source. The Board may direct the purchase of any supply, equipment, or material upon a finding by two-thirds vote that there is only a single source of procurement and that the purchase is for the sole purpose of duplicating or replacing supply, equipment, or material in use without observance of competitive bidding requirements. (Public Contract Code Section 20227)
6. Purchase of electronic equipment and specialized rail transit equipment. The Board by two-thirds vote may direct the purchase of electronic equipment, including, but not limited to, computers, telecommunications equipment, fare collection equipment, and microwave

equipment; and specialized rail transit equipment, including, but not limited to, rail cars, and contracts for work that include conversion of rail car motive power system to alternating current or the complete replacement of existing rail car motive power units that utilize direct current, by competitive negotiation. (Public Contract Code Section 20229.1) See Chapter IV for further detailed discussion.

7. Construction contracts under \$10,000 and purchases under \$100,000. Contracts for the construction of facilities and works between \$2,000 and \$10,000 and purchases of supplies, equipment, and materials between \$2,500 and \$100,000 do not require competitive bidding, however, three written or oral quotations are required to permit prices and terms to be compared. (Public Contract Code Section 20221)

VI-3 SERVICES AGREEMENTS

Services agreements generally include professional, technical, maintenance and repair services, and lease and licenses for District use of real property, facilities, equipment and software. The District Act allows the District to contract for any professional services which cannot satisfactorily be performed by officers or employees of the District. (Public Utilities Code Section 28768)

Selection of private architectural, engineering, environmental, land surveying, or construction project management firms is required to be on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required. (Government Code Section 4526)

The District to insure open competition, however, has a policy of competitively negotiating services agreements by the process of issuing a Request for Proposals (RFP) for services over \$100,000, or by obtaining multiple quotes for services below \$100,000.

VI-4 FORM OF AGREEMENT AND CONTRACT PROVISIONS

Agreements over \$50,000 are generally in the form of a professional services agreement or proposal/contract. Agreements under \$50,000 are generally by short form professional services or letter agreement.

Contract provisions are standardized, but may be changed from time to time, and have been approved by the Office of the General Counsel.

VI-5 NON-COMPETITIVE EMERGENCY PROCUREMENT PROCEDURES

The most typical emergency is a situation requiring an immediate response by the User Department/Project Manager or System Safety Department to rectify a condition which poses an immediate danger to life or property.

- 1.1 The procedure for emergency procurements is as follows: The Department Manager of the responsible User Department/Project Manager or the respective Department Manager for System Safety shall submit a request for the emergency procurement (Attachment M) to the General Manager or his designee stating the basis for or condition causing the emergency, the items or services or purchases required, and the name of a recommended Contractor/Consultant. Prior to submitting the request to the General Manager, the User Department shall obtain legal review.
- 1.2 The General Manager's Office shall have the responsibility for approving or disapproving the procurement request and, if it is approved, the General Manager shall be responsible for notifying the Board explaining the necessity for such actions.
- 1.3 Upon receipt of a request for emergency procurement, the Contract Administration/ Purchasing Division may ascertain whether the same type of item or services as requested is currently under order through the competitive bidding (or negotiation for Personal Services) procedures of the District.
 - 1.3.1 If an award for the item or service requested has already been made, the Procurement Department may contact the Contractor/Consultant to ascertain whether adjustments in quantities, delivery schedule, or other performance requirements can be made to accommodate the emergency.
 - 1.3.2 If necessary, premium payments may be negotiated with the Contractor provided that reasonable efforts shall be made to meet the requirements of the District at the lowest price. This may be done by soliciting bids or quotations from at least two (2) other Contractors.
- 1.4 If no current contract for the requested item or services exists, or if a current Contractor is unable to meet the emergency procurement requirements of the District, the Contract Administration/ Purchasing Division may contact other known Contractors/Vendors to ascertain their ability to supply the item or service and their terms for so doing. The emergency nature of the procurement exempts the District from having to follow sealed bidding procedures, and, depending on the nature of the emergency, it may be necessary to contract with the first Contractor discovered who can perform the work. To the extent that circumstances permit, however, awards may be made on the basis of the lowest responsive and responsible Vendor able to meet the emergency procurement requirements of the District.
- 1.5 To the extent consistent with the objective of obtaining a reasonable price on the item or service procured, non-competitive contracts or adjustments to existing competitive contracts may be made only to the extent needed to obtain quantities required until the item or service can be obtained in accordance with the sealed bidding procedures of the District.

- 1.6 Reasonable efforts may be made to obtain quotations from at least three (3) Suppliers for the item or service which cannot be obtained by the adjustment of existing contracts. If time permits, the solicitation and response shall be in writing; if not, a written record shall be maintained of the essential facts of the oral solicitation and response.

VI-6 RESPONSIBILITIES FOR THE NON-COMPETITIVE PROCUREMENT OF SERVICES, AGREEMENTS AND CONTRACTS *

| <u>Responsibility</u> | | <u>Action</u> |
|---|----|--|
| User Department/Project Manager | 1. | Identifies requirements, develops non-competitive procurement justification and/or obtains Approval-In-Concept. Prepares cost estimate, specifications, and processes appropriately approved Purchase Requisition or Request for Consultant Contract. Obtains necessary funding clearances. Submits to Procurement Department. |
| Contract Administration/ Purchasing Division | 2. | Develops the proposed contract and identifies appropriate contract type (firm fixed price, cost plus fixed fee, etc.). |
| User Department/Project Manager, Office of Civil Rights and General Counsel | 3. | Reviews and comments on proposed contract. General Counsel reviews as to form. |
| Contract Administration Division | 4. | Sends copy to and solicits cost and technical proposal from Contractor. |
| User Department/Project Manager/ Contract Administration Division | 5. | Develop pre-negotiation objectives. |
| Contractor | 6. | Returns cost and technical proposals to Contract Administration/Purchasing Division. |
| User Department/Project Manager | 7. | Performs technical evaluation of technical elements of Contractor's proposal. |
| Contract Administration/ Purchasing Division | 8. | Performs price or cost analysis to determine reasonableness of Contractor's price. Certifies that price is fair and reasonable. |
| Contract Administration/ Purchasing Division | 9. | Negotiates contract, calling upon User Department/Project Manager and General Counsel as needed. |

* These procedures do not apply in limited instances such as those discussed in Chapter VI-2.

| <u>Responsibility</u> | | <u>Action</u> |
|---------------------------------|-----|-----------------------------|
| User Department/Project Manager | 10. | Concur on negotiated costs. |

| | | |
|--|-----|--|
| User Department/Project Manager | 11 | Prepares and circulates EDD to obtains staff approvals and Board authorization to execute agreement/contract |
| Contract Administration Division | 12. | Prepares final contract documents. |
| General Counsel | 13. | Reviews and approves proposed contract as to legal form. |
| Contract Administration Division | 14. | Forwards contract to Contractor for execution. |
| Contracting Officer | 15. | Approves contract award. Issues Notice of Award. |
| Contractor | 16. | Returns executed contract and, if required, insurance policies/bonds. |
| Procurement Manager or General Manager, as appropriate | 17. | Executes contract for the District. |
| Contract Administration Division | 18. | Issues Notice to Proceed to Contractor and delivers (mails) copy of contract. |
| | 19. | Distributes conformed documents. |
| | 20. | Maintains official contract file. |

VI-7 NON-COMPETITIVE CONTRACT ADMINISTRATION/PURCHASING DIVISION FILES

1.0 **NON-COMPETITIVE CONTRACT FILES**: The following documents become part of the Official Contract File maintained by the Contract Administration Division:

- EDD requesting Approval-in-Concept and associated non-competitive procurement justification documents.
- Technical and cost proposals and the evaluation thereof.
- Record of negotiation and cost analysis.
- Comments/concurrences from User Department/Project Manager and Office of Civil Rights; the Office of the General Counsel approval as to legal form.
- Funding document.
- EDD authorizing non-competitive procurement -- requires either Board's approval or General Manager's authorization with notification to the Board if for Services, Leases and Licenses.
- Original contract.
- Copy of Notice to Proceed and Notice of Award.
- For emergency procurements, competitive quotes or bids, if obtained.
- Record of negotiation and cost analysis for any contract modifications or supplementals.
- Executed contract amendments.
- Final payment memo.
- Certificate of completion.

2.0 **NON-COMPETITIVE COMMODITY PROCUREMENT FILES**: The following documents become part of the Official Purchasing File maintained by the Procurement Department's Purchasing Division:

- Approved and completed purchase requisition
- EDD authorizing non-competitive procurement
- Record of negotiation and price/cost analysis
- Bid

- Bid tabulation
- All internal and external correspondence
- Copy of approved Contract Administration/Purchasing Division EDD if required
- Copy of Purchase Order

Pages 232 through 234 are reserved.

CHAPTER VII

DOCUMENTATION OVERVIEW

CHAPTER VII DOCUMENTATION OVERVIEW

VII-1 GENERAL

This Chapter describes some of the types of documentation necessary in specific contracting situations to substantiate the permanent contract files. The documents discussed here are only those not covered adequately elsewhere in the Manual. In some cases, the types of documentation addressed are required by FTA for all Federally funded contracts. Additional direction may be given for other funding agency procurement requirements.

VII-2 TYPES OF DOCUMENTATION

The documents listed below should be prepared as indicated. There is some redundancy inherent in any such type of effort which attempts to document important aspects of a procurement, however, all documentation should be prepared as suggested and incorporated in the permanent contract files.

- 1.0 **MEMORANDUM TO FILE**: Written Memorandum(a) to File must be incorporated in the permanent contract file(s). The Memorandum(a) to File consists of a summary of events leading up to the need for a decision; the specific important action being considered; all the facts considered in order to make the decision; and the decision which was made based on the facts (i.e., approval of new Subcontractors, large change orders, significant disputes and resolutions).
- 1.1 **APPLICABILITY**: The Memorandum(a) to File shall be used in the event of a decision to restrict or waive competition; or any other major contracting decisions which deviate from District or, where applicable, FTA guidelines.
- 2.0 **NON-COMPETITIVE OR SOLE-SOURCE JUSTIFICATION**: This document is prepared by the User Department/Project Manager for procurements from a sole source for contracts other than purchase and public works contracts. This document is used primarily for services contracts and consists of statements concerning the requirements, purpose, and special characteristics or interest which warrant a non-competitive procurement such as a procurement from a sole source. This document must be a factually supported justification due to the existence of an emergency or the unique capability of a specific Contractor. The document must be signed by a manager from the User Department/Project Manager authorized to make such statements (See Chapter VI).
- 2.1 **APPLICABILITY**: This document must be prepared for all non-competitive procurements in excess of \$2,500 although for a contract between \$2,500 and \$10,000, a less thorough justification is required than for a contract over \$10,000. Non-competitive procurements in excess of \$100,000 require Board approval and those over \$50,000 require the approval of the Deputy General Manager prior to contract execution (See Chapter VI).
- 3.0 **SMALL PURCHASE DOCUMENTATION**: The records consist of oral or written quotations received during a small purchase effort (See Chapter V).
- 3.1 **APPLICABILITY**: This type of document is required for small purchases up to \$100,000 and public works up to \$10,000.
- 4.0 **CONTRACT FILE - SEALED BID PROCUREMENT**: See Chapter III-8.
- 5.0 **CONTRACT FILE - COMPETITIVELY NEGOTIATED PROCUREMENTS**: See Chapter IV-4.
- 6.0 **CONTRACT FILE - NON-COMPETITIVE PROCUREMENTS**: See Chapter VI-5.

7.0 **CONTRACT COST AND PRICE ANALYSIS FOR EVERY PROCUREMENT ACTION:** The District must perform a cost or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the District must make independent estimates before receiving bids or proposals.

The District's objective with respect to price is to (1) purchase services and supplies from responsible sources at prices that it determines to be fair and reasonable, (2) price each contract separately and independently and not (i) use proposed price reductions under other contracts as an evaluation factor or (ii) consider losses or profits realized or anticipated under other contracts; and (3) not include in a contract price any amount for a specified contingency to the extent that the contract provides for price adjustment based upon the occurrence of that contingency.

The determination that a price is fair and reasonable shall be based upon some form of written analyses, (i) either on the basis of price, cost and profit, or some combination of both price and cost and (ii) the price is consistent with scope of work; made prior to making any award or modification after award.

Price analysis must be performed on all procurements, whether or not a cost analysis is required. The depth of a price analysis will depend upon the products or services being purchased and the size and complexity of the procurement.

Price analysis alone is sufficient in order to make the determination that the price is fair and reasonable only when one of the following conditions exists, i.e. the proposed price is either:

- (i) The direct result of adequate price competition;
- (ii) Based upon the previous results of adequate price competition;
- (iii) Established by market or catalog prices (for identical items);
- (iv) Based upon market or catalog prices (for similar items); or
- (v) Set by Law or regulation.

Where none of these conditions set forth above exist, then price analysis alone is not sufficient to establish that the proposed price is fair and reasonable and a separate analysis of costs, will be required in addition to price analysis. All awards for Architectural-Engineering contracts and modifications thereto require cost analysis in that price is not an award factor. In general, price analysis alone is insufficient to support a determination as to reasonableness of price in all non-competitive procurements including modifications to contracts that were the result of sealed bids and cost analysis is required. In addition, where appropriate, a technical analysis of the price/cost proposal will be performed to determine that the individual elements of the proposed price are consistent with the District's requirements, necessary and appropriate. (See Section 7.4 - Technical Evaluation.)

At the time the Purchase Requisition or Request for Consultant Services or Public Works and the Scope of Work are submitted to Procurement, the appropriate technical staff must also submit either

an estimated price, or an estimated cost and profit of the work effort in a sufficiently detailed format to permit general comparability to the expected bids or proposals. Such estimated price or estimated cost and profit must be developed prior to receipt of any Contractor price or cost proposal.

Such an estimate is not adequate by itself, however, it is to serve as the basis for determining the reasonableness of the proposed price or costs and profit. Rather, analyses must be performed by either the Procurement Department (price analysis) or the Project Manager (cost, profit and technical analysis). The four types of analysis are described below.

- 7.1 **PRICE ANALYSIS**: This is an evaluation of a bid that does not involve an in-depth evaluation of all the separate cost elements and the profit factors that comprise a Bidder's bid.

A price analysis shall be in writing and shall include whatever actions the Contract Administrator/ Buyer takes to reach a decision that a price is fair and reasonable. These actions may include analysis such as:

- A comparison of competitive price quotations;
- A comparison of prior quotations and contract prices with current quotations for the same or similar end-items;
- The use of rough yardsticks such as dollar per pound, per horsepower, or other units to point up apparent gross inconsistencies;
- A comparison of prices or published price lists issued on a competitive basis, and published market prices of commodities, together with discount or rebate schedules;
- A comparison of proposed prices with independent estimates.

At a minimum, any comparisons made, shall be made using properly adjusted price data and shall be in a tabular format and differences if any, analyzed and explained.

- 7.2 **COST ANALYSIS**: This is a detailed evaluation of cost accounting data submitted by a Proposer and of the individual cost elements in a Proposer's offer to perform. Cost analyses will be performed by the Project Manager or designee with the oversight and participation of the Contract Administrator. A cost analysis is generally conducted to determine whether the Proposer is applying sound management in proposing the application of resources to the contracted effort and whether costs are proper, allowable, and allocable. Cost analysis is a more detailed review of a Proposer's proposal than a price analysis. It involves an in-depth look at the Proposer's cost and pricing data and of the judgmental factors applied in projecting from the data to the estimated costs. The objective is to form an opinion as to the degree to which the proposed costs represent what performance of the contract should cost, assuming reasonable economy and efficiency. In conducting a cost analysis, it is not enough simply to examine a Contractor's proposed figures on the number of hours his staff will work,

the amounts and cost of materials, and the rates of labor and overhead from accounting records. It is also not enough to project the actual cost experience and call it the estimate of future costs.

Contract cost analysis is the element-by-element examination of the estimated or actual cost of performing a contract, the analysis of cost accounting data furnished by a Proposer. It involves:

- The verification of cost data;
- The review of cost or pricing data to determine whether any cost or pricing data necessary to make the Contractor's proposal accurate, complete, and current have not been either submitted or identified in writing by the Contractor and if there are such data, attempt to obtain them and negotiate, using them or making satisfactory allowance for the incomplete data
- The verification that the cost submissions are in accordance with the specific contract requirements such as the cost principles and procedures contained in 48 CFR Part 31 and, when applicable, the requirements and procedures in 48 CFR Part 30, Cost Accounting Standards;
- The evaluation of specific cost elements;
- The evaluation of the effect of current practices on future costs to ensure that the effects of inefficient or uneconomical past practices are not projected into the future;
- The projection of the cost data to determine its effect on prices.

A cost analysis examines such factors as:

- The basis for allocating overhead costs;
- Allowances for contingencies; and
- The appropriateness of allocations of particular overhead costs to the contract.

7.3 **PROFIT ANALYSIS**: Where price analysis alone is insufficient to support a determination that the proposed price is fair and reasonable then cost and profit or fee must be separately analyzed and negotiated. The Contractor's proposed fee or profit shall be analyzed using structured approaches to provide a discipline for ensuring that all relevant factors are considered.

The Project Manager with the oversight and participation of the Contract Administrator, shall use the District's pre-negotiation cost objective estimate as the basis for calculating the profit or fee pre-negotiation objective.

At a minimum, any comparisons made or analyses developed, shall be in a tabular format and differences if any, analyzed and explained.

Profit analysis is not applying a single percentage to the Contractors proposed cost, i.e., applying 10% to the total estimated cost.

7.4 **TECHNICAL EVALUATION:** All procurement actions that include a determination that the proposed price or cost is fair and reasonable shall include a separate determination that the Contractor cost proposal is responsive to the Contractor technical proposal and the extent to which the individual elements are necessary and appropriate to meet the District's requirements. This determination forms the basis for subsequently performing cost or price analysis as necessary.

- For all procurement actions with price reasonableness determinations over \$25,000, a separate technical analysis memorandum shall be developed and made available to the individuals responsible for price or cost analysis. For pricing actions under \$25,000, this analysis memorandum will normally be a separately identified part of the price or cost analysis.

Where price analysis alone is sufficient to support a determination that the proposed price is fair and reasonable then the responsiveness procedures set forth in Chapter III satisfy this requirement.

Where price analysis alone is insufficient to support a determination that the proposed price is fair and reasonable then a separate responsiveness evaluation shall be performed and as a minimum, the Contractor's cost proposal shall be evaluated for the following conditions:

- The necessity and reasonableness for certain direct costs
- The necessity and reasonableness for amounts of direct labor hours;
- The necessity and reasonableness for proposed direct labor classifications;

8.0 **EXECUTIVE DECISION DOCUMENT (EDD), CONTRACTS MANAGEMENT/PURCHASING DIVISION STAFF SUMMARY:** The Executive Decision Document (EDD) is the vehicle used to obtain executive approval of numerous types of actions within the District including some procurement actions. The EDD is used to obtain the required sign-offs and approvals for most procurement related actions, e.g. approvals for award, and rejection.

The EDD may be used by User Department/Project Managers to obtain the General Manager's Approval-in-Concept for certain procurements (See Chapter I-4); if approved, the EDD is sent along with the other required documents to the Procurement Department to initiate a procurement. An EDD is prepared to obtain Board approval for all awards \$100,000 and greater.

9.0 **OTHER DOCUMENTATION REQUIREMENTS**

9.1 **BID SAMPLE MEMORANDUM:** For FTA funded projects and for procurements over the small purchase threshold in which submission of descriptive literature or bid samples is required as part of a bid, a bid sample justification memorandum should be prepared by the User Department/Project Manager. This document should detail reasons why it is necessary to obtain this information as a part of the bid and how the information will be used in the selection of the successful Contractor.

9.2 **PERFORMANCE BONDING MEMORANDUM:** For non-construction contracts, FTA discourages performance bonding requirements except where applicable law or regulation provides for such bonding. Regardless of the funding source, a Memorandum to File including the solicitation history and a canvass of Vendors who did not bid and the reasons why, should be prepared regarding such necessity.

9.3 **LIQUIDATED DAMAGES PROVISIONS:** The District shall determine whether or not use of a liquidated damages provision is appropriate for each specific procurement. The amount of liquidated damages must be reasonable to compensate BART for possible damages and not be so large as to be construed as a penalty. Contract Administrators should not include such provisions in a contract unless:

- (1) The time of delivery is of such importance that the District can reasonably expect to suffer damage if the delivery is delinquent;
- (2) The Project Manager determines that the delivery schedule is reasonable at the time of award; and
- (3) Damages would be difficult or impossible to establish.

In addition, the Contract Administrator will insure that the assessment for damages, as may be established by the Project Manager, shall be at a specific rate per day for each day of overrun in contract performance time. The established rate will be used in subsequent contracts awarded for the work. Further, it shall be understood by the Project Manager that any liquidated damages recovered shall be credited to the project account involved unless the FTA permits otherwise.

Finally, if a Project Manager determines that a liquidated damages clause is necessary in a contract, a Memorandum to File shall be prepared to document the derivation of the rate of assessment and demonstrate that it is reasonable, proper, and not arbitrary.

9.4 **SINGLE BID/UNRESPONSIVE BID SITUATIONS:** The District may award a contract to a single responsive, responsible Bidder provided an analysis has been completed which documents that the bid is responsive, the Bidder is responsible and the price is fair and reasonable. Regardless of the funding source, a Memorandum to File shall be prepared including the solicitation history and a canvass of Vendors who did not bid and the reasons why, and a statement by the Project Manager that the specification has been analyzed and concludes that there are no items in the solicitation that inhibit or eliminate competition or, if the analysis shows that the solicitation contains a restrictive item, a justification that the District needs the item to meet BART's requirements.

If the procurement is in excess of \$100,000 and has been advertised for bids and no responsive bids have been received, the District may choose to revise the solicitation document and rebid the project or may, subject to State law requirements, be able to proceed with a negotiated contract (e.g., lower

price on the open market). Those negotiations must be fully documented including a Memorandum to the File and an analysis documenting that the negotiated cost and profit is fair and reasonable.

- 9.5 **AWARD TO OTHER THAN THE APPARENT LOWEST BIDDER:** For a procurement to be awarded to other than the apparent lowest Bidder on the grounds of non-responsiveness/non-responsibility, the EDD shall be prepared stating the reasons for such action as discussed in the bid rejection procedures in Chapter III-6, Section 6.0.

- 9.6 **EVALUATION AND EXERCISE OF AN OPTION:** An option means a unilateral right in a contract by which, for a specified time, the District may elect to purchase additional equipment, supplies, or services called for by the contract, or may elect to extend the term of the contract.

If the District chooses to use options, the option quantities of periods contained in the contractor's/consultant's bid or offer must be evaluated in order to determine contract award. When options have not been evaluated as part of the award, the exercise of such options will be considered a sole source procurement. In addition, the District must ensure that the exercise of an option is in accordance with the terms and conditions of the option stated in the initial contract awarded.

Accordingly, the District may exercise an option only after making a written determination, signed by the Department Manager, Procurement, or designee, and concurred in by the User Department/Project Manager, is placed in the contract file, stating that the exercise of the option is the most advantageous method of fulfilling the District's requirements, considering price and other factors and the District has the authority to exercise the option.

The determination shall be made on the basis of one of the following:

- a. A new solicitation fails to produce a better price or a more advantageous offer than that offered by the option;
- b. An analysis of prices or an examination of the market indicates that the option price is better than prices available in the market or that the option is the more advantageous offer; or
- c. The time between the award of the contract containing the option and the exercise of the option is so short that it indicates the option price is the lowest price obtainable or the more advantageous offer. The determination shall take into consideration such factors as market stability and comparison of the time since award with the usual duration of contracts for such supplies or services.

The determination should also take into account the District's need for continuity of operations and potential costs of disrupting operations and is in accordance with the terms of the options in the contract.

- 9.7 **CLAIMS:** In addition to other requirements, Contractor claims are to be evaluated and resolved by the District pursuant to the following consideration, requirements and limits:

- a. Before settlement of a claim, Memoranda to File shall be prepared which adequately document all pertinent facts, events, audits to substantiate claimed costs, and negotiations to serve as the basis for funding agency concurrence in the compromise or settlement of the claim, in the event that funding agency review and concurrence become necessary.
- b. Such records shall substantiate that reasonable and prudent measures were taken by the District to prevent or offset the causes underlying the claim and that such claimed costs were not caused by mismanagement on the part of the District or attributable to the third party.
- c. Note, however, that a separate legal evaluation of the likelihood of success in any potential litigation proceeding should be prepared and kept in the Office of the General Counsel's files.

9.8 PURCHASE OF ITEMS IN PURCHASE CONTRACTS BY DESIGNATING A BRAND NAME:
(Where only a single brand name is known to the District)

In certain procurement actions, where the District is compelled to specify a product by name, the solicitation documents should, to the greatest extent possible, identify at least two brand names or trade names followed by the words "or equal". In these instances, the District should carefully identify its minimum needs and clearly set forth those salient physical and functional characteristics associated with the brand name product being procured.

In rare instances where there is an urgent need for the use of only one brand name, the User Department/Project Manager shall certify to the Department Manager of Procurement that an appropriately qualified individual has performed the following actions and memorialized that action in a memorandum to file:

- a. An identified individual has made a diligent search of all available trade journals, catalogs and industry sources;
- b. This same individual has consulted with, and identified other appropriate individuals on the District staff with relevant technical knowledge; and
- c. On the basis of this action, this same individual has made a determination that no other comparable brand or trade name, or equal product is known to the District.

9.9 PURCHASE OF ITEMS IN PUBLIC WORKS CONTRACTS BY DESIGNATING A SINGLE BRAND NAME: *(Where other brand names are known to the District)*

For naming a single brand name where no other brand name is known to the District, see the requirements for Section 9.8.

Where a single brand name has been determined to be a unique or novel application required in the public interest, then this shall be a separate part of the documentation and supported by appropriate data.

Where a product is designated as a Designated Matching Product (DMP), to match others in use, within the District either completed or in the course of completion, the User Department/Project Manager shall certify to the Department Manager of Procurement that an appropriately qualified individual has prepared a memorandum to file which addresses areas such as:

- a. Identifies what particular product, material, or thing is being 'matched';
- b. Performed a cost/benefit analysis, or some other economic analysis which quantifies the benefits that the District will receive by restricting competition on this DMP and the benefits in reduced inventory costs must be balanced against any increased cost that result from the lack of direct price competition on this designated matching product;
- c. Increased maintenance labor or tooling costs that would occur if material other than that proposed as DMP were to be acquired (if applicable);
- d. Other significant public interests affected by this procurement action as appropriate.

10.0 **MISTAKE IN BID FOR PUBLIC WORKS CONTRACTS:** The District may allow a bidder to rescind its bid on the basis of mistake in bid only after making a written determination, signed by the Contracting Officer or designee, and concurred in by the Procurement, Legal, User Department/Project Manager and other District departments as appropriate, is placed in the contract file. The determination shall be made on the basis of the following:

- a. A technical evaluation by appropriately qualified individuals performing the following actions and analyses; and memorializing these actions into memoranda to file:
 - performed an analysis of the bidder furnished bid data and determined that there is support for the bidder's claim that a mistake in bid was made.
 - determined that the bidder complied with the notice requirements in the solicitation documents. as well as providing in the notice to the District, sufficient detail on how the mistake occurred.
 - determined that this same mistake caused the bid to be materially different than that intended by the bidder.
 - reviewed the bidder's bid and concluded that the mistake was made in filling out the District's bid form and not from (i) errors in judgement, or (ii) carelessness in inspecting the site of the work, or (iii) in reading the District's plans or specifications.

- b. Contract Administration or the Sponsoring Department/Project Manager may request BART Internal Audit to assess the consistency and accuracy of the bidder furnished data as a basis for making a written determination that a mistake in bid has occurred in the filling out of the District's bid form and not from other factors such as error in judgment or carelessness.

The role of Internal Audit in these determinations is advisory only; that is, Internal Audit may advise but not direct the Project Manager/Contract Administrator. However, if the Project Manager/Contract Administrator do not accept the auditor's recommendations, the appropriate individual must document in the determination the rationale for not accepting the auditor's recommendations.

Since bid relief is governed by California statute under Public Contracts Code, review of the bidder's request and the written determination to consent to relive the bidder of its bid shall be reviewed by the Office of General Counsel for legal compliance

Pages 247 through 254 are reserved.

CHAPTER VIII

CONTRACT ADMINISTRATION

CHAPTER VIII CONTRACT ADMINISTRATION

VIII-1 RESPONSIBILITIES

- 1.0 **PROJECT MANAGER RESPONSIBILITIES:** After Contracts are executed and awarded, it shall be the Project Manager's responsibility to guide the Contractor through the work process. Generally, the Scope of Work or Specifications in the contract defines specific tasks, milestones, and review procedures which vary depending on the specific project. The Project Manager shall provide technical direction to the Contractor and respond to correspondence on technical matters from the Contractor's designated representative. The Project Manager shall review the progress of the work on a periodic basis, and initiate review by District staff, public agencies and affected utilities as required.

The District has requirements that certain products to be provided under the terms of a contract be inspected and/or tested by the District or other authorized organizations prior to shipment, acceptance, continuation of the work, or payment (depending on the type of product and the contract). The Project Manager is responsible for ensuring that any such required testing and inspection is performed.

The Contractor is required to document the amount of time and money spent on the work periodically, as specified in the contract. The Project Manager shall review the Contractor's documentation and invoices in relation to the milestones, work expended to date and budgeting information. The Project Manager shall also review invoices for accuracy and content and then prepare GSAs or payment applications in accordance with the contract Terms and Conditions.

The Project Manager has a continuing responsibility to monitor the Contractor's work progress until it is completed and the product or service is accepted by the District.

For projects funded by the FTA or other Grantors, the Project Manager also has a continuing responsibility to maintain compliance with the Grant agreement and specifically the requirements of the Project Management Circular as appropriate. When circumstances require FTA concurrence on matters other than procurement requirements, then the Project Manager should coordinate with other District departments as appropriate to obtain the requisite FTA clearance.

Upon completion of the Consultant/Contractor/Vendor effort and where deemed appropriate, a final evaluation report in a narrative form, prepared by the Project Manager/Sponsoring Department will be sent to Procurement to be used for future evaluation of the Consultant/Contractor/Vendor. The Project Manager will obtain, from the Office of Civil Rights, a report on the Consultant's compliance in meeting DBE goals or Availability Percentages for the project (if applicable), for transmittal to Procurement.

Except as otherwise provided for in the District's Resident Engineer's Manual as applied to public works and procurement contracts, the Project Manager and User Department/Project Manager personnel do not have authority to modify, supplement or terminate contracts or to default

Contractors. If it is the recommendation of the User Department/Project Manager representative that any of these actions be taken, the recommendation and supporting documentation must be forwarded to the Contract Administrator/Buyer for action.

The Project Manager is responsible for closing out public works and procurement contracts consistent with established procedures. (See also below.)

- 2.0 **CONTRACT ADMINISTRATION DIVISION RESPONSIBILITIES:** Immediately after award of the contract, the technical administration of the contract becomes primarily the responsibility of the User Department/Project Manager with the administrative assistance of the Contract Administration Division. The Project Manager establishes the methods and procedures to be utilized in the performance of the contract. The Contract Administrator and Procurement management are responsible for resolving contractual issues with respect to termination or default in accordance with District and departmental procedures. The Office of the General Counsel must be consulted prior to taking any default or termination action.

Other than public works and procurement contracts, the Contract Administration Division performs contract close-out in accordance with established procedures. The Project Manager is responsible for closing out public works and procurement contracts in conformance with procedures set forth in the Resident Engineer's manual. (See Section VIII-5 for services and miscellaneous procurements and Section VIII-6 for Public Works contracts.)

There is no requirement for closing out purchase contracts as they are considered complete when the purchases under them equal their total dollar limitation, if any, or when their stated time period expires.

- 2.1 **FEDERALLY FUNDED WORK ADDED TO NON-FEDERALLY FUNDED CONTRACTS:** In those instances where it becomes necessary to add Federally funded work to a contract which was originally non-Federally funded, the Contract Administrator shall be responsible to insure that all applicable Federal clauses are added to the contract.

Furthermore, prior to incorporating the Federally funded work and Federal provisions into the original contract, the District will provide a copy of the original contract to the FTA Region IX Administrator for review. Only after the Region assures the District that the original contract meets Federal requirements will approval to add Federally funded requirements be granted. The Contract Administrator will take appropriate action based upon that decision.

- 3.0 **PROGRESS PAYMENTS:** There are two major types of progress payments: those based on costs and those based on completion of work. Both types are considered contract financing methods. Progress payments may be appropriate if:

- The contractor will not be able to bill for the first-delivery of products, or other performance milestones, for a substantial time after work begins.

- The contractor's expenditures prior to delivery of the first items will have a significant impact on the contractor's working capital.

Depending upon the circumstances, the District may consider incorporating progress payment provisions into its contracts. At such times, the Project Manager and/or Contract Administrator should consider the following aspects relative to progress payments:

- (1) Progress payments are only made to the contractor for costs incurred in the performance of the contract.
- (2) When progress payments are used, the District must obtain the title to property (materials, work in progress, and finished goods) for which progress payments are made. Alternative security for progress payments by irrevocable letter of credit or equivalent means to protect the District's interests in the progress payments may be used in lieu of obtaining title.

4.0 Advance Payments. Advance payments are payments made to a contractor before the contractor incurs contract costs. The District may use its local share funds for advance payments. However, in Federally funded contracts, if there is no automatic preaward authority for the contract, then advance payments made with local share funds before FTA assistance has been awarded, or before a letter of no prejudice has been issued or other preaward authority has been provided, or before FTA approval for the specific advance payment has been obtained, are ineligible for reimbursement.

The following principles and restrictions apply in Federally funded contracts:

Use of FTA Assistance Prohibited. The District may not use FTA assistance to make payments to a contractor before the contractor has incurred the costs for which the payments would be attributable. However, if the District determines that there are sound business reasons justifying the advance payment and adequate security for the payment, FTA's advance written concurrence on a written request is required before such advance payment can be made with FTA or matching local share funds. FTA recognizes that advance payments are typically required for, but are not limited to, public utility connections and services, rent, tuition, insurance premiums, subscriptions to publications, software licenses, construction mobilization costs, transportation, hotel reservations, and conference and convention registrations. Accordingly, the District may use FTA assistance to support or reimburse the costs of such acquisitions.

The Legal Department may provide additional guidance relative to this subject.

VIII-2 EXECUTION OF CONTRACT CHANGES (MODIFICATIONS, AMENDMENTS, CHANGE ORDERS, UNIT ITEM OVERRUNS)

- 1.0 **AUTHORIZATION FOR CONTRACT CHANGES:** Contract changes (Attachment W) shall be made pursuant to the provisions in the basic contract when it becomes necessary to change the contract cost and/or fee, Scope of Work, contract duration, or any other element of the contract. Unless otherwise authorized in extremely limited situations by this Procurement Manual, the District's Resident Engineer's manual, or a duly authorized District official, all contract changes must be executed in writing, before the work is performed, by the authorized representative of the Contractor and the District as set forth in Chapter I-4.
- 1.1 Changes to the contract are considered within the Scope of Work if they do not constitute a significant change from the original purpose of the work or the intended method of achievement. In this case, the Project Manager informs the Contract Administrator that a change order or modification is required, and obtains a proposal from the Contractor for work to be performed. A contract modification is negotiated by the Project Manager with the oversight and participation of the Contract Administrator, and a Change Order is issued and executed in accordance with the delegations in Chapter I.
- 1.2 For purchases and construction contracts subject to competitive bidding laws: If within Scope of Work, a change order may be issued subject to the terms of the contract. If outside of Scope of Work, a new contract will need to be competitively bid.
- 1.3 For service agreements, if work is outside of Scope of Work either amend the agreement to change the scope or issue a new agreement which may be subject to issuing an RFP. The Project Manager shall advise the Contract Administrator and coordinate the requirement for a contract change as soon as the need is known and shall provide the necessary documentation to permit the changes to be processed in the most expeditious manner to prevent delays in the project schedule.
- 1.4 The District may not use Federal assistance to finance:
- (a) Improper Contract Expansion. A contract has been improperly expanded when it includes a larger scope, greater quantities, or options beyond the District's reasonably anticipated needs. A contract has also been improperly expanded when excess capacity has been added primarily to permit assignment of those contract rights to another entity. The Common Grant Rules require the District to have procurement procedures that preclude acquiring property or services it does not need.
- (b) Cardinal Changes. A significant change in contract work (property or services) that causes a major deviation from the original purpose of the work or the intended method of achievement, or causes a revision of contract work so extensive, significant, or cumulative that, in effect, the contractor is required to perform very different work from that described in the original contract, is a cardinal change. Such practices are sometimes informally referred to as

“tag-ons.” A change within the scope of the contract (sometimes referred to as an “in-scope” change) is not a “tag-on” or cardinal change.

2.0 **CHANGES (MODIFICATIONS OR AMENDMENTS) TO SERVICES AGREEMENTS OR MISCELLANEOUS PROCUREMENT CONTRACTS**

- 2.1 **INITIATING A REQUEST FOR A CONTRACT CHANGE:** The User Department/Project Manager will prepare a "Request for a Change to Consultant Agreement No. ____" package for transmittal to the Department Manager of Procurement. (See Chapter II-1 for procedures to initiate these procurement actions.)

This package shall include, but not be limited to, scope of work, a schedule, a cost estimate and as appropriate key personnel requirements, work breakdown structure, recommended subcontractors and their scope of work, estimated budget, work products, any service warranties that will be required, etc. The cost estimate shall be prepared on the basis of a detailed analysis of the required work as though the District were submitting a proposal and shall state the basis for the cost estimate, i.e. previous cost experience, etc.

If an item is missing from the package and a reasonable explanation has not been provided for the missing item, the Contract Administrator shall telephone the Project Manager and inform him that if the missing item or reasonable explanation is not provided within two days, the package will be returned to the requestor for suitable action.

- 2.2 **CONSULTANT PROPOSAL:** The Contract Administrator will forward the Scope of Work and any proposed changes to the terms and conditions to the Consultant and request a technical and cost proposal. The Consultant will usually be given ten (10) working days to respond.

- 2.3 **PROPOSAL REVIEW:** The Contract Administrator will transmit a copy of the proposal to the Project Manager for review and comments. The Project Manager will perform a cost analysis of the cost proposal. If the Consultant is proposing an increase in his or her overhead rate above the original contract, the Project Manager may request supporting financial information from the Consultant. The Project Manager may opt to contact the Department of Internal Audit with a request to make a recommendation on the Consultant's proposed increase in overhead rates.

All of the above, shall be subject to the oversight and participation of the Contract Administrator.

- 2.4 **NEGOTIATIONS:** After receiving the Contract Administrator's comments, the cost or price analysis and the Department of Internal Audit recommendations on overhead rates, the Project Manager will request that the Consultant come into BART for a negotiations session. Prior to such session the Project Manager will meet with the Contract Administrator to finalize the negotiation strategy. The Project Manager will negotiate the specific contract terms and contract cost, with the Office of the General Counsel's assistance with negotiation of legal issues, as needed, and the Contract Administrator's assistance at negotiation sessions, as needed, to resolve issues of a technical nature. The Project Manager will document all negotiation sessions

sufficiently to allow a rapid reconstruction of the rationale for the recommended price without the Project there to explain the files. (See Chapter X for further guidance on price negotiations.)

All of the above, shall be subject to the oversight and participation of the Contract Administrator.

- 2.5 **FINAL COST PROPOSAL:** Upon completion of negotiations, the Project Manager will request a revised Consultant cost proposal. The Project Manager will transmit a copy of the final cost proposal to the Contract Administrator for approval.
- 2.6 **CONTRACT APPROVAL:** Upon receipt of the Contract Administrator's approval of the final cost proposal, the Project Manager will coordinate the EDD, if any is required, for approval of the contract modification or amendment. The Project Manager will prepare the EDD and provide the information on the "Impact on Funding" and other technical data as needed.
- 2.7 **FUNDING APPROVAL REQUEST:** The Project Manager will request and obtain funding approval for all projects.
- 2.8 **APPROVAL AND EXECUTION OF CONTRACT MODIFICATION OR AMENDMENT:** Procurement will transmit a copy of the modification or amendment to the Office of the General Counsel for review and approval as to legal form. Originals of the proposed modification or amendment will be sent to the Consultant for execution and returned to the Contract Administration Division, along with any required bonds or insurance policies. Upon receipt of the EDD with proper approval, and the originals of the modification or amendment executed by the Consultant, Procurement will obtain District execution of the modification or amendment (Attachment X).
- 2.9 **NOTICE TO PROCEED:** After execution of the modification or amendment, Procurement shall prepare the "Notice to Proceed" letter to the Consultant for signature by the Department Manager of Procurement, or his/her designee. Procurement will also transmit a fully executed original of the modification or amendment to the Consultant. Procurement will transmit a signed copy of the Notice to Proceed letter and a conformed copy of the modification or amendment to the appropriate Assistant General Manager and another copy of each to the Office of the General Counsel and the Project Manager for use in the administration of the contract.
- 2.10 **ACTIONS AND DOCUMENTS REQUIRED FOR SERVICE AGREEMENT MODIFICATIONS:** The actions and documentation required to formalize a modification to a service agreement are as follows: (Similar procedures may be used for changes to Miscellaneous procurement contracts.)
- Actions performed by the Project Manager or designee:
 1. Negotiating the change (work and price) with the Consultant.
 2. Performing a cost analysis as appropriate.

- Documentation Prepared by the Project Manager:
 1. A request for a change, signed by the Assistant General Manager or his authorized designee.
 2. A description of the change to be accomplished.
 3. A revised Scope of Work, if appropriate.
 4. Revised Staffing & Cost Estimate, if appropriate.
 5. Project Manager's cost estimate.
 6. Funding Documentation.
 7. Prepares the EDD and circulates for Board approval, if necessary.
 8. Cost Analysis and profit memorandum
 9. Minutes of negotiations
- Actions performed by the Contract Administrator:
 1. Performing a price analysis as appropriate.
 2. Preparing contract change document and submitting it to the Office of the General Counsel to obtain approval as to form.
 3. Sending change to Consultant for execution.
 4. Obtaining District approval and execution of changes in accordance with signatory authority levels indicated in Chapter I of this Manual.
 5. Distribution of conformed documents.
- Documentation Prepared by the Contract Administrator:
 1. Price Analysis.
 2. The change order, modification, or amendment to the agreement.

3.0 **ADDITIONAL WORK ORDERS (CONTRACT CHANGE ORDERS) TO PUBLIC WORKS CONTRACTS**

- 3.1 **GENERAL:** A contract change order is a written authorization issued by the District and signed in acceptance by the contractor(s) which revises the existing contract in a way which adds to, deletes from, or alters the work, consistent with the project scope, alters the cost or scheduled completion of work item(s) contained in the original contract.

In addition to the terms of the contract, the District's Resident Engineer's Manual describes the administrative steps necessary to issue a contract change order.

For projects funded by FTA, the Project Manager must make a determination as to the eligibility of the change order costs. (See below for further discussion on FTA requirements for determining cost eligibility.)

The review threshold for Contract Administration on public works change orders is \$100,000, although the Project Manager may request assistance from Contract Administration at lower levels if appropriate.

4.0 **ACTIONS AND DOCUMENTS REQUIRED FOR PUBLIC WORKS CONTRACT CHANGES:**

The actions and documentation required to formalize a public works contract modification are as follows:

- Actions performed by the Project Manager or designee:
 1. Negotiating the change (work and price) with the Contractor.
 2. Performing a cost analysis as appropriate.
 3. Submitting it to Contract Administration and the Office of the General Counsel to obtain approval as to form.
 4. Sending the change order to the Contractor for execution.
 5. Obtaining District approval and execution of changes in accordance with signatory authority levels indicated in Chapter I of this Manual.
 6. Distribution of conformed documents.
- Documentation Prepared by the Project Manager:
 1. The District's Resident Engineer's Manual describes the documentation necessary to issue a contract change order.
- Actions performed by the Contract Administrator above the review threshold:
 1. Performing a price analysis as appropriate.
 2. Review the contract change document
- Documentation Prepared by the Contract Administrator for change orders over the review threshold:
 1. Price Analysis as appropriate.
 2. The contract change order .

VIII-3 WORK DIRECTIVES/TASK ORDERS (WDs or TOs)

- 1.0 **INITIATING A REQUEST FOR A WORK DIRECTIVE/TASK ORDER:** The User Department/Project Manager will prepare a "Request for Work Directive/Task Order to Consultant Agreement No. _____" package for transmittal to the Procurement Department (Contract Administration Division). This package shall include, but not be limited to, scope of work, a schedule, a cost estimate and as appropriate key personnel requirements, work breakdown structure, recommended subcontractors and their scope of work, estimated budget, work products, any service warranties that will be required, etc.

The cost estimate shall be prepared on the basis of a detailed analysis of the required work as though the District were submitting a proposal and shall state the basis for the cost estimate, i.e. previous cost experience, etc.

If an item is missing from the package and a reasonable explanation has not been provided for the missing item, the Contract Administrator shall telephone the Project Manager and inform him or her that if the missing item or reasonable explanation is not provided within two days, the package will be returned to the requestor for suitable action.

- 2.0 **REQUEST FOR CONSULTANT WORK DIRECTIVE/TASK ORDER PROPOSAL:** The Contract Administrator will forward to the Consultant a Work Directive/Task Order Proposal Request that describes an initial task description and implementation schedule. As a minimum, such proposal shall consist of two parts, a technical proposal and a separate cost proposal. Unless otherwise required by the Proposal Request, the cost proposal shall not be submitted at the same time as the technical proposal. The Consultant will usually be given ten (10) working days to respond.

- 2.1 **PROPOSAL REVIEW AND PRICE NEGOTIATIONS:** The Contract Administrator will transmit a copy of the proposal to the Project Manager for review and comments. Proposal review will be accomplished in two stages; first the technical proposal will be evaluated and discussed and then the cost proposal will be evaluated and discussed, all in conformance with the procedures set forth in Chapter X, Price Negotiation Overview. The Work Directive technical proposal will also be evaluated as to the responsibility of any new subcontractors in conformance with the procedures in Chapter III 6, Section 3.0 and as appropriate, non-collusion declaration, fair employment practices certification, Buy America certification for any cement or steel being furnished.

Where, the Project Manager is unable to develop a cost estimate without reviewing the Consultant technical proposal, the Contract Administrator shall instruct the Consultant in the Proposal Request to not submit the cost proposal with the technical proposal and wait for direction to transmit. When the Project Manager has completed the technical proposal discussions and completed the independent estimate then the cost proposal shall be solicited.

All of the above, shall be subject to the oversight and participation of the Contract Administrator.

- 2.2 **FINAL COST PROPOSAL**: Upon completion of negotiations, the Project Manager will request a revised Consultant cost proposal. The Project Manager will transmit a copy of the final cost proposal to the Contract Administrator for approval.
- 2.3 **WORK DIRECTIVE/TASK ORDER APPROVAL**: Following the Contract Administrator's approval of the final cost proposal, the Contract Administrator will coordinate the concurrences for approval of the Work Directive/Task Order. The Project Manager will assist the Contract Administrator in preparing the Work Directive/Task Order and provide funding information and other technical data as needed. The Contract Administrator will be responsible for affirmatively assuring at all times that all executed Work Directives/ Task Orders and their modifications remain within approval limits.
- 2.4 **APPROVAL AND EXECUTION OF WORK DIRECTIVES/TASK ORDERS**: Originals of the proposed WD/TO will be sent to the Consultant for execution and returned to the Contract Administration Division, along with any required bonds or insurance policies. Upon receipt of the WD/TO with proper approval, and the originals of the WD/TO executed by the Consultant, the Project Manager will obtain District execution of the WD/TO.
- 2.5 **NOTICE TO PROCEED**: After execution of the Work Directive/Task Order, or modifications thereto, the Contract Administrator shall issue the "Notice to Proceed" letter to the Consultant as well as transmit a fully executed original of the Work Directive/Task Order, or modifications thereto to the Consultant. Contract Administration will transmit a signed copy of the Notice to Proceed letter and a copy of the executed Work Directive/Task Order, or modifications thereto to the Project Manager or sponsoring department for use in the administration of the Work Directive/Task Order.
- 3.0 **ACTIONS AND DOCUMENTATION REQUIRED FOR WORK DIRECTIVES/TASK ORDERS OR MODIFICATIONS THERETO**: The actions and documentation required to formalize a Work Directive/Task Order or modification thereto are as follows:
- Actions performed by the Project Manager or designee:
 1. Negotiating the change (work and price) with the Consultant.
 2. Performing a cost analysis as appropriate.
 3. Obtaining District approval and execution of changes in accordance with signatory authority levels indicated in Chapter I of this Manual.
 - Documentation Prepared by the Project Manager:
 1. A request for a Work Directive/Task Order, or modification thereto, signed by the appropriate approval authority.
 2. A description of the change to be accomplished, if a modification.
 3. A revised Scope of Work, if appropriate.
 4. Revised Staffing & Fee Estimate, if appropriate.

5. Project Manager's cost estimate.
 6. Funding Documentation.
 7. Price or Cost Analysis (and profit as necessary).
 8. Summary of negotiations.
 9. Preparing Notice of Physical Completion and transmitting to Contract Administrator.
- Actions performed by the Contract Administrator:
 1. Prepares the Work Directive or Task Order and circulates it for concurrence as necessary.
 2. Performing a price analysis as appropriate.
 3. Performing a contract accounting analysis to affirmatively demonstrate that the proposed Work Directive/Task Order, or modification thereto, is within the current authority for the contract.
 4. Sending the Work Directive/Task Order, or modification thereto, to Consultant for execution.
 - Documentation Prepared by the Contract Administrator:
 1. Price Analysis.
 2. Notice to Proceed letter.

4.0 WORK DIRECTIVE/TASK ORDER CLOSE-OUT: A Work Directive/Task Order is considered to be completed when:

- (a) The contractor or Consultant has completed the required deliveries, if any, and the District has inspected and accepted the supplies;
- (b) The contractor has performed all services, completed all deliverables, work products, etc., and the District has accepted the same; and
- (c) All option provisions, if any, have expired; or
- (d) The District has given the contractor or consultant a notice of complete Work Directive/Task Order termination.

Files for all Work Directives/Task Orders should be closed within 6 months of the date, BART Contract Administration receives written evidence of physical completion from the User Department/Project Manager. Settlements on work of indirect cost rates should be closed as part of the close-out procedures for services agreements, etc. below.

When closing out Work Directive/Task Order contract files, the Contract Administrator shall use these close-out procedures, however, subject to supervisory approval, these close-out actions

may be modified to reflect the extent of administration that has been performed when appropriate, to reduce administrative costs and to enable de-obligation of excess funds.

A Work Directive/Task Order contract file shall not be closed if (1) the Work Directive/Task Order is in some way related to a pending litigation or under appeal, or (2) in the case of a termination, all termination actions have not been completed.

4.1 DETAILED PROCEDURES FOR CLOSING OUT WORK DIRECTIVE/TASK ORDER FILES:

The Contract Administrator is responsible for initiating administrative close-out of the Work Directive/Task Order after receiving a written Notice of Physical Completion from the User Department/Project Manager for any Work Directive/Task Order.

At the outset of this process, an initial contract funds status review shall be accomplished by the Project Manager, and where appropriate, excess funds shall be identified and de-obligated by modification to the Work Directive.

When complete, the Work Directive/Task Order close-out procedures shall ensure that:

- (1) Property clearance is received if contractor has control of District furnished equipment or other property as well as property purchased by the contractor/consultant with District funds;
- (2) All issues with respect to interim or disallowed direct compensation have been settled (settlement of directly associated indirect compensation will normally be settled as a matter of contract close-out for the agreement as a whole);
- (3) Price revision, if any, is completed;
- (4) Subcontractor compensation issues that affect BART interests, as appropriate, are settled by the prime contractor;
- (5) All termination actions are completed;
- (6) Any Work Directive/Task Order audit action is completed;
- (7) If necessary, a Contractor's closing statement has been received which, if needed, includes a release against claims for additional direct cost compensation;
- (8) Contractor's final invoice has been submitted; and
- (9) Contract funds review has been completed and de-obligation of any excess funds is recommended by the Project Manager.

When the actions above have been verified, BART Contract Administration shall ensure that a Work Directive/Task Order completion statement has been prepared that (i) identifies the dollar amount of excess funds, if any, and (ii) contains a statement by the Contract Administrator that all required contract administration actions have been fully and satisfactorily accomplished.

VIII-4 CONTRACT TERMINATION

- 1.0 **REASON FOR TERMINATION**: The performance of work under a contract may be terminated in part or in whole pursuant to the termination provisions in the contract which may include termination for convenience (i.e., a reduced need or in the best interests of the District) or for default (i.e., the Contractor has failed to perform in accordance with the contractual requirements). Termination for cause and termination for convenience provisions must be included in contracts exceeding \$10,000. Furthermore, all small purchase contracts must contain a resolution provision for breach of contracts. Termination shall be accomplished according to contract provisions and with the concurrence of the Office of General Counsel and the Project Manager.
- 2.0 **NOTIFICATION OF CONTRACTOR**: When the decision to recommend termination of a contract is made, a "Notice of Intent to Terminate Contract" may be prepared by the Procurement Department and sent to the Consultant by Certified Mail, Return Receipt Requested if appropriate and is in conformance with contract requirements. The Notice of Intent to Terminate Contract shall specify the reason for the anticipated termination (Contract Article), the extent to which the performance of work is to be terminated (i.e., in whole or in part) and the day upon which such termination is expected to become effective. A meeting to negotiate the terms of the termination can be set up at this time if such a meeting is appropriate. After issuance of the Notice of Intent to Terminate Contract and pursuant to the Termination/Default Article(s) of the Contract, negotiations for the settlement of claims if any, etc. shall be accomplished as soon as possible to protect the interests of, and minimize the liability of, the District. If appropriate, a Notice of Termination may be sent without the Notice of Intent to Terminate in accordance with the contract requirements.
- 3.0 **AUTHORITY TO TERMINATE CONTRACTS**: As soon as the terms of the termination have been negotiated by the Procurement Department in coordination with the User Department/Project Manager, the Procurement Department will recommend the termination to the Contracting Officer. The individual authorized to award the original contract is authorized to approve the termination of the contract except that the General Manager is also authorized to terminate contracts approved by the Board (See Chapter I-4).
- 4.0 **FINAL TERMINATION NOTICE**: Upon approval of the termination, the Procurement Department will issue a Notice of Termination to the Contractor by Certified Mail, Return Receipt Requested. In the case of a Purchase Order, an amended order will serve as final notice.

VIII-5 CONTRACT CLOSE-OUT PROCEDURES - SERVICE AGREEMENTS AND MISCELLANEOUS PROCUREMENT CONTRACTS

This Section VIII-5 sets forth the procedures for closing out cost-reimbursable type services agreements. Professional services agreements close-out will not occur immediately at the completion date of the contract but over a period of time. Some events will occur prior to the contract completion date and others such as final audit and indirect rate negotiations may occur long after the contract completion date. The Contract Administration Division ensuring that contract files are closed in a timely manner.

Contract close-out procedures for professional services agreements performed on a basis other than cost reimbursable basis and Non-Personal Services contracts will be developed jointly with other User Department/Project Managers.

These procedures may be used for final audit and indirect rates negotiations for service agreements where the time of performance extends beyond three years.

Contract close-out procedures for public works contracts are set forth in Section VIII-6.

1.0 DEFINITIONS

"Close-out," as used in this Chapter, means the administrative procedure which is undertaken to confirm that (a) all contractual actions required have been completed, (b) all known claims have been resolved, (c) contract performance review has been performed, (d) all questioned costs have been resolved, (e) all accounts have been reconciled, (f) "Notice of Final Payment" has been issued, (g) Final Payment has been completed and (h) all official contract files are properly documented so that they can be closed. (Note: close-outs for multi-year procurement that extend beyond three years may not have completed all these steps.)

"Questioned Costs," as used in this Chapter, means those costs which have not been resolved, such as the following:

1. Audit findings, e.g. overhead, direct and out-of-pocket expenses;
2. Backcharges for performance;
3. Extra work claims by the Consultant;
4. Claims by the District.

If it is determined that there are questioned costs then the documentation supporting these costs are forwarded to the Contract Administration Division for resolution (reconciliation) during the close-out process.

2.0 INITIATING CLOSE-OUT

- A. The Project Manager shall initiate close-out as soon as the performance of work under a contract is considered completed, i.e. the Consultant has performed the work of the contract in accordance therewith except for such work as necessary to effect close-out
- OR
- The District has issued a formal termination notice to the Consultant prior to completion of the contractually-required services.
- OR
- The work has proceeded to a point in a multi-year procurement where it is appropriate to close out compensation issues for prior years.
- B. With the exception of multi-year procurements extending beyond three years, partial contract close-outs are not to be performed. The entire contract including all modifications and amendment agreements is to be closed out as one contract. Service agreements that support more than one capital project shall not be closed until the services required by all the projects, within the contract, have been completed or terminated.
- C. For contracts for which a determination has been made that legal action is pending, the close-out will be put on hold until such time as said action has been resolved by the General Counsel.

3.0 **ESTABLISHING THAT A CONTRACT IS COMPLETED:** The fact that the work under a contract has been completed and the contract is ready for close-out is to be established by the Project Manager.

- A. Mere cessation of work does not constitute contract completion. A contract is not complete simply because the District has put a "stop" or "hold" on the work (whether formally or informally), even if the Consultant has performed fully and satisfactorily to that point. Generally, close-out cannot proceed until the related construction project for which the Consultant was hired is complete and a reconciliation of costs has occurred.
- B. Exhaustion of contract funds does not in itself constitute contract completion. If, in the opinion of the District and the contract terms provide a means, the Consultant exhausted all funds prior to the completion of the required services, the District may require the Consultant to complete performance of the contract, at no additional cost to the District.
- C. Reaching the end of the contract duration does not in itself constitute contract completion. In some cases the District may give the Consultant an extension of time if the Consultant needs additional time in order to complete the terms of the contract Scope of Work.

- D. A Consultant's services are completed only when: (1) the Consultant has performed all services required by the contract and the Project Manager has accepted these services; or (2) the Contract Administration Division has issued a termination letter to the Consultant pursuant to the terms of the contract.

3.1 **PROJECT REVIEW:** With the exception of partial close-outs for final rates, the following shall be performed:

- A. The Project Manager will create a "Consultant Contract Deliverables Check List" as appropriate. The Project Manager shall be responsible for reviewing the Consultant's submittals for completeness and acceptability against the standard set by the specifically prepared check list. The Project Manager shall complete the appropriate memoranda to certify that:
 - 1. The contract is complete.
 - 2. The required deliverables have been received.
- B. The Project Manager shall see to it that the Consultant has provided the District with sufficient proof of effective insurance throughout the contract period, in the form, and level, of coverage required under the contract.
- C. For all architectural and engineering and other professional services agreements, as appropriate, the Project Manager shall perform a written errors and omissions review to determine whether back charges are warranted.
- D. The Project Manager shall perform a written evaluation of the Consultant's performance, in accordance with Chapter IV-1, 3.7 or IV-2, 4.7.
- E. The Project Manager shall perform a written evaluation of claims by or against the Consultant and by or against the Contractor(s) involved with the related project.
- F. The Project Manager shall initiate a request for a contract modification when the Project Manager determines a contract change is required for one or more of the following reasons:
 - 1. A reduction in scope due to a change in the requirement of services the District requires to be provided.
 - 2. Additional funds are required, or funds are to be recovered by the District.
 - 3. An extension of time (duration) is required.
 - 4. Compensation is to be redistributed among various parts of the Agreement that have separately established compensation sublimits.

5. Standard terms and conditions of the contract require modification such as insurance requirements.

- 3.2 **INTRA-DISTRICT COORDINATION:** Concurrent with the actions outlined in 3.1 above, the Project Manager shall send the memorandum set forth below to discover whether there are any open administrative problems with the contract or any outstanding claims involving the Consultant.

The Project Manager shall send a memorandum to the Contract Administration Division, Legal, Operations and Accounting Departments to discover whether there are any contract changes, claims, stop notices, complaints, unpaid bills, unbilled charges or pending or active litigation which would affect or prevent contract close-out.

- 3.2.1 For cost type contracts, BART Internal Audit shall be requested to perform final audits in the following cases:

1. When the total compensation for the Agreement exceeds \$1 million, the direct cost reimbursement will be audited.
2. When the total compensation for the prime consultant exceeds \$1 million, the direct cost reimbursement for the Agreement will be audited and final rates will be established by audit.

This guidance does not preclude the Contract Administrator from exercising discretion in either (i) requesting final rate proposal or data from the consultant or subcontractor(s), (ii) requesting assistance from BART Internal Audit in reviewing select areas of compensation such as indirect cost reimbursement as part of contract close out, or (iii) identifying firm, fixed price contracts that the Contract Administrator has a reasonable basis for requesting internal audit review on identifiable price items.

- 3.3 **COMMUNICATION WITH CONSULTANT:** Concurrent with the actions outlined in Sections 3.1 and 3.2 above, the Project Manager shall send a letter to the Consultant. The purpose of this action is to notify the Consultant of the District's intent to close out the contract and to advise the Consultant what actions and submittals are required in order to allow release of retainage, if any. Contract Administration Division and Internal Audit Department should receive a copy of this letter.

4.0 **RESOLUTION OF QUESTIONED COSTS**

4.1 **PROCEDURES:**

- A. When there are no accrued District claims against the Consultant but there are areas of questioned and/or other unresolved costs requiring the Consultant's account to be

negotiated against the contract and billings, the Project Manager negotiates with the Consultant on the identified questioned and/or other unresolved costs with the oversight and participation of the Contract Administrator. Attached to the request memorandum shall be a check list, as well as any applicable errors and omissions documentation.

OR

When there are accrued District claims against the Consultant regarding areas of questioned costs, final rates, or other unresolved costs requiring the Consultant's account to be negotiated against the contract and billings, the Project Manager negotiates with the Consultant on the basis of audit report identifying the questioned and/or other unresolved costs with the oversight and participation of the Contract Administrator.

The contractor shall submit to the Contract Administrator and BART Internal Audit, a final indirect cost rate proposal reflecting actual cost experience during the covered period, together with supporting cost or pricing data.

The auditor shall (i) audit the proposal and seek agreement on it with the contractor and (ii) in coordination with the Contract Administrator and Project Manager, prepare an indirect cost rate agreement conforming to the requirements of the contracts; (iii) prepare an audit report including the information required by Chapter VII and X.

- B. The Contract Administration Division will review the completeness of the close-out package and will consult with the Project Manager in order to ascertain the initial close-out facts. The Contract Administrator will advise the Project Manager as to whether or not the close-out package is sufficient to proceed, and the expected completion date of Contract Administration Division action for each accepted close-out package.
- C. The Project Manager will send the Consultant an initial position letter stating the District's position with respect to the questioned and/or other unresolved costs of the Audit Report. If the Consultant decides to accept the District's close-out position, proceed to Section 4.2.
- D. The Project Manager, or designee, meets with the Consultant to negotiate an agreement of all areas of questioned and/or other unresolved costs in accordance with established guidelines by the planned completion date, calling upon the following as needed:
 - Internal Audit Officer
 - Office of the General Counsel
 - Contract Administrator

Every effort is to be made to reach a resolution of the questioned and/or other unresolved costs with the Consultant. Where no agreement appears possible, or the Consultant will not cooperate with the Project Manager, proceed to Section 4.3.

A complete record of negotiations is to be maintained in the close-out file. This file is maintained in the Contract Administration Division.

All of the above, shall be subject to the oversight and participation of the Contract Administrator.

4.2 **APPROVAL OF CONTRACT QUESTIONED COSTS**

- A. If and when an agreement is reached concerning the questioned and/or other unresolved costs, the results of such agreement will be summarized by the Project Manager in a letter of Consultant acceptance to be signed by the Consultant.
- B. The results of the negotiation are to be set forth in a Summary Results of Negotiations similar in form to the price negotiation memorandum requirements in Chapter IV-1, or IV-2 and as appropriate Chapter X. Authorization approval on the resolution of questioned and/or other unresolved costs will be in accordance with the delegations outlined in Chapter 1.
- C. Notification of resolution of questioned and/or other unresolved costs, with a copy of the summary results of negotiations, shall be made by memo to the Contract Administrator.

- 4.3 **NEGOTIATION/CLOSE-OUT DEADLOCK:** If Project Manager is unable to arrive at an acceptable resolution of questioned and/or other unresolved costs with the Consultant after a good faith effort of negotiation, or if, at any time in the process, contract close-out appears to be permanently held up by the Consultant, the Department Manager of Procurement will make a recommendation to the Assistant General Manager of Administration that a Business Review Panel (as described in Chapter IV, Introduction) be convened. This Panel will make a recommendation as to the "business" measure(s) the District will take to remove the deadlock including, but not limited to, settlement, litigation or other measures, as appropriate.

5.0 **CLOSE-OUT RECOMMENDATION**

- A. The Project Manager shall prepare the final payment application based on the resolution of questioned and/or other unresolved costs, or the results of the audit if there were no questioned or other unresolved costs.
- B. After preparation of the final payment application, the Project Manager shall recommend release of the retainage, if any.
- C. If the Consultant owes money to the District, the Project Manager is responsible for initiating the recovery process. To proceed with the contract close-out and issuance of a Certificate of Completion, the Project Manager will submit the final payment package to the Accounting Department for processing (See Section 6.0).

6.0 **APPLICATION FOR FINAL PAYMENT**

- A. Upon completion of the actions in Sections 4.1 and 4.2 above, the Project Manager shall prepare the Final Payment Package. The Final Payment Package will consist of the following:
1. Recommendation to release retainage, if any.
 2. Memorandum accompanying Consultant Agreement No. ____ and Final Invoice/application for final payment.
 3. Consultant's release, as necessary.
 4. Certificate of Completion.
- B. The Project Manager shall obtain an invoice and application for final payment. Consultant's application for final payment must be submitted in strict conformance with the close-out recommendation. The Project Manager is responsible for verifying conformance. All reconciliation of interim or disallowed costs or indirect cost rates, as required to conform with the close-out recommendation, shall be made within the invoice and the application for final payment. The Project Manager logs the date of the contract close-out letter and the related close-out correspondence for each contract to include:
1. Contract Number;
 2. Date to Accounting Office and Contract Administration Division;
 3. Date recommendations and reconciliation releases are received.
 4. The final payment package submitted to the Accounting Department shall be in accordance with the District's Policy and processes.

6.1 **CONSULTANT'S RELEASE**

- A. Upon receipt of the final payment package, including the Final Audit Report and the Project Manager's recommendation for final payment, the Accounting Department reviews and analyzes the contract close-out letter and attachments for completeness. The final payment package is to include:
1. Transmittal sheet.
 2. Memorandum Sheet.
 3. Consultant Payment Forms.
 4. Backup for the negotiated settlement amount between the Consultant and the Project Manager.
 5. Any necessary backup documentation substantiating the final payment amount.

The Accounting Department will perform a final accounting check. When the final payment package submitted by the Project Manager is not complete, the Accounting Department will verbally contact the Project Manager to inform him of the missing documents and, in writing, give two (2) weeks notice to provide the same. If the missing

documents are not received by the deadline, the Accounting Department will return the payment package to the Project Manager.

B. When the Consultant Payment Package is complete, the Accounting Department shall perform the following activities:

1. Final accounting check.
2. Check for stop notices.
3. Preparation of Consultant's Release.

Upon performance of these activities, the Accounting Department, if applicable pursuant to the terms of the agreements, will send the "Release" to the Consultant for execution and also a copy to the Project Manager. If execution cannot be obtained, the Consultant Payment Package will be returned to the Project Manager to determine further action. Such action can include proceeding to Certification of Completion and contract closure.

C. Upon receipt of the executed "Consultant's Release," the Accounting Department shall forward the signed original to the Office of the General Counsel for approval of the release form.

6.2 **CERTIFICATE OF COMPLETION**

A. Upon return of the "Consultant's Release," with the Office of the General Counsel's written approval as necessary, the Accounting Department shall prepare a "Certificate of Completion."

In cases where money has to be recovered from the Consultant, the Certificate of Completion is to be prepared only after the Project Manager submits the payment package to the Accounting Department as outlined in 6.0. The amount to be recovered will be indicated in the Certificate of Completion.

B. If there are any questions about the "Certificate of Completion", the Office of the General Counsel will be consulted.

C. Upon return of the "Certificate of Completion," it shall be submitted to the requestor department manager for approval. After the requestor department manager approval it shall be submitted to the Manager of Capital Program Control Division for approval, if appropriate. In those cases where no payment is to be made to the Consultant, proceed to Section 7.0.

6.3 **FINAL PAYMENT**: Upon return of the approved "Certificate of Completion," the Accounting Department shall prepare a final payment package. This package will include the signed "Consultants' Release" and the approved "Certificate of Completion."

6.4 **FINAL PAYMENT VOUCHER:** Capital Accounting reviews the estimate package for funding authorizations (i.e.: balance available in correct percentage by funding source). Documentation is examined as appropriate. Arithmetical calculations are checked and confirmed. Postings are made to ledgers and a voucher is prepared.

7.0 **OFFICIAL FILES**

7.1 **MAINTENANCE:** The District's official files are decentralized to each office performing contracting, contract administration, or paying functions, and the responsibility for their maintenance is so assigned.

7.2 **CLOSING ACTIVE CONTRACT FILES:** In general, the contractual relationship between the District and the Consultant ends with the acceptance of the final payment by the Consultant. All departments shall keep their contract file open (active) until proof of final payment has been received or as otherwise may be defined in the terms and conditions of the contract.

Certain terms and conditions may continue past (survive) the acceptance of final payment, such as maintenance of professional liability or other insurance coverage. Departments responsible for administration of items that survive the acceptance of final payment shall keep their files "active" until such time as this requirement ceases under the terms and conditions of the contract.

7.3 **RECORDS RETENTION:** Inactive contract files must be retained for the retention period as established in the District's current Record Retention Schedule.

7.4 **CONTRACT ADMINISTRATOR RESPONSIBILITY:** For services agreements, the Contract Administrator will then do the following:

1. Prepare a new file folder containing:
 - a. 1 original signed agreement
 - b. 1 original signed copy of all modifications and/or amendments
 - c. 1 original Consultant proposal
 - d. 1 signed copy of funding commitments, State, and Federal
 - e. 1 signed EDD, select and retain memos
 - f. 1 final cost proposal(s)
 - g. 1 copy of all signed documents, other than those listed above pertinent to the project.
2. Dispose of extra signed original agreements, if any, conformed copies, proposals submitted by other than the retained Consultant, undersigned or draft agreements, memos, or their correspondence in the file.
3. Inform Capital Program Control Division and Accounting indicating that the project was closed out on (date).

4. Relocate file to closed file storage area at BART's Records Center, 205 Alice Street, Oakland.

8.0 **VARIANCE FROM PROCEDURES**: In special circumstances a variance from these procedures may be considered and granted. The approval of the Department Manager of Procurement and the Manager of Capital Program Control Division will be required for any variance from these procedures.

VIII-6 CONTRACT CLOSE-OUT PROCEDURES - PUBLIC WORKS CONTRACTS

This Section VIII-6 sets forth the procedures for closing out public works contracts over \$10,000 and as appropriate, for public works contracts under \$10,000. The Contract Administration Division and the User Department/Project Manager are responsible for ensuring that contract files are closed in a timely manner.

1.0 DEFINITIONS

See Section VIII-5, 1.0

2.0 INITIATING CLOSE-OUT

See Section VIII-5, 2.0

- 3.0 **ESTABLISHING THAT A CONTRACT IS COMPLETED:** The District's Resident Engineer's Manual describes the basic administrative steps that will be taken when a public works contract has been completed and is ready for acceptance by the District, and the project can be closed out.

Pages 281 through 284 are reserved.

CHAPTER IX

**BONDING, INSURANCE REQUIREMENTS, STOP NOTICES,
AND LIQUIDATED DAMAGES**

CHAPTER IX BONDING, INSURANCE REQUIREMENTS, STOP NOTICES, AND LIQUIDATED DAMAGES

IX-1 CONTRACT PERFORMANCE: SURETIES, BONDS, AND LIQUIDATED DAMAGES

- 1.0 **BID SECURITY**: The bid security shall consist of a firm commitment such as a bid bond executed by an admitted surety insurer, cash or certified or cashiers' check, accompanying a bid as assurance the Bidder will, upon acceptance of its bid, execute such contractual documents as may be required within the time specified.
- 2.0 **PERFORMANCE BOND**: A performance bond is one executed in connection with a contract to secure fulfillment of all the Contractor's obligations under such contract.
- 3.0 **PAYMENT BOND**: A payment bond is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in public works contracts in excess of \$25,000.
- 4.0 **LIQUIDATED DAMAGES**: The sum which a party to a contract agrees to pay if he breaks some promise and, which having been arrived at by good faith effort to estimate actual damage that will probably ensue from breach, is recoverable as agreed damages if breach occurs. These damages for breach may be liquidated in the contract at an amount which is reasonable in light of the anticipated or actual harm by such breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.

IX-2 REQUIREMENTS FOR BONDS

1.0 BID SECURITY

- 1.1 Bid security shall generally be required in all competitively bid construction contracts and purchase contracts estimated to cost in excess of \$100,000 although the Contract Administrator/Buyer may decide in conjunction with the Manager of Insurance against requiring bid security for purchases on a “case-by-case” basis should circumstances indicate that the benefits of not requiring bid security outweigh the risks.
- 1.2 The bid security amounts shall generally be 10% of the bid price. It may also be set at a fixed dollar value. For Federally funded contracts in excess of \$50 million dollars, District staff will review its surety requirements in accordance with the guidance contained in FTA Circular 4220.1F prior to release of the contract documents.
- 1.3 When a bid security is required, the solicitation must contain a statement to that effect, and provide sufficient details for Bidders to determine the amount of the bid security required.

2.0 PERFORMANCE AND PAYMENT (LABOR AND MATERIALS) BONDS

- 2.1 All public works contracts estimated to cost in excess of \$25,000 shall provide for payment bonds. All contracts shall generally provide for a performance bond of 100% or it may be set at a fixed value. In such cases, the justification for the bonding must be fully documented.
- 2.2 Purchase Orders for commodities provide for performance bonds when deemed appropriate.
- 2.3 The performance and payment bonds shall generally be 100% of the contract price. For Federally funded contracts in excess of \$50 million dollars, District staff will review its payment bond requirements in accordance with the guidance contained in FTA Circular 4220.1F prior to release of the contract documents.
- 2.4 When a contract with bonds is modified or supplemented by a change affecting the contract price, the Contractor shall be required to furnish additional bonding to provide for the changes to the contract.
- 3.0 **STOP NOTICES AND RELEASE BONDS FOR STOP NOTICES**: The stop notice is a procedure authorized by California Civil Code Section 3179 et seq. which allows subcontractors, material suppliers and other persons involved in District Public Works contracts who have claims related to non-payment for their work or supplies to stop District payment to the general contractor until the claim is resolved.

The posting of stop notice bond by the general contractor in response to a stop notice is a procedure authorized by California Civil Code Section 3196 to release the funds until the claim is resolved.

The Controller-Treasurer will send a copy of the Stop Notice to the Project Manager, the Resident Engineer and the Office of the General Counsel. The Office of the General Counsel will review and advise the Controller-Treasurer whether to honor the Stop Notice. The Resident Engineer will be advised by the Project Manager of the action taken by the Controller-Treasurer and the Office of the General Counsel.

- 4.0 **SUBSTITUTION OF SECURITIES FOR RETENTION:** California Public Contracts Code Section 22300 allows contractors to submit bonds, or letters of credit as a substitute for the District retaining monies from its payment. Alternatively, the contractor may propose an escrow agreement in lieu of retainage.

California Government Code Section 16430 lists specific securities eligible for investment in lieu of retention. Any agreements of this type must be reviewed by the Controller-Treasurer's office and the Office of the General Counsel prior to execution.

5.0 **LIQUIDATED DAMAGES**

- 5.1 All contracts shall be evaluated to determine if a liquidated damages clause is appropriate. The amount of liquidated damages must be reasonable to compensate the District for possible damage and not be so large as to be construed as a penalty.
- 5.2 Prior to the publication of a solicitation, the Contract Administrator/Buyer and Project Manager shall develop and record a detailed rationale regarding the derivation of the rate of assessment of liquidated damages and ensure it is reasonable, proper and not arbitrary. (See Attachment Y.)
- 5.3 Such rationale shall take into consideration the cost impact to the District if a failure to perform occurs, including the combined effects of schedule, manpower and other related work elements. This determination shall be formalized and made a permanent part of the contract file.
- 5.4 Liquidated Damage provisions should not be included unless:
- 1) The time of delivery is of such importance that the District can reasonably expect to suffer damage if the delivery is delinquent;
 - 2) The District determines that the delivery schedule is reasonable at the time of award; and
 - 3) Damages would be difficult or impossible to establish.
- 5.5 Additional information on Liquidated Damages is also contained in Chapter VII under Section VII-2, Types of Documentation, paragraph 9.3, Liquidated Damages Provisions.

IX-3 INSURANCE - GENERAL

- 1.0 **PURPOSE OF INSURANCE:** Contractors providing goods and services shall be required to carry sufficient insurance to protect the District from third-party lawsuits for personal injury (including death) and property damage.

- 2.0 **TYPES AND LEVELS OF INSURANCE:** Insurance types and limits shall be determined by the Contract Administration Division personnel, in coordination with the District's Insurance Manager and/or Insurance Coordinator.

- 2.1 In certain limited cases, the District will permit the Contractor to substitute an approved program of self-insurance. The Contractor must demonstrate that he can sustain the potential losses being self-insured.

- 2.2 Contractors shall be required to provide workers' compensation and disability coverage as required by State statutes in amounts to be determined by the Manager of Insurance.

IX-4 TIMING OF SUBMITTAL OF BONDS AND INSURANCE

- 1.0 **INSURANCE REQUIRED BEFORE AWARD:** Contractor must submit the requisite performance and payment bonds and insurance policy or policies (not merely certificates) to the Contract Administrator. (See Attachments Z, AA, BB, CC & DD.) These bonds and policies must be reviewed and approved by the Office of the General Counsel and Manager of Insurance for conformity before a Notice of Award can be issued.

Pages 291 through 294 are reserved.

CHAPTER X

PRICE NEGOTIATION OVERVIEW

CHAPTER X PRICE NEGOTIATION OVERVIEW

X-1 APPLICABILITY

- 1.0 Price negotiation is a technique used in the absence of adequate and effective price competition to reach a sound decision on contract price and terms. When applying these techniques and procedures, the District's objective is to reach a fair and reasonable price and a contract type that will sustain that price. (These procedures do not apply to evaluating price in sealed bid procurements.)
- 1.1 While proposed prices submitted in the absence of adequate price competition are frequently lowered by analysis and price negotiation, price reduction is not the principal objective; however where warranted, price reduction is a proper result.
- 1.2 The negotiation procedures discussed in this Chapter are in addition to those discussed in Chapters IV, VI and, as appropriate V. These procedures do not supersede any specific contract terms or procedures in the District's contracts and agreements. If there are any conflicts between the procedures in this chapter and the contract terms, the terms will govern.
- 2.0 The District's objective with respect to price negotiations is to aggressively negotiate better prices on District Agreements or Claims; failure to aggressively negotiate contract price and terms deprives BART from obtaining the most advantageous terms and conditions obtainable.

X-2 DISTRICT PRICING POLICIES

1.0 The District's policy with respect to price negotiation is the following:

- Price negotiation is a technique used in the absence of direct price competition to reach a sound decision on contract price.
- Price negotiations shall be based upon two part Contractor proposals, namely a technical proposal and a separate cost or price proposal.
- Price negotiations shall be conducted in two steps, an evaluation and discussion of technical proposals first and then a separate evaluation and discussion of cost/price proposals.
- Price negotiations shall be supported by an independent cost or price estimate by the District, prepared in advance of receipt of the Contractor's cost or price proposal; or revised as appropriate in advance of any associated revisions to the Contractor's cost or price proposal.
- Price negotiations shall take place only at the appropriate times. That is, (i) only after the technical proposal has been evaluated and discussed completely; (ii) complete, fully documented and supported cost or price proposals have been received; (iii) the cost or price proposal has been compared against the technical proposal for consistency with the defined scope of work, necessity and appropriateness of the individual elements of the proposed cost or price; (iv) the cost or price proposal has been analyzed using contractor furnished cost or price data if applicable and the District's cost or price estimate; (v) all issues of fact have been resolved and the assumptions and judgements made by the offeror in developing the price or cost proposal have been isolated; and (vi) pre-negotiation objectives developed and reviewed as necessary.
- The negotiated price shall be summarized in a price negotiation memorandum. (See generally Chapter IV.) This summarization shall be adequate to support a rapid reconstruction of all major considerations of the particular pricing effort. It must demonstrate how the pricing effort proceeded from District price estimate(s) and contractor price proposal(s) to pre-negotiation objective(s) to agreed upon price. It must also indicate the extent to which Contractor submitted price or cost data were not considered or, although considered, were not relied upon in reaching agreement on contract price.

2.0 The District's policy with respect to negotiated price is to:

- (1) purchase services and supplies from responsible sources at negotiated prices that it determines to be fair and reasonable prices,
- (2) negotiate each price separately and independently and not
 - (i) use proposed price reductions under other procurement actions as a factor or

- (ii) consider losses or profits realized or anticipated under other procurement actions;
and
 - (3) not include in the negotiated price any amount for a specified contingency to the extent that the contract provides for price adjustment based upon the occurrence of that contingency.
- 2.1 The determination that a negotiated price is fair and reasonable shall be based upon some form of written analysis, either on the basis of price, cost and profit, or some combination of both price and cost, made prior to making any award, modification after award, or any other procurement action involving compensation. (See Chapter VII-2, 7.0)
- 2.2 Where the negotiated price cannot be supported with a determination that the negotiated price is 'fair and reasonable' then it shall be determined as 'best obtainable' and appropriate management approvals shall be obtained and included in the contract file.
- 2.3 The natural and probable consequence of unsupported Contractor pricing or defective Contractor cost data, whether prime or subcontracted, is an increase in the negotiated price to the District. Therefore, the negotiated price shall be reduced in that amount.
- 3.0 The District's policy with respect to negotiated profit or fee is as follows:
- Where price analysis alone is insufficient to support a determination that the proposed price is fair and reasonable then cost and profit or fee must be separately analyzed and negotiated. The Contractor's proposed fee or profit shall be analyzed using structured approaches to provide a discipline for ensuring that all relevant factors are considered.
- 4.0 The District's policy with respect to subcontracted pricing is as follows:
- (1) Subcontract costs and pricing arrangements are significant elements to be considered during price negotiations and in arriving at a determination that the negotiated price is fair and reasonable.
 - (2) Basic responsibility for selecting subcontractors, managing subcontractor performance and determining that consistent with District pricing policy and procedures, the proposed subcontractor pricing is 'fair and reasonable' is the responsibility of the Contractor. Such determinations shall reasonably conform to District requirements for prime contractor pricing determinations. (See Chapter VII.)
 - (3) The Project Manager who is negotiating price with the oversight and participation of the Contract Administrator, must have adequate knowledge of these subcontracted pricing elements as they relate to the negotiated price for the prime procurement action and ratify that determination by the prime contractor that the proposed subcontractor pricing is fair and reasonable. If the Contract Administrator cannot concur with the Project Manager in ratifying

the prime contractor's determination that the proposed subcontractor pricing is 'fair and reasonable', then the Project Manager will make a written determination which will be inserted by the Contract Administrator into the contract file.

- (4) The Project Manager with the oversight and participation of the Contract Administrator is responsible for assuring that any subcontractor negotiated profit or fee is consistent with District practices. (See Chapter VII, Section 7.3)

X-3 DEFINITIONS

- 1.0 When used in procurement, the terms clarifications, discussions and negotiations have precise technical meanings.
- 1.1 'Negotiation' as used in this Chapter is a procedure that includes the receipt of proposals from offerors, permits bargaining and usually affords offerors an opportunity to revise their offers before award of a contract through the use of either competitive proposals (see Chapter IV), or other than competitive procedures (see Chapter VI). Any contract awarded without the use of sealed bidding procedures (see Chapter III, or V) is a negotiated contract.
- 1.2 'Clarification' as used in this Chapter is any communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in an offer. (See generally Chapter III-5 and III-6.) Under no circumstances is the offeror allowed an opportunity to revise or otherwise modify its offer, except to the extent that correction of apparent clerical mistakes results in a revision.
- 1.3 'Discussion' as used in this Chapter is any oral or written communication with an offeror (other than for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in an offer, i.e. clarification), whether or not initiated by the District, that (i) involves information essential for determining the acceptability of an offer, or (ii) provides an offeror with the opportunity to revise or otherwise modify its offer.
- 1.4 'Fact-finding' is the search for facts to support development of the price negotiation objectives and is the search for offeror information not provided with the offer. Fact-finding may involve asking questions, presenting additional information concerning District requirements. It should not discuss the District's position on specific offeror deficiency(ies) nor the District's Price objectives. Even though fact-finding is not negotiations, it is considered to be a part of the Discussions. Fact-finding may only be conducted when discussions are authorized in conformance with the procedures in Chapters IV and VI of this Manual.
- 2.0 'Prospective Pricing' as used in this chapter requires a pricing decision (i) in advance of performance, and (ii) based upon an analysis of comparative prices, cost estimates, past costs, or a combination of such factors. A fundamental principle of prospective pricing is to achieve agreement on all other terms and conditions of the contract at the time agreement is reached on contract Price.
- 3.0 'Retroactive Pricing' as used in this chapter requires a pricing decision, i.e., construction claims, that (i) takes place after some or all of the contract performance has been completed and some or all of the contractors costs have been incurred, (ii) is based upon an analysis of Contractor's recorded cost data and (iii) the contractor's performance has been reviewed.
- 4.0 'Cost or Pricing Data' as used in this manual is all factual data up to the time that contract price is agreed upon which prudent buyers and sellers would reasonably expect to have a significant effect on price negotiations. Being factual, these data are types of information that can be verified. They do

not reflect on the accuracy of the Contractor's judgement about estimated future costs or projections; they do, however, include the data forming the basis for that judgement. Cost or pricing data are more than historical accounting data; they are all facts that can be reasonably expected to contribute to the soundness of estimates of future costs (Prospective pricing) and to the validity of costs already incurred (Retroactive pricing).

- 5.0 A 'fair and reasonable' price is a price that is fair to both parties, considering contractual terms and conditions, promised quality, timeliness of contract performance, market conditions and the total acquisition cost to the District. Although generally, a fair and reasonable price is a function of the law of supply and demand, there are statutory, regulatory and judgmental limits on the concept.
- 5.1 A 'pre-negotiation objective' is a range of goals, including desired costs or prices which District analysis indicates as the limits within which fair and reasonable contract provisions including compensation can be negotiated. These objectives should summarize all District positions and assumptions relevant to price and other factors.
- 5.2 'Technical analysis' is the evaluation of functions that cause costs to occur and can provide useful information such as the validity of Contractor projections as to forecasted costs or prices, quantities and kinds of materials, proposed labor classifications and quantity of hours, procedures and processes, etc.

X-4 REQUIREMENTS FOR PRICE OR COST DATA

- 1.0 When necessary, the Contract Administrator or the Project Manager can request the Offeror(s) to provide a limited, partial, or a complete price or cost breakdown to support price negotiation. The District's objective in this regard is to limit requests to those situations in which such data are necessary to (i) assure a fair and reasonable price, or (ii) verify that both parties understand all requirements of the contract that affect the cost of doing the work.
- 2.0 When the Offeror's price appears to be unrealistic or low, then the Offeror can be requested to provide cost data to allow the District to perform a 'cost realism' analysis to ensure that there is a reasonable expectation that the proposed price is consistent with the required contractual effort.
- 2.1 The District's objective in this respect is to acquire sufficient data on the proposed price to verify that the Offeror can perform at that price.
- 3.0 When cost analysis is necessary for determining price reasonableness in small value procurements, Contract Administrators/Buyers shall only request those data necessary to support that decision. Contract Administrators/Buyers have discretion to determine whether to request limited, partial, or complete, albeit uncertified, data. It is important to ensure that the benefits of obtaining such cost data outweigh the costs involved to produce or acquire it.
- 4.0 In requesting limited, partial, or cost realism data, the Contract Administrator/Buyer shall specify exactly what is requested from the Offeror.

X-5 REQUIREMENTS FOR PRICE NEGOTIATION

1.0 NECESSITY FOR PRICE NEGOTIATIONS:

Price negotiation is generally required when competitive proposals have been solicited and always required when other than competitive procedures are used to acquire goods and services. (Price negotiation is not required and in fact has no place when the procedures of Chapter III, SEALED BIDS, or Chapter V, SMALL PURCHASES, are used to acquire goods, materials, equipment, or public works.)

Negotiations with offeror(s) should be held to establish that the offeror understands the nature of the District's requirements, has the necessary finances, personnel and facilities to complete performance in a satisfactory manner; that the proposed terms and conditions are acceptable and the proposed price is fair and reasonable.

1.1 The Project Manager, with the oversight and participation of the Contract Administrator, must determine the need for negotiations and the extent or level of effort required. It is District policy to only conduct negotiations when they are necessary.

2.0 For all procurement actions other than modifications or work directives, it is necessary to conduct discussions with Offerors unless one of the following conditions exist:

- Prices are set by Law or regulation, or
- All of the following:
 - (i) It can be clearly demonstrated on the basis of full and open competition, or prior cost experience also based upon full and open competition, with the product or service that the acceptance of the most favorable initial offer without discussions will result in the lowest overall cost to the District at a fair and reasonable price;
 - (ii) The solicitation notified all offerors of the possibility that the District could make an award without discussions;
 - (iii) The award is in fact made with no written or oral discussions. However, communications may be made with offerors for the purposes of clarifying the offer (see definitions above). The 'mistake in proposal' procedures in Chapter IV may also be used for resolving suspected mistakes in the most favorable initial offer when award without discussions is contemplated;
 - (iv) The most favorable initial offer is prospectively priced.

Where the solicitation documents did not advise the offerors of the possibility of award without discussions then discussions must be conducted in conformance with the procedures of Chapter IV or VI.

- 2.1 However in any procurement action, it is against District policy to award without discussions, on the basis of the most favorable initial offer when the offer or pricing proposed reasonably indicates that the District could obtain savings by conducting discussions.

Therefore, discussions must be conducted when the circumstances of the competition or lack thereof, including the pattern of the pricing obtained, reasonably place the Project Manager or Contract Administrator on notice that award on the basis of initial offer(s) only may not result in the lowest overall cost to the District.

- 2.2 It is also District policy to conduct discussions with the offeror in all retroactively priced procurements.

- 3.0 Modification or Work Directive/Task Order actions may be conducted using either prospective or retroactive pricing. To the greatest extent possible or otherwise approved by the Project Manager/User Department's supervisory chain, all such procurement actions will be conducted on a prospective pricing basis.

- 4.0 For all Modification procurement actions, it is necessary to conduct discussions with the Contractor unless the offer is prospectively priced and one of the following conditions exist:

- Prices are set by Law or regulation, or
- It can be clearly demonstrated on the basis of full and open competition in the underlying procurement action, or prior cost experience in a related procurement action, also based upon full and open competition, with the product or service that the acceptance of the Contractor's offer for modification without discussions will result in the lowest overall cost to the District at a fair and reasonable price.

- 5.0 For all Work Directive/Task Order procurement actions, it is necessary to conduct discussions with the Contractor unless the Work Directive/Task Order Proposal is prospectively priced and one of the following conditions exist:

(Work Directive and Task Order are used interchangeably)

- Prices are set by Law or regulation, or
- It can be clearly demonstrated on the basis of full and open competition in the underlying procurement action, or prior cost experience in a related procurement action, also based upon full and open competition, with the product or service that the acceptance of the Contractor's Work Directive Proposal without discussions will result in the lowest overall cost to the District at a fair and reasonable price.

6.0 To clearly demonstrate that the most favorable initial offer is the lowest overall cost to the District at a fair and reasonable price, the contract terms and conditions must be clear to all offerors (or Work Directive Proposal as appropriate) and the offered price must be at or near the District's estimate of a fair and reasonable price.

7.0 The Project Manager with the concurrence of the Contract Administrator may make a written determination to accept the proposed price only when the following conditions exist:

- Presence of 'Full and Open' competition and adequate price or cost experience with the goods, construction, services, etc. to be procured;
- Notice in the RFP that award may be made without discussions;
- Assurance that no written or oral discussions have actually taken place.

(For further information, see FTA Procurement Alert No. 5.)

X-6 DETERMINE NEED FOR FACT-FINDING

- 1.0 Fact-finding is the search for facts to support development of the District's pre-negotiation objectives and can include any search for pricing or product information data from any source.
- 1.1 Even though fact-finding is not considered to be negotiations, it is considered to be a part of discussions as defined above and may only be conducted when discussions have been authorized.
- 2.0 The search for additional Offeror information generally centers on a review of the District's technical requirements and the Offeror's understanding of those requirements. This additional information can have a significant effect on the development of the District's pre-negotiation objectives for contract price.
- 3.0 Fact-finding can be performed at different levels of intensity using different methods of communications and must be adapted to the particular circumstances of the procurement action. In determining the need for fact-finding and the method to use for communications, the following should be considered:

- (i) Whether discussions are contemplated;
- (ii) The technical complexity of the District's requirements;
- (iii) The magnitude of the award;
- (iv) The degree to which the procurement will achieve full and open competition.

However, if discussions are not authorized or required then fact finding will not be conducted.

- 4.0 The common methods of fact-finding are as follows:
 - (i) Conducting telephone conversations to obtain additional information concerning the Offeror's proposal. (Largely used for relatively simple requirements and low dollar value.)
 - (ii) Conducting a conference on or off District facilities with any number of representatives from either the Offeror or the District which may include a variety of technical and contracting specialists on both sides. (Applicable to moderately complex requirements and dollar values.)
 - (iii) Issuing a written request for additional information from Offeror to identify proposal deficiencies. (Applicable to moderately complex requirements and dollar values where documentation is required.)
- 4.1 Written communication as a method of fact-finding is more likely to be used for competitive procurement actions than non-competitive actions because the ensuing record provides a basis for

the source selection decision whereas for noncompetitive procurement actions, it does not provide for the free interchange that is needed in non-competitive discussions.

X-7 PRICE NEGOTIATION SUPPORT

1.0 **TECHNICAL EVALUATION:** The nature of technical aspects of cost proposals is such that they require an evaluation of the reasonableness and acceptability of all the qualitative, quantitative and relative aspects of the cost proposal. (See Chapter VII, Section 7.4, TECHNICAL EVALUATION.) As used in this Manual, they are defined as follows:

- (i) 'Qualitative aspects of the cost proposal' is defined as relating to the types of individual cost elements proposed, i.e. labor, materials, equipment, travel, reproduction, etc.;
- (ii) 'Quantitative aspects of the cost proposal' is defined as relating to the amounts of individual cost elements proposed, i.e. labor hours for each category proposed, amounts of materials, number of pieces of equipment or hours required thereof, number of trips, amount of reproduction, etc. and
- (iii) 'Relative aspects of the cost proposal' is defined as the relations between the various individual cost elements or between the various classes of cost elements, i.e. engineering labor hours relative to project management labor hours, material costs as a ratio of the directly associated production labor, reproduction costs as a ratio of the directly associated engineering labor, etc.
- (iv) 'Audit' is defined as an activity that is conducted on the accounting records or other related documents to determine the allowability, allocability and reasonableness of the proposed or claimed elements of cost.

1.1 **RESPONSIBILITY FOR TECHNICAL EVALUATION:** While the responsibility for the determination of the reasonableness of the final recommended price remains with the Contracting Officer or the Project Manager, as appropriate recommendations and advice from technical specialists shall be used in the evaluation of contractor cost proposals and negotiation of price. The Procurement Department or the Project Manager, as appropriate, may identify individuals or organizations in the District with the requisite technical expertise to perform technical evaluations as appropriate.

Procurement or the Project Manager/User Department as appropriate, will draft a request to the identified individual or department and identify specific responsibilities pertaining to the technical evaluation, including but not limited to the following:

- Reviewing the qualitative, quantitative and relative aspects of the cost proposal and supporting data;
- Submitting a technical evaluation report which addresses the qualitative, quantitative and relative aspects of the individual cost elements as to their acceptability;

- Supporting the technical evaluation by including a summary of the evaluation recommendation and the basis used in performing the evaluation and the recommendations arrived at;
- Identifying (i) what cost elements were determined not to be responsive to the technical proposal and what efforts were made to clarify them, (ii) what technical or cost data was judged to be defective, or was not used in the evaluation of the cost proposal; and,
- Completing that review and report within the requested time period as well as explaining what evaluations could not be performed due to time constraints.

Presentation of a thorough explanation of the evaluation basis is necessary in order to enable the Project Manager or Contract Administrator to determine the adequacy of the technical evaluation. The identified individual shall perform the technical evaluation on the understanding that they may be required to assist in the price negotiations when discussions relate to their recommendations as well as any subsequent justifications with respect to the final contract price.

The Project Manager/User Department is responsible for ensuring that the requested technical evaluator has current copies of the Contractor's technical and cost proposals and other data as appropriate.

2.0 **AUDIT SUPPORT:** The District's Internal Audit Department can support the Project Manager/Contract Administrator in price negotiations by thoroughly exploring the support and accounting data and systems that backs up a Contractor's cost proposal. The role of Internal Audit in pricing actions whether negotiated or established by direct price competition is advisory only; that is, Internal Audit may advise but not direct the Project Manager/Contract Administrator. However, if the Project Manager/Contract Administrator does not accept the auditor's recommendations, the Project Manager/Contract Administrator must document in either the pre-negotiation objectives, or in the price negotiation memorandum, the rationale for not accepting the auditor's recommendations.

2.1 **APPLICABILITY:** For all procurement actions with price reasonableness determinations over \$500,000 in absolute value, a request for audit support shall be made to Internal Audit prior to conducting price negotiations. Audit support requests may be made at lower values if the reasonableness of a proposed price cannot be established due to the following:

- Lack of knowledge or experience with a particular contractor;
- Existence of sensitive conditions in the pricing action;
- Inability to evaluate the price reasonableness through price or cost analyses of existing data.

For all procurement actions with price reasonableness determinations over \$100,000 and less than \$500,000 in absolute value, notification shall be given to Internal Audit in advance of price negotiations.

2.2 **REQUESTS FOR AUDIT SUPPORT:** Requests for Audit support must be made to Internal Audit in writing and meet the following requirements:

- Prescribe the extent of audit support needed such as the following examples:
 - complete detailed audit including technical analysis reports; or
 - complete detailed audit of selected proposed cost elements; or
 - audit of labor and overhead rates only; or
 - desk audit to provide an audit opinion using available data without an in-depth review of proposed costs; or
 - desk audit supplemented by detailed audit opinion of selected cost elements.
- State the specific areas of input desired.
- Include information where necessary to perform the review, including but not limited to the following:
 - contractor cost proposal and revisions as appropriate; or
 - any related documentation submitted by contractor; or
 - any technical analysis already completed.
- Assign a realistic deadline for receipt of the audit report. (Deadlines for Audit support should be predicated upon complete price proposals and supporting documentation adequate for an audit.)

Ordinarily, requests for audit support are accompanied by any technical analyses that are available.

2.3 **REVIEWING THE AUDIT EVALUATION:** The Project Manager/Contract Administrator are responsible for reviewing the audit report to make sure that it meets the requirements of the specific pricing action. The auditor is responsible for the scope and depth of the audit. The explanation and rationale for an audit finding must be clearly stated and understandable. As a minimum, the audit report shall include the following:

- The findings on specific areas listed in the request for audit support;
- An explanation of the basis and method used by the Contractor in preparation of its cost proposal;
- An identification of the original cost proposal and of all subsequent written formal and other identifiable submissions by which cost or pricing data were either submitted or identified;

- A description of cost or pricing data coming to the attention of the auditor that were not submitted but that may have a significant effect on the negotiation of the final price;
- A list of any cost or pricing data submitted that were not accurate, complete and current and of any cost representations that are unsupported. When the result of deficiencies is so great that the auditor cannot perform an audit or considers the proposal unacceptable as a basis for price negotiations, the Project Manager and Contract Administrator shall be notified either orally, or in writing, so that corrective action may be taken. The auditor shall then confirm in a timely fashion, the notification in writing, explaining the deficiencies and the cost impact on the Contractor's cost proposal.
- The originals of all technical analyses received by the auditor and a quantification of the monetary impact of the technical analysis findings;
- An opinion by the auditor as to the adequacy of the Contractor's accounting system or estimating methods, to support the cost proposal or to permit satisfactory administration of the contract contemplated;
- A statement as to the extent to which the auditor discussed discrepancies or mistakes in fact in the cost proposal with the Contractor.

The Project Manager/Contract Administrator are responsible for identifying all discrepancies between audit findings and other data. These discrepancies must be addressed in pre-negotiation positions and in the price negotiation memorandum.

If the Project Manager/Contract Administrator do not concur with the auditor's recommendation, they must document the basis for this determination subject to the concurrence of the Department Manager of Procurement and transmit a copy to Internal Audit.

The determination by the auditor that the Contractor's accounting system is adequate is especially critical to support a recommendation to award on the basis of a cost plus fixed fee (CPFF) contract. Cost analysis concerns over the adequacy of the contractor's accounting and estimating systems focus on the use of historical cost data for projecting future costs. Generally, if the historical costs are questionable, then the projections from that cost data are equally questionable. Caution should be exercised when negotiating price with organizations that have questionable accounting systems.

- 2.4 **NOTIFICATION TO INTERNAL AUDIT:** The Project Manager/Contract Administrator are responsible for giving notice to Internal Audit prior to commencing price negotiations below \$500,000. Such notice should ordinarily be at least 30 calendar days in advance of any discussions. Internal Audit should also be notified when requested price or cost data will not be available when audit support has been requested.

X-8 PREPARATION FOR PRICE NEGOTIATION

- 1.0 It is District policy that in any procurement action, pre-negotiation objectives be established prior to the negotiation of any contract price. The scope and depth of the analysis should be directly related to the dollar value, importance and complexity of the procurement action.
- 1.1 Price negotiation is intended to permit the District and the offeror to agree on a fair and reasonable price. Price negotiation does not require that agreement be reached on every element of cost. Reasonable compromises may be necessary, and it may not be possible to negotiate a price that is in accord with all the contributing specialists' opinions or with the District's pre-negotiation objective. The objective in employing specialists in this regard is to solicit information on matters within their areas of special competence, not to ask them to develop pre-negotiation objectives.
- 1.2 The Project Manager and Contract Administrator are responsible for exercising the requisite judgment and are jointly responsible for the final pricing decision. The recommendations and counsel of contributing specialists, including auditors, are advisory only. However, they should include comments in the price negotiation memorandum when significant audit or other specialist recommendations are not adopted. (See Chapter IV-1, Section 2.12.4 and Chapter IV-2, Section 3.11.2)
- 2.0 The primary concern in price negotiations is the price the District actually pays; the contractor's eventual cost and profit or fee should be a secondary concern. The District's objective is to negotiate a contract of a type and with a price providing the contractor the greatest incentive for efficient and economical performance. The negotiation of a contract type and a price are related and should be considered together with the issues of risk and uncertainty to the contractor and the District. Therefore, the Project Manager and Contract Administrator, should not become preoccupied with any single element and should balance the contract type, cost, and profit or fee negotiated to achieve a total result and price fair and reasonable to both the District and the contractor. If, however, the contractor insists on a price or demands a profit or fee that the Project Manager and Contract Administrator consider unreasonable and the District has taken all authorized actions (including determining the feasibility of developing an alternative source) without success, the Contract Administrator shall then refer the contract action to the Department Manager of Procurement. Disposition of the action by the Department Manager of Procurement should be documented in the contract file.
- 3.0 The process of determining pre-negotiation objectives helps the District to judge the overall reasonableness of proposed prices and to negotiate a fair and reasonable price or cost and fee. In setting the pre-negotiation objectives, the Project Manager and Contract Administrator shall analyze the offeror's proposal, taking into account the field pricing report, if any; any audit report and technical analysis whether or not part of a field pricing report; and other pertinent data such as independent District cost estimates and price histories. This process may include fact-finding sessions with the offeror when the Project Manager or Contract Administrator deems appropriate.
- 3.1 The Project Manager and the Contract Administrator shall establish pre-negotiation objectives before the negotiation of any pricing action. The scope and depth of the analysis supporting the objectives

should be directly related to the dollar value, importance, and complexity of the pricing action. When cost analysis is required, the analysis shall address (1) the pertinent issues to be negotiated, (2) the cost objectives, and (3) a profit or fee objective.

X-9 CONDUCTING PRICE NEGOTIATIONS

- 1.0 **COMPETITIVE PRICE NEGOTIATIONS:** In all price negotiations for other than Architectural/Engineering service agreements, it is District policy that a counteroffer cannot be made in response to an offer. A counteroffer implies that if accepted, an agreement has been reached. Since negotiations must be conducted with all offerors in the competitive range, no such commitment can be made. Nor can any offeror be provided with technical or price information from another offeror's proposal. (See generally Chapter IV-2.)

Architectural/Engineering price negotiations shall follow non-competitive procedures except that should the District be unable to reach agreement on a fair and reasonable basis, discussions with the proposer shall be terminated and commenced with the next most qualified proposer in conformance with Chapter IV-1 and the associated procurement documents (i.e., RFP).

- 1.1 **BASIS FOR PRICE NEGOTIATIONS:** It is District policy that price negotiations shall be conducted on the same basis that the price reasonableness determination will be made. That is, if price analysis alone is sufficient to support a determination that the negotiated price is fair and reasonable then the negotiations may be conducted on a price basis, i.e. without a separate evaluation of cost and profit. If price analysis alone is insufficient to support a price reasonableness determination then the negotiations must be conducted on a cost basis, i.e. with a separation of cost and profit, etc.

- 1.2 **COMPETITIVE PRICE POSITIONS:** Pre-negotiation objective for competitive pricing actions should be developed separately for each proposal in the competitive range. Techniques to persuade a proposer to improve its proposal where improvement is necessary include the following:

- Advising the proposer of deficiencies in its cost or price proposal so that the proposer is given an opportunity to satisfy the District's requirements. This includes any rationale for determining that the proposed pricing is deficient based on comparisons with historical pricing, District cost estimates, etc.
- Attempting to resolve any uncertainties concerning the technical proposal and other terms and conditions of the cost proposal.
- Resolving any suspected mistakes or clerical errors in the cost proposal without disclosing information concerning other cost proposals or the evaluation process.
- Providing the proposer a reasonable opportunity to submit any cost or price data, technical or other revisions to its proposal that may result from the price negotiations.
- Point out when compared to other price or cost data that the proposed price is considered by the District to be too high or otherwise unrealistic.
- Discuss potential tradeoffs between price and other contractual terms.

2.0 **NON-COMPETITIVE PRICE NEGOTIATIONS**: In all non-competitive pricing actions, the District and the proposer exchange offers until a final price is agreed upon. The negotiated price represents a position that both sides can accept.

3.0 **PRICE POSITIONS**: Pre-negotiation objective for all pricing actions should reflect three pricing positions: minimum, objective or target and maximum.

- The minimum price position should be the starting point in price negotiations and should never represent a price that cannot be supported by reasoned analysis.
- The objective or target price position should be the most reasonable and should represent the price the District would accept.
- The maximum price position should be the highest price position that the District can reasonably be expected to accept, given the information available at the start of price negotiations. This maximum price position may change during price negotiations if additional information is presented by the offeror that changes the District's price objective.

4.0 **REQUIREMENTS CHANGES IN PRICE NEGOTIATIONS**: In non-competitive price negotiations, all elements of the contract are subject to negotiated change during the negotiation process. In preparing for such price negotiations, any such changes in the terms and conditions, etc. should be identified that could be considered in exchange for a corresponding reduction in price. A technical requirements increase should result in a higher price objective while a decrease should result in a lower price objective. A change in requirements that is neither an increase or decrease in overall technical requirements should result in no change to the District's price objectives.

In all competitive price negotiations, no changes can be made to the District's requirements unless all proposers have an opportunity to revise their cost or price proposals.

Where Audit support has been requested, Internal Audit should be notified of all technical requirements changes.

Pages 317 through 325 are reserved.