

**CHAPTER 130-30
OPA PROCUREMENT REGULATIONS**

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Chapter Authority: 1 CMC § 2303(d)

Chapter History: Amdts. Adopted 44 Com. Reg. 48025 (Jan. 28, 2022); Amdts. Proposed 43 Com. Reg. 47662 (Oct. 28, 2021); Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

Part 001 - General Provisions

Subpart A - General

§ 130-30-001 Purposes

- (a) Interpretation. The regulations in Chapter 130-30 shall be construed and applied to promote their underlying purposes and policies.
- (b) Purposes and Policies. The underlying purposes and policies of the regulations in Chapter 130-30 are:
- (1) To simplify, clarify, and modernize the procurement policies and practices of the Office of the Public Auditor (OPA);
 - (2) To provide for increased public confidence in the procedures followed in public procurement;
 - (3) To ensure the fair and equitable treatment of persons who deal with the procurement system of OPA;
 - (4) To provide increased economy in OPA procurement activities and to maximize to the fullest extent practicable the purchasing value of public funds;
 - (5) To foster effective broad-based competition within the free enterprise system; and
 - (6) To provide safeguards for the maintenance of a procurement system of quality and integrity.

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

Commission Comment: The Commission changed “insure” to “ensure” in (a)(3) pursuant to 1 CMC § 3806(g).

§ 130-30-005 Authority

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The regulations in Chapter 130-30 are promulgated under the authority of 1 CMC § 2303(d) which provides the Public Auditor authority to promulgate procurement regulations and administer the procurement function of OPA.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-010 Applicability of Supplementary General Principles of Law

Unless displaced by the particular provisions of Chapter 130-30, the principles of law and equity including, but not limited to, the Uniform Commercial Code of the Commonwealth and common law of fraud, conflicts of interest, waste, false pretenses, and public purpose shall supplement the regulations in Chapter 130-30.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-015 Requirement of Good Faith

The regulations in Chapter 130-30 require all parties, including OPA employees, contractors, and suppliers, involved in the negotiation, bidding, performance, or administration of OPA contracts to act in good faith.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-020 Application of Regulations

The regulations in Chapter 130-30 apply to all OPA expenditures of public funds irrespective of source, including federal assistance monies. Nothing in Chapter 130-30 shall be construed to prevent OPA from complying with the terms and conditions of any grant, cooperative agreement, or memoranda. The regulations in Chapter 130-30 do not apply to employment contracts.

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-025 Severability

If any provision of the regulations in Chapter 130-30 or any application thereof to any person or circumstance is held invalid by a court of competent jurisdiction, such invalidity shall not affect other provisions or applications of the regulations in Chapter 130-30 which can be given effect without the invalid provision or application, and to this end, the provisions of Chapter 130-30 are declared to be severable.

Modified, 1 CMC § 3806(g).

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History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-030 Validity of Contract

No OPA contract with the exception of employment contracts shall be valid unless it complies with the regulations in Chapter 130-30.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-035 Remedy Against Employee

Any procurement action of an employee of OPA in violation of the regulations in Chapter 130-30 is an action outside the scope of his or her employment. OPA will seek to have any liability asserted against it by a contractor which directly results from these improper acts to be determined judicially to be the individual liability of the employee who committed the wrongful act.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

Subpart B - Definitions

§ 130-30-040 Definitions

As used in Chapter 130-30, unless the context otherwise requires, the following meanings apply:

- (a) “Attorney General” means the Attorney General of the Commonwealth of the Northern Mariana Islands.
- (b) “Construction” means the process of building, altering, repairing, improving, or demolishing of a public structure, or building, or public improvements commonly known as “capital improvements.” It does not include the routine maintenance of existing structures, buildings, or public real property.
- (c) “Contract” means all types of agreements, regardless of what they may be called for the procurement of supplies, services, or construction, including purchase orders.
- (d) “Cost-reimbursement contract” means a contract under which a contractor is reimbursed for costs which are allowable and in accordance with the contract terms and the regulations in Chapter 130-30, and a fee, if any.
- (e) “Designated Hearing Officer” means a CNMI-licensed attorney contracted by OPA to preside over appeals to decisions made by the Procurement Officer.

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- (f) “Definite-quantity contract” means a contract which provides for delivery of a definite quantity of specific supplies or services for a fixed period. This type of contract may be used when it can be determined in advance that a definite quantity of supplies or services will be required during the contract period.
- (g) “Dispute” means a disagreement concerning the legal rights and obligations of contracting parties, which, if not settled by mutual agreement, must be referred to a neutral third party for resolution.
- (h) “Employee” means an individual receiving a salary from OPA.
- (i) “Firm-fixed-price contract” means a contract which provides for a price that is not subject to any subsequent adjustment as a result of the contractor’s cost experience in performing the contract. This type of contract places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss.
- (j) “Goods” means all property, including but not limited to equipment, materials, supplies, and other tangible personal property of any kind or nature, printing, insurance, and leases of real and personal property.
- (k) “Invitation for bids” means all documents, whether attached or incorporated by reference, utilized for soliciting bids.
- (l) “Official with expenditure authority” means the Public Auditor or designee who may expend, obligate, encumber, or otherwise commit public funds under the Planning and Budgeting Act or under any annual appropriation act.
- (m) “Person” means an individual, sole proprietorship, partnership, joint venture, corporation, other unincorporated association, or a private legal entity.
- (n) “Procurement” means buying, purchasing, renting, leasing, or acquiring construction, goods, or services. It also includes all functions that pertain to the obtaining of construction, goods, or services, including description of requirements, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration.
- (o) “Public Auditor” means the Public Auditor of the Commonwealth Office of the Public Auditor.
- (p) “Purchase description” means the words used in a solicitation to describe the goods, services, or construction to be purchased and include specifications attached to, or made part of, the solicitation.
- (q) “Requirements contract” means a contract which provides for filling all actual purchase requirements of designated OPA activities for supplies or services during a specified contract period, with deliveries or performance to be scheduled with the contractor.

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- (r) “Responsible” in reference to a vendor, bidder, offeror, or contractor, means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.
- (s) “Responsive” in reference to a vendor, bidder, offeror, or contractor, means a person who has submitted a bid or proposal which conforms in all material respects to the invitation for bids or request for proposals.
- (t) “Secretary” means the Secretary of Finance.
- (u) “Services” means the furnishing of time, labor, or effort by a person other than an employee, and not involving the delivery of a specific end product other than reports, plans, and incidental documents.

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

Subpart C - Public Access

§ 130-30-045 Public Access to Procurement Information

Procurement information shall be a matter of public record and shall be available for public inspection. Procurement information may be kept confidential when necessary to ensure proper bidding procedures or to comply with the requirements of 1 CMC § 7849. This decision shall be made only by the Public Auditor.

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

Commission Comment: The Commission changed “insure” to “ensure” pursuant to 1 CMC § 3806(g).

Part 100 - Procurement Organization

§ 130-30-105 Procurement Officer of the Office of the Public Auditor

The Public Auditor shall designate an employee of OPA to serve as the Procurement Officer to administer and supervise the day-to-day procurement activities and functions of the office.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-110 Duties and Responsibilities of the Procurement Officer

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The duties and responsibilities of the Procurement Officer include, but are not limited to, the following:

- (a) Ensure that the regulations in Chapter 130-30 are observed in all OPA procurement activities;
- (b) Procure or supervise the procurement of all supplies, goods, and services needed by OPA;
- (c) Conduct bidding, procurement, negotiation, or administration of OPA contracts upon request of the Public Auditor;
- (d) Sell, trade, or otherwise dispose of surplus property belonging to and no longer needed by OPA;
- (e) Exercise general supervision and control over all inventories of supplies belonging to OPA;
- (f) Exercise general oversight and control on the use of physical assets and other capital equipment to prevent waste or abuse or other unauthorized use;
- (g) Establish and maintain programs for the inspection, testing, and acceptance of supplies;
- (h) Hear all protests and disputes; and
- (i) Oversee the administration of OPA contracts.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-115 Contract Review, Processing, and Oversight

- (a) All contracts must first be prepared by the Procurement Officer who shall certify that he has complied with the Procurement Regulations, codified in Chapter 130-30, and that the proposed contract is for a public purpose, and does not constitute a waste or abuse of public funds. All contract documents must be complete including attachments and exhibits, if they are incorporated into the contract by reference. The contract documents prepared by the Procurement Officer shall be submitted to the Public Auditor for review.
- (b) The contract shall next be forwarded for approval by the Secretary of Finance or his designee who shall certify the availability of funds.
- (c) The third review is that of the OPA Legal Counsel or his designee who shall certify the contract as to form and legal capacity.
- (d) The contract shall then be approved by the Public Auditor.

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(e) After the Public Auditor's approval, the Procurement Officer shall forward the contract to the contractor for his approval and signature.

(f) After the signature of the contractor, the Procurement Officer shall provide copies of said contract to the:

- (1) Public Auditor
- (2) Secretary of Finance
- (3) Contractor.

(g) No contract is effective against OPA until all of the parties whose signatures are required on the contract form have signed the contract. A contract shall contain a right to audit records clause.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-120 Acceptance of Gratuities by the Procurement Officer and OPA employees

In addition to the restrictions found in § 130-30-625, the Procurement Officer and the employees of OPA shall not accept from any person any gift of value given to them with the intent to influence their business judgment.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

Part 200 - Source Selection and Contract Formation

Subpart A - Source Selection

§ 130-30-201 Requirements for Competition

OPA shall provide for full and open competition through use of the competitive procedure that is best suited to the circumstances of the contract action unless otherwise authorized under Chapter 130-30. The competitive procedures available for use in fulfilling the requirement for full and open competition are as follows:

- (a) Competitive sealed bidding (§ 130-30-205);
- (b) Competitive sealed proposals (§ 130-30-210);
- (c) Architect-engineer services (§ 130-30-305); and
- (d) Competitive selection procedures for professional services (§ 130-30-310).

Modified, 1 CMC § 3806(g)

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History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-205 Competitive Sealed Bidding

(a) All OPA procurement shall be awarded by competitive sealed bidding under this section, except as provided in:

- (1) § 130-30-210 (Competitive Sealed Proposals);
- (2) § 130-30-220 (Small Purchases);
- (3) § 130-30-225 (Sole Source Procurement);
- (4) § 130-30-230 (Expedited Purchasing in Special Circumstances);
- (5) § 130-30-305 (Architect-Engineer Services); and
- (6) § 130-30-310 (Competitive Selection Procedures for Professional Services).

(b) Invitation for Bids.

(1) An invitation for bids shall be issued and shall include at the minimum:

- (i) An invitation for bids number;
- (ii) Date of issuance;
- (iii) Name, address, and location of the Office of the Public Auditor;
- (iv) Specific location where bids must be submitted;
- (v) Date, hour, and place of bid opening;
- (vi) A purchase description in sufficient detail to permit full and open competition and allow bidders to properly respond;
- (vii) Quantity to be furnished;
- (viii) Time, place, and method of delivery or performance requirements;
- (ix) Essential contractual terms and conditions; and
- (x) Any bonding requirements.

(2) Purchase descriptions of construction, goods, or services shall detail to the greatest extent practicable the specific requirements the contractor is expected to perform or deliver. At a minimum, a purchase description shall adequately set forth the essential physical and functional characteristics of the construction, goods, or services necessary to fulfill OPA's minimum requirements.

(c) Application for Brand Name Descriptions. An acquisition that uses a brand name description or other purchase description to specify a particular brand name, product, or feature of a product peculiar to one manufacturer is not normally allowed regardless of the number of sources solicited. It shall be allowed only when justified and approved in accordance with the procedures on justifying sole-source procurement. Specifically, the justification shall indicate that the use of such descriptions in the acquisition is essential to OPA's requirements, thereby precluding consideration of a product manufactured by another company. "Brand-name or equal" descriptions and other purchase descriptions that permit prospective contractors to offer products other than those specifically referenced by brand name, provide for full and open competition and do not require justifications and approvals to support their use.

(d) Bid Solicitation Accuracy. The bid solicitation shall accurately reflect OPA's requirement. It shall adequately state what is to be done or what is to be delivered to OPA in

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order to allow bidders to properly respond and evaluations to be made on a uniform basis. Exact quantities shall be stated in the statement of deliverables, unless use of a requirements contract is justified under § 130-30-260.

(e) **Publication.** The Procurement Officer shall publicize all invitations for bids in order to increase competition and broaden industry participation. The bidding time (i.e., the time between issuance of the solicitation to the public and opening of bids) shall be prescribed as follows:

(1) **Minimum Bidding Time.** A bidding period of at least 30 calendar days shall be provided unless the Procurement Officer determines that a shorter time is reasonable and necessary. Such shorter bidding period must afford potential bidders a reasonable opportunity to respond considering the circumstances of the individual acquisition, such as the complexity, and urgency. The bidding period, however, shall never be less than fourteen calendar days.

(2) **Extended Bidding Period.** Because of limited bidding time in certain cases, potential sources may be precluded from bidding and others may be forced to include contingencies that, with additional time, could be eliminated. To avoid unduly restricting competition or paying higher-than-necessary prices, the Procurement Officer may increase the 30-day bidding period by not more than 60 additional calendar days, considering such factors as:

- (i) Degree of urgency;
- (ii) Complexity of requirements;
- (iii) Anticipated extent of subcontracting;
- (iv) Geographic distribution of bidders; and
- (v) Normal transmittal time for invitations and bids.

(f) **Public Notice.** The Procurement Officer shall advertise the invitation for bids in a newspaper of general circulation in the Commonwealth at least once in each week from the time the solicitation is issued, including the week when the bidding period expires. Direct solicitations for bids are allowable provided public notice is fulfilled.

(g) **Bid Receipt.**

(1) All bids shall be submitted to OPA. Bids documents shall be received prior to the time set for opening and shall be maintained sealed in a secure manner. Bids submitted from vendors outside the Commonwealth must be postmarked or with other proof of submission by the date set in the invitation for bids and must be received within seven working days of that date. Bidders outside the Commonwealth must notify the Public Auditor in writing of their intent to bid in order to receive this additional seven days for the receipt of the actual bid documents. This notice of intent to bid may be by any mode of written communication including telex, facsimile, or other electronic transmission.

(2) If a bid is opened by mistake, it shall be resealed and the person who opened the bid shall write his signature and print his title on the envelope and deliver it to the Procurement Officer. No information contained in the bid shall be disclosed prior to the bid opening. The Procurement Officer shall cause the opened bid to be placed into the sealed receptacle.

(h) **Bid Opening.** The bid opening shall be conducted by the Procurement Officer. Bids received prior to the bid closing date shall be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids. The Procurement Officer shall be present at the bid opening. The bids shall be publicly opened. The amount of each bid,

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together with the name of each bidder shall be recorded. The record and each bid shall be open to public inspection. The Procurement Officer shall prepare a written summary of the bid opening.

(i) **Bid Acceptance and Bid Evaluation.** Bids shall be unconditionally accepted without alteration or correction, except as authorized in Chapter 130-30. Bids shall be evaluated based on the requirements set forth in the invitation for bids, which may include criteria as is necessary to reasonably permit a determination as to the acceptability of the bid for the particular purpose intended.

(j) **Responsiveness of Bids.** To be considered for award, a bid must comply in all material respects with the invitation for bids. Bids must be filled out, executed, and submitted in accordance with the bid instructions. A bid may be considered only if:

- (1) The bidder accepts all material terms and conditions of the invitation, and
- (2) Any future award based upon the bid would result in a binding contract with terms and conditions that do not vary from the requirements of the invitation. Electronic or facsimile bids shall not be considered unless permitted by the invitation.

(k) **Bid Rejection.** A bid may be rejected for any of the following reasons:

- (1) Failure to conform to essential requirements of the invitation for bids such as specifications or time of delivery;
- (2) Imposition of conditions or restrictions in the bid which modify requirements of the invitation or limit the bidder's liability to OPA. For example, bids shall be rejected in which the bidder:
 - (i) Protects against future changes in conditions, such as increased costs;
 - (ii) Fails to state a price and indicates that price shall be the price in effect at the time of delivery;
 - (iii) States a price but qualifies it as subject to price in effect at time of delivery; or
 - (iv) Limits the rights of OPA.
- (3) Unreasonableness as to price;
- (4) A bid from a non-responsible bidder as defined in § 130-30-240.
- (5) A bid from a non-responsive bidder as defined in § 130-30-205(j).

(l) **Correction or Withdrawal of Bids; Cancellation of Awards.** Correction or withdrawal of inadvertently erroneous bids, before or after award, or cancellation of awards based on bid mistakes must be approved by the Public Auditor in writing. After the bid opening, no changes in bid price or other provisions of bids prejudicial to the interest of OPA or fair competition shall be allowed. Whenever a bid mistake is suspected, OPA shall request confirmation of the bid prior to award. In such an instance, if the bidder alleges an error, OPA shall only permit correction of the bid or withdrawal of the bid in accordance with subsection (l)(1) or (l)(2).

(1) **Correction of bids.** Correction of bids shall only be permitted when:

(i) An obvious clerical mistake is clearly evident from examining the bid document.

Examples of such mistakes are errors in addition or the obvious misplacement of a decimal point; or

(ii) The otherwise low bidder alleges a mistake and the intended bid is evident from the bid document or is otherwise supported by clear and convincing evidence as to the bid intended and

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the corrected bid remains the low bid. A low bidder shall not be permitted to correct a bid mistake resulting from an error in judgment.

(2) **Withdrawal of bids.** Withdrawal of a bid shall only be permitted where the otherwise low bidder alleges a mistake and there is clear and convincing evidence as to the existence of a mistake.

(3) **Cancellation of awards.** Cancellation of awards or contracts shall only be permitted when:

- (i) Evidence as to the existence of the mistake is not discovered until after the award;
- (ii) There exists no clear and convincing evidence to support the bid intended; and
- (iii) Performance of the contract at the award price would be unconscionable.

(m) **Award.**

(1) The contract must be awarded with reasonable promptness by written notice to the lowest responsive bid by a responsible bidder whose bid fully meets the requirements of the invitation for bids and the regulations in Chapter 130-30. Unsuccessful bidders shall also be promptly notified.

(2) Notice of an award shall only be made by the presentation of a contract with all of the required signatures to the bidder. No other notice of an award shall be made. No acceptance of an offer shall occur nor shall any contract be formed until an OPA contract is written and has been approved by all the officials required by law and regulation. OPA contracts shall contain a clause which states that the signature of the private contractor shall be the last in time to be affixed to a contract and that no contract can be formed prior to the approval of all required government officials.

(3) In the event all bids exceed available funds, and time or economic considerations preclude re-solicitation of work of a reduced scope, the Procurement Officer may be authorized by the Public Auditor to negotiate an adjustment of the bid price including changes in bid requirements, with the lowest responsive and responsible bidder in order to bring the bid price within the amount of available funds. The negotiation shall be documented in writing and attached to the bidding documents.

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-210 Competitive Sealed Proposals

(a) **Conditions for use.** When the Public Auditor determines in writing that the use of a competitive sealed bidding is either not practical or not advantageous to OPA, a contract may be entered into by competitive sealed proposals. Such determination shall be placed in the contract file.

(b) **Request for proposals.** Proposals shall be solicited through a request for proposals.

(c) **Public notice.** Adequate public notice of the request for proposals shall be given in the same manner as provided for in competitive sealed bids.

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(d) Receipt of proposals. Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals shall be prepared and opened for public inspection after contract award except where public inspection would violate confidentiality mandates or jeopardize an ongoing investigation or audit.

(e) Evaluation factors. The request for proposals shall state the relative importance of price and other evaluation factors. Price or cost to OPA shall be included as an evaluation factor in every solicitation of proposals. The Procurement Officer must ensure that the following requirements are complied with in any evaluation of proposals:

(1) All evaluation factors stated in the solicitation shall be considered in determining proposals in the competitive range (i.e., those allowed to participate further in the selection process), and any subsequent evaluations (including evaluation of best and final offers from the competitive range offerors).

(2) Competitive range. The Public Auditor shall determine which proposals are in the competitive range, based on the recommendations of the evaluator or evaluation team, for the purpose of conducting written or oral discussions, and shall include all proposals that have a reasonable chance of being selected for award. When there is doubt as to whether a proposal is in the competitive range, the proposal shall be included. Proposals determined to have no reasonable chance of being selected for contract award shall no longer be considered for selection. A proposal is not reasonably susceptible of being selected for award and can be excluded from the competitive range if it is clear that:

(i) Its contents are so unacceptable that a revision of the proposal in the negotiation stage would be equivalent to accepting a new proposal; or

(ii) In comparison with other proposals, such proposal clearly has no chance of being selected for award.

(3) Technical evaluation. If any technical evaluation is necessary beyond ensuring that the proposal meets the minimum requirements in the solicitation, the evaluator or evaluation team shall document the technical evaluation which shall include:

(i) The basis for the evaluation;

(ii) 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. The supporting documentation prepared for the selection decision shall show the proposals' comparative strengths, weaknesses, and risks in terms of the evaluation factors.

(4) When technical criteria (generally, criteria other than price) are involved, the Procurement Officer shall ensure that appropriate qualified personnel are assigned to conduct a technical evaluation of the proposals. In forming an evaluation team, the Procurement Officer shall ensure that:

(i) The evaluators, including any other personnel responsible for the selection of competitive range offerors or final selection of an offeror, are formally designated to exercise such responsibility by the Public Auditor; and

(ii) Before conducting any evaluation, the Public Auditor shall approve an evaluation plan which as a minimum shall include:

(A) A statement of the evaluation factors and any significant sub-factors and their relative importance;

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- (B) A description of the evaluation process, methodology, and techniques to be used; and
- (C) Documentation requirements.

(f) Notification to offerors excluded in the competitive range. The Procurement Officer shall promptly notify offerors when they are excluded from the competitive range or otherwise excluded from further consideration. The notice shall state the basis for the exclusion.

(g) Discussion with responsible offerors and revisions to proposals. As provided in the request for proposals, discussions may be conducted with responsible and responsive offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification and to ensure full understanding of, and responsiveness to, solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals and such revisions may be permitted after submission and prior to award for the purpose of obtaining the best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

(h) Award. Award shall be made to the responsible offeror whose proposal is determined in writing to be most advantageous to OPA taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation and the contract file shall contain the basis on which the award is made. Within three working days after the date of contract award, the Procurement Officer shall provide written notification to each unsuccessful offeror (unless pre-award notice was given under § 130-30-210(f)). The notice shall include, as applicable:

- (1) The number of offerors solicited;
- (2) The number of proposals received;
- (3) The name and address of each offeror receiving an award;
- (4) The items, quantities, and unit prices of each award (if the number of items or other factors makes listing unit prices impracticable, only the total contract price need be furnished); and

(5) In general terms, the reason the offeror's proposal was not accepted, unless the price information in item (h)(4) of this subsection readily reveals the reason. In no event shall an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

Commission Comment: The Commission changed "insure" to "ensure" in (g) pursuant to 1 CMC § 3806(g).

§ 130-30-215 Circumstances Permitting Other than Full and Open Competition

(a) The following procurement methods permit contracting without using full and open competition:

- (1) Small purchases (§ 130-30-220);

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- (2) Sole source procurement (§ 130-30-225); and
- (3) Expedited purchasing in special circumstances (§ 130-30-230).

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-220 Small Purchases

(a) Any procurement not exceeding the amounts established herein may be made in accordance with small purchase procedures, established in this section. However, procurement requirements shall not be artificially divided so as to constitute a small purchase.

(b) Purchases that use Government-sourced funds (local funds) or any combination of both local and federal funds may be made to the small purchase procedures of this subsection:

(1) For purchases that do not exceed \$10,000.00 at least one price quote shall be obtained.

However, where practicable, the Procurement Officer shall seek to obtain more than one price quote.

(2) A blanket order may be used to make purchases without securing a price quote when the purchases do not exceed \$1,000.00. The goods or services that may be purchased under a blanket purchase order must be defined (i.e. office supplies) and shall not be used for equipment. The Procurement Officer shall promptly submit to the Public Auditor copies of receipts for all purchases made under a blanket-purchase order. The Public Auditor may instruct the Procurement Officer to explain the need for the goods or services and how the prices paid were reasonable.

(3) For purchases that exceed \$10,000.00, but which are less than or equal to \$50,000.00, a minimum of three vendors shall be solicited to submit written or electronic quotations. The quotations shall be recorded and placed in the procurement file. If fewer than three vendors submit quotations, the Procurement Officer shall certify, in writing, to the Public Auditor that fewer than three vendors responded and shall provide written proof of the request. If fewer than three of the solicited vendors submit quotes, the Public Auditor may either approve the request or direct the Procurement Officer to solicit additional quotes.

(4) The Procurement Officer shall limit to \$50,000.00 per fiscal year the total amount of purchase orders made in accordance with the small purchase procedures of this subsection (a) that the Procurement Officer issues to any single non-governmental vendor, unless the Public Auditor approves, in writing, of the proposed expenditures that would exceed the limit.

(c) Purchases that use only federal funds may be made according to the small purchase procedures of this subsection:

(1) For purchases that do not exceed \$10,000.00, at least one price quote shall be obtained.

However, the Public Auditor may require the Procurement Officer to obtain more than one price quote.

(2) For purchases that exceed \$10,000.00, but which are less than or equal to \$250,000.00, a minimum of three vendors shall be solicited to submit written or electronic quotations. The quotations shall be recorded and placed in the procurement file. If fewer than three vendors submit quotations the Procurement Officer shall certify, in writing, to the Public Auditor that

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fewer than three vendors responded and shall provide written proof of the request. If fewer than three of the solicited vendors submit quotes, the Public Auditor may either approve the quote, instruct the Procurement Officer to solicit additional quotes, or require that the purchase be procured pursuant to §130-30-205 or other applicable provisions of the regulations in Chapter 130-30.

(d) Any lease or purchase of vehicles shall be procured pursuant to § 130-30-315. Any lease or purchase of machinery and equipment in excess of \$2,500 shall be procured pursuant to § 130-30-205 or other applicable provisions of the regulations in Chapter 130-30.

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 44 Com. Reg. 48025 (Jan. 28, 2022); Amdts. Proposed 43 Com. Reg. 47662 (Oct. 28, 2021); Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016);

§ 130-30-225 Sole Source Procurement

(a) A contract may be awarded for a supply, service, or construction without competition when:

- (1) The Procurement Officer determines in writing that there is only one source for the required supply, service, or construction;
- (2) Solely for the purpose of obtaining expert witnesses for litigation; or
- (3) For legal services

(b) For any sole source procurement pursuant to subsections (a)(2), or (a)(3), the Public Auditor shall state in writing the reasons the services are required.

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-230 Expedited Purchasing in Special Circumstances

(a) When special circumstances require the expedited procurement of goods or services, the Procurement Officer may request in writing that the Public Auditor approve expedited procurement without the solicitation of bids for proposals.

(b) The factors to be considered by the Procurement Officer shall be:

- (1) The urgency of the OPA's need for the goods or services;
- (2) The availability of the goods or service in the Commonwealth and the timeliness in acquiring it; and
- (3) Any other factors establishing the expedited procurement is in the best interest of OPA.

(c) The expedited procurement shall be as competitive as possible under the circumstances.

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(d) The total amount of goods or service that may be approved under this section shall not exceed \$25,000.

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

Subpart B - Cancellation of Invitation for Bids and Request for Proposals

§ 130-30-235 Cancellation

An invitation for bids or request for proposals may be canceled, and any and all bids or proposals may be rejected, when such action is determined in writing by the Public Auditor to be in the best interest of OPA based on:

- (a) Inadequate or ambiguous specifications contained in the solicitation;
- (b) Specifications which have been revised;
- (c) Goods or services being procured which are no longer required;
- (d) Inadequate consideration given to all factors of cost to OPA in the solicitation;
- (e) Bids or proposals received indicate that the needs of OPA can be satisfied by a less expensive good or service;
- (f) All offers with acceptable bids or proposals received are at unreasonable prices;
- (g) Bids were collusive; or
- (h) Cancellation is determined to be in the best interest of OPA.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

Subpart C - Qualifications and Duties

§ 130-30-240 Responsibility of Bidders and Offerors

- (a) Awards shall be made only to responsible contractors. To be determined responsible, a prospective contractor must:
 - (1) Have adequate financial resources to perform the contract, or the ability to obtain them;
 - (2) Be able to comply with the required delivery or performance schedule;
 - (3) Have a satisfactory performance record;
 - (4) Have a satisfactory record of integrity and business ethics;

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- (5) Have the necessary organization, experience, and skills, (or the ability to obtain them), required to successfully perform the contract;
 - (6) Have the necessary production, construction, and technical equipment facilities, or the ability to obtain them; and
 - (7) Be otherwise qualified and eligible to receive an award under applicable laws and rules.
- (b) **Obtaining information.** Prior to award, the Procurement Officer shall obtain information from the bidder or offeror necessary to make a determination of responsibility using the factors in subsection (a). The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for determination of non-responsibility with respect to that bidder or offeror.
- (c) **Right of non-disclosure.** Information furnished by a bidder or offeror pursuant to subsection (b) may not be disclosed outside of OPA, or any other government official involved without prior consent by the bidder or offeror.
- (d) **Non-responsibility determination.** When a bid or proposal on which a contract award would otherwise be made is rejected because the prospective contractor is found to be non-responsible, a written determination shall be signed by the Procurement Officer stating the basis for the determination and this shall be placed in the contract file.

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-245 Pre-qualification of Contractors

Prospective suppliers of goods or services may be pre-qualified for particular types of construction, goods and services when determined necessary by the Procurement Officer. Opportunity for qualification before solicitation shall be afforded to all suppliers. Solicitation mailing lists of potential contractors shall include, but shall not be limited to, pre-qualified suppliers. In no event will bidders be allowed to qualify after the bid opening.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

Subpart D - Types of Contracts

§ 130-30-250 Permissible Types of Contracts

OPA contracts shall utilize a firm fixed price unless the use of a cost-reimbursement contract is justified under § 130-30-255. OPA contracts shall also use definite-quantity contracts unless a requirements contract is justified under § 130-30-260. Use of cost-plus-a-percentage-of-cost and percentage of construction cost methods of contracting are prohibited.

Modified, 1 CMC § 4806(g).

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History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-255 Cost-reimbursement Contracts

- (a) Policy. Cost-reimbursement contracts must contain a ceiling which the contractor shall not exceed without the approval of the Procurement Officer.
- (b) Application. A cost-reimbursement contract may be used when the Procurement Officer attaches to the contract a written determination that:
- (1) Uncertainties in the work to be performed make the cost of performance too difficult to estimate with the degree of accuracy required for a firm fixed price contract;
 - (2) Use of a cost reimbursement contract is likely to be less costly to OPA than any other type due to the nature of the work to be performed under the contract.
- (c) Limitations.
- (1) A cost-reimbursement contract may only be used when the Public Auditor and Procurement Officer determine that the contractor's accounting system is adequate for determining costs applicable to the contract, and OPA surveillance in the form of a construction management contract will be obtained to ensure the use of efficient methods and effective cost controls in the performance of the contract.
 - (2) The use of cost-reimbursement contracts is prohibited for the acquisition of commercially available items.
- (d) Cost-plus-fixed-fee contracts.
- (1) Description. A cost-plus-fixed-fee contract is a cost-reimbursement contract that provides for payment to the contractor of a negotiated fee that is fixed at the inception of the contract. The fixed fee does not vary with actual cost, but may be adjusted as a result of changes in the work to be performed under the contract, authorized pursuant to § 130-30-410(a).
 - (2) Application.
 - (i) A cost-plus-fixed-fee contract is suitable for use when the conditions of § 130-30-255(b) are present and the contract is for the performance of research or preliminary exploration or study, and the level of effort required is unknown.
 - (ii) A cost-plus-fixed-fee contract normally must not be used in development of major systems once preliminary exploration, studies, and risk reduction have indicated a high degree of probability that the development is achievable and OPA has established reasonably firm performance objectives and schedules.
 - (3) Limitations. No cost-plus-fixed-fee contract shall be awarded unless the Procurement Officer complies with all limitations in § 70-30.3-255(c).

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-260 Requirements Contracts

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(a) For the information of offerors and contractors, the Public Auditor shall state a realistic estimated total quantity in the solicitation and resulting contract. This estimate is not a representation to an offeror or contractor that the estimated quantity will be required or ordered, or that conditions affecting requirements will be stable or normal. The Public Auditor may obtain the estimate from records of previous requirements and consumption, or by other means, and shall base the estimate on the most current information available.

(b) The contract shall state, if feasible, the maximum limit of the contractor's obligation to deliver and OPA's obligation to order. The contract may also specify maximum or minimum quantities that OPA may order under each individual order and the maximum that it may order during a specified period of time. The contract shall specify that failure of OPA to order such estimated minimum or maximum quantities will not entitle the contractor to any equitable adjustment in unit price.

(c) Application. A requirements contract may be appropriate for acquiring supplies or services when OPA anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated OPA activities will need during a definite period.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

Subpart E - Inspection and Audit

§ 130-30-265 Right to Inspect Place of Business

OPA, may at reasonable times, inspect the place of business of a contractor or any subcontractor which is related to the performance of any contract awarded or to be awarded by OPA.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-270 Right to Audit Records

As required by 1 CMC § 7845, the contractor and subcontractor or grantee and subgrantee at all levels shall provide OPA with access to and the right to examine and copy any records, data, or papers relevant to a government contract or grant for a period of three years after the final payment under the contract or grant. A clause to this effect shall appear in all OPA contracts and obligations.

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

Subpart F - Reports and Records

§ 130-30-275 Report of Anti-competitive or Deceptive Practices

- (a) When for any reason any person suspects the following practices are occurring among bidders, offerors, contractors, or subcontractors, a notice of the relevant facts shall be transmitted by the Procurement Officer to the Attorney General without delay:
- (1) Unfair methods of competition;
 - (2) Deceptive acts; or
 - (3) Unfair business practices.
- (b) These acts are more fully defined at 4 CMC § 5101–5206.

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-280 Retention of Procurement Records

- (a) OPA shall maintain a record listing all contracts for a minimum of five years after completion of construction, or full delivery of the goods or services under the contract. The records shall contain:
- (1) Each contractor’s name;
 - (2) The amount and type of each contract; and
 - (3) A listing of the supplies, services, or construction procured under each contract.
- (b) All procurement records, except those designated herein as not subject to disclosure, shall be available to public inspection.

Modified, 1 CMC § 3806(e).

History: Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Proposed 39 Com. Reg. 39785 (Jul. 28, 2017).

Part 300 - Procurement of Construction and Architect-Engineer Services, Professional Services, Vehicles, and Special Conditions for Computer Software and Hardware

§ 130-30-301 Construction Procurement

- (a) Invitation for Bids.
- (1) Deposit. The Procurement Officer shall determine the amount of deposit required for potential bidders to obtain the invitation for bids.
 - (2) Contents. The invitation for bids shall be prepared in accordance with § 130-30-205(b). In addition, the following items shall be included in the invitation for bids:
 - (i) Notice to Bidders. General information regarding the project;
 - (ii) Instructions to Bidders. Information on the preparation of bids, bid security requirements, and forms and certifications that must be submitted with the bid;
 - (iii) General Conditions. Standard contract clauses governing the performance of work;

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- (iv) Special Conditions. Special contract clauses depending on the nature and dollar amount of the work to be performed; and
 - (v) Technical Specifications. Specifications governing the technical aspects of the work to be performed.
- (b) Bid Security.
- (1) Requirement. Bid security shall be required for all competitive sealed bidding construction contracts where the price is estimated by the Procurement Officer to exceed \$25,000 or when the Procurement Officer determines it is in the interest of OPA. Bid security shall be on a bid bond, in cash, by certified check, cashiers' check or other form acceptable to OPA. A surety company shall hold the certificate of authority from the U.S. Secretary of the Treasury as an acceptable surety or other surety acceptable to the Attorney General.
 - (2) Amount. Bid security shall be an amount equal to at least fifteen percent of the amount of the bid or other amount as specified in the invitation for bids depending upon the source of funding.
 - (3) Rejection of Bid. Failure to furnish bid security, when required by the invitation, shall result in rejection of the bid as non-responsive.
- (c) Contract Performance and Payment Bonds.
- (1) When a construction contract is awarded in excess of \$25,000, the following bonds or security shall be delivered to OPA and shall become binding on the parties upon the execution of the contract:
 - (i) A performance bond satisfactory to OPA pursuant to subsection (c)(2), executed by a surety company authorized to do business in the Commonwealth or otherwise secured in a manner satisfactory to the OPA, in an amount equal to one hundred percent of the price specified in the contract; and
 - (ii) A payment bond satisfactory to OPA pursuant to subsection (c)(2), executed by a surety company authorized to do business in the Commonwealth or otherwise secured in a manner satisfactory to OPA, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract. The bond shall be in an amount equal to one hundred percent of the price specified in the contract.
 - (2) Acceptability of payment and performance bonds. The Procurement Officer shall ensure that the bonding company's pledged assets are sufficient to cover the bond obligation. Prior to the execution of the contract, the Procurement Officer shall require the selected contractor to submit:
 - (i) A current license from the bonding company showing that it has authority to issue bonds; and
 - (ii) A certification from the bonding company that the unencumbered value of its assets (exclusive of all outstanding commitments on other bond obligations) exceeds the penal amount of each bond.
 - (3) A contractor submitting an unacceptable payment or performance bond may be permitted a reasonable time, as determined by the Procurement Officer, to substitute an acceptable bond prior to executing a contract. When evaluating payment and performance bonds, the Procurement Officer shall confirm the acceptability of the bonding company from other government agencies, such as the Insurance Office under the Department of Commerce.

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(d) Suits on Payment Bonds; Right to Institute. Every person who has furnished labor or material to the contractor or its subcontractors for the work provided in the contract, in respect of which a payment bond is furnished under this section, and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by such person or material was furnished or supplied by such person for which such claim is made, shall have the right to sue on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action for the sum or sums justly due such person; provided, however, that any person having a direct contractual relationship with a subcontractor of the contractor, but no contractual relationship express or implied with the contractor furnishing said payment bond, shall have a right of action upon the payment bond upon giving written notice to the contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material upon which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be personally served or served by mailing the same by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office or conducts its business.

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

(f) Fiscal Responsibility. Every contract modification, change order, or contract price adjustment under a construction contract shall be subject to prior written certification by the Secretary of Finance as to the effect of the contract modification, change order, or adjustment in contract price on the total project budget or the total contract budget. In the event that the certification discloses a resulting increase in the total project budget and/or the total contract budget, such contract modification, change order, or adjustment in contract price shall not be made unless sufficient funds are available therefore, or the scope of the project or contract is adjusted so as to permit the degree of completion that is feasible within the total project budget and/or total contract budget as it existed prior to the price under consideration; provided, however, that with respect to the validity, as to the contractor, of any executed contract modification, change order, or adjustment in contract price which the contractor has reasonably relied upon, it shall be presumed that there has been compliance with the provisions of this subsection.

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-305 Architect-Engineer Services

(a) Procurement Method. Architect-engineer services shall be procured as provided in this section except when authorized as a small purchase, or expedited procurement.

(b) Policy. It is the policy to publicly announce all requirements for architect-engineer services and negotiate contracts on the basis of demonstrated competence and qualifications at a fair and reasonable price.

(c) Negotiation. The Procurement Officer shall negotiate a contract with the highest qualified architect-engineer firm at a price determined to be fair and reasonable to OPA. In determining what constitutes a fair and reasonable price to OPA, the Procurement Officer shall consider factors such as the prices proposed by other firms responding to the solicitation. If a fair and reasonable price cannot be negotiated with the highest ranking qualified firm, then the Procurement Officer may select additional firms in order of competence and qualifications and continue negotiations until a fair and reasonable price is agreed upon.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-310 Competitive Selection Procedures for Professional Services

(a) Procurement method. The services of accountants, physicians, or lawyers shall be procured as provided in this section except when authorized as a small purchase, expedited procurement, or sole-source procurement.

(b) Policy. It is the policy to publicly announce all requirements for professional services and negotiate contracts on the basis of demonstrated competence and qualifications at a fair and reasonable price. Persons engaged in providing professional services may submit statements of qualifications and expressions of interests providing such types of services. Persons may amend these statements at any time by filing a new statement.

(c) Public announcement and form of request for proposals. Adequate notice of the need for such services shall be given by the Public Auditor through a request for proposals. The request for proposals shall describe the services required, list the type of information and data required of each offeror, and state the relative importance of particular qualifications.

(d) Discussions. The Public Auditor or Procurement Officer may conduct discussions with any offeror who has submitted a proposal to determine such offeror's qualifications for further consideration. Discussions shall not disclose any information derived from proposals submitted by other offerors.

(e) Award. Award shall be made to the offeror determined in writing by the Procurement Officer to be the best qualified based on the evaluation factors set forth in the request for proposals, and negotiation of compensation determined to be fair and reasonable. If compensation cannot be agreed upon with the best qualified offeror then negotiations will be formally terminated with the selected offeror. If proposals were submitted by one or more other offerors determined to be qualified, negotiations may be conducted with such other offeror or offerors, in the order of their respective qualification ranking, and the contract may be awarded

to the offeror then ranked as best qualified if the amount of compensation is determined to be fair and reasonable.

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-315 Lease or Purchase of Vehicles

(a) Policy. Any lease or purchase of OPA vehicles shall be governed by this section. It applies to both the initial acquisition of vehicles and the renewal or extension of vehicle leases. The lease or purchase of vehicles shall be procured using an invitation for bids, unless it qualifies for other procurement methods. All vehicles leased or purchased shall be procured in the name of OPA, and shall conform to CNMI and federal laws, including the CNMI Government Vehicle Act (1 CMC § 7406), and associated rules and regulations.

(b) Whether to Lease or Purchase. Agencies shall consider whether to lease or purchase vehicles based on a case-by-case evaluation of comparative costs and other factors.

(c) Purchase method. The purchase method is appropriate if the vehicles will be used beyond the point in time when cumulative leasing costs exceed the purchase costs.

(d) Lease Method. The lease method is appropriate if it is to OPA's advantage under the circumstances. The lease method may also serve as an interim measure when the circumstances require immediate use of vehicles to meet program or system goals; but do not currently support acquisition by purchase.

(e) Lease with Option to Purchase. If a lease is justified, a lease with option to purchase is preferable. Generally, a long term lease shall be avoided, but may be appropriate if an option to purchase or other favorable terms are included. If a lease with option to purchase is used, the contract shall state the purchase price or provide a formula which shows how the purchase price will be established at the time of purchase.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-320 Computer Software and Hardware

(a) Notwithstanding any other provision of these regulations, commercial computer software, including documentation, and hardware may be procured pursuant to this part.

(b) Commercial computer software, including commercial computer software documentation, may be acquired under a license customarily provided to the public.

(c) In acquiring commercial software, OPA shall not generally require offerors and contractors to:

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- (1) Furnish technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public;
 - (2) Transfer intellectual property rights or otherwise relinquish to, or otherwise provide, OPA the rights to use, modify, reproduce, release, perform, display, or disclose commercial computer software or commercial computer software documentation, except as mutually agreed to by the parties.
- (d) Competitive bidding, or competitive procurement shall not be required for commercial software upon a showing that:
- (1) The software is advertised for sale to the public at prices which are readily determinable from public sources, including but not limited to, sources on the internet;
 - (2) Proof of contemporaneous pricing which is actually available to CNMI purchasers is supplied in the contract package; and
 - (3) The other prices shown are within 10% of the pricing selected, or, the selected vendor will provide support for the software of a value which compensates for the difference in price.
- (e) Competitive bidding, or competitive procurement shall not be required with respect to software for the following:
- (1) Software purchased is an updated version of software previously purchased;
 - (2) An extension of the license for previously-purchased software;
 - (3) An extension of maintenance services for previously-purchased software; or
- (f) The purchase of computer hardware, software, and/or related services, which is/are purchased pursuant to a US General Services Administration (GSA) blanket contract which had been negotiated by the federal government, shall be presumptively concluded to be in compliance with the competitive procurement requirements of these Regulations. This presumption shall apply not only to commercially available products, but also to products which are designed, manufactured and/or assembled according to GSA specifications.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

Part 400 - Contract Terms and Administration of Contracts

§ 130-30-401 Contract Clauses

- (a) **Price.** In executing contracts, OPA shall set the maximum amount that can be charged under the contract and disallow open-ended contracts, i.e. contracts which do not specify the maximum contract price. Whatever contract type is selected, OPA shall limit contracts to a fixed price or a ceiling price, and the contractor shall not exceed the price set unless a change order is approved (See § 130-30-410, change order).
- (b) **Payment Terms.** Payments shall be made only upon submission of evidence of work performed and adherence to contract terms and specifications. Generally, a one-time payment shall be made after the official with expenditure authority has certified completion of work or delivery of goods or services. Other types of payments are as follows:

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- (1) Advance Payments. Advance payments shall be authorized only in certain circumstances as provided in (b)(1)(i)–(iii).
- (i) The contractor fails to qualify as a responsible contractor due solely to the absence of financial capability, and it is justified under § 130-30-225 that the contractor is the only available source, subject to the following conditions:
- (A) General requirements - the contractor pledges adequate security, and the Public Auditor determines, based on written findings, that the advance payment is in the public interest.
- (B) The standards for advance payment determination are:
- (I) The advance payments will not exceed the contractor’s interim cash needs based on an analysis of the cash flow required for contract performance, consideration of the reimbursement or other payment cycle, and employment of the contractor’s own working capital;
- (II) The advance payments are necessary to supplement other funds or credit available for the contract;
- (III) The recipient is otherwise qualified as a responsible contractor in all areas other than financial capability; and
- (IV) Paying the contractor in advance will result in specific advantages to OPA.
- (C) Advance payments shall be limited to not more than 25 percent of the contract price or an amount equivalent to a 60 day working capital requirement, whichever is lower.
- (ii) The Public Auditor demonstrates in writing that the common business practice of a particular industry requires buyers to pay on an advance payment basis. Such advance payment shall be limited to not more than 50 percent of the contract price. Pertinent documents supporting such business practice shall be attached to the written justification.
- (2) Progress Payments. Contracts may provide for progress payments to contractors for work performed or costs incurred in the performance of the contract. Not less than 10 percent of the contract amount shall be withheld pending final completion of the contract and an evaluation of the contractor’s performance. However, if the contract consists of the performance of separate and distinct tasks, then any funds so withheld with regard to a particular task may be paid upon completion of that task and an evaluation of the contractor’s performance. No progress payments on a contract shall be made unless it has first been established that the covered work or service has been delivered in accordance with the contract. Payments shall be allowed on stored materials only upon arrival of materials in the CNMI, not prior to shipment, and only after inspection by the Public Auditor.
- (c) The contract shall accurately reflect actual OPA requirements, stating adequately what is to be done or to be delivered to OPA. For instance, definite quantities shall be stated in the statement of deliverables, unless use of a requirements contract was justified under § 130-30-260. Contracts with general requirements shall be disallowed.

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-405 Contract Administration

- (a) The primary responsibility for ensuring compliance in contracting rests with the Public Auditor. The Public Auditor must ensure that the Procurement Officer complies with

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requirements for advertising the availability of contracts, soliciting bids from potential contractors, evaluating the bidding contractors, drafting the contracts to conform with applicable requirements, obtaining the appropriate approvals, approving payment for services, and evaluating the contractors upon completion of the contracts.

(b) The oversight responsibility for OPA's administration and enforcement of its contracts rests primarily with the Procurement Officer. He or she shall be responsible for the day to day procurement activities, for developing standard contract administration procedures to be used by OPA and for maintaining a central depository of contractor evaluations.

(c) Contract Monitoring.

(1) Contract monitoring shall be accomplished through "production surveillance and reporting." Production surveillance is a function which the Procurement Officer uses to determine contractor progress and to identify any factors that may delay performance. It shall involve OPA review and analysis of:

(i) Contractor performance plans, schedules, controls, and industrial processes; and

(ii) The contractor's actual performance under them.

(2) When information on contract performance status is needed, the Procurement Officer shall require contractors to submit production progress reports.

(3) A post evaluation of each contractor shall be performed by the Procurement Officer before final payment and close-out of the contract is done.

(4) Final payment shall not be made unless the contractor has submitted a tax clearance verifying the filing of all required Commonwealth employment, excise, gross revenue, and income tax returns and payment of all amounts owing on such returns.

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-410 Change Order

(a) Execution of a change order shall only be allowed if an increase, decrease, or change in the scope of work is required which was not reasonably foreseeable at the time of the formation of the contract. However, no change order resulting in an increase in contract cost or time shall be allowed when it is a direct result of the contractor's inexperience, inefficiency, or incompetence.

(b) Before adding significant new work to existing contracts, OPA shall thoroughly assess whether or not it would be more prudent to seek competition. Change orders on construction and A&E contracts which exceed 25 percent of the cumulative contract price shall automatically be procured through competitive procedures pursuant to § 130-30-201, except when the procurement of the additional work is authorized without using full and open competition under § 130-30-215.

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(c) Contractors shall not be allowed to continue working beyond the expiration term of an original contract in the absence of an approved new contract or change order. Change orders shall be processed using the procedures for processing new contracts in § 130-30-115.

(d) Extension of Services. Award of contracts for recurring and continuing service requirements are often delayed due to circumstances beyond the control of contracting offices. In order to avoid negotiation of short extensions to existing contracts, the Procurement Officer may include an option clause in solicitations and contracts which will enable OPA to require continued performance of any services within the limits and at the rates specified in the contract. The option provision may be exercised more than once, but the total extension of performance thereunder shall not exceed 6 months.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

Part 500 - Protests and Disputes

Subpart A - Bid Protests and Appeals

§ 130-30-501 Protests to the Procurement Officer

(a) General

(1) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the Procurement Officer. The protest shall be received by the Procurement Officer in writing within ten days after such aggrieved person knows or should have known of the facts giving rise thereto. The writing shall fully state the factual and legal grounds for the protest. The Procurement Officer shall consider all protests or objections to the award of a contract, whether submitted before or after award;

(2) Other persons, including bidders involved in or affected by the protest shall be given notice of the protest and its basis. These persons shall also be advised that they may submit their views and relevant information to the Procurement Officer within ten days of receipt of the notice;

(3) The Procurement Officer shall decide the protest within twenty calendar days after all interested parties have submitted their views unless he certifies that the complexity of the matter requires a longer time, in which event he shall specify the appropriate longer time;

(4) When a protest, before or after award, has been appealed to the Public Auditor, as provided in these procedures, the Procurement Officer shall compile a report. The Procurement Officer should include with his report a copy of:

(i) The protest;

(ii) The bid submitted by the protesting bidder and a copy of the bid of the bidder who is being considered for award, or whose bid is being protested;

(iii) The solicitation, including the specifications on portions relevant to the protest;

(iv) The abstract of offers or relevant portions;

(v) Any other documents that are relevant to the protest; and

(vi) The Procurement Officer's signed statement setting forth findings, actions, and recommendations and any additional evidence or information deemed necessary in determining

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the validity of the protest. The statement shall be fully responsive to the allegation of the protest. If the award was made after receipt of the protest, the Procurement Officer's report will include the determination prescribed in subsection (b)(3).

(5) Since timely action on protests is essential, they should be handled on a priority basis. Upon receipt of notice that an appeal from the Procurement Officer's decision has been taken to the Public Auditor, the Procurement Officer shall immediately begin compiling the information necessary for a report as provided in subsection (a)(4).

(b) Protest Before Award

(1) When a proper protest against the making of an award is received, the award will be withheld pending disposition of the protest. The bidders whose bids might become eligible for award shall be informed of the protest. In addition, the Procurement Officer shall request those bidders, before expiration of the time for acceptance of their bids, to extend the time for acceptance to avoid the need for re-advertisement. In the event of failure to obtain such extensions of bids, consideration shall be given to proceeding with an award under subsection (b)(2).

(2) When the Procurement Officer receives a protest, a contract may not be awarded pending the resolution of the protest and appeal to the Public Auditor, if any, (including the time period for filing an appeal), unless it is determined in writing that urgent and compelling circumstances which significantly affect the interest of OPA will not permit awaiting the resolution of the protest or appeal, if any.

(3) The Procurement Officer is authorized to act upon the determination in subsection (b)(2) after receiving the approval of the Public Auditor. The approval is obtained by submitting the determination of the urgent and compelling situation to OPA Legal Counsel for review, and absent objection from OPA Legal Counsel within five days of such submittal, the Procurement Officer's determination becomes final. The Procurement Officer also shall give written notice to the protester and others concerned of the decision to proceed with the award.

(c) Protests After Award

Although persons involved in or affected by the filing of a protest after award may be limited, in addition to the Procurement Officer, at least the contractor shall be furnished the notice of protest and its basis in accordance with subsection (a)(2). When it appears likely that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to OPA's interest, the Procurement Officer should consider seeking a mutual agreement with the contractor to suspend performance on a no-cost basis.

(d) Computation of Time

(1) Except as otherwise specified, all "days" referred to in this part are deemed to be working days of the Commonwealth government. The term "file" or "submit" except as otherwise provided refers to the date of transmission.

(2) In computing any period of time prescribed or allowed by these procedures, the day of the act or event from which the designated period of time begins to run shall not be included.

Modified, 1 CMC § 3806(g).

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History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-505 Appeals of Procurement Officer's Decisions to a Designated Hearing Officer

- (a) Within 10 days of receipt of the appeal, the Public Auditor shall contract a Designated Hearing Officer to preside over the appeal. The Designated Hearing Officer must be a CNMI-licensed attorney in good standing. The Public Auditor shall notify all interested parties upon selection of a Designated Hearing Officer. Such notice shall instruct all interested parties that further communication regarding the appeal must be directed to the Designated Hearing Officer.
- (b) Jurisdiction; Exhaustion of Remedies. A written appeal to the Public Auditor from a decision by the Procurement Officer may be taken provided that the party taking the appeal has first submitted a written protest to the Procurement Officer as provided in § 130-30-501, and the Procurement Officer has denied the protest or has failed to act on the protest within the time provided for in § 130-30-501(a)(3).
- (c) Form of Appeal. No particular form of pleading is required for filing an appeal to the Public Auditor. The appeal shall, however:
- (1) Include the name and address of the appellant;
 - (2) Identify the number of the solicitation or contract;
 - (3) Contain a concise, logically arranged, and direct statement of the grounds for appeal; and
 - (4) Specifically request a ruling by the Public Auditor.
- (d) Time for Filing Appeal. An appeal from the Procurement Officer's decision must be received by the Public Auditor not later than ten days after the appellant receives the decision of the Procurement Officer, or, in the event that the Procurement Officer has not decided the protest within ten days from the date that he should have decided the protest pursuant to § 130-30-501(a)(3). Any appeal received after these time limits shall not be considered by the Public Auditor or Designated Hearing Officer.
- (e) Notice of Appeal, Submission of the Procurement Officer's Report and Time for Filing of Comments on Report.
- (1) The Public Auditor shall notify the Procurement Officer in writing within one day of the receipt of an appeal, requesting the Procurement Officer to give notice of the appeal to the contractor if award has been made or, if no award has been made, to all bidders or proposers who appear to have a substantial and reasonable prospect of receiving an award if the appeal is denied. The Procurement Officer shall be requested to furnish in accordance with § 130-30-501(a)(2) copies of the protest and appeal documents to such parties with instructions to communicate further directly with the Public Auditor or his Designated Hearing Officer as directed.
 - (2) Material submitted by an appellant will not be withheld from any Commonwealth or federal agency which may be involved in the appeal except to the extent that the withholding of information is permitted or required by law or regulation. If the appellant considers that the protest contains material which should be withheld, a statement advising of this fact must be

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affixed to the front page of the appeal document and the allegedly proprietary information must be so identified wherever it appears.

(3) The Public Auditor or his Designated Hearing Officer shall request the Procurement Officer to submit a complete report on the appeal to the Designated Hearing Officer as expeditiously as possible (generally within 10 working days) in accordance with § 130-30-501(a)(4) and to furnish a copy of the report to the appellant and other interested parties.

(4) Comments on the Procurement Officer's report shall be filed with the Designated Hearing Officer within ten days after the Designated Hearing Officer's receipt of the report, with a copy to the Public Auditor and to other interested parties. Any rebuttal an appellant or interested party may make shall be filed with the Designated Hearing Officer within five days after receipt of the comments to which rebuttal is directed, with a copy to the Public Auditor, the appellant, and interested parties, as the case may be.

(5) The failure of an appellant or any interested party to comply with the time limits stated in this section may result in resolution of the appeal without consideration of the comments untimely filed.

(f) **Furnishing of Information on Protests.** The Designated Hearing Officer shall, upon request, make available to any interested party information bearing on the substance of the appeal which has been submitted by interested parties or agencies except to the extent that withholding of information is permitted or required by law or regulation. Any comments thereon shall be submitted within a maximum of ten days.

(g) **Time for Submission of Additional Information.** Any additional information requested by the Designated Hearing Officer from the appellant or interested parties shall be submitted no later than five days after the receipt of such request.

(h) **Conference.**

(1) A conference on the merits of the appeal with the Designated Hearing Officer may be held at the request of the appellant, any other interested party, or the Procurement Officer. Request for a conference should be made prior to the expiration of the time period allowed for filing comments on the agency report. Except in unusual circumstances, requests for a conference received after such time will not be honored. The Designated Hearing Officer will determine whether a conference is necessary for resolution of the appeal.

(2) Conferences normally will be held prior to expiration of the period allowed for filing comments on the agency report. All interested parties shall be invited to attend the conference. Ordinarily, only one conference will be held on an appeal.

(3) Any written comments to be submitted, if deemed appropriate by the Designated Hearing Officer, as a result of the conference, must be received by the Designated Hearing Officer within five days of the date on which the conference was held.

(4) **Time for Decision - Notice of Decision:** The Designated Hearing Officer shall, if possible, issue a decision on the appeal within 25 days after all information necessary for the resolution of the appeal has been received. A copy of the decision shall immediately be mailed or otherwise transmitted to the appellant, other participating parties, and the Procurement Officer.

(i) **Request for Reconsideration.**

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- (1) Reconsideration of a decision of the Designated Hearing Officer may be requested by the appellant, any interested party who submitted comments during consideration of the protest, the Procurement Officer, or the Public Auditor. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.
- (2) Request for reconsideration of a decision of the Designated Hearing Officer shall be filed not later than ten days after the basis for reconsideration is known or should have been known, whichever is earlier. The term “filed” as used in this section means receipt by the Designated Hearing Officer.
- (3) A request for reconsideration shall be subject to these bid protest procedures consistent with the need for prompt resolution of the matter.

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-510 Remedies

- (a) Remedies Prior to Award. If prior to award the Procurement Officer or the Designated Hearing Officer determines that a solicitation or proposed award of a contract is in violation of law or regulation, then the Procurement Officer or the Designated Hearing Officer shall have the solicitation or proposed award:
 - (1) Canceled; or
 - (2) Revised to comply with law or regulation.
- (b) Remedies After an Award. If after an award the Procurement Officer or the Designated Hearing Officer determines that a solicitation or award of a contract is in violation of law or regulation, then the Procurement Officer or the Designated Hearing Officer may:
 - (1) If the person awarded the contract has not acted fraudulently or in bad faith:
 - (i) Ratify or affirm the contract provided it is determined that doing so is in the best interest of OPA; or
 - (ii) Terminate the contract and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to termination;
 - (2) If the person awarded the contract has acted fraudulently or in bad faith:
 - (i) Declare the contract null and void; or
 - (ii) Ratify or affirm the contract if such action is in the best interests of OPA, without prejudice to OPA’s rights to such damages as may be appropriate.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-515 Effective Date

All protests as to the manner of bidding, the failure to properly award a bid, the failure of OPA to contract with a business after bidding, or the cancellation of bids which may or may not be

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subject of lawsuit but have not reached final judgment as of the effective date of the regulations in Chapter 130-30 shall be heard in accordance with this subpart upon the request of the actual or prospective bidder, vendor, or contractor who is aggrieved.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

Subpart B - Disputes

§ 130-30-520 Disputes

(a) Any dispute between OPA and a contractor relating to the performance, interpretation of, or compensation due under a contract, which is the subject of the regulations in Chapter 130-30, must be filed in writing with the Procurement Officer and the Public Auditor within ten calendar days after knowledge of the facts surrounding the dispute.

(b)(1) The Procurement Officer will attempt to resolve the dispute by mutual agreement. If the dispute cannot be settled either party may request a decision on the dispute from the Public Auditor. The Public Auditor shall review the facts pertinent to the dispute, secure necessary legal assistance and prepare a decision that shall include:

- (i) Description of the dispute;
- (ii) Reference to pertinent contract terms;
- (iii) Statement of the factual areas of disagreement or agreement; and
- (iv) Statement of the decision as to the factual areas of disagreement and conclusion of the dispute with any supporting rationale.

(2) The Public Auditor may require a hearing or that information be submitted on the record, in his discretion.

(c) **Duty to Continue Performance.** A contractor that has a dispute pending before the Public Auditor or the Procurement Officer must continue to perform according to the terms of the contract and failure to so continue shall be deemed to be a material breach of the contract unless he obtains a waiver of this provision by the official with the expenditure authority.

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

Part 600 - [Reserved]

Part 700 - Ethics in Public Contracting

Subpart A - Definitions

§ 130-30-701 Definitions of Terms

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- (a) “Confidential information” means any information which is available to an employee only because of the employee’s status as an employee of OPA and is not a matter of public knowledge or available to the public on request.
- (b) “Conspicuously” means written in such special or distinctive form, print, or manner that a reasonable person against whom it is to operate ought to have noticed it.
- (c) “Direct or indirect participation” means involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity.
- (d) “Financial interest” means:
- (1) Ownership of any interest or involvement in any relationship from which or as a result of which, a person within the past year has received or is presently or in the future entitled to receive compensation; or
 - (2) Holding a position in a business such as an officer, director, trustee, partner, employee or the like, or holding any position of management.
- (e) “Gratuity” means a payment, loan, subscription, advance, deposit of money, services or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received.
- (f) “Immediate family” means spouse, children, parents, brothers, and sisters.

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

Subpart B - Standards of Conduct

§ 130-30-705 Policy

Public employment is a public trust. In OPA contracting, public employees shall discharge their duties impartially so as to:

- (a) Ensure fair competitive access to OPA procurement by reasonable contractors; and
- (b) Conduct themselves in a manner as to foster public confidence in the integrity of the OPA procurement process.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-710 General Standards

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(a) Employees. Any attempt to realize personal gain through public employment by conduct inconsistent with the proper discharge of the employee's duties is a breach of a public trust. In order to fulfill this ethical standard, employees must meet the requirements of the regulations in Chapter 130-30.

(b) Contractors. Any effort to influence any public employee to breach the standards of ethical conduct set forth in Chapter 130-30 is also a breach of ethical standards.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-715 Employee Disclosure Requirements

(a) Disclosure of benefit received from contract. Any employee who has, or obtains any benefit from any OPA contract with a business in which the employee has a financial interest shall report such benefit to the Public Auditor.

(b) Failure to disclose benefit received. Any employee who knows or should have known of such benefit and fails to report such benefit is in breach of these ethical standards.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-720 Employee Conflict of Interest

(a) Conflict of interest. It is a breach of ethical standards for any employee to participate directly or indirectly in a procurement when the employee knows that:

- (1) The employee or any member of the employee's immediate family has a financial interest pertaining to the procurement; or
- (2) Any other person, business, or organization with whom the employee or any member of the employee's immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement.

(b) Discovery of actual or potential conflict of interest, disqualification and waiver. Upon discovery of an actual or potential conflict of interest, an employee shall promptly file with the Procurement Officer a written statement of disqualification and shall withdraw from further participation in the transaction involved.

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-725 Gratuities and Kickbacks

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

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

Modified, 1 CMC § 3806(g).

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130- 30-730 Prohibition Against Contingent Fees

(a) **Contingent fees.** It shall be a breach of ethical standards for a person to be retained, or to retain a person, to solicit or secure OPA contracts upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies for the purpose of securing business.

(b) **Representation of contractor.** Every person, before being awarded an OPA contract, shall represent, in writing that such person has not retained anyone in violation of this section. Failure to do so constitutes a breach of ethical standards.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-735 Contract Clauses

The prohibitions against gratuities, kickbacks, and against contingent fees shall be conspicuously set forth in every contract and solicitation therefor.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-740 Restrictions on Employment of Present and Former Employees

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(a) Present employees. It shall be a breach of ethical standards for any employee who is participating directly or indirectly in the procurement process to become or be, while such an employee, the employee of any person contracting with OPA.

(b) Restrictions on former employees in matters connected with their former duties. Permanent disqualification of former employee personally involved in a particular matter. It shall be a breach of ethical standards for any former employee knowingly to act as a principal, or as an agent for anyone other than OPA, in connection with any:

- (1) Judicial or other proceeding, application, request for a ruling or other determination;
- (2) Contract;
- (3) Claim; or
- (4) Charge or controversy, in which the employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise while an employee, where OPA is a party or has a direct or substantial interest.

(c) Disqualification of business when an employee has a financial interest. It shall be a breach of ethical standards for a business in which an employee has a financial interest knowingly to act as a principal, or as an agent for anyone other than OPA, in connection with any:

- (1) Judicial or other proceeding, application, request for a ruling or other determination;
- (2) Contract;
- (3) Claim; or
- (4) Charge or controversy, in which the employee either participates personally and substantially through decision, approval, disapproval recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of the employee's official responsibility, where OPA is a party or has a direct and substantial interest.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-745 Use of Confidential Information

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

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-750 Collusion by Bidders

Collusion or secret agreements between bidders for the purpose of securing an advantage to the bidders against OPA in the awarding of contracts are prohibited. The Public Auditor may declare the contract void if he finds sufficient evidence after a contract has been let that contract was obtained by a bidder or bidders by reason of collusive or secret agreement among the bidders to the disadvantage of OPA.

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History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-755 Civil and Administrative Remedies

In addition to existing remedies provided by law, any person who violates any of the provisions of the regulations in Chapter 130-30 may be subject to one or more of the following:

- (a) OPA employees.
 - (1) An employee who violates the provisions of the rules and regulations in Chapter 130-30 is subject to adverse action as may be appropriate in his or her particular circumstances.
 - (2) This action includes but is not limited to reprimand, suspension without pay, termination of employment, civil injunction, civil suit for damages or return of government money, or criminal prosecution.
- (b) Contractors. A contractor who violates a provision of the rules and regulations in Chapter 130-30 shall be subject to a written warning of reprimand, the termination of the contract, or suspension from being a contractor or subcontractor under an OPA contract in addition to other penalties prescribed by law.
- (c) All proceedings under this section must be in accordance with due process requirements.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).

§ 130-30-760 Authority to Debar or Suspend

- (a) Authority. After reasonable notice to the person involved and reasonable opportunity for the person to be heard under the Administrative Procedure Act (1 CMC §§ 9101, *et seq.*), the Public Auditor, after consultation with the Attorney General, shall have authority to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than three years. The Public Auditor, after consultation with the Attorney General, shall have authority to suspend a person from consideration for award of contracts if there is probable cause for debarment. The suspension shall not be for a period exceeding three months.
- (b) Causes for debarment or suspension. The causes for debarment or suspension include the following:
 - (1) Conviction for commission of a criminal offense is an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;
 - (2) Conviction under Commonwealth or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, violation of the Consumer Protection Act (4 CMC §§ 5101, *et seq.*), violation of any unfair business practices as prescribed by 4 CMC § 5202, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects its responsibility as a government contractor;

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- (3) Conviction under Commonwealth or federal antitrust statutes arising out of the submission of bids or proposals such as in chapter 2 of division 5 of title 4 of the Commonwealth Code;
 - (4) Violation of contract provisions, as set forth below, of a character which is regarded by the Public Auditor to be so serious as to justify debarment action:
 - (i) Deliberate failure without good cause to perform in accordance with the specifications within the time limits provided in the contract; or
 - (ii) A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered a basis for debarment;
 - (5) Any other cause that the Public Auditor determines to be so serious and compelling as to affect responsibility as an OPA, including debarment by another governmental entity; or
 - (6) For violation of any of the ethical standards set forth in part 600.
- (c) Decision. The Public Auditor shall issue a written decision to debar or suspend. The decision shall state the reasons for the action taken.
- (d) Notice of decision. A copy of the decision shall be mailed or otherwise furnished immediately to the debarred or suspended person. A copy of the decision shall also be provided to other Commonwealth procurement offices.

History: Amdts. Adopted 39 Com. Reg. 40368 (Nov. 28, 2017); Amdts. Proposed 39 Com. Reg. 39785 (Jul. 28, 2017); Adopted 38 Com. Reg. 38404 (Aug. 28, 2016); Proposed 38 Com. Reg. 37923 (May 28, 2016).