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GRANT GILLESPIE
EXECUTIVE DIRECTOR

May 3, 2022

Dr. Shane Robbins, Superintendent
Kershaw County School District
2029 West DeKalb Street
Camden, SC 29020

Re: Written Opinion of the Division of Procurement Services
Kershaw County School District
Proposed Procurement Code and Regulations, dated May 2, 2022

Dr. Robbins:

On May 2, 2022, you requested the Division of Procurement Services provide a written opinion pursuant to SC Code Ann. § 11-35-5340, regarding Kershaw County School District's referenced Procurement Code and Regulations. Our evaluation of the District's proposed Procurement Code and Regulations relied on your certification provided in the request letter that every change in the base document has been shown.

The opinion of the Division of Procurement Services is that the referenced Procurement Code and Regulations are substantially similar to the provisions of the South Carolina Consolidated Procurement Code and Regulations[1] in effect at the date of this opinion.

This opinion does not extend to or endorse any exemptions granted by the District's Board or provided for in the District's internal operating procedures. As reflected in Section 710 of referenced procurement code, the District's board has exclusive authority and responsibility regarding exemptions.[2]

Sincerely,

Crawford Milling
Director, Audit and Certification

cc: Al Morant, Procurement Officer
John St. C. White, Materials Management Officer

[1] See SC Code Ann. § 11-35-5340 and Regulation 19-445.3000 (C) Substantially Similar, and (E) Guidelines, Model Code. (Attachment 1)
[2] See 2021 Model School District Procurement Code, Section 710, and Model Comment (Attachment 2)

Attachment 1
School Districts Subject to Consolidated Procurement Code; Exemptions

SECTION 11-35-5340. School district subject to consolidated procurement code; exemptions.

Irrespective of the source of funds, any school district whose budget of total expenditures, including debt service, exceeds seventy-five million dollars annually is subject to the provisions of Chapter 35, Title 11, and shall notify the Director of the Division of Procurement Services of the State Fiscal Accountability Authority of its expenditures within ninety days after the close of its fiscal year. However, if a district has its own procurement code which is, in the written opinion of the Division of Procurement Services of the State Fiscal Accountability Authority, substantially similar to the provisions of the South Carolina Consolidated Procurement Code, the district is exempt from the provisions of the South Carolina Consolidated Procurement Code except for a procurement audit which must be performed every three years by an audit firm approved by the Division of Procurement Services. Costs associated with the internal review and audits are the responsibility of the school district and will be paid to the entity performing the audit.

19-445.3000. School District Procurement Codes; Model.

A. Application.

Under Section 11-35-5340, a school district is exempt from the South Carolina Consolidated Procurement Code (except for a procurement audit) if the district has its own procurement code which is, in the written opinion of the Division of Procurement Services of the State Fiscal Accountability Authority, substantially similar to the provisions of the Consolidated Procurement Code and regulations in effect at the time the opinion is issued.

B. Delegation.

The authority and responsibilities under Section 11-35-5340 are hereby delegated to the Materials Management Officer.

C. Substantially Similar.

To qualify for approval, a district code should largely mirror, but need not be identical to, the Consolidated Procurement Code. Because a district code needs only to be substantially similar to the consolidated procurement code and regulations, a district code may accommodate the differing context of school districts (e.g., differences between state government and local school district operations, including size, purchasing staff resources, volume and type of procurements, and structure of its governing body and executive hierarchy) as long as it preserves the sound procurement policies and practices underlying the rules found in the consolidated procurement code and regulations.

D. Definitions.

Covered District means a school district subject to the requirements of Section 11-35-5340. Model code means a model school district procurement code and any subsequent modifications to the model code, including instructions regarding how each district may customize the model code to an individual district's organizational structure.

E. Guidelines; Model Code.

By requiring a written opinion, Section 11-35-5340 provides for an exercise of judgment. The best interest of the state is served by exercising this judgment in a consistent manner. Accordingly, the Materials Management Office may publish guidance regarding its exercise of this judgment, including publication of a model code. In developing a model code, the Materials Management Officer should consult with all covered districts and the State Department of Education. Any model should be designed to serve and comply with the purposes and policies enumerated in Section 11-35-20 in the specific context of local school district operations, with due regard for minimizing administrative costs of compliance with the model code. Prior to publishing a model code, the Materials Management Officer must determine in writing that the model code is substantially similar to the provisions of the South Carolina Consolidated Procurement Code and these procurement regulations. Any school district may adopt the model code.

F. Duration of Written Opinion.

A written opinion issued pursuant to Section 11-35-5340 remains valid for a covered district's procurement code until the covered district seeks and receives a written opinion for modifications to its procurement code.

G. Effect of Adoption.

A procurement code adopted by a school district in accordance with all applicable law shall have the full force and effect of law.

Attachment 2
2021 School District Model Code
Section 710 - Model Comment

SECTION 710. Exemptions. (S.C. Code § 11-35-710)

The Board may exempt specific supplies, services, information technology, or construction from the purchasing procedures required in this code. Exemptions granted by the Board shall appear in any internal operating protocols or procedures adopted pursuant to Section 540.

[*Model Comment:*

(1) At the state level, exemptions granted by the State Fiscal Accountability Authority do not form part of the Consolidated Procurement Code. Similarly, exemptions granted by a school board may not be included in the District's procurement code. A District may wish to include such exemptions in the District's internal operating protocols or procedures adopted pursuant to Section 540.

(2) Any exemption from a District's procurement code must be approved by the Board through an act of equal dignity. Such exemptions cannot be approved simply by including them in the procedures adopted under Section 540.

(3) Pursuant to Section 11-35-710, the Division of Procurement Services must approve the District's procurement code as substantially similar to the Consolidated Procurement Code. Given this limitation, Division of Procurement Services cannot approve exemptions other than those appearing in Section 11-35-710 of the Consolidated Procurement Code. Accordingly, Districts are encouraged to adopt the Section 710 as it appears in this model. However, Division of Procurement Services will approve a version of Section 710 that mirrors Section 11-35-710.

(4) Division of Procurement Services will not offer a written opinion approving or disapproving a school board's exemptions. The determination of which procurements should be exempt belongs to the elected officials. See, generally, Glasscock Company, Inc. v. Sumter County, 361 S.C. 483, 604 S.E.2d 718 (Ct. App. 2004) (rejecting argument that 11-35-50 (now 11-35-5320) prevents local government from exercising the flexibility provided to the state by section 11-35-710). Caveat: Division of Procurement Services advises school districts to avoid granting excessive or overly broad exemptions. At some point, exemptions could so undermine the purposes of the law as to be inconsistent with the General Assembly's mandates in Sections 11-35-5320 and 11-35-5340. As part of its approval process, Division of Procurement Services offers no official opinion as to individual exemptions.

(5) Since 1981, the South Carolina Budget & Control Board and the State Fiscal Accountability Authority have granted a number of exemptions for state agencies. A comprehensive list of the currently available exemptions is available at the following URL: www.procurement.sc.gov]

TABLE OF CONTENTS

Article 1. General Provisions

Section 10. Citation.
Section 20. Purpose and policies.
Section 25. Supersession of conflicting laws.
Section 30. Obligation of good faith.
Section 40. Application of this Code.
Section 45. Payment for goods and services received by District.
Section 210. Determinations; exemption.
Section 310. Definitions.
Section 410. Public access to procurement information.
Section 450. Reporting purchases.

Article 3. Procurement Organization

Section 510. Centralization of materials management authority.
Section 540. Authority and duties of the Board.
Section 710. Exemptions.
Section 840. Delegation of authority
Section 1030. Procurement training and certification.
Section 1250. Authority to contract for auditing services.
Section 1260. Authority to contract for legal services.

Article 5. Source Selection and Contract Formation

Section 1410. Definitions of terms used in this article.
Section 1510. Methods of source selection.
Section 1520. Competitive sealed bidding.
Section 1524. Resident vendor preference.
Section 1525. Competitive fixed price bidding.
Section 1528. Competitive best value bidding.
Section 1529. Competitive online bidding.
Section 1530. Competitive sealed proposals.
Section 1540. Negotiations after unsuccessful competitive sealed bidding.
Section 1550. Small purchase procedures; when competitive bidding required.
Section 1560. Sole source procurement; public notice.
Section 1570. Emergency procurements; public notice.
Section 1575. Participation in auction or sale of supplies from bankruptcy.
Section 1710. Cancellation of invitation for bids or request for proposals.
Section 1810. Responsibility of bidders and offerors.
Section 1820. Prequalification of supplies and suppliers.
Section 1830. Cost or pricing data.
Section 2010. Types of contracts.
Section 2015. Effect of contract or amendment.
Section 2020. Approval of accounting system.
Section 2030. Multiterm contracts.
Section 2040. Inapplicable laws.
Section 2050. Void contract terms or conditions.
Section 2060. Material changes prohibited.

Section 2210. Right to inspect plant.
Section 2220. Right to audit records.
Section 2410. Finality of determinations.
Section 2420. Reporting of anticompetitive practices.
Section 2430. Retention of procurement records.
Section 2440. Records of procurement actions.

Article 7. Specifications

Section 2610. Definitions of terms used in this article.
Section 2710. Issuance of specifications; duties of the Board.
Section 2730. Assuring competition.
Section 2740. Relationship with using agencies.
Section 2750. Specifications prepared by architects and engineers.

Article 9. Construction, Architect-Engineer, Construction Management, and Land Surveying Services

Section 2910. Definitions of terms used in this article.
Section 3005. Project delivery methods authorized.
Section 3010. Choice of project delivery method.
Section 3015. Source selection methods assigned to project delivery methods.
Section 3020. Additional bidding procedures for construction procurement.
Section 3021. Subcontractor substitution.
Section 3023. Prequalification on District construction.
Section 3024. Additional procedures applicable to procurement of certain project delivery methods.
Section 3030. Bond and security.
Section 3035. Errors and omissions insurance.
Section 3037. Other forms of security.
Section 3040. Contract clauses and their administration.
Section 3050. Cost principles regulations for construction contractors.
Section 3070. Approval of architectural, engineering or construction changes which do not alter scope or intent or exceed approved budget.
Section 3210. Policy.
Section 3215. Preference for resident design service; definitions; exceptions.
Section 3220. Qualifications based selection procedures.
Section 3230. Exception for small architect engineer, construction management and land surveying services contract.
Section 3245. Architect, engineer, or construction manager; performance of other work.

Article 10. Indefinite Delivery Contracts

Section 3305. Establishment of indefinite quantity contracts.
Section 3310. Indefinite quantity contracts.

Article 11. Modifications and Termination of Contracts for Supplies and Services.

Section 3320. Task order contracts.
Section 3410. Contract clauses and their administration.

Article 13. Cost Principles

Section 3510. Cost principles required for supplies and services contracts.

Article 15. Supply Management

Section 3810. Regulations for sale, lease, transfer and disposal.
Section 3820. Allocation of proceeds for sale or disposal of surplus supplies.
Section 3830. Trade-in sales.
Section 3850. Sale of unserviceable supplies.

Article 17. Legal and Contractual Remedies

Section 4210. Right to protest; procedure; duty and authority to attempt to settle; administrative review; stay of procurement.
Section 4215. Posting of bond or irrevocable letter of credit.
Section 4220. Authority to debar or suspend.
Section 4230. Authority to resolve contract and breach of contract controversies.
Section 4310. Solicitations or awards in violation of the law.
Section 4315 Unauthorized award or modification of a contract.
Section 4320. Contract controversies.
Section 4330. Frivolous protests.
Section 4340. Rights and remedies.
Section 4410. Procurement Review Panel.
Section 4425. Final order not appealed.
Section 4430. Communication of panel members.

Article 19. Intergovernmental Relations

Article 21. Assistance to Minority Businesses

Section 5010. Definitions of terms used in this article.
Section 5210. Statement of policy and its implementation.
Section 5220. Duties of the chief procurement officer.
Section 5230. Regulations for negotiation with District minority firms.
Section 5240. Minority business enterprise (MBE) utilization plan.
Section 5250. Progress payments and letter of credit.

Article 23. Statewide Provisions

District Procurement Regulations

2000. District Procurement Regulations.
2005. Internal Procurement Procedures; Procurement Records.
2010. Disclosure of Procurement Information.
2015. Unauthorized or Illegal Procurements.
2017. Pre-solicitation Procedures.
2025. Authority to Contract for Certain Services; Definitions.
2027. Electronic Commerce.
2030. Competitive Sealed Bidding; The Invitation for Bids.
2040. Publication of District Business Opportunities.
2042. Pre Bid Conferences.
2045. Receipt, Safeguarding, and Disposition of Bids.

2050. Bid Opening.
2055. Bid Acceptance and Bid Evaluation.
2060. [Repealed]
2065. Rejection of Bids.
2070. Rejection of Individual Bids.
2075. All or None Qualifications.
2077. Bid Samples and Descriptive Literature.
2080. Bid Reductions.
2085. Correction or Withdrawal of Bids; Cancellation of Awards.
2090. Award.
2095. Competitive Sealed Proposals.
2097. Rejection of Proposals.
2098. Rejection of Individual Proposals.
2100. Small Purchases and Other Simplified Purchasing Procedures.
2105. Sole Source Procurements.
2110. Emergency Procurements.
2115. Information Technology Procurements.
2120. Cost or Pricing Data.
2122. Price Reasonableness.
2125. Responsibility of Bidders and Offerors.
2127. Organizational Conflicts of Interest
2130. Prequalification of Supplies and Suppliers.
2132. Prequalification for a Single Solicitation.
2135. Conditions for Use of Multi term Contracts.
2140. Specifications.
2141. Commercial Products.
2143. Contract clauses and administration.
2145. Construction, Architect Engineer, Construction Management, and Land Surveying Services.
2150. Surplus Property Management.
2152. Leases, Lease/Payment, Installment Purchase, and Rental of Personal Property.
2160. Assistance to Minority Businesses.
2165. Gifts
2180. Assignment, Novation, and Change of Name.
2200. Administrative Review Protective Orders.

District Internal Operating Procedures

Appendix I of the Office of State Engineer's 2020 Manual for Planning and Execution of State Permanent Improvements. *See also* Competitive Sealed Proposals, Required Procedures and Guidance for Communications After Opening but Prior to Award (eff. Sept. 2021), *found at* https://procurement.sc.gov.

Chapter 3.5 of the Office of State Engineer's 2020 Manual for Planning and Execution of State Permanent Improvements.

Office of State Engineer's 2020 Manual for Planning and Execution of State Permanent Improvements, Chapters 9.3 and 9.4, Indefinite Quantity contracts for professional services; and Chapters 9.5 and 9.6, Task Order Contracts for construction services.

PROCUREMENT CODE & REGULATIONS
KERSHAW COUNTY SCHOOL DISTRICT

ARTICLE 1

GENERAL PROVISIONS

SECTION 10. Citation. (S.C. Code § 11-35-10)

(1) Adoption. This document is adopted pursuant to the mandate of Section 11-35-5340 of the South Carolina Code of Laws, is intended to have the force and effect of law, and shall be known and may be cited as the "Kershaw County School District Consolidated Procurement Code." Section 11-35-5340 of the South Carolina Code of Laws provides as follows: " Irrespective of the source of funds, any school district whose budget of total expenditures, including debt service, exceeds seventy-five million dollars annually is subject to the provisions of Chapter 35, Title 11, and shall notify the Director of the Division of Procurement Services of the State Fiscal Accountability Authority of its expenditures within ninety days after the close of its fiscal year. However, if a District has its own procurement code which is, in the written opinion of the Division of Procurement Services of the State Fiscal Accountability Authority, substantially similar to the provisions of the South Carolina Consolidated Procurement Code, the District is exempt from the provisions of the South Carolina Consolidated Procurement Code except for a procurement audit which must be performed every three years by an audit firm approved by the Division of Procurement Services. Costs associated with the internal review and audits are the responsibility of the school district and will be paid to the entity performing the audit."

[Model Comment:
1. This 2021 Model School District Code is the first revision of the 2011 Model School District Code. Although a few new statutes and regulations (e.g. competitive negotiations, S.C. Code § 11-35-1535 and Regulation 19-446.2099) were inappropriate for or not relevant to school districts and not included in this version, most of the statutory and regulatory amendments since 2011 have been tailored for school districts and incorporated into this 2021 version. A redline comparison between the 2011 and 2021 codes is found here: https://www.procurement.sc.gov/schoolscodes

2. Section 11-35-5340 provides for the Division of Procurement Services of the State Fiscal Accountability Authority to provide a written opinion. Regulation 19-445.3000(B), a regulation promulgated by the State Fiscal Accountability Authority, provides that "[t]he authority and responsibilities under Section 11-35-5340 [have been] delegated to the Materials Management Officer."
3. Section 11-35-5340 is implemented by a regulation, which reads as follows:
A. Application.
Under Section 11-35-5340, a school district is exempt from the South Carolina Consolidated Procurement Code (except for a procurement audit) if the District has its own procurement code which is, in the written opinion of the Division of Procurement Services of the State Fiscal Accountability Authority, substantially similar to the provisions of the Consolidated Procurement Code and regulations in effect at the time the opinion is issued.
B. Delegation.
The authority and responsibilities under Section 11-35-5340 are hereby delegated to the Materials Management Officer.
C. Substantially Similar.
To qualify for approval, a District code should largely mirror, but need not be identical to, the Consolidated Procurement Code. Because a District code needs only to be substantially similar to the consolidated procurement code and regulations, a District code may accommodate the differing context of school districts (e.g., differences between state government and local school district operations, including size, purchasing staff resources, volume and type of procurements, and structure of its governing body and executive hierarchy) as long as it preserves the sound procurement policies and practices underlying the rules found in the consolidated procurement code and regulations.
D. Definitions.
Covered District means a school district subject to the requirements of Section 11-35-5340. Model code means a model school district procurement code and any subsequent modifications to the model code, including

instructions regarding how each District may customize the model code to an individual District's organizational structure.

E. Guidelines; Model Code.

By requiring a written opinion, Section 11-35-5340 provides for an exercise of judgment. The best interest of the state is served by exercising this judgment in a consistent manner. Accordingly, the Materials Management Office may publish guidance regarding its exercise of this judgment, including publication of a model code. In developing a model code, the Materials Management Officer should consult with all covered Districts and the State Department of Education. Any model should be designed to serve and comply with the purposes and policies enumerated in Section 11-35-20 in the specific context of local school district operations, with due regard for minimizing administrative costs of compliance with the model code. Prior to publishing a model code, the Materials Management Officer must determine in writing that the model code is substantially similar to the provisions of the South Carolina Consolidated Procurement Code and these procurement regulations. Any school district may adopt the model code.

F. Duration of Written Opinion.

A written opinion issued pursuant to Section 11-35-5340 remains valid for a covered District's procurement code until the covered District seeks and receives a written opinion for modifications to its procurement code.

G. Effect of Adoption.

A procurement code adopted by a school district in accordance with all applicable law shall have the full force and effect of law

23 S.C. Code Ann. Regs. 19-445.3000.]

(2) Prior District Rules Superseded. This code and the accompanying procurement regulations supersede all other prior codes, regulations, ordinances, policies, procedures, or other rules of this District regarding procurement. To the extent of any conflict, this code and the accompanying procurement regulations take precedence over any other codes, regulations, ordinances, policies, procedures, or other rules of this District.

(3) Approval of Code. By letter dated May 3, 2022, the District received a written opinion from the Division of Procurement Services to the effect that this code and the accompanying procurement regulations are substantially similar to the provisions of the South Carolina Consolidated Procurement Code and the regulations promulgated thereunder, as required by Section 11-35-5340 and Regulation 19-445.3000 of the South Carolina Code of Laws and Regulations.

(4) Updating of Code. The Board intends that this code be updated in conjunction with changes to the South Carolina Consolidated Procurement Code and the regulations promulgated thereunder; accordingly, whenever the South Carolina Consolidated Procurement Code or the regulations promulgated thereunder are updated, the Superintendent shall submit conforming updates for approval to both Division of Procurement Services and the Board of Trustees of the District.

[*Model Comments:*

1. Function of Comments. Commentary has been added throughout this document to provide cross references with other laws and to provide assorted helpful information. Model Comments are not intended to be part of the code or regulation, but rather, are offered only as guidance. These comments will appear in brackets after the section to which they apply.

2. Public Notice. This code adopts South Carolina Business Opportunities (SCBO) as the standard method of providing public notice regarding contract opportunities; use of SCBO is mandatory. Publication of a notice in SCBO is free for school districts. Likewise, SCBO is free for vendors. In addition to publishing notices in SCBO, the District may elect to also publish notices in any other periodical or publication it deems appropriate.

3. Cross Reference to State Code. This code adopts a numbering system that closely parallels the numbering system used in the South Carolina Consolidated Procurement Code and the State Fiscal Accountability Authority's Procurement Regulations. This numbering system is maintained in order to promote consolidating, clarifying, and modernizing the law of procurement in this state, one of the General Assembly's expressly stated goals for the Procurement Code. § 11-35-20(d). As a resource, the Division of Procurement Services has a document showing exactly how the model school code differs from the state code. That document is available at the following link: https://www.procurement.sc.gov/schoolscodes

4. Interplay of Code & Regulations: Rather than adopt a model code that integrates the code and regulations into one seamless document, this office has chosen to maintain the distinction between a code and separate regulations. Under state law, statutes and regulations have important differences from one another, and the only way to maintain these differences is to maintain the distinction by keeping the two separate. Nevertheless, to help explain the interplay of the two, please see the Official Comment to Section 540. Finally, R.2000A provides that (a) to the extent there is conflict

between the code and regulations, the code take precedence, and (b) the regulations herein have the same relationship to the District's code as regulations promulgated under the administrative procedures act have to statutes enacted by the General Assembly.

5. Organization Structure & Assignment of Authority: In the state code, responsibilities and authority are assigned either to specific officials or to an entity in general. For example, the State Fiscal Accountability Authority must grant exemptions, while an agency head can approve sole source awards. This dispersion of authority is carefully crafted to maintain the integrity of the procurement process and to limit the use of methods that should be used rarely rather than routinely. Some of these roles have no ready parallel at the District level. Nevertheless, it is important to assign such authority in a manner that fosters both integrity and the use of sound procurement practices. In drafting this model, Division of Procurement Services has used its best efforts to assign responsibility and authority in a manner that facilitates the purpose behind the structure established by the state code. In order to understand Division of Procurement Services' approach to this critical issue, please review Attachment B and refer to it as you review this model.

6. Resources: To assist those seeking additional guidance regarding various procurement issues, the Division of Procurement Services will post a document showing the differences between the latest version of this model school code and the South Carolina Consolidated Procurement Code. You can find Division of Procurement Services' website by clicking on www.procurement.sc.gov]

SECTION 20. Purpose and policies. (S.C. Code § 11-35-20)

(1) This code must be construed and applied to promote underlying purposes and policies.

(2) The underlying purposes and policies of this code are:

(a) to provide increased economy in District procurement activities and to maximize to the fullest extent practicable the purchasing values of funds while ensuring that procurements are the most advantageous to the District and in compliance with the provisions of the Ethics Government Accountability and Campaign Reform Act;

(b) to foster effective broad-based competition for public procurement within the free enterprise system;

(c) to develop procurement capability responsive to appropriate user needs;

(d) to consolidate, clarify, and modernize the law governing procurement in this District and permit the continued development of explicit and thoroughly considered procurement policies and practices;

(e) to require the adoption of competitive procurement laws and practices by units of the District;

(f) to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement;

(g) to provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process;

(h) to develop an efficient and effective means of delegating roles and responsibilities to the District officials; and

(i) to promote consistency, certainty, and efficiency, it is the intent of the District to have this code interpreted as consistently as possible with official interpretations of parallel provisions of the South Carolina Consolidated Procurement Code.

SECTION 25. Supersession of conflicting laws. (S.C. Code § 11-35-25)

If this code applies to a procurement, the provisions of this code supersede all laws or parts of laws in conflict with it to the extent of the conflict including, but not limited to, the principles of law and equity, the common law, and the Uniform Commercial Code of this State.

SECTION 30. Obligation of good faith. (S.C. Code § 11-35-30)

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

SECTION 40. Application of this Code. (S.C. Code § 11-35-40)

(1) General Application. This code applies only to contracts solicited or entered into after the effective date of this code unless the parties agree to its application to a contract entered into prior to its effective date.

(2) Application to District Procurement. This code applies to every procurement or expenditure of funds by this District under contract irrespective of the source of the funds, including federal assistance monies, except as specified in Section 40(3) (Compliance with Federal Requirements) and except that this code does not apply to gifts, to the issuance of grants, or to contracts between public procurement units, except as provided in Article 19 (Intergovernmental Relations). Notwithstanding the foregoing, the provisions of Article 23 (Statewide Provisions) apply as provided therein. It also shall apply to the disposal of District supplies as provided in Article 15 (Supply Management).

[*Model Comment:*
1. The last sentence of Section 11-35-40 was added by Section 5 of 2007 Act No. 110. That sentence inapplicable to school districts, so it is omitted.
2. By its terms, this code is inapplicable to contracts between the District and other public procurement units, except as provided in Article 19 (Intergovernmental Relations). However, as emphasized by Section 11-35-4810(2), if the District wants to participate in a cooperative procurement conducted by another public procurement unit, the procurement must comply with this code and all its procedures. An intergovernmental contract, however, cannot be used to circumvent the code's requirements. See *§ 11-35-4880*]

(3) Compliance with Federal Requirements. Where a procurement involves the expenditure of federal assistance, grant, or contract funds, the District also shall comply with federal laws (including authorized regulations) as are mandatorily applicable and which are not presently reflected in this code; however, failure to comply with the foregoing is not subject to review under Article 17. Notwithstanding, where federal assistance, grant, or contract funds are used in a procurement by the District, this code, including any requirements that are more restrictive than federal requirements, must be followed, except to the extent such action would render the District ineligible to receive federal funds whose receipt is conditioned on compliance with mandatorily applicable federal law. In those circumstances, the solicitation must identify and explain the impact of such federal laws on the procurement process, including any required deviation from this code.

(4) The acquisition of a facility or capital improvement by a foundation or eleemosynary organization on behalf of or for the use of the District which involves the use of public funds in the acquisition, financing, construction, or current or subsequent leasing of the facility or capital improvement is subject to the provisions of this code in the same manner as the District. The definition and application of the terms "acquisition," "financing," "construction," and "leasing" are governed by generally accepted accounting principles.

[*Model Comment: Paragraph (5) of Section 11-35-40 was added by 2008 Act No. 208, which regarded the use of the Educational Broadband Service spectrum. In light of this Act's purposes and its specific application to Greenville Technical College and Trident Technical College, this paragraph is deleted as inapplicable to school districts.*]

SECTION 45. Payment for goods and services received by District. (S.C. Code § 11-35-45)

(A) The District is responsible for the payment of all supplies, services, or information technology within thirty work days after the acceptance of the goods or services and proper invoice, whichever is received later, and shall pay an amount not to exceed fifteen percent per annum, as established by the South Carolina Comptroller General for state agencies, on any unpaid balance which exceeds the thirty work-day period, if the vendor specifies on the statement or the invoice submitted to the District that a late penalty is applicable if not paid within thirty work days after the acceptance of goods or services.

(B) The thirty-day period shall not begin until the District certifies its satisfaction with the received goods or services and proper invoice.

[*Model Comment:*
1. Reference is made to the South Carolina Comptroller General (CG) because, in the opinion of this office, allowing Districts to establish their own interest rate is not substantially similar to the Consolidated Procurement Code. On March 28, 1994, the CG set the interest rate at 6.25%. As of September 2020, that rate has not been changed. The current interest rate, and the CG's rules regarding application of this section to state agencies, is posted at the following URL provided below.
2. The CG exempts some late payments from application of this section by effectively establishing an interest rate of zero. For additional information regarding application of this section, see the "Disbursement Regulations" on the CG's website.

SECTION 210. Determinations; exemption. (S.C. Code § 11-35-210)

Written determinations expressly required by the code or regulations must be retained in an official contract file of the District. These determinations must be documented in sufficient detail to satisfy the requirements of audit as provided in Section 11-35-1230.

[*Model Comment: Section 11-35-1230 has no application to school districts. The applicable audit requirement appears in Section 11-35-5340.*]

SECTION 310. Definitions. (S.C. Code § 11-35-310)

Unless the context clearly indicates otherwise:

"Information Technology (IT)" means information resources, telecommunications, and information services:

(a) "Information resources" means any equipment including interconnected systems or subsystems of equipment that is used in the automatic acquisition, creation, conversion, duplication, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the using agency.

(i) "Information resources" includes, but is not limited to, computers, ancillary equipment, including imaging peripherals, input, output, and storage devices and devices necessary for security and surveillance, peripheral equipment designed to be controlled by the central processing unit of a computer, databases, software, firmware, middleware, and application and application development software; whether owned, leased, licensed, or accessed as a service; and routine maintenance and support.

(ii) "Database" means a collection of recorded information in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer.

(iii) "Software" means computer programs that comprise a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations.

(iv) For purposes of this definition, equipment is used by a District if the equipment is used by the District directly or is used by a contractor under a contract with the District that requires its use.

(b) "Telecommunications" means voice, data, message, and video transmissions, and includes the transmission and switching facilities of public telecommunications systems, as well as operating and network software.

(c) "Information Services" means services provided by a contractor associated with any aspect of information resources or telecommunications, except that information services does not include information resources or telecommunications.

"Board" means the Board of Trustees of the Kershaw County School District.

"Business" means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other legal entity.

"Business day" means a day that is neither a Saturday, Sunday, nor a state or federal holiday.

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

"Chief Business Official" means a District employee, above the level of procurement officer and reporting directly to the superintendent, designated in writing by the Superintendent as having primary management responsibility for District business operations or finance. Unless otherwise provided by the Superintendent, the "Chief Business Official" shall also serve as the "Chief Procurement Officer." The name and official District title of the person currently serving as the District's chief business official must be published in the internal procurement procedures issued pursuant to Section 540.

> [*Model Comment: (1) In order to accommodate Districts with limited staff, the person appointed as the CBO also serves as the CPO, by default. The preference is to separate these functions by having the Superintendent appoint different people to each. The intent is to elevate the role of the CBO to a person* <u>*at least*</u> *one step removed from the purchasing office, hopefully more. (2) Unlike the CPO, the CBO is not authorized to delegate authority to others. If the same person serves both functions, responsibilities assigned to the CBO may not be delegated. Those assigned to the CPO may be delegated. (3) The wording of this definition is critical and should not be modified. It is carefully tied to numerous decisions regarding how best to adapt the Consolidated Procurement Code to the school district context.*]

"Chief procurement officer" means a District employee, above the level of procurement officer, designated in writing by the Superintendent as having primary management responsibility for supervising procurement or disposal by the District. The Superintendent may provide for the division or sharing of duties and powers assigned by this code to the chief procurement officer to more than one person. Unless otherwise designated in writing by the Superintendent, the chief business official serves as the chief procurement officer. The name and official District title of the person currently serving as the District's chief procurement officer must be published in the internal procurement procedures issued pursuant to Section 540.

> [*Model Comment: (1) This CPO must be a person above the level of procurement officer and below the level of superintendent. Preferably someone outside the procurement office. By default, the person serving as the CPO is also the CBO. While this approach may be necessary for smaller Districts, it tends to undermine the level of independence the code envisions for a CPO. (2) The District should identify the District's position title for the person serving as the chief procurement officer in its published internal procurement procedures. See § 540(2). (3) Subject to the organizational relationship outlined in Comment No. 1 above, a District may elect to have more than one chief procurement officer. For example, a District may have one chief procurement officer for supplies and services, one for construction related services, and another for disposal of surplus property.*]

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

> [*Model Comment: For a discussion of "routine operation, routine repair, or routine maintenance" and how to determine whether an acquisition is one for construction, you may wish to consult with the OSE Manual.*]

"Contract" means all types of agreements, regardless of what they may be called, for the procurement or disposal of supplies, services, information technology, or construction.

"Contract modification" means a written order signed by the procurement officer, directing the contractor to make changes which the changes clause of the contract authorizes the procurement officer to order without the consent of the contractor.

"Contractor" means any person having a contract with the District.

"Cost effectiveness" means the ability of a particular product or service to efficiently provide goods or services to the District. In determining the cost effectiveness of a particular product or service, the

procurement officer shall list the relevant factors in the bid notice or solicitation and use only those listed relevant factors in determining the award.

"Data" means recorded information, regardless of form or characteristics.

"Days" means calendar days. In computing any period of time prescribed or allowed by this code or the regulations, or by any order of the Procurement Review Panel, the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period computed is to be included, unless it is a Saturday, Sunday, or a legal holiday for the District or federal holiday, in which event the period runs to the end of the next day which is neither a Saturday, Sunday, nor such holiday.

"Debarment" means the disqualification of a person to receive invitations for bids, or requests for proposals, or the award of a contract by the District, for a specified period of time commensurate with the seriousness of the offense or the failure or inadequacy of performance.

"Designee" means a duly authorized representative of a person with formal responsibilities under the code.

"District" means Kershaw County School District.

"Employee" means an individual drawing a salary from the District, whether elected or not, and any nonsalaried individual performing personal services for the District.

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

"Invitation for bids" means a written or published solicitation issued by an authorized procurement officer for bids to contract for the procurement or disposal of District supplies, services, information technology, or construction, which will ordinarily result in the award of the contract to the responsible bidder making the lowest responsive bid.

"Person" means any business, individual, union, committee, club, other organization, or group of individuals.

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

"Procurement officer" means any person duly authorized by the District, in accordance with procedures prescribed by regulation, to enter into and administer contracts and make written determinations and findings with respect thereto. The term also includes an authorized representative of the governmental body within the scope of his authority.

"Public funds" means any money or property owned by the State or a political subdivision thereof, regardless of form and whether in specie or otherwise.

"Real property" means any land, all things growing on or attached thereto, and all improvements made thereto including buildings and structures located thereon.

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

"Services" means the furnishing of labor, time, or effort by a contractor not required to deliver a specific end product, other than reports which are merely incidental to required performance. This term includes consultant services other than architectural, engineering, land surveying, construction management, and related services. This term does not include employment agreements or information services as defined above.

"Subcontractor" means any person having a contract to perform work or render service to a prime contractor as a part of the prime contractor's agreement with the District.

"Supplies" means all personal property including, but not limited to, equipment, materials, printing, and insurance.

"State" means state government.

"State Engineer" means the person holding the position as head of the state engineer's office.

"Superintendent" means the District's chief executive official, usually known as the Superintendent.

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

[Drafting Note: The definition of "Term Contract" has no application to school districts.]

SECTION 410. Public access to procurement information. (S.C. Code § 11-35-410)

(A) Procurement information must be a public record to the extent required by Chapter 4, Title 30 (The Freedom of Information Act), except as otherwise provided by this code, and with the exception that, pursuant to the authority granted by Section 11-35-5340 of the South Carolina Code of Laws, commercial or financial information obtained in response to a request for proposals or any type of bid solicitation that is privileged and confidential need not be disclosed.

> [*Model Comment: (1) The South Carolina Freedom of Information Act applies to school districts. (2) The added language reflects the argument that the District code, as a document expressly sanctioned by state law, can be read as an extra "exemption" from the disclosure obligation of FOIA, just as Section 11-35-410 creates an exemption. See D.W. Flowe & Sons, Inc. v. Christopher Const. Co.*, 327 S.C. 17, 482 S.E.2d 558 (1997), overruled on other grounds by *Evins v. Richland County Historic Preservation Comm'n*, 341 S.C. 15, 532 S.E.2d 876 (2000)]

(B) Privileged and confidential information is information in specific detail not customarily released to the general public, the release of which might cause harm to the competitive position of the party supplying the information. Examples of this type of information include:

(1) customer lists;

(2) design recommendations and identification of prospective problem areas under an RFP;

(3) design concepts, including methods and procedures;

(4) biographical data on key employees of the bidder.

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

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

> *[Model Comment: Division of Procurement Services has published a standard set of bidding instructions for state agencies regarding how offerors should mark their bids and offers. Those instructions are available at www.procurement.sc.gov.]*

(E) The District, with the approval of the chief procurement officer, may keep portions of a solicitation confidential and release the information to prospective offerors only upon execution of a nondisclosure agreement, provided the information is otherwise exempted from disclosure by law.

(F) If requested in writing before a final award by an actual bidder, offeror, contractor, or subcontractor with regard to a specific intended award or award of a contract, the procurement officer shall, within five days of the receipt of any such request, make documents directly connected to the procurement activity and not otherwise exempt from disclosure available for inspection at an office of the responsible procurement officer. Without otherwise limiting any other exemptions granted by law, and except as provided herein,

documents of and documents incidental to proposed contractual arrangements, including those used for contract negotiations, are not exempt from disclosure after the date notice of intent to award is posted, unless the notice is subsequently canceled.

[*Model Comment: Obligating procurement officers to respond to document requests within five days helps to ameliorate the consequences of the short deadlines in Section 4210 and helps ensure that an interested party may review relevant materials in a timely matter. This section also provides that the FOIA exemption dealing with proposed contractual relations does not apply after the date of the notice of intent to award is posted, unless the notice is subsequently cancelled.*]

SECTION 450. Reporting purchases. (S.C. Code § 11-35-450)

(A) The purchase of furniture, floor coverings, wall coverings, or other decorative or ornamental items by the District must be reported to the Board before the purchase, when the cost of the furniture, covering, or item exceeds one thousand dollars and it is to be used in:

(1) an office or adjoining reception area utilized by the Superintendent or assistant Superintendent; or

(2) a board room or a conference room used as a board room.

(B) The reports required in subsection (A) must include the item to be purchased and its price. Upon receiving the reports, the Board formally shall approve or disapprove the purchase.

ARTICLE 3.

PROCUREMENT ORGANIZATION

SECTION 510. Centralization of materials management authority. (S.C. Code § 11-35-510)

Except as otherwise provided herein, all rights, powers, duties, and authority of the District relating to the procurement of supplies, services, information technology, and construction and to the management, control, warehousing, sale and disposal of supplies, construction, information technology, and services, regardless of source of funding, are hereby delegated to the chief procurement officer by the Board.

SECTION 540. Authority and duties of the board. (S.C. Code § 11-35-540)

(1) Regulations. The District's procurement regulations, which are adopted in conjunction with this code, are binding in all procurements made by the District; provided, however, that the code takes precedence over the regulations to the extent of any conflict between them. The procurement regulations shall have the same relationship to this code as regulations promulgated under the administrative procedures act have to statutes enacted by the General Assembly.

[Model Comment: South Carolina courts have explained the relationship between statutes and regulations as follows: Regulations authorized by the legislature have the force of law. Faile v. S.C. Employment Security Commission, 230 S.E.2d 219 (S.C. 1976). However, a regulation may not alter or add to a statute. U.S. Outdoor Advertising, Inc. v. South Carolina Dept. of Transp., 481 S.E.2d 112, 113 (S.C. 1997). As stated by our Supreme Court in 1943, "a rule cannot be made by an administrative body which would materially alter or add to the law; a rule to be valid may only implement the law." Banks v. Batesburg Hauling Co., 24 S.E.2d 496, 499 (S.C. 1943).]

(2) Approval of Procurement Procedures. The District shall develop internal procurement procedures consistent with this code and the procurement regulations; except, that the procurement procedures must be approved in writing by the Superintendent.

[Model Comment: The following list identifies most of the items that must appear in such procedures:
□ § 310 – the name and official District title of the people that serve as CBO and CPO
□ § 710 – exemptions granted by the Board

□ § 1520(3) – identify newspaper of general circulation (if elected by District's board)
□ § 3030(1)(a) – extra circumstances requiring bid security
□ R. 2145 – forms: contract, bond, letters of credit, guarantees
□ R. 2145(K)(5) – guidelines for proposal development docs]

(3) The board shall consider and decide matters of policy within the provisions of this code including those referred to it by the chief procurement officers. The board has the power to audit and monitor the implementation of its regulations and the requirements of this code.

SECTION 710. Exemptions. (S.C. Code § 11-35-710)

The Board may exempt specific supplies, services, information technology, or construction from the purchasing procedures required in this code. Exemptions granted by the Board shall appear in any internal operating protocols or procedures adopted pursuant to Section 540.

[*Model Comment:*
(1) At the state level, exemptions granted by the State Fiscal Accountability Authority do not form part of the Consolidated Procurement Code. Similarly, exemptions granted by a school board may not be included in the District's procurement code. A District may wish to include such exemptions in the District's internal operating protocols or procedures adopted pursuant to Section 540.
(2) Any exemption from a District's procurement code must be approved by the Board through an act of equal dignity. Such exemptions cannot be approved simply by including them in the procedures adopted under Section 540.
(3) Pursuant to Section 11-35-710, the Division of Procurement Services must approve the District's procurement code as substantially similar to the Consolidated Procurement Code. Given this limitation, Division of Procurement Services cannot approve exemptions other than those appearing in Section 11-35-710 of the Consolidated Procurement Code. Accordingly, Districts are encouraged to adopt the Section 710 as it appears in this model. However, Division of Procurement Services will approve a version of Section 710 that mirrors Section 11-35-710.
(4) Division of Procurement Services will not offer a written opinion approving or disapproving a school board's exemptions. The determination of which procurements should be exempt belongs to the elected officials. See, generally, Glasscock Company, Inc. v. Sumter County, 361 S.C. 483, 604 S.E.2d 718 (Ct. App. 2004) (rejecting argument that 11-35-50 (now 11-35-5320) prevents local government from exercising the flexibility provided to the state by section 11-35-710). Caveat: Division of Procurement Services advises school districts to avoid granting excessive or overly broad exemptions. At some point, exemptions could so undermine the purposes of the law as to be inconsistent with the General Assembly's mandates in Sections 11-35-5320 and 11-35-5340. As part of its approval process, Division of Procurement Services offers no official opinion as to individual exemptions.
(5) Since 1981, the South Carolina Budget & Control Board and the State Fiscal Accountability Authority have granted a number of exemptions for state agencies. A comprehensive list of the currently available exemptions is available at the following URL: www.procurement.sc.gov]

SECTION 840. Delegation of authority. (S.C. Code § 11-35-840)

Subject to this code and the regulations, the chief procurement officers may delegate authority to designees. A delegation of authority by the chief procurement officers must be in writing and available upon request by the public to the chief procurement officer.

[Model Comment: The Consolidated Procurement Code creates three chief procurement officers with broad, statewide authority. These officials work for an agency other than the using agency, giving them both a high level of independence and substantial authority. School districts have no easy parallel to the state's CPOs. At best, their powers can be divided between different school officials, such as the District superintendent, the school board, and the school's procurement staff. Accordingly, this provision is drafted to apply only to a CPO.]

SECTION 1030. Procurement training and certification. (S.C. Code § 11-35-1030)

The chief procurement officers develop a system of training for procurement in accordance with regulations. The training must encompass the latest techniques and methods of public procurement. If considered appropriate by the chief procurement officers, the training must include a requirement for the certification of the procurement officer of the District.

SECTION 1250. Authority to contract for auditing services. (S.C. Code § 11-35-1250)

No contract for auditing or accounting services shall be awarded without the approval of the Board. [*Alternative Text: In the alternative, Districts may specify the Superintendent as the official appropriate to approve such contracts. If the District uses alternative language, the alternative text must also be used for R. 2025(E).*]

SECTION 1260. Authority to contract for legal services. (S.C. Code § 11-35-1260)

No contract for the services of attorneys shall be awarded without the approval of the Board. [*Alternative Text: In the alternative, Districts may specify the Superintendent as the official appropriate to approve such contracts. If the District uses alternative language, the alternative text must also be used for R. 2025D.*]

ARTICLE 5.

SOURCE SELECTION AND CONTRACT FORMATION

SECTION 1410. Definitions of terms used in this article. (S.C. Code § 11-35-1410)

Unless the context clearly indicates otherwise:

(1) “"Commercial product" means supplies, other than printing, or information resources:

(a) that is of a type customarily used by the general public and that has been sold, leased, or licensed to the general public;

(b) that would satisfy the criteria in subitem (a) were it not for modifications of a type customarily available in the commercial marketplace, or minor modifications made to meet state requirements; or

(c) that is a combination of products meeting the requirements of subitem (a) or (b) that are of a type customarily combined and sold in combination to the general public.

(2) "Commercially available off-the-shelf product" means supplies, other than printing, or information resources: that is a commercial product, as defined herein, that is sold in substantial quantities in the commercial marketplace; and is offered to the State, without modification, in the same form in which it is sold in the commercial marketplace. It does not include agricultural products, petroleum products, and other items customarily sold in bulk.

(3) "Cost-reimbursement contract” means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this code, and paid a fee, if any.

(4) "Established catalog price” means the price included in a catalog, price list, schedule, or other form that:

(a) is regularly maintained by a manufacturer or vendor of an item;

(b) is either published or otherwise available for inspection by customers;

(c) states prices at which sales are currently or were last made to a significant number of buyers constituting the general buying public for the supplies, services, or information technology involved.

(5) “Invitation for bids” means all documents, whether attached or incorporated by reference, utilized for soliciting bids in accordance with the procedures set forth in Section 1520.

(6) "Purchase description” means specifications or other document describing the supplies, services, information technology, or construction to be procured.

(7) "Request for proposals” means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.

(8) "Responsible bidder or offeror" 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 which may be substantiated by past performance.

(9) "Responsive bidder or offeror" means a person who has submitted a bid or proposal which conforms in all material aspects to the invitation for bids or request for proposals.

SECTION 1510. Methods of source selection. (S.C. Code § 11-35-1510)

Unless otherwise provided by law, all District contracts must be awarded by competitive sealed bidding, pursuant to Section 1520, except as provided in:

(1) Section 1250 (Authority to Contract for Auditing Services);
(2) Section 1260 (Authority to Contract for Legal Services);
(3) Section 1525 (Fixed Priced Bidding);
(4) Section 1528 (Competitive Best Value Bidding);
(5) Section 1529 (Competitive Online Bidding);
(6) Section 1530 (Competitive Sealed Proposals);
(7) Section 1540 (Negotiations After Unsuccessful Competitive Sealed Bidding);
(8) Section 1550 (Small Purchases);
(9) Section 1560 (Sole Source Procurements);
(10) Section 1570 (Emergency Procurements);
(11) Section 1575 (Participation in Auction or Bankruptcy Sale);
(12) (Reserved)
(13) Section 3015 (Source Selection Methods Assigned to Project Delivery Methods);
(14) Section 3220 (Architect Engineer, Construction Management and Land Surveying Services Procurement Procedures); and
(15) Section 3230 (Exception for Small Architect-Engineer and Land Surveying Services Contracts).

SECTION 1520. Competitive sealed bidding. (S.C. Code § 11-35-1520)

(1) Condition for Use. Contracts must be awarded by competitive sealed bidding except as otherwise provided in Section 1510.

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

(3) Notice. Adequate notice of the invitation for bids must be given at a reasonable time before the date set forth in it for the opening of bids. The notice must include publications in "South Carolina Business Opportunities." Governmental bodies may charge vendors the cost incurred for copying and mailing bid or proposal documents requested in response to a procurement.

[*Alternative Text: Districts are advised that, except for some procurements for COTS or construction, the Consolidated Procurement Code requires advertisement in South Carolina Business Opportunities for all procurements valued above $25,000. See S.C. Code § 11-35-1550. Nevertheless, if requested, Division of Procurement Services will approve the following language in lieu of the second sentence above:*

"The notice must include publications in the newspaper of general circulation, as selected by the Board and identified in the District's internal procurement procedures (§ 540) and should include publications in 'South Carolina Business Opportunities.' For a procurement with a total potential value over two hundred and fifty thousand dollars, the notice must include publications in 'South Carolina Business Opportunities.' The District may give additional or wider public notice in any other media."

If the District uses the alternative language, the alternative text for R. 2040 must also be used.]

[*Model Comment: Cross reference Section 1550 and Section 3020.*]

(4) Receipt and Safeguarding of Bids. All bids, including modifications, received before the time of opening must be kept secure and unopened, except as provided by regulation.

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

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

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

[*Model Comment: (1) The authority granted in this paragraph must be exercised in compliance with Regulation 2085. (2) The authority to cancel awards or contracts after award but prior to performance is tantamount to revoking a contract and should not be used as a normal administrative solution to defective procurement practices. After opening, the correction or withdrawal of bids can undermine the integrity of the procurement process. Given these concerns, such authority should be exercised by an official one step removed from procurement. Accordingly, this section places the final authority over these actions with the chief business official.*]

(8) Reserved.

[*Model Comment: "Discussions" with bidders is no longer part of Section 1520. In the past, this section was often applied inconsistently, and this inconsistent application frustrated the purpose of this Code when it was used to allow non-responsive bidders to cure their bids through discussions.*]

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

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

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

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

(d) Tie bids involving South Carolina firms must be resolved in favor of the South Carolina firm located in the District.

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

(10) Award. Unless there is a compelling reason to reject bids as prescribed by regulation, notice of an award or an intended award of a contract to the lowest responsive and responsible bidders whose bid meets the requirements set forth in the invitation for bids must be given by posting the notice on the date and at a location specified in the invitation for bids. For contracts with a total or potential value in excess of one hundred thousand dollars, notice of an intended award of a contract must be given by posting the notice for

seven business days before entering into a contract and must be sent electronically to all bidders responding to the solicitation on the same day that the notice is posted in accordance with this section. The posting date shall appear on the face of all these notices. If a change to the posting date is necessary, notice of the revised posting date must be given by posting the notice for three business days at the location identified in the solicitation and must be sent electronically to all bidders responding to the solicitation on the same day that the notice is posted in accordance with this section. The invitation for bids and a notice of award or notice of intent to award must contain a statement of a bidder's right to protest pursuant to Section 4210(1). When only one response is received, the notice of intent to award and the delay of award may be waived.

[*Model Comment: Regarding reject of bids or proposals, cross reference Regulation 2065 and 2097.*]

(11) Request for Qualifications.

(a) Before soliciting bids, the procurement officer, may issue a request for qualifications from prospective bidders. The request must contain, at a minimum, a description of the scope of work to be solicited by the invitation for bids, the deadline for submission of information, and how prospective bidders may apply for consideration. The request must require information concerning the prospective bidders' product specifications, qualifications, experience, and ability to perform the requirements of the contract. Adequate public notice of the request for qualifications must be given in the manner provided in Section 1520(3).

(b) After receipt of the responses to the request for qualifications from prospective bidders, the rank of the prospective bidders must be determined in writing from most qualified to least qualified on the basis of the information provided. Bids then must be solicited from at least the top two prospective bidders by means of an invitation for bids. The determination regarding how many bids to solicit is not subject to review under Article 17.

(12) (Reserved)

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

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

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

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

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

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

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

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

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

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

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

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

(j) failure of a bidder to furnish references;

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

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

SECTION 1524. Resident vendor preference. (S.C. Code § 11-35-1524)

(A) For purposes of this section:

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

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

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

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

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

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

(7) 'Services' means services as defined by Section 310 and also includes services as defined in the definition of Information Technology.

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

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

(B)(1) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease by seven percent the price of any offer for a South Carolina end product.

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

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

(4) If a contract is awarded to a bidder that received the award as a result of the South Carolina end product or United States end product preference, the contractor may not substitute a nonqualifying end product for a qualified end product. A substitution in violation of this item is grounds for debarment pursuant to Section 4220. If a contractor violates this provision, the District may terminate the contract for cause and, in addition, the contractor shall pay to the District an amount equal to twice the difference between the price paid by the District and the bidder's evaluated price for a substituted item.

(5) If a bidder is requesting this preference, the bidder, upon request of the procurement officer, must provide documentation that establishes the bidder's qualifications for the preference. Bidder's failure to provide this information promptly is grounds to deny the preference and for enforcement pursuant to subsection (E)(6).

(C)(1) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease a bidder's price by seven percent if the bidder maintains an office in this State and either: (i) maintains at a location in South Carolina at the time of the bid an inventory of expendable items which are representative of the general type of commodities on which the award will be made and which have a minimum total value, based on the bid price, equal to the lesser of fifty thousand dollars or the annual amount of the contract; (ii) is a manufacturer headquartered and having an annual payroll of at least one million dollars in South Carolina and the end product is made or processed from raw materials into a finished end product by that manufacturer or its affiliate (as defined in Section 1563 of the Internal Revenue Code); or (iii) at the time of bidding, directly employs or has a documented commitment with individuals domiciled in South Carolina that will perform services expressly required by the solicitation and the total direct labor cost to bidder for those individuals to provide those services exceeds fifty percent of the bidder's total bid price.

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

(3) If a bidder is requesting this preference, the bidder, upon request by the procurement officer, must provide documentation that establishes the bidder's qualifications for the preference and, for the preference claimed pursuant to subsection (C)(1)(iii), must identify the persons domiciled in South Carolina that will perform the services involved in the procurement upon which bidder relies in qualifying for the preference, the services those individuals are to perform, and documentation of the bidder's labor cost for each person identified. Bidder's failure to provide this information promptly is grounds to deny the preference and for enforcement under subsection (E)(6) below.

(D)(1) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease a bidder's price by two percent if:

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

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

(2) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease a bidder's price by four percent if:

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

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

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

(4) Subject to other limits in this section, an offeror may benefit from applying for more than one of, or from multiple applications of, the preferences allowed by items (1) and (2).

(5)(a) In its bid, a bidder requesting any of the preferences allowed by items (1) and (2) must identify the subcontractor to perform the work, the work the subcontractor is to perform, and the bidder's factual basis for concluding that the subcontractor's work constitutes the required percentage of the work to be performed in the procurement.

(b) If a bidder is requesting a preference allowed by items (1) or (2), upon request by the procurement officer, the bidder shall identify the persons domiciled in South Carolina that are to perform the services involved in the procurement upon which the bidder relies in qualifying for the preference, the services those individuals are to perform, the employer of those persons, the bidder's relationship with the employer, and documentation of the subcontractor's labor cost for each person identified. Bidder's failure

to provide this information promptly will be grounds to deny the preference and for enforcement pursuant to subsection (E)(6) below.

(c) If a contract is awarded to a bidder that received the award as a result of a preference allowed by items (1) or (2), the contractor may not substitute any business for the subcontractor on which the bidder relied to qualify for the preference, unless first approved in writing by the procurement officer. A substitution in violation of this subitem is grounds for debarment pursuant to Section 11-35-4220. If a contractor violates this provision, the procurement officer may terminate the contract for cause. If the contract is not terminated, the procurement officer may require the contractor to pay the State an amount equal to twice the difference between the price paid by the State and the price offered by the next lowest bidder, unless the substituted subcontractor qualifies for the preference.

(E)(1) A business is not entitled to any preferences unless the business, to the extent required by law, has:

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

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

(2) The preferences provided in subsections (B) and (C)(1)(i) and (ii) do not apply to a single unit of an item with a price in excess of fifty thousand dollars or a single award with a total potential value in excess of five hundred thousand dollars.

(3) The preferences provided in subsections (C)(1)(iii) and (D) do not apply to a bid for an item of work by the bidder if the annual price of the bidder's work exceeds fifty thousand dollars or the total potential price of the bidder's work exceeds five hundred thousand dollars.

(4) A solicitation must provide potential bidders an opportunity to request the preferences that apply to a procurement. By submitting a bid and requesting that a preference be applied to that bid, a business certifies that its bid qualifies for the preference for that procurement. For purposes of applying this section, a bidder is not qualified for a preference unless the bidder makes a request for the preference as required in the solicitation. If a solicitation specifies which preferences, if any, apply to a procurement, the applicability of preferences to that procurement is conclusively determined by the solicitation unless the solicitation document is timely protested as provided in Section 4210. If two or more bidders are tied after the application of the preferences allowed by this section, the tie must be resolved as provided in Section 1520(9). Price adjustments required by this section for purposes of evaluation and application of the preferences do not change the actual price offered by the bidder.

(5) This section does not apply to an acquisition of motor vehicles as defined in Section 56-15-10 of the South Carolina Code of Laws or an acquisition of supplies or services relating to construction. This section does not apply to a procurement conducted pursuant to Section 1550(2)(a) or (b), Section 1530, or Article 9 of this code.

> [*Model Comment: In addition to the exclusions provided here, see 1529(4), which provides that the preferences do not apply to reverse auctions.*]

(6) Pursuant to Section 4220, a business may be debarred if: (i) the business certified that it qualified for a preference, (ii) the business is not qualified for the preference claimed, and (iii) the certification was made in bad faith or under false pretenses. If a contractor has invalidly certified that a preference is applicable, the chief business official may terminate the contract for cause, and the chief business official may require the contractor to pay the District an amount equal to twice the difference between the price paid by the District and the price offered by the next lowest bidder.

(7) The sum of all preferences allowed by items (D)(1) and (D)(2), when applied to the price of a line item of work, may not exceed six percent unless the bidder maintains an office in this State. Under no circumstances may the cumulative preferences applied to the price of a line item exceed ten percent.

(8) As used in items (C)(1)(iii), (D)(1)(b), and (D)(2)(b), the term 'documented commitment' means a written commitment by the bidder to employ directly an individual, and by the individual to be employed by the bidder, both contingent on the bidder receiving the award.

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

SECTION 1525. Competitive fixed price bidding. (S.C. Code § 11-35-1525)

(1) Conditions for Use. When the District determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the District, a contract may be entered into by competitive fixed price bidding subject to the provisions of Section 1520 and the regulations, unless otherwise provided for in this section.

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

(3) Public Notice. Adequate public notice of the solicitation shall be given in the same manner as provided in Section 1520(3).

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

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

(6) Reserved.

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

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

[*Model Comment: The deletion of Section 1525(9) may not be interpreted as an indication that the failure of a specific offeror to receive business is grounds for a dispute.* See *Editor's Note to § 11-35-1525(9) of the South Carolina Procurement Code, Act 41 of 2019.*]

SECTION 1528. Competitive best value bidding. (S.C. Code § 11-35-1528)

(1) Conditions for Use. When the District determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the District, a contract may be entered into by competitive best value bidding subject to the provisions of Section 1520 and the regulations, unless otherwise provided for in this section.

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

(3) Public Notice. Adequate public notice of the request for the solicitation shall be given in the same manner as provided in Section 1520(3).

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

(5) Evaluation Factors. The best value bid must state the factors to be used in determination of award and the numerical weighting for each factor. Price must be a factor in determination of award and cannot be weighted at less than sixty percent. Best value bid evaluation factors may include, but are not limited to, any of the following:

(a) operational costs the District would incur if the bid is accepted;

(b) quality of the product or service or its technical competency;

(c) reliability of delivery and implementation schedules;
(d) maximum facilitation of data exchange and systems integration;
(e) warranties, guarantees, and return policy;
(f) vendor financial stability;
(g) consistency of the proposed solution with the District's planning documents and announced strategic program direction;
(h) quality and effectiveness of business solution and approach;
(i) industry and program experience;
(j) prior record of vendor performance;
(k) vendor expertise with engagement of similar scope and complexity;
(l) extent and quality of the proposed participation and acceptance by all user groups;
(m) proven development methodologies and tools; and
(n) innovative use of current technologies and quality results.

(6) Clarification of Responsive Bid. The procurement officer may ask a responsive bidder to clarify an ambiguity in its bid; however, no material modification of the bid is allowed.

[*Model Comment: Cross reference Regulation 2080.*]

(7) Selection and Ranking. Bids shall be evaluated by using only the criteria and weightings stated in the invitation for best value bids. All evaluation factors, other than price, will be considered independent of and prior to determining the effect of price on the score for each participating bidder. Once the evaluation is complete, all responsive bidders must be ranked from most advantageous to least advantageous to the District, considering only the evaluation factors stated in the invitation for best value bids.

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

SECTION 1529. Competitive online bidding. (S.C. Code § 11-35-1529)

(1) Conditions for Use. When the District determines in writing that on-line bidding is more advantageous than competitive sealed bidding, a contract may be entered into by competitive on-line bidding, subject to the provisions of Section 1520 and the regulations, unless otherwise provided in this section.

(2) Public Notice. Adequate public notice of the request for the solicitation must be given in the same manner as provided in Section 1520(3).

(3) Bidding Process. The solicitation must designate both an Opening Date and Time and a Closing Date and Time. The Closing Date and Time need not be a fixed point in time, but may remain dependent on a variable specified in the solicitation. At the Opening Date and Time, the District must begin accepting real-time electronic bids. The solicitation must remain open until the Closing Date and Time. Before the Opening Date and Time, the District shall require bidders to register, shall register only responsible bidders, and, as a part of that registration, require bidders to agree to any terms, conditions, or other requirements of the solicitation. If less than two bidders are registered, the solicitation must be canceled. Following receipt of the first bid after the Opening Date and Time, the lowest bid price must be posted electronically to the Internet and updated on a real-time basis. At any time before the Closing Date and Time, a bidder may lower the price of its bid, except that after Opening Date and Time, a bidder may not lower its price unless that price is below the then lowest bid. Bid prices may not be increased after Opening Date and Time. Except for bid prices, bids may be modified only as otherwise allowed by this code. A bid may be withdrawn only in compliance with Section 1520. If a bid is withdrawn, a later bid submitted by the same bidder may not be for a higher price. If the lowest responsive bid is withdrawn after the Closing Date and Time, the District may cancel the solicitation in accordance with this code or reopen electronic bidding to all pre-existing bidders by giving notice to all pre-existing bidders of both the new Opening Date and Time

and the new Closing Date and Time. Notice that electronic bidding will be reopened must be given as specified in the solicitation.

(4) Receipt and Safeguarding of Bids. Other than price, any information provided to the District by a bidder must be safeguarded as required by Section 1520(4).

(5) Provisions Not to Apply. Section 1524 (Resident Vendor Preference) and paragraph (5) (Bid Opening) of Section 1520 (Competitive Sealed Bidding) do not apply to solicitations issued pursuant to this section.

SECTION 1530. Competitive sealed proposals. (S.C. Code § 11-35-1530)

(1) Conditions for Use.

(a) If a District determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the District, a contract may be entered into by competitive sealed proposals subject to the provisions of Section 1520 and the regulations, unless otherwise provided in this section.

(b) The regulations may provide that it is either not practicable or not advantageous to the District to procure specified types of supplies, services, information technology, or construction by competitive sealed bidding.

(2) Public Notice. Adequate public notice of the request for proposals must be given in the same manner as provided in Section 1520(3).

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

(4) Request for Qualifications.

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

(b) After receipt of the responses to the request for qualifications from prospective offerors, rank of the prospective offerors must be determined in writing from most qualified to least qualified on the basis of the information provided. Proposals then must be solicited from at least the top two prospective offerors by means of a request for proposals. The determination regarding how many proposals to solicit is not subject to review pursuant to Article 17.

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

(6) Discussion with Offerors. As provided in the request for proposals, and under regulations, discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors must be accorded fair and equal treatment with respect to any opportunity for discussions. In conducting discussions, there must be no disclosure of confidential information derived from proposals submitted by competing offerors. The board shall promulgate regulations governing discussions.

[*Model Comment: (1) Cross reference Regulation 2095(I). (2) Communications pursuant to this subsection (6) must be conducted in accordance with the guidance appearing in the District's internal operating procedures. See attached.*]

[Alternative Text: The Division of Procurement Services will not provide an affirmative written opinion for a school's code that contains [1] subsection (6) above and [2] R. 2095I unless it includes the following document, which is incorporated by reference into the District's internal operating procedures: Competitive Sealed Proposals, Required Procedures and Guidance for Communications After Opening but Prior to

Award (eff. Sept. 2021), *found at* https://procurement.sc.gov. In the alternative, a District may elect to mark both 1530(6) and R. 2195I as "[reserved]". {Also see note to R. 2095(J)(b).}]

(7) Selection and Ranking. Proposals must be evaluated using only the criteria stated in the request for proposals and there must be adherence to weightings that have been assigned previously. Once evaluation is complete, all responsive offerors must be ranked from most advantageous to least advantageous to the District, considering only the evaluation factors stated in the request for proposals.

(8) Negotiations. After proposals have been ranked pursuant to Section 1530(7), the procurement officer, in his sole discretion and not subject to review under Article 17, may proceed in any of the manners indicated below, except that in no case may confidential information derived from proposals and negotiations submitted by competing offerors be disclosed:

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

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

(c) before or after negotiations pursuant to Section 1530(8), the procurement officer may make changes to the request for proposals within the general scope of the request for proposals and may provide all responsive offerors an opportunity to submit their best and final offers, which must be reevaluated and ranked pursuant to Section 1530(7).

(9) Award. Award must be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the District, taking into consideration the evaluation factors set forth in the request for proposals, unless the procurement officer determines to utilize one of the options provided in Section 1530(8). The award of the contract must be made on the basis of evaluation factors that must be stated in the RFP. The contract file must contain the basis on which the award is made and must be sufficient to satisfy external audit. Procedures and requirements for the notification of intent to award the contract must be the same as those provided in Section 1520(10).

[Model Comment: Division of Procurement Services's three chief procurement officers have jointly issued guidance to assist procurement officers in conducting negotiations and in requesting best-and-final offers. Issued as Competitive Sealed Proposals, Required Procedures and Guidance for Communications After Opening but Prior to Award (eff. Sept. 2021), found at https://procurement.sc.gov]

SECTION 1540. Negotiations after unsuccessful competitive sealed bidding. (S.C. Code § 11-35-1540)

When bids received pursuant to an invitation for bids under Section 1520 are considered unreasonable by the District, or are not independently reached in open competition, or the low bid exceeds available funds as certified by the appropriate fiscal officer, and it is determined in writing by the chief business official, that time or other circumstances will not permit the delay required to resolicit competitive sealed bids, a contract may be negotiated pursuant to this section, provided that:

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

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

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

[*Model Comment: Contrast with negotiations under 3020(d).*]

SECTION 1550. Small purchase procedures; when competitive bidding required. (S.C. Code § 11-35-1550)

(1) Authority. The following small purchase procedures may be utilized only in conducting procurements that are up to the amounts specified herein. Procurement requirements must not be artificially divided by governmental bodies so as to constitute a small purchase pursuant to this section.

(2) Competition and Price Reasonableness.

(a) No Competition. Small purchases not exceeding ten thousand dollars may be accomplished without securing competitive quotations if the prices are considered reasonable. The purchasing office must annotate the purchase requisition: "Price is fair and reasonable" and sign. The purchases must be distributed equitably among qualified suppliers. When practical, a quotation must be solicited from other than the previous supplier before placing a repeat order. The administrative cost of verifying the reasonableness of the price of purchase "not in excess of" may more than offset potential savings in detecting instances of overpricing. Action to verify the reasonableness of the price need be taken only when the procurement officer of the governmental body suspects that the price may not be reasonable, comparison to previous price paid, or personal knowledge of the item involved.

[Model Comment: The 2021 Code increases this limit from $2,500 to $10,000]

(b) Three Written Quotes. Written request for written quotes from a minimum of three qualified sources of supply may be made and, unless adequate public notice is provided in the South Carolina Business Opportunities, documentation of at least three bona fide, responsive, and responsible quotes must be attached to the purchase requisition for a small purchase not in excess of twenty-five thousand dollars, or for a small purchase of commercially available off-the-shelf products not in excess of one hundred thousand dollars, or for a small purchase of construction not in excess of one hundred thousand dollars. The award must be made to the lowest responsive and responsible sources. The request for quotes must include a purchase description. Requests must be distributed equitably among qualified supplies unless advertised as provided above.

[Model Comment: (1) The 2021 Code increases the limit from $10,000 to $25,000 and requires that non-advertised purchases not exceeding $25,000 (or $100,000 for COTS or construction) must have three documented bona-fide written, responsive, and responsible quotes; see R.2141 (Commercial products)]

(c) Advertised Small Purchase. Written solicitation of written quotes, bids, or proposals may be made for a small purchase, other than a small purchase of construction, not in excess of one hundred thousand dollars. The procurement must be advertised at least once in the South Carolina Business Opportunities publication. A copy of the written solicitation and written quotes must be attached to the purchase requisition. The award must be made to the lowest responsive and responsible source or, when a request for proposal process is used, the highest ranking offeror.

[Model Comment: The 2021 Code increases this advertisement limit from $50,000 to $100,000]

[*Districts are advised that, except for some procurements for COTS or construction, the Consolidated Procurement Code requires advertisement in South Carolina Business Opportunities for all procurements valued above $25,000 Nevertheless, if requested, Division of Procurement Services will approve the following language in lieu of the second sentence above:*

"The procurement must be advertised at least once in a newspaper of general circulation in the District."

If the District uses the alternative language, the newspaper to be used must be specified in R. 2040.]

(3) Advertising Threshold. Except for procurements of either commercially available off-the-shelf products or construction, if conducted pursuant to item (2)(b), all competitive procurements above twenty-five thousand dollars must be advertised at least once in the South Carolina Business Opportunities publication. The District may charge vendors the cost incurred for copying and mailing bid or proposal documents requested in response to a procurement.

[*Alternative Text: Districts are advised that, except for some procurements for COTS or construction, the Consolidated Procurement Code requires advertisement in South Carolina Business Opportunities for all procurements valued above $25,000. Nevertheless, if requested, Division of Procurement Services will approve the following language in lieu of the first sentence above:*

"All competitive procurements above twenty-five thousand dollars must be advertised at least once in a newspaper of general circulation in the District."

If the District uses the alternative language, the newspaper to be used must be specified in R. 2040.]

[Model Comment: (1) See R.2100 (small purchases), R.2141 (commercial products); (2) Small purchase limits greater than those currently provided in Section 11-35-1550 will not be considered substantially similar. See Charleston County School District v. Leatherman, 368 S.E.2d 76 (S.C. Ct. App. 1988).]

SECTION 1560. Sole source procurement; public notice. (S.C. Code § 11-35-1560)

(A) A contract may be awarded for a supply, service, information technology, or construction item without competition if, under regulations, the Superintendent, or a designee above the level of the procurement officer, determines in writing that there is only one source for the required supply, service, information technology, or construction item. Except for contracts with a total potential value of fifty thousand dollars or less, adequate public notice of the intent to award without competition must be posted in South Carolina Business Opportunities, except that public notice is not required if the Superintendent, after consultation with the Board, determines in writing that award without such notice is in the interest of the District. Notice must contain a statement of the right to protest under Section 4210(1) and must be posted at least five business days before entering a contract. For contracts with a total potential value greater than two hundred fifty thousand dollars, such notice must be posted at least ten business days before entering a contract.

[Model Comment: The 2021 Code requires that, unless exempted in writing by the Superintendent after consultation with the Board, sole-source procurements greater than $50,000 require five business days of public notice before entering a contract. For how this relates to protest deadlines, see new Section 4210(1)(c).]

(B) Written documentation must include the determination and basis for the proposed sole source procurement. A delegation of authority by the Superintendent with respect to sole source determinations must be submitted in writing to the chief procurement officer. In cases of reasonable doubt, competition must be solicited. Any decision by a District that a procurement be restricted to one potential vendor must be accompanied by a thorough, detailed explanation as to why no other will be suitable or acceptable to meet the need.

SECTION 1570. Emergency procurements; public notice. (S.C. Code § 11-35-1570)

(A) Notwithstanding any other provision of this code, the Superintendent or a designee may award or authorize others to award emergency contracts only when there exists an immediate threat to public health, welfare, critical economy and efficiency, or safety under emergency conditions as defined in regulations; and provided, that such emergency procurements shall be made with as much competition as is practicable

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

(B) When a contract entered pursuant to subsection (A) has a total or potential value in excess of fifty thousand dollars, notice of the award must be posted in South Carolina Business Opportunities (SCBO) as soon as practicable thereafter. The posted notice must contain a statement of the right to protest under Section 4210(1).

[Model Comment: The 2021 Code requires that notice of emergency procurements greater than $50,000 must be posted in SCBO as soon as practicable thereafter. For how this relates to protest deadlines, see new Section 4210(1)(c).]

SECTION 1575. Participation in auction or sale of supplies from bankruptcy. (S.C. Code § 11-35-1575)

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

SECTION 1710. Cancellation of invitation for bids or request for proposals. (S.C. Code § 11-35-1710)

Any solicitation under this code may be cancelled, or any or all bids or proposals may be rejected in whole or part as may be specified in the solicitation, when it is in the best interest of the District. The reasons for rejection, supported with documentation sufficient to satisfy external audit, shall be made a part of the contract file.

[*Model Comment: Consider this provision in conjunction with Section 1520(7) and Regulations 2065 and 2095.*]

SECTION 1810. Responsibility of bidders and offerors. (S.C. Code § 11-35-1810)

(1) Determination of Responsibility. Responsibility of the bidder or offeror shall be ascertained for each contract let by the District based upon full disclosure to the procurement officer concerning capacity to meet the terms of the contracts and based upon past record of performance for similar contracts. The regulations establish standards of responsibility that shall be enforced in all District contracts.

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

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

(4) Public procurement units, as defined in Section 11-35-4610 of the South Carolina Code of Laws, may provide information to one another relating to the responsibility or prior performance of a bidder or offeror or provide any other information about a bidder or offeror that is otherwise related to procurement. Any person affiliated with a public procurement unit in an official capacity, who provides such information in good faith, is immune from civil and criminal liability which might otherwise result by reason of his actions. In all such civil or criminal proceedings, good faith is a rebuttable presumption.

SECTION 1820. Prequalification of supplies and suppliers. (S.C. Code § 11-35-1820)

The regulations may provide for prequalification of suppliers or supplies.

SECTION 1830. Cost or pricing data. (S.C. Code § 11-35-1830)

(1) Contractor Certification. A contractor shall, except as provided in subsection (3) of this section, submit cost or pricing data and shall certify that, to the best of his knowledge and belief, the cost or pricing data submitted is accurate, complete, and current as of mutually determined specified date prior to the date of:

(a) the pricing of any contract awarded by competitive sealed proposals pursuant to Section 1530 or pursuant to the sole source procurement authority as provided in Section 1560 where the total contract price exceeds an amount established by regulations; or

(b) the pricing of any change order or contract modification which exceeds an amount established by regulations.

(2) Price Adjustment. Any contract, change order or contract modification under which a certificate is required shall contain a provision that the price to the District, including profit or fee, shall be adjusted to exclude any significant sums by which the District finds that such price was increased because the contractor furnished cost or pricing data was inaccurate, incomplete, or not current as of the date agreed upon between parties.

(3) Cost or Pricing Data Not Required. The requirements of this section shall not apply to contracts:

(a) where the contract price is based on adequate price competition;

(b) where the contract price is based on established catalog prices or market prices;

(c) where contract prices are set by law or regulations; or

(d) where it is determined in writing in accordance with regulations that the requirements of this section may be waived and the reasons for such waiver are stated in writing.

[*Model Comment: Consider this provision in conjunction with Regulation 2120.*]

SECTION 2010. Types of contracts. (S.C. Code § 11-35-2010)

Subject to the limitations of this section, any type of contract that will promote the best interests of the District may be used, except that the use of a cost-plus-a-percentage-of-cost contract must be approved by the Superintendent. A cost-reimbursement contract, including a cost-plus-a-percentage-of-cost contract, may be used only when a determination sufficient for external audit is prepared showing that the contract is likely to be less costly to the District than any other type or that it is impracticable to obtain the supplies, services, information technology, or construction required except under that contract.

SECTION 2015. Effect of contract or amendment. (S.C. Code § 11-35-2015)

A contract or amendment thereto, including, but not limited to, a change order or contract modification, is not effective against the District unless the contract or amendment is in writing and signed by an officer having actual authority to bind the District.

SECTION 2020. Approval of accounting system. (S.C. Code § 11-35-2020)

The chief procurement officer may require that:

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

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

SECTION 2030. Multiterm contracts. (S.C. Code § 11-35-2030)

(1) Specified Period. Unless otherwise provided by law, a contract for supplies, services, or information technology must not be entered into for any a period of more than one year unless approved in a manner prescribed by regulation. The term of the contract and conditions of renewal or extension must be included in the solicitation and funds must be available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods must be subject to the availability and appropriation of funds for them.

(2) Determination Prior to Use. Before the utilization of a multiterm contract, it must be determined in writing by the District that:

(a) estimated requirements cover the period of the contract and are reasonably firm and continuing; and

(b) such a contract serves the interest of the District by encouraging effective competition or otherwise promoting economies in District procurement.

(3) Cancellation Due to Unavailability of Funds in Succeeding Fiscal Periods. When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract must be canceled.

(4) Maximum Duration. The maximum potential duration for a contract is five years. A maximum potential duration of up to seven years may be approved by the Superintendent.

(5) Approval. Every type of contract with a maximum potential duration exceeding seven years must be approved by the board. For competitive procurements, approval of the maximum potential duration must be granted before solicitation.

SECTION 2040. Inapplicable laws. (S.C. Code § 11-35-2040)

The following laws are inapplicable to contracts solely for the procurement of commercially available off-the-shelf products pursuant to Section 1550:

(1) Chapter 14, Title 8, Unauthorized Aliens and Public Employment;

(2) Section 11-9-105, Contracts for Legal or Consultant Services;

(3) Section 11-35-5300, Prohibition of Contracting with Discriminatory Business;

(4) Chapter 57, Title 11, Iran Divestment Act;

(5) Chapter 107, Title 44, Drug-Free Workplace Act; and

(6) any other provision of law identified by regulations that sets forth policies, procedures, or requirements that impact the procurement of commercially available off-the-shelf products by the District, except for a provision of law that: (i) provides for criminal or civil penalties; (ii) appears in Article 17 of this code; or (iii) specifically refers to this section and provides that, notwithstanding this section, it is applicable to contracts for the procurement of commercially available off-the-shelf products.

SECTION 2050. Void contract terms or conditions. (S.C. Code § 11-35-2050)

Any term or condition in any contract entered into by the District that requires the District to defend, indemnify, or hold harmless another person, must be void ab initio, unless such term is expressly authorized by law. All contracts must be governed by South Carolina law. Without limiting the applicability of Section 4230, the exclusive venue for any dispute arising out of or related to any contract is in South Carolina. Any contract containing any terms or conditions inconsistent with any of the foregoing are otherwise enforceable as if it did not contain such term or condition.

[*Model Comment: (1) This section is new for the 2021 Code and mirrors S.C. Code Ann. § 11-35-2050; (2) See R.2143.* (3) *For the enforceability of a District's Code, see* D.W. Flowe & Sons, Inc. v. Christopher Const. Co., *327 S.C. 17, 482 S.E.2d 558 (1997), overruled on other grounds by* Evins v. Richland County Historic Preservation Comm'n, *341 S.C. 15, 532 S.E.2d 876 (2000)*]

SECTION 2060. Material changes prohibited. (S.C. Code § 11-35-2060)

A change order or a contract modification may not alter a contract in a manner or degree inconsistent with the underlying purposes and policies of this code or the regulations.

[*Model Comment: Cross reference Regulation 2143.*]

SECTION 2210. Right to inspect plant. (S.C. Code § 11-35-2210)

The chief procurement officer or his designee is authorized, at reasonable times, to inspect the part of the plant or place of business of a contractor or subcontractor which is related to the performance of a contract awarded or to be awarded by the District.

SECTION 2220. Right to audit records. (S.C. Code § 11-35-2220)

(1) Audit of Cost or Pricing Data. All District contracts shall contain a clause setting forth the District's right at reasonable times and places to audit the books and records of any contractor or subcontractor who has submitted cost or pricing data pursuant to Section 1830 to the extent that such books and records relate to such cost or pricing data. The contract shall further set forth that the contractor or subcontractor who receives a contract, change order, or contract modification for which cost or pricing data is required, shall maintain such books and records that relate to such cost or pricing data for three years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing by the chief procurement officer; provided, however, that such records shall be retained for additional periods of time beyond this three-year period upon request of the chief procurement officer.

(2) Contract Audit. The District shall be entitled to audit the books and records of a contractor or any subcontractor under any negotiated contract or subcontract other than a firm fixed price contract to the extent that such books and records relate to the performance of such contract or subcontract. Such books and records shall be maintained by the contractor for a period of three years from the date of final payment under the prime contract and by the subcontractor for a period of three years from the date of final payment under the subcontract, unless a shorter period is otherwise authorized in writing by the chief procurement officer.

SECTION 2410. Finality of determinations. (S.C. Code § 11-35-2410)

(A) The determinations required by the following sections and related regulations are final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law: Section 1520(7) (Competitive Sealed Bidding: Correction or Withdrawal of Bids; Cancellation of Awards), Section 1520(11) (Competitive Sealed Bidding: Request for Qualifications), Section 1525(1) (Competitive Fixed Price Bidding: Conditions for Use), Section 1528(1) (Competitive Best Value Bidding: Conditions for Use), Section 1528(8) (Competitive Best Value Bidding: Award), Section 1529(1) (Competitive Online Bidding: Conditions for Use), Section 1530(1) (Competitive Sealed Proposals, Conditions for Use), Section 1530(4) (Competitive Sealed Proposals: Request for Qualifications), Section 1530(7) (Competitive Sealed Proposals, Selection and Ranking of Prospective Offerors), Section 1530(9) (Competitive Sealed Proposals Award), Section 1540 (Negotiations After Unsuccessful Competitive Sealed Bidding), Section 1560 (Sole Source Procurement), Section 1570 (Emergency Procurement), Section 1710 (Cancellation of Invitation for Bids or Requests for Proposals), Section 1810 (Responsibility of Bidders and Offerors), Section 1830(3) (Cost or Pricing Data, Cost or Pricing Data Not Required), Section 2010 (Types and Forms of Contracts), Section 2020 (Approval of Accounting System), Section 2030(2) (Multiterm Contracts, Determination Prior to Use), Section 3010(1) (Choice of Project Delivery Method), Section 3020(d) (Construction Procurement Procedures: Negotiations After Unsuccessful Competitive Sealed Bidding), Section 3023 (Prequalification on District Construction), Section 3220(5) (Procurement Procedure, Selection and

Ranking of the Three Most Qualified), Section 4210(7) (Stay of Procurement During Protests, Decision to Proceed), and Section 4810 (Cooperative Use of Supplies, Services, or Information Technology).

(B) The chief business official shall review samples of the determinations periodically, and issue reports and recommendations on the appropriateness of the determinations made.

SECTION 2420. Reporting of anticompetitive practices; privileged communications. (S.C. Code § 11-35-2420)

(A) When any information or allegations concerning anticompetitive practices among any bidders or offerors, come to the attention of any employee of the District, immediate notice of the relevant facts shall be transmitted to the Office of the Attorney General.

(B) Communications to the Office of the Attorney General and any testimony relating to the matters described in Section 2420(A) are privileged and may not be disclosed without prior approval of the Office of the Attorney General. A person required or permitted to report pursuant to Section 2420(A) or who participates in an investigation or judicial proceedings resulting from the report, acting in good faith, is immune from civil and criminal liability which might otherwise result by reason of these actions. In all such civil or criminal proceedings, good faith is a rebuttable presumption.

SECTION 2430. Retention of procurement records. (S.C. Code § 11-35-2430)

All procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the Department of Archives and History after consultation with the Attorney General. All retained documents shall be made available to the Attorney General or a designee upon request and proper receipt therefor.

[*Model Comment: Cross reference should be made to Regulations promulgated by the South Carolina Department of Archives and History, e.g., Regulations 12-902.15, .17 - .21, .25, & .27, which appear in Volume 23 of the South Carolina Code of Laws.*]

SECTION 2440. Records of procurement actions. (S.C. Code § 11-35-2440)

(1)(a) Contents of Records. The chief procurement officer shall submit semi-annually a record listing all contracts made pursuant to Section 1560 (Sole Source Procurement) or Section 1570 (Emergency Procurements) to the Superintendent. The record must contain:

(i) each contractor's name;

(ii) the amount and type of each contract;

(iii) a listing of supplies, services, information technology, or construction procured under each contract.

(b) The chief procurement officer shall maintain these records for five years.

(2) Publication of Records. A copy of the record must be submitted to the board on an annual basis and must be available for public inspection.

[*Model Comment: Regulation 2015 contains an additional reporting requirement.*]

ARTICLE 7.

SPECIFICATIONS

SECTION 2610. Definitions of terms used in this article. (S.C. Code § 11-35-2610)

As used in this article, the term "specifications" means any technical or purchase description or other description of the physical or functional characteristics, or of the nature of a supply, service, or construction item. It may also include a description of any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery.

[*Model Comment: Read this section in conjunction with Regulation 2140.*]

SECTION 2710. Issuance of specifications; duties of the Board. (S.C. Code § 11-35-2710)

The regulations may govern the preparation, maintenance, and content of specifications for supplies, services, information technology, and construction required by the District.

[*Model Comment: Read this section in conjunction with Regulation 2140.*]

SECTION 2730. Assuring competition. (S.C. Code § 11-35-2730)

All specifications shall be drafted so as to assure cost effective procurement of the District's actual needs and shall not be unduly restrictive.

[*Model Comment: Read this section in conjunction with Regulation 2140.*]

SECTION 2740. Relationship with using agencies. (S.C. Code § 11-35-2740)

Specifications shall be drawn in such a manner as to ensure maximally cost effective procurement, consistent with regulations.

[*Model Comment: Read this section in conjunction with Regulation 2140.*]

SECTION 2750. Specifications prepared by architects and engineers. (S.C. Code § 11-35-2750)

The requirements of this article regarding the nonrestrictiveness of specifications apply to each solicitation and include, among other things, all specifications prepared by architects, engineers, designers, draftsmen, and land surveyors for District contracts.

ARTICLE 9.

CONSTRUCTION, ARCHITECT-ENGINEER, CONSTRUCTION MANAGEMENT, AND LAND SURVEYING SERVICES

[*Model Comment: Article 9 of the Model School Code parallels Article 9 of the Consolidated Procurement Code, which is adapted in large part from Article 5 of the ABA's 2000 Model Procurement Code for State and Local Governments (hereinafter "MPC"). The General Assembly adopted many of construction related provisions of the ABA's Model Code when it enacted 2008 Act 174. In doing so, the General Assembly stated that "the relevant official comments to the [ABA] model code, and the construction given to the [ABA] model code, should be examined as persuasive authority for interpreting and construing the new code provisions created by this act." Accordingly, a number of the following Model Comments include quotes from the ABA's Official Comments.*]

SECTION 2910. Definitions of terms used in this article. (S.C. Code § 11-35-2910)

(1) "Architect-engineer and land surveying services" are those professional services associated with the practice of architecture, professional engineering, land surveying, landscape architecture, and interior design pertaining to construction, as defined by the laws of this State, as well as incidental services that members of these professions and those in their employ may logically or justifiably perform, including

studies, investigations, surveys, evaluations, consultations, planning, programming conceptual designs, plans and specifications, cost estimates, inspections, shop drawing reviews, sample recommendations, preparation of operating and maintenance manuals, and other related services.

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

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

(4) "Construction management services" are those professional services associated with contract administration, project management, and other specified services provided in connection with the administration of a project delivery method defined in Section 3005 (Project Delivery Methods Authorized).

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

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

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

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

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

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

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

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

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

[*Model Comment: (1) Read in conjunction with Regulation 2145K(2). (2) The following official comments to the Model Procurement Code provide insight into the role of design requirements. MPC '5-101, cmt.2. ("Government prepares a functional description that sets forth only the essential features of each project, including anticipated schedule, and estimated budget for design, construction, operation, and maintenance. . . . If the design requirements go beyond functional description into particular design, construction, finance, or operational requirements, the scope and the intensity of this competition is compromised, to the detriment of both government and offerors. For example, "design-build" competitions in which major design decisions are already set forth in the design requirements -- known in the industry as "detail-build" -- are not likely to produce innovation in the integration of design and construction. "Detail-build" procurements split the professional design function between government and the contractor, an allocation that leads to confusion and disputes over liability for design, for construction results, and for performance problems. The Code encourages government: (1) to prepare design requirements for each project before a procurement method is selected; and (2) to procure the design function from a single entity."); MPC, opening commentary ("The starting gate for these competitions is the statement of "design requirements" in the RFP, which establishes a common minimum*

threshold of owner requirements in these competitions. The finish gate is the submission of "proposal development documents" by offerors in response to the RFP.").]

(11) "Independent peer reviewer services" are additional architectural and engineering services that a District shall acquire in design-build, design-build-operate-maintain, or design-build-finance-operate-maintain procurements. The function of the independent peer reviewer is to confirm that the key elements of the professional engineering and architectural design provided by the contractor are in conformance with the applicable standard of care. If a District elects not to contract with the independent peer reviewer proposed by the successful offeror, the independent peer reviewer must be selected through competitive sealed proposals.

[*Model Comment: Read in conjunction with Section 3024(3)(b) and Regulation 2145(A)(7). (2) The following official comments to the Model Procurement Code provide insight into the role of an independent peer reviewer: MPC ' 5-204(3), cmt. ("The Independent Peer Reviewer provides an independent professional peer review of key elements of the design of major public facilities. The Independent Peer Reviewer's function is not to conduct a second design alongside the designers of record. The Independent Peer Reviewer's purpose is to provide the government with independent professional advice and assurance that key design elements of the project are consistent with the functional description in the Request for Proposals and with the common law standard of professional care. The Independent Peer Reviewer's contractual relationship and professional obligation is to the [State]. By requiring that the offeror recommend an appropriate Independent Peer Reviewer (upon which the offeror is evaluated), the professional quality of the Independent Peer Reviewer is assured to be high."); MPC ' 5-101(7), cmt. 2 ("(3) The independent peer reviewer function is applied to these types of procurements because these project delivery methods typically include contract periods for operations and maintenance of between 15 and 25 years. In design-build operate maintain and design build finance operate maintain procurements, a high portion of the contract price is devoted to operation, maintenance, and (in the case of design build finance operate maintain) to financing concerns. The government has heightened, but practical, interests: (a) to ensure that initial design is consistent with the applicable standard of care; (b) to preserve the government's investment in the project during the contract period; and (c) to provide increased flexibility in the event a termination for convenience or for default is in the government's interest. An independent, contemporaneous, peer review by a highly qualified professional designer will help to ensure that the contractor's design comports with good engineering and architectural practice at the time the services are rendered.").*]

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

(13) "Operations and maintenance" means a project delivery method in which the District enters into a single contract for the routine operation, routine repair, and routine maintenance of an infrastructure facility.

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

[*Model Comment: Read in conjunction with Regulation 2145(K)(3).*]

SECTION 3005. Project delivery methods authorized. (S.C. Code § 11-35-3005)

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

(a) design-bid-build;

(b) construction management at-risk;

(c) operations and maintenance;

(d) design-build;

(e) design-build-operate-maintain; and

(f) design-build-finance-operate-maintain.

(2) In addition to those methods identified in item (1), the regulations may:

(a) approve as an alternate project delivery method any combination of design, construction, finance, and services for operations and maintenance of an infrastructure facility; and

(b) allow or require the District to follow any of the additional procedures established by Section 11-35-3024.

(3) Participation in a report or study that is later used in the preparation of design requirements for a project does not disqualify a firm from participating as a member of a proposing team in a construction management at-risk, design-build, design-build-operate-maintain, or design-build-finance-operate-maintain procurement unless the participation provides the business with a substantial competitive advantage.

SECTION 3010. Choice of project delivery method. (S.C. Code § 11-35-3010)

The project delivery method used for a District construction project must be that method which is most advantageous to the District and results in the most timely, economical, and successful completion of the construction project. The District shall select, in accordance with regulations, the appropriate project delivery method for a particular project and shall state in writing the facts and considerations leading to the selection of that particular method.

SECTION 3015. Source selection methods assigned to project delivery methods. (S.C. Code § 11-35-3015)

(1) Scope. This section specifies the source selection methods applicable to procurements for the project delivery methods identified in Section 3005 (Project delivery methods authorized), except as provided in Sections 1550 (Small Purchases), 1560 (Sole Source Procurement), 1570 (Emergency Procurements), 3230 (Exception for small architect-engineer, and land surveying services contract), 3310 (Indefinite quantity contracts for architectural-engineering, and land surveying services), and 3320 (Indefinite quantity contracts for construction).

(2) Design-bid-build:

(a) Design. Architect-engineer, construction management, and land surveying services. The qualifications based selection process in Section 3220 (Qualifications Based Selection Procedures) must be used to procure architect-engineer, construction management, and land surveying services, unless those services are acquired in conjunction with construction using one of the project delivery methods provided in Section 3015 (3), (5), (6), (7), and (8).

(b) Construction. Competitive sealed bidding, as provided in Section 1520 (Competitive Sealed Bidding), must be used to procure construction in design-bid-build procurements.

(3) Construction Management at-risk. Contracts for construction management at-risk must be procured as provided in either Section 1520 (Competitive Sealed Bidding) or Section 1530 (Competitive Sealed Proposals).

(4) Operations and Maintenance. Contracts for operations and maintenance must be procured as set forth in Section 1510 (Methods of Source Selection).

(5) Design-build. Contracts for design-build must be procured by competitive sealed proposals, as provided in Section 1530 (Competitive Sealed Proposals), except that the regulations may describe the circumstances under which a particular design-build procurement does not require the submission of proposal development documents as required in Section 3024(2)(b).

[*Model Comment: Despite this authority, the regulations do not allow design-build solicitations that do not require submission of proposal development documents. Stated differently, a design-build procurement cannot be evaluated on qualifications alone.*]

(6) Design-build-operate-maintain. Contracts for design-build-operate-maintain must be procured by competitive sealed proposals, as provided in Section 1530 (Competitive Sealed Proposals).

(7) Design-build-finance-operate-maintain. Contracts for design-build-finance-operate-maintain must be procured by competitive sealed proposals, as provided in Section 1530 (Competitive Sealed Proposals).

(8) Other. Contracts for an alternate project delivery method approved pursuant to Section 3005(2) must be procured by a source selection method provided in Section 1510, as specified by the authority approving the alternative project delivery method.

SECTION 3020. Additional bidding procedures for construction procurement. (S.C. Code § 11-35-3020)

Exceptions in Competitive Sealed Bidding Procedures. The process of competitive sealed bidding as required by Section 3015(2)(b) must be performed in accordance with the procedures outlined in Article 5 of this code subject to the following exceptions:

(a) Invitation for Bids. The District is responsible for developing a formal invitation for bids for each construction project. The invitation must include, but not be limited to, all contractual terms and conditions applicable to the procurement. A copy of each invitation for bids must be advertised formally in South Carolina Business Opportunities.

(b) Bid Acceptance. Instead of Section 1520(6), the following provision applies. Bids must be accepted unconditionally without alteration or correction, except as otherwise authorized in this code. The District's invitation for bids must set forth all requirements of the bid including, but not limited to:

(i) The District, in consultation with the architect-engineer assigned to the project, shall identify by license classification or subclassification in the invitation for bids all subcontractors who are expected to perform work for the prime contractor to or about the construction when those subcontractors' contracts are each expected to exceed three percent of the prime contractor's total base bid. In addition, the District, in consultation with the architect-engineer assigned to the project, may identify by license classification or subclassification in the invitation for bids a subcontractor who is expected to perform work which is vital to the project. The determination of which subcontractors are included in the list provided in the invitation for bids is not protestable pursuant to Section 4210 or another provision of this code. A bidder in response to an invitation for bids shall clearly identify in his bid only those subcontractors to perform the work as identified in the invitation for bids. If the bidder determines to use his own employees to perform a portion of the work for which he would otherwise be required to list a subcontractor and if the bidder is qualified to perform that work under the terms of the invitation for bids, the bidder shall list himself in the appropriate place in his bid and not subcontract that work except with the approval of the District for good cause shown.

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

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

(c) Instead of Section 1520(10), the following provisions apply:

(i) Unless there is a compelling reason to reject bids as prescribed by regulation, notice of an intended award of a contract to the lowest responsive and responsible bidder whose bid meets the requirements set forth in the invitation for bids must be given by posting the notice at a location that is specified in the invitation for bids. The invitation for bids and the posted notice must contain a statement of the bidder's right to protest pursuant to Section 4210(1) and the date and location of posting must be announced at bid opening. In addition to posting notice, the District promptly shall send all responsive bidders a copy of the notice of intended award and of the bid tabulation. The mailed notice must indicate the posting date and must contain a statement of the bidder's right to protest pursuant to Section 4210(1).

(ii) After five business days' notice is given, the District may enter into a contract with the bidder named in the notice in accordance with the provisions of this code and of the bid solicited. The procurement officer must comply with Section 1810.

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

(d) Negotiations after Unsuccessful Competitive Sealed Bidding. Instead of Section 1540, the following provisions apply:

(i) If bids received pursuant to an invitation for bids exceed available funds, and it is determined in writing by the District that circumstances do not permit the delay required to resolicit competitive sealed bids, and the base bid, less deductive alternates, does not exceed available funds by an amount greater than ten percent of the construction budget established for that portion of the work, a contract may be negotiated pursuant to this section with the lowest responsible and responsive bidder. The District may change the scope of the work to reduce the price to be within the established construction budget but may not reduce the price below the established construction budget more than ten percent without a written request by the chief business official based on the interest of the District.

SECTION 3021. Subcontractor substitution. (S.C. Code § 11-35-3021)

(1) After notice of an award or intended award has been given, whichever is earlier, the prospective contractor identified in the notice may not substitute a business as subcontractor in place of a subcontractor listed in the prospective contractor's bid or proposal, except for one or more of the following reasons:

(a) upon a showing satisfactory to the District by the prospective contractor that:

(i) the listed subcontractor is not financially responsible;

(ii) the listed subcontractor's scope of work did not include a portion of the work required in the plans and specifications, and the exclusion is not clearly set forth in the subcontractor's original bid;

(iii) the listed subcontractor was listed as a result of an inadvertent clerical error, but only if that request is made within four working days of opening;

(iv) the listed subcontractor failed or refused to submit a performance and payment bond when requested by the prospective contractor after the subcontractor had represented to the prospective contractor that the subcontractor could obtain a performance and payment bond; and

(v) the listed subcontractor must be licensed and did not have the license at the time required by law;

(b) if the listed subcontractor fails or refuses to perform his subcontract;

(c) if the work of the listed subcontractor is found by the District to be substantially unsatisfactory;

(d) upon mutual agreement of the contractor and subcontractor; and

(e) with the consent of the District for good cause shown.

(2) The request for substitution must be made to the District in writing. This written request does not give rise to a private right of action against the prospective contractor in the absence of actual malice.

(3) If substitution is allowed, the prospective contractor, before obtaining prices from another subcontractor, must attempt in good faith to negotiate a subcontract with at least one subcontractor whose bid was received before the submission of the prospective contractor's offer. This section does not affect a contractor's ability to request withdrawal of a bid in accordance with the provisions of this code and the regulations.

(4) This section applies to a procurement conducted using the source selection methods authorized by Section 3015(2)(b), (3), (5), (6), (7), and (8).

SECTION 3023. Prequalification on District construction. (S.C. Code § 11-35-3023)

In accordance with this section, the applicable section of Article 5, and procedures published by the State Engineer, a District may limit participation in a solicitation for construction to only those businesses, including potential subcontractors, that are prequalified. The prequalification process may be used only with the approval of the Superintendent.

If businesses are prequalified, the District must issue a request for qualifications. Adequate public notice of the request for qualifications must be given in the manner provided in Section 1520(3). The request must contain, at a minimum, a description of the general scope of work to be acquired, the deadline for

submission of information, and how businesses may apply for consideration. The evaluation criteria must include, but not be limited to, prior performance, recent past references on all aspects of performance, financial stability, and experience on similar construction projects. Using only the criteria stated in the request for qualifications, businesses must be ranked from most qualified to least qualified. The basis for the ranking must be determined in writing. If fewer than two businesses are prequalified, the prequalification process must be canceled.

[*Model Comment: Read in conjunction with Section 3024(2)(c)(i), Regulation 2132, and Regulation 2145. Pre-qualification must be conducted in accordance with the guidance appearing in the District's internal operating procedures. See attached. Note: The Superintendent grants any approval required by reference to "OSE" or the "State Engineer".*]

[Drafting Note: In order to acquire an affirmative written opinion for a school's code, the following document must be incorporated by reference into the District's internal operating procedures: Chapter 3.5 of the Office of State Engineer's 2020 Manual for Planning and Execution of State Permanent Improvements.]

SECTION 3024. Additional procedures applicable to procurement of certain project delivery methods. (S.C. Code § 11-35-3024)

(1) Applicability. In addition to the requirements of Section 1530 (Competitive Sealed Proposals), the procedures in this section apply as provided in items (2), (3), and (4) below.

[*Model Comment: Read in conjunction with Regulation 2145(K)(1).*]

(2) Content of Request for Proposals. A Request for Proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain:

(a) must include design requirements;

[*Model Comment: Read in conjunction with Section 2910(10).*]

(b) must solicit proposal development documents; and

[*Model Comment: Read in conjunction with Section 2910(14).*]

(c) may, if the District determines that the cost of preparing proposals is high in view of the size, estimated price, and complexity of the procurement:

(i) prequalify offerors in accordance with Section 3023 by issuing a request for qualifications in advance of the request for proposals;

(ii) select, pursuant to procedures designated in the State of South Carolina's Manual for Planning and Execution of State Permanent Improvements, a short list of responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award before discussions and evaluations pursuant to Section 1530, if the number of proposals to be short-listed is stated in the Request for Proposals and prompt public notice is given to all offerors as to which proposals have been short-listed; or

[*Model Comment: According to Section 3023(A) above, the determination regarding how many offers to prequalify is not subject to protest. No aspect of the short list process is insulated from protest. Given the option of prequalification under paragraph (i) above, Division of Procurement Services anticipates little if any need for the type of short listing authorized by this paragraph. Accordingly, the Model retains the reference to state level guidance on this process.*]

(iii) pay stipends to unsuccessful offerors, if the amount of the stipends and the terms under which stipends are paid are stated in the Request for Proposals.

(3) Evaluation Factors. A Request for Proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain must:

(a) state the relative importance of (i) demonstrated compliance with the design requirements, (ii) offeror qualifications, (iii) financial capacity, (iv) project schedule, (v) price, or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements, and (vi) other factors, if any; and

[*Model Comment: Read in conjunction with Regulation 2145K(4).*]

(b) require each offeror to identify an Independent Peer Reviewer whose competence and qualifications to provide that service must be an additional evaluation factor in the award of the contract.

[*Model Comment: Read in conjunction with Section 2910(111) and Regulation 2145(A)(7).*]

SECTION 3030. Bond and security. (S.C. Code § 11-35-3030)

(1) Bid Security.

(a) Requirement for Bid Security. Bid security is required for all competitive sealed bidding for construction contracts in a design-bid-build procurement in excess of one hundred thousand dollars and other contracts as may be prescribed by the District's internal procurement procedures (Section 540). Bid security is a bond provided by a surety company meeting the criteria established by the regulations or otherwise supplied in a form that may be established by regulation.

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

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

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

(2) Contract Performance Payment Bonds.

(a) When Required-Amounts. Contracts for construction must require the following bonds or security:

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

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

[*Model Comment: (1) The District's internal procurement procedures (§ 540) may wish to address the impact on the District of the Subcontractors' and Suppliers' Payment Protection Act, appearing in Title 29, Chapter 6, Article 3 of the South Carolina Code of Laws. (2) The Office of State Engineer includes in the OSE Manual a guide entitled: Bid, Payment, and Performance Bonds, What they are, How they work, and a Checklist of what you need (December 2009).*]

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

(iv) in the case of a construction manager at-risk contract, the solicitation may provide that bonds or security are not required during the project's preconstruction or design phase, if construction does not

commence until the requirements of subitems (i) and (ii) above have been satisfied. Additionally, the solicitation may provide that bonds or security as described in subitems (i) and (ii) above may be furnished for one or more designated portions of the project, in an amount equal to one hundred percent of the value of the construction of each designated portion, and also may prescribe the time of delivery of the bonds or security. In no event may construction of any portion of the work commence until the appropriate bonds or security have been delivered to the District;

(v) in the case of a design-build, design-build-operate-maintain, or design-build-finance-operate-maintain contract, the solicitation may provide that bonds or security as described in subitems (i) and (ii) above may be furnished for one or more designated portions of the project, in an amount equal to one hundred percent of the value of the design and construction of each designated portion, and also may prescribe the time of delivery of the bonds or security. In no event may design or construction of any portion of the work commence until the appropriate bonds or security have been delivered to the District.

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

(c) Suits on Payment Bonds-Right to Institute, Where and When Brought. Section 11-35-3030(2)(c)-(d) of the South Carolina Code of Laws, as amended, provides for legal actions on payment bonds.

[Model Comment: Districts may wish to consider the following legal authorities: (1) D.W. Flowe & Sons, Inc. v. Christopher Constr. Co., 326 S.C. 17, 482 S.E.2d 558 (1997) overruled on other grounds by *Evins v. Richland County Historic Preservation Comm'n*, 341 S.C. 15, 532 S.E.2d 876 (2000)*, and (2) S.C. Code Ann. § 11-1-120]*

(3) Bonds Forms and Copies.

(a) Bonds Forms. The regulations specify the form of the bonds required by this section.

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

(4) Retention.

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

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

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

SECTION 3035. Errors and omissions insurance. (S.C. Code § 11-35-3035)

Regulations shall specify when a District shall require offerors to provide appropriate errors and omissions insurance to cover architectural and engineering services under the project delivery methods set forth in Section 3005(1)(a), (d), (e), and (f).

SECTION 3037. Other forms of security. (S.C. Code § 11-35-3037)

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

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

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

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

SECTION 3040. Contract clauses and their administration. (S.C. Code § 11-35-3040)

(1) Contract Clauses. District construction contracts and subcontracts may include clauses providing for adjustments in prices, time of performance, and other appropriate contract provisions including, but not limited to:

(a) the unilateral right of a District to order in writing:

(i) all changes in the work within the general scope of the contract; and

(ii) all changes in the time of performance of the contract which do not alter the general scope of the contract work;

(b) variations occurring between estimated quantities of work in the contract and actual quantities;

(c) suspension of work ordered by the District;

(d) site conditions differing from those indicated in the contract or ordinarily encountered.

(2) Price Adjustments.

(a) Adjustments in price pursuant to clauses promulgated by regulation must be computed and documented with a written determination. The price adjustment agreed upon must approximate the actual cost to the contractor and all costs incurred by the contractor must be justifiably compared with prevailing industry standards, including reasonable profit. Costs must be properly itemized and supported by substantiating data sufficient to permit evaluation before commencement of the pertinent performance or as soon after that as practicable, and must be arrived at through whichever one of the following ways is the most valid approximation of the actual cost to the contractor:

(i) by unit prices specified in the contract or subsequently agreed upon;

(ii) by the costs attributable to the events or situations under those clauses with adjustment of profits or fee, all as specified in the contract or subsequently agreed upon;

(iii) by agreement on a fixed price adjustment;

(iv) in another manner as the contracting parties may mutually agree; or

(v) in the absence of agreement by the parties, through unilateral determination by the District of the costs attributable to the events or situations under those clauses, with adjustment of profit or fee, all as computed by the District in accordance with applicable sections of the regulations and subject to the provisions of Article 17 of this code.

(b) A contractor is required to submit cost or pricing data if an adjustment in contract price is subject to the provisions of Section 1830.

(3) Additional Contract Clauses. The construction contracts and subcontracts may include clauses providing for appropriate remedies that cover as a minimum:

(a) specified excuses for delay or nonperformance;

(b) termination of the contract for default;

(c) termination of the contract in whole or in part for the convenience of the District.

(4) Modification of Required Clauses. The chief procurement officer may vary the clauses promulgated by regulation for inclusion in a particular construction contract if the variations are supported by a written determination that states the circumstances justifying the variations, if notice of a material variation is stated in the invitation for bids.

SECTION 3050. Cost principles regulations for construction contractors. (S.C. Code § 11-35-3050)

The regulations may set forth cost principles which shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under provisions in construction contracts which provide for the reimbursement of costs.

SECTION 3070. Approval of architectural, engineering, or construction changes which do not alter general scope or intent or exceed approved budget. (S.C. Code § 11-35-3070)

A District may approve and pay for amendments to architectural/engineering contracts and change orders to construction contracts which do not alter the general scope or intent of the project and which do not exceed the previously approved project budget.

SECTION 3210. Policy. (S.C. Code § 11-35-3210)

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

[*Model Comment: Sections 1520 and 1550 are inapplicable to construction related professional design services. This provision requires public notice of all A/E, CM, and land surveying contracts, except as otherwise allowed by Section 3230. Consistent with Section 3220 and R. 2145D, advertisement must be in South Carolina Business Opportunities.*]

SECTION 3215. Preference for resident design service; definitions; exceptions. (S.C. Code § 11-35-3215)

(A) As used in this section:

(1) 'Design services' means architect engineer, construction management, or land surveying services as defined in Section 2910 and awarded pursuant to Section 3220.

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

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

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

(D) In an evaluation conducted pursuant to Section 3220, a resident firm must be ranked higher than a nonresident firm if the District's selection committee finds the two firms otherwise equally qualified.

(E) This section does not apply to a procurement if either the procurement does not involve construction or the design services are a minor accompaniment to a contract for nondesign services.

SECTION 3220. Qualifications based selection procedures. (S.C. Code § 11-35-3220)

(1) District Selection Committee. A District shall establish its own architect-engineer, construction management, and land surveying services selection committee, referred to as the District selection committee, which must be composed of those individuals the Superintendent determines to be qualified to make an informed decision as to the most competent and qualified firm for the proposed project. The Superintendent or his qualified responsible designee shall sit as a permanent member of the District selection committee for the purpose of coordinating and accounting for the committee's work.

(2)(a) Advertisement of Project Description. The District selection committee is responsible for:

(i) developing a description of the proposed project;

(ii) enumerating all required professional services for that project; and

(iii) preparing a formal invitation to firms for submission of information.

(b) The invitation must include, but not be limited to, the project title, the general scope of work, a description of all professional services required for that project, the submission deadline, and how interested firms may apply for consideration. The invitation must be advertised formally in South Carolina Business Opportunities.

(3) Response to Invitation. The date for submission of information from interested persons or firms in response to an invitation must not be less than fifteen days after publication of the invitation. Interested architect-engineer, construction management, and land surveying persons or firms shall respond to the invitation with the submission of a current and accurate Federal Standard Form 330, Architect-Engineer and Related Services Questionnaire, and Federal Standard Form 255, Architect-Engineer and Related Services Questionnaire for Specific Project, or their successor forms or similar information as may be prescribed by regulation, and other information that the particular invitation may require.

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

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

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

(i) past performance;

(ii) the ability of professional personnel;

(iii) demonstrated ability to meet time and budget requirements;

(iv) location and knowledge of the locality of the project if the application of this criterion leaves an appropriate number of qualified firms, given the nature and size of the project;

(v) recent, current, and projected workloads of the firms;

(vi) creativity and insight related to the project;

(vii) related experience on similar projects;

(viii) volume of work awarded by the District to the person or firm during the previous five years, with the objective of effectuating an equitable distribution of contracts by the District among qualified firms including Minority Business Enterprises certified by the South Carolina Office of Small and Minority Business Assistance and firms that have not had previous District work; and

[*Alternative Text: In lieu of the phrase "certified by the South Carolina Office of Small and Minority Business Assistance," Districts may use the phrase "certified in accordance with Article 21 of this code."*]

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

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

(6) Notice of Selection and Ranking. When it is determined by the District that the ranking report is final, written notification of the highest ranked person or firm must be sent immediately to all firms interviewed.

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

[*Model Comments: The State Engineer's Manual has forms for complying with this provision that may be of assistance.*]

SECTION 3230. Exception for small architect-engineer, construction management and land surveying services contract. (S.C. Code § 11-35-3230)

(1) Procurement Procedures for Certain Contracts. A District securing architect-engineer, construction management, or land surveying services which are estimated not to exceed fifty thousand dollars may award contracts by direct negotiation and selection, taking into account:

(a) the nature of the project;

(b) the proximity of the architect-engineer or land surveying services to the project;

(c) the capability of the architect, engineer, or land surveyor to produce the required service within a reasonable time;

(d) past performance; and

(e) ability to meet project budget requirements.

(2) Maximum Value of Small Contracts with One Person or Firm. The total value of contracts awarded to a single architectural engineering, construction management, or land surveying firm by a single District pursuant to subsection (1) may not exceed one hundred fifty thousand dollars in a twenty-four-month period. Persons or firms seeking to render professional services pursuant to this section shall furnish the District with whom the firm is negotiating a list of professional services, including fees paid for them, performed for the District during the fiscal year immediately preceding the fiscal year in which the negotiations are occurring and during the fiscal year in which the negotiations are occurring.

(3) Reserved.

(4) Splitting of Larger Projects Prohibited. A District may not break a project into small projects for the purpose of circumventing the provisions of Section 3220 and this section.

(5) When negotiating a contract pursuant to this section, a District may not negotiate with a firm unless any unsuccessful negotiations with a different firm have been concluded in writing. Once negotiations with a firm have been concluded, negotiations may not be reopened.

SECTION 3245. Architect, engineer, or construction manager; performance of other work. (S.C. Code § 11-35-3245)

(a) An architect or engineer performing design work, or a construction manager performing construction management services, both as described in Section 2910(1) and (3), under a contract awarded pursuant to

the provisions of Section 3220 or Section 3230, may not perform other work, by later amendment or separate contract award, on that project as a contractor or subcontractor either directly or through a business in which he or his architectural engineering or construction management firm has greater than a five percent interest.

(b) For purposes of this section, safety compliance and other incidental construction support activities performed by the construction manager are not considered work performed as a contractor or subcontractor. If the construction manager performs or is responsible for safety compliance and other incidental construction support activities, and these support activities are in noncompliance with the provisions of Section 41-15-210, then the construction management firm is subject to all applicable fines and penalties.

(c) This section applies only to procurements for construction using the design-bid-build project delivery method.

ARTICLE 10.

INDEFINITE DELIVERY CONTRACTS

SECTION 3305. Establishment of indefinite quantity contracts. (S.C. Code § 11-35-3305)

With the approval of the chief procurement officer, and in accordance with any applicable regulations, a procurement officer may establish contracts providing for an indefinite quantity, within state maximum or minimum limits, of specified supplies, service, or information technology, to be furnished during a fixed period, and that provide for the issuance of orders for delivery or performance of individual requirements during the period of the contract. The chief procurement officer may establish the contracts on behalf of or for use by any District.

SECTION 3310. Indefinite quantity contracts. (S.C. Code § 11-35-3310)

(1) General Applicability. Indefinite quantity contracts may be awarded on an as-needed basis for architectural-engineering and land-surveying services pursuant to Section 3220.

(2) Architectural-Engineering and Land-Surveying Services. When architectural-engineering and land-surveying services contracts are awarded, each contract must be limited to a total expenditure of three hundred thousand dollars for a two-year period with individual project expenditures not to exceed one hundred thousand dollars.

(3) Small Indefinite Quantity Contracts. Small indefinite quantity contracts for architectural-engineering and land-surveying services may be procured as provided in Section 3230. A contract established under this section must be subject to Section 3230, and any applicable regulations.

ARTICLE 11.

MODIFICATIONS AND TERMINATION OF CONTRACTS FOR SUPPLIES AND SERVICES

SECTION 3320. Task order contracts. (S.C. Code § 11-35-3320)

(A) The term "task order contract" means a contract that does not procure or specify a firm quantity of services, other than a minimum or maximum quantity, and that provides for the issuance of task orders for the performance of tasks during the period of the contract. Subject to the requirements of this section and other applicable law, a District may enter into task order contracts to acquire construction services when the exact time or exact quantities of future tasks are not known at the time of contract award.

(B) At any given time, a District may enter into task order contracts with four businesses for each geographic area for each licensing classification and subclassification for construction. Licensing classification and subclassification has the meaning provided by Chapter 11, Title 40. Except as otherwise

provided in this section, a task order contract for construction must be procured as provided in Section 1530, not including paragraph (4) (Request for Qualifications) or paragraph (8) (Negotiations). All evaluations must be conducted by a panel composed of at least three members. Except as provided by regulation, award must be made to the four responsible offerors whose proposals are determined in writing to be the most advantageous to the District, taking into consideration the evaluation factors set forth in the request for proposals. The contract file must contain the basis on which the awards will be made and must be sufficient to satisfy external audit. Procedures and requirements for the notification of intent to award the contracts must be the same as those provided in Section 1520(1) (Award). Section 3023 does not apply to contracts awarded pursuant to this section.

(C) Limitations on task order contracts.

(1) A task order contract awarded for geographic area may not be used to perform services at a different geographic area.

(2) A task order contract may not exceed five years, including extensions.

(3) Total expenditures pursuant to all task order contracts for construction resulting from a single solicitation may not exceed four million dollars.

(4) The total construction cost of a single project performed using multiple task orders or task orders in combination with other types of contracts may not exceed five hundred thousand dollars. Projects may not be divided artificially to avoid this limitation.

(5) A single project must not be performed using task order contracts for construction in combination with contracts awarded pursuant to Section 1550. Standards for determining whether work constitutes a single project must be established in the State Engineer's Manual for Planning and Execution of State Permanent Improvements.

(D) Limitations on task orders.

(1) A task order must clearly specify all tasks to be performed or property to be delivered under the order so the full price for the performance of the work can be established when the order is placed. All task orders must be issued on a fixed-price basis.

(2) A quote request for construction must be provided to all task order contractors. A task order for construction may not be issued unless the District receives at least two responsive, bona fide, fixed-price quotes. Any award must be issued to the contractor submitting the lowest responsive quote.

(3) All task orders must be issued within the period of the contract and must be within the scope and maximum value of the contract.

(4) A task order for construction may not be less than ninety thousand dollars and may not exceed three hundred fifty thousand dollars. Work may not be aggregated or divided artificially in order to avoid these limits.

(E) Any solicitation for a task order contract must include the following:

(1) the period of the contract, including the number of options to extend the contract and the period for which the contract may be extended under each option, if any;

(2) the maximum dollar value of the services to be procured under the contract;

(3) the minimum and maximum dollar value of the services to be procured under a single task order;

(4) a description that reasonably describes the licensing classification and the general scope, nature, complexity, and purposes of the services to be procured under the contract in a manner that will enable a prospective offeror to decide whether to submit an offer;

(5) the procedures that the governmental body will use for requesting fixed price quotes and for issuing orders, a restriction on communications between contractors regarding pending quote requests, and a requirement that all contractors must respond to all quote requests;

(6) the geographic area to which the task order contract applies. Ordinarily, a geographically contiguous area should not be subdivided; and

(7) the number of task order contracts to be awarded.

(F) Every award of a task order contract is subject to procedures or guidelines established in the Manual for Planning and Execution of State Permanent Improvements.

(G) Administrative review under Article 17 is not available for the award of an individual task order, except for a protest of the award of a task order on the ground that the order increases the scope, period, or maximum value of the task order contract under which the order is issued.

SECTION 3410. Contract clauses and their administration. (S.C. Code § 11-35-3410)

(1) Contract Clauses. The regulations may require the inclusion in supplies, services, and information technology contracts of clauses providing for adjustments in prices, time of performance, or other contract provisions, as appropriate, and covering the following subjects:

(a) the unilateral right of a District to order in writing changes in the work within the general scope of the contract and temporary stopping of the work or delaying performance; and

(b) variations occurring between estimated quantities of work in a contract and actual quantities.

(2)(a) Price Adjustments. Adjustments in price pursuant to clauses promulgated under subsection (1) of this section shall be computed and documented with a written determination. The price adjustment agreed upon shall approximate the actual cost to the contractor, and all costs incurred by the contractor shall be justifiable compared with prevailing industry standards, including a reasonable profit. Costs shall be properly itemized and supported by substantiating data sufficient to permit evaluation before commencement of the pertinent performance or as soon thereafter as practicable, and shall be arrived at through whichever one of the following ways is the most valid approximation of the actual cost to the contractor:

(i) by unit prices specified in the contract or subsequently agreed upon;

(ii) by the costs attributable to the events or situations under such clauses with adjustment for profit or fee, all specified in the contract or subsequently agreed upon;

(iii) by agreement on a fixed price adjustment;

(iv) by rates determined by the Public Service Commission and set forth in the applicable tariffs;

(v) in such other manner as the contracting parties may mutually agree; or

(vi) in the absence of agreement by the parties, through unilateral determination by the District of the costs attributable to the events or situations under such clauses, with adjustment of profit or fee, all as computed by the District in accordance with applicable sections of the regulations issued under Article 13 of this code and subject to the provisions of Article 17 of this code.

(b) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of Section 1830.

(3) Additional Contract Clauses. The regulations may require the inclusion in District supplies, services, and information technology contracts of clauses providing for appropriate remedies and covering the following subjects:

(a) specified excuses for delay or nonperformance;

(b) termination of the contract for default; and

(c) termination of the contract in whole or in part for the convenience of the District.

(4) Modification of Clauses. The chief procurement officer may vary the clauses promulgated by regulation for inclusion in any particular District contract; provided, that any variations are supported by a written determination that states the circumstances justifying such variations; and provided, further, that notice of any such material variations shall be stated in the invitation for bids or request for proposals.

ARTICLE 13.

COST PRINCIPLES

SECTION 3510. Cost principles required for supplies and services contracts. (S.C. Code § 11-35-3510)

The regulations may set forth cost principles that must be used to determine the allowability of incurred costs for the purpose of reimbursing costs under provisions in supplies, services, and information technology contracts that provide for the reimbursement of costs.

ARTICLE 15.

SUPPLY MANAGEMENT

SECTION 3810. Regulations for sale, lease, transfer and disposal. (S.C. Code § 11-35-3810)

Subject to existing provisions of law, the regulations shall govern:
(1) the sale, lease, or disposal of surplus supplies by public auction, competitive sealed bidding, or other appropriate methods designated by such regulations;
(2) the transfer of excess supplies between schools and departments.

SECTION 3820. Allocation of proceeds for sale or disposal of surplus supplies. (S.C. Code § 11-35-3820)

Except as provided in Section 3830 and the regulations pursuant thereto, the sale of all District-owned supplies, or personal property not in actual public use must be conducted and directed by the chief procurement officer. The sales must be held at such places and in a manner as in the judgment of the chief procurement officer is most advantageous to the District. Unless otherwise determined, sales must be by either public auction or competitive sealed bid to the highest bidder.

SECTION 3830. Trade-in sales. (S.C. Code § 11-35-3830)

(1) Trade-in Value. Unless otherwise provided by law, the District may trade-in personal property, the trade-in value of which may be applied to the procurement or lease of like items. The trade-in value of such personal property shall not exceed an amount as specified in regulations.
(2) Approval of Trade-In Sales. When the trade-in value of personal property of a District exceeds the specified amount, the chief business official shall have the authority to determine whether:
(a) the subject personal property shall be traded in and the value applied to the purchase of new like items; or
(b) the property shall be classified as surplus and sold in accordance with the provisions of Section 3820. The chief business official's determination shall be in writing and be subject to the provisions of this code.

[*Model Comment: Above a certain dollar threshold, the state's Surplus Property Office uses its expertise to assist agencies in deciding whether the best economic decision is to trade in surplus property or to sell it. School District's have no parallel to the state's Surplus Property Office. Accordingly, the chief business official is identified as the appropriate level official to provide this oversight function.*]

SECTION 3850. Sale of unserviceable supplies. (S.C. Code § 11-35-3850)

The District may sell any supplies owned by it after the supplies have become entirely unserviceable and can properly be classified as “junk”, in accordance with procedures established by the District. All sales of unserviceable supplies by the District must be made in public to the highest bidder, after advertising for fifteen days.

ARTICLE 17.

LEGAL AND CONTRACTUAL REMEDIES

SECTION 4210. Right to protest; procedure; duty and authority to attempt to settle; administrative review; stay of procurement. (S.C. Code § 11-35-4210)

(1) Right to Protest.

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

(b) Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall notify the chief business official in writing of its intent to protest within seven business days of the date that award or notification of intent to award, whichever is earlier, is posted and sent in accordance with this code. Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract and has timely notified the chief business official of its intent to protest, may protest to the chief business official in the manner stated in subsection (2) within fifteen days of the date award or notification of intent to award, whichever is earlier, is posted and sent in accordance with this code; except that a matter that could have been raised pursuant to subitem (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.

[*Model Comment: For protests to awards or intended awards, a protestor must now file an intent to protest within 7 business days. The actual protest must be filed within 15 calendar days of the award or intended award.*]

(c) Any actual or prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract pursuant to Section 1560 or Section 1570 shall notify the chief business official in writing of its intent to protest within five business days of the date that award or notification of intent to award, whichever is earlier, is posted in accordance with this code. Any actual or prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of such a contract and has timely notified the chief business official of its intent to protest, may protest to the chief business official in the manner stated in subsection (2) within fifteen days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code; except that a matter that could have been raised pursuant to subitem (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.

[*Model Comment: Subsection (c) concerns protests to awards or intended awards pursuant to Section 1560 (sole source) or Section 1570 (emergency). It is almost identical to subsection (b), except a protestor must file an intent to protest within five business days of the award or intended award.*]

(d) The rights and remedies granted by subsection (1) and Section 4410(1)(b) are not available for contracts with an actual or potential value of up to fifty thousand dollars.

(2) Protest Procedure. A protest pursuant to subsection (1) must be in writing, filed with the chief business official, and set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided. The protest must be received by the chief business official within the time provided in subsection (1).

(3) Duty and Authority to Attempt to Settle Protests. Before commencement of an administrative review as provided in subsection (4), the chief business official or his designee may attempt to settle by mutual agreement a protest of an aggrieved bidder, offeror, contractor, or subcontractor, actual or prospective, concerning the solicitation or award of the contract. The chief business official has the authority to approve any settlement reached by mutual agreement.

[*Model Comment: A settlement may not authorize action that would otherwise be improper and may not be used to circumvent the code's requirements.*]

(4) Administrative Review and Decision. If in the opinion of the chief business official, after reasonable attempt, a protest cannot be settled by mutual agreement, the chief business official shall conduct promptly an administrative review. The chief business official shall commence the administrative review no later than fifteen business days after the deadline for receipt of a protest has expired and shall issue a decision in writing within ten days of completion of the review. The decision must state the reasons for the action taken.

(5) Notice of Decision. A copy of the decision under subsection (4) along with a statement of appeal rights pursuant to Section 4210(6) must be mailed or otherwise furnished immediately to the protestant and other party intervening. The chief business official also shall post a copy of the decision at a date and place communicated to all parties participating in the administrative review, and the posted decision must indicate the date of posting on its face and must be accompanied by a statement of the right to appeal provided in Section 4210(6).

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the chief business official, who shall forward the request to the panel and must be in writing, setting forth the reasons for disagreement with the decision of the chief business official. The person also may request a hearing before the Procurement Review Panel.

[Drafting Note: Districts are encouraged to delete the text highlighted in yellow. Because a district may not have a standing procurement review panel, the removal of this language ensures that a full time employee always exists to receive an appeal.]

(7) Automatic Stay of Procurement During Protests. In the event of a timely protest pursuant to subsection (1), the District shall not proceed further with the solicitation or award of the contract until ten days after a decision is posted by the chief business official, or, in the event of timely appeal to the Procurement Review Panel, until a decision is rendered by the panel except that solicitation or award of a protested contract is not stayed if the chief business official, after written approval of the Superintendent, makes a written determination that the solicitation or award of the contract without further delay is necessary to protect the interest of the District.

[*Model Comment: Lifting the automatic stay is an extraordinary measure that should be used only rarely, and only when doing so is necessary to protect the best interest of the district, including the district's interest in an open and competitive procurement process. Because a written determination to lift a stay directly impacts the rights of a protestant, districts are reminded that all entities involved in the protest should receive immediate notice of such a determination.*]

(8) Notice of Chief Business Official Address. Notice of the address of the chief business official must be included in every notice of an intended award and in every invitation for bids, request for proposals, or other type solicitation.

SECTION 4215. Posting of bond or irrevocable letter of credit. (S.C. Code § 11-35-4215)

The Board may request that the chief business official require any bidder or offeror who files an action protesting the intended award or award of a contract solicited under Article 5 of this code and valued at one million dollars or more to post with the chief business official a bond or irrevocable letter of credit payable to the District in an amount equal to one percent of the total potential value of the contract as determined

by the chief business official. The chief business official's decision to require a bond or irrevocable letter of credit is not appealable under Article 17. The bond or irrevocable letter of credit shall be conditioned upon the payment of all reasonable reimbursement costs which may be adjudged against the bidder or offeror filing the protest in the administrative hearing in which the action is brought and in any subsequent appellate court proceeding. For protests of intended award or award of a contract of the District's request for sole source or emergency procurements, the bond or irrevocable letter of credit shall be in an amount equal to one percent of the District's estimate of the contract amount for the sole source or emergency procurement requested. In lieu of a bond or irrevocable letter of credit, the chief business official may accept a cashier's check or money order in the amount of the bond or irrevocable letter of credit. If, after completion of the administrative hearing process and any appellate court proceedings, the District prevails, it may request that the Procurement Review Panel allow it to recover all reasonable reimbursement costs and charges associated with the protest which shall be included in the final order or judgment, excluding attorney's fees. Upon payment of such costs and charges by the bidder or offeror protesting the intended award or award of a contract, the bond, irrevocable letter of credit, cashier's check, or money order shall be returned to the bidder or offeror. Failure to pay such costs and charges by the bidder or offeror protesting the intended award or award of a contract shall result in the forfeiture of the bond, irrevocable letter of credit, cashier's check, or money order to the extent necessary to cover the payment of all reasonable reimbursement costs adjudged against the protesting bidder or offeror. If the bidder or offeror prevails in the protest, the cost of providing the bond, irrevocable letter of credit or cashier's check may be sought from the District requesting the bond or irrevocable letter of credit; provided that in no event may the amount recovered exceed fifteen thousand dollars.

SECTION 4220. Authority to debar or suspend. (S.C. Code § 11-35-4220)

(1) Authority. After reasonable notice to the person or firm involved, and a reasonable opportunity for that person or firm to be heard, the chief business official has the authority to debar a person for cause from consideration for award of contracts or subcontracts. The chief business official has authority to suspend a person or firm from consideration for award of contracts or subcontracts during an investigation if there is probable cause for debarment. The period of debarment or suspension is as prescribed by the chief business official.

[*Model Comment: "Suspension" is defined in Section 310 and includes a probable-cause standard..*]

(2) Causes for Debarment or Suspension. The causes for debarment shall include, but not be limited to:

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

(b) conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or another offense indicating a lack of business integrity or professional honesty which currently, seriously, and directly affects responsibility as a District contractor;

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

(d) violation of contract provisions, as set forth below, of a character regarded by the chief business official to be so serious as to justify debarment action:

(i) deliberate failure without good cause to perform in accordance with the specifications or within the time limit 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; except, that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor must not be considered a basis for debarment;

(e) violation of an order of a chief business official or the Procurement Review Panel;

(f) violation of the Ethics, Government Accountability, and Campaign Reform Act of 1991, as amended, as determined by the State Ethics Commission, as an incident to obtaining or attempting to obtain a public contract or subcontract, or in the performance of the contract, or subcontract; and

(g) any other cause the chief business official determines to be so serious and compelling as to affect responsibility as a District contractor or subcontractor, including debarment by another governmental entity for any cause listed in this subsection.

(3) Decision. The chief business official shall issue a written decision to debar or suspend within ten days of the completion of his administrative review of the matter. The decision must state the action taken, the specific reasons for it, and the period of debarment or suspension, if any.

(4) Notice of Decision. A copy of the decision pursuant to subsection (3) and a statement of appeal rights pursuant to Section 4220(5) must be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening. The chief business official also shall post a copy of the decision at a time and place communicated to all parties participating in the administrative review and the posted decision must indicate the date of posting on its face and shall be accompanied by a statement of the right to appeal provided in Section 4220(5).

(5) Finality of Decision. A decision pursuant to subsection (3) is final and conclusive, unless fraudulent or unless the debarred or suspended person requests further administrative review by the Procurement Review Panel pursuant to Section 4410(1), within ten days of the posting of the decision in accordance with Section 4220(4). The request for review must be directed to the chief business official, who shall forward the request to the panel, and must be in writing, setting forth the reasons why the person disagrees with the decision of the chief business official. The person also may request a hearing before the Procurement Review Panel.

[Drafting Note: Districts are encouraged to delete the text highlighted in yellow. Because a district may not have a standing procurement review panel, the removal of this language ensures that a full time employee always exists to receive an appeal.]

(6) Debarment constitutes debarment of all divisions or other organizational elements of the contractor, unless the debarment decision is limited by its terms to specific divisions, organization elements, or commodities. The debarring official may extend the debarment decision to include any principals and affiliates of the contractor if they are specifically named and given written notice of the proposed debarment and an opportunity to respond. For purposes of this section, business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or a third party controls or has the power to control both. Indications of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment. For purposes of this section, the term "principals" means officers, directors, owners, partners, and persons having primary management or supervisory responsibilities within a business entity including, but not limited to, a general manager, plant manager, head of a subsidiary, division, or business segment, and similar positions.

(7)(a) The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct is evidence of such knowledge, approval, or acquiescence.

(b) The fraudulent, criminal, or other seriously improper conduct of a contractor may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct.

(c) The fraudulent, criminal, or other seriously improper conduct of one contractor participating in a joint venture or similar arrangement may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct is evidence of such knowledge, approval, or acquiescence.

(8) The chief business official shall maintain and update a list of debarred and suspended persons and shall make the list publicly available.

SECTION 4230. Authority to resolve contract and breach of contract controversies. (S.C. Code § 11-35-4230)

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

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

> [*Model Comment: In Act 41 of 2019, the General Assembly amended § 11-35-4230 to transform the one-year deadline from a statute of repose to a statute of limitations. This was done to ameliorate the harsh result that can happen if a claim, such as one for indemnification, accrues more than one year after the contractor last performs work under the contract. See, e.g.,* Appeal by University of South Carolina v. Loveless Commercial Contracting, Inc., *Panel Case No. 2018-1, which was decided under former state law. The 2021 Model Code adopts this change.*].

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

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

(5) Notice of Decision. A copy of the decision pursuant to subsection (4) and a statement of appeal rights under Section 4230(6) must be mailed or otherwise furnished immediately to all parties participating in the administrative review proceedings. The chief business official also shall post a copy of the decision at a time and place communicated to all parties participating in the administrative review, and the posted decision must indicate the date of posting on its face and must be accompanied by a statement of the right to appeal provided in Section 4230(6).

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected requests a further administrative review by the Procurement Review Panel pursuant to Section 4410(1) within ten days of the posting of the decision in accordance with Section 4230(5). The request for review must be directed to the chief business official, who shall forward the

request to the panel, and must be in writing setting forth the reasons why the person disagrees with the decision of the chief business official. The person also may request a hearing before the Procurement Review Panel.

[Drafting Note: Districts are encouraged to delete the text highlighted in yellow. Because a district may not have a standing procurement review panel, the removal of this language ensures that a full time employee always exists to receive an appeal.]

SECTION 4310. Solicitations or awards in violation of the law. (S.C. Code § 11-35-4310)

(1) Applicability. The provisions of this section apply where it is determined by either the chief business official or the Procurement Review Panel, upon administrative review, that a solicitation or award of a contract is in violation of the law. The remedies set forth herein may be granted by either the chief business official after review under Section 4210 or by the Procurement Review Panel after review under Section 4410(1).

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

(a) canceled;

(b) revised to comply with the law and rebid; or

(c) awarded in a manner that complies with the provisions of this code.

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

(a) the contract may be ratified and affirmed, provided it is in the best interests of the District; or

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

(4) Entitlement to Costs. In addition to or in lieu of any other relief, when a protest submitted under Section 4210 is sustained, and it is determined that the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror may request and be awarded a reasonable reimbursement amount, including reimbursement of its reasonable bid preparation costs.

SECTION 4315. Unauthorized award or modification of a contract. (S.C. Code § 11-35-4315)

The regulations may provide for appropriate action where it is discovered either: (a) that a person lacking actual authority has made an unauthorized award or modification of a contract, or (b) that a contract award or modification is otherwise in violation of the code or regulations.

[Model Comment: See R.2015]

SECTION 4320. Contract controversies. (S.C. Code § 11-35-4320)

Remedies available in a contract controversy brought under the provisions of Section 4230. The chief business official or the Procurement Review Panel, in the case of review under Section 4410(1), may award such relief as is necessary to resolve the controversy as allowed by the terms of the contract or by applicable law.

SECTION 4330. Frivolous protests. (S.C. Code § 11-35-4330)

(1) Signature on Protest Constitutes Certificate. The signature of an attorney or party on a request for review, protest, motion, or other document constitutes a certificate by the signer that the signer has read the document, to the best of his knowledge, information, and belief formed after reasonable inquiry it is well

grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and it is not interposed for an improper purpose, such as to harass, limit competition, or to cause unnecessary delay or needless increase in the cost of the procurement or of the litigation.

(2) Sanctions for Violations. If a request for review, protest, pleading, motion, or other document that is filed with the chief business official or the Procurement Review Panel is signed in violation of this subsection, the Procurement Review Panel, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction that may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the protest, pleading, motion, or other paper, including a reasonable attorney's fee.

(3) Filing. A motion regarding a matter that is not otherwise before the panel may not be filed until after a final decision has been issued by the chief business official. A motion for sanctions pursuant to this section must be filed with the panel no later than fifteen days after the later of either the filing of a request for review, protest, motion, or other document signed in violation of this section, or the issuance of an order that addresses the request for review, protest, motion, or other document that is the subject of the motion for sanctions.

SECTION 4340. Rights and remedies. (S.C. Code § 11-35-4340)

There is no remedy against the District other than those provided in this chapter in any case involving a procurement subject to this code. The rights and remedies granted in this article are to the exclusion of all other rights and remedies against the District for matters arising out of or related to this code.

SECTION 4410. Procurement Review Panel. (S.C. Code § 11-35-4410)

(1) Creation. There is created the District's Procurement Review Panel which is charged with the responsibility to review and determine de novo:

(a) requests for review of written determinations of the chief business officials pursuant to Sections 4210(6), 4220(5), and 4230(6); and

(b) requests for review of other written determinations, decisions, policies, and procedures arising from or concerning the procurement of supplies, services, information technology, or construction procured in accordance with the provisions of this code and the regulations; except that a matter which could have been brought before the chief business officials in a timely and appropriate manner pursuant to Sections 4210, 4220, or 4230, but was not, must not be the subject of review under this paragraph. Requests for review pursuant to this paragraph must be submitted to the chief business official in writing, setting forth the grounds, within fifteen days of the date of the written determinations, decisions, policies, and procedures.

[Drafting Note: Districts are encouraged to make the changes highlighted in yellow. Because a district may not have a standing procurement review panel, this change ensures that a full time employee always exists to receive an request for review.]

(2) Membership.

(a) The Panel must be composed of a member of the Board appointed by the Board, who will chair the Panel. In addition, four persons shall be appointed, one each, by the Chair of the Board, the Vice-Chair of the Board, the Superintendent, and the chief business official. These four persons should be members of the community who are well-respected representatives of several of the professions and businesses affected by this code, including, but not limited to (1) goods and services, (2) information technology, (3) procurements (4) construction; (5) architecture, engineering, construction management, and land surveying. Each of these persons shall serve a one-year term running from July 1 through June 30 annually. These persons shall recuse themselves in any matter in which they have an actual or apparent conflict of interest.

(b) When a vacancy is created, the official responsible for originally appointing the member vacating his or her seat shall appoint the successor to complete the term of service.

(c) Members may be reappointed to succeed themselves.

[*Alternative Language: Your district must have a board or panel that will provide quasi-judicial administrative reviews of certain procurement related disputes, such as protests, contract disputes, and debarment actions. In order to minimize the work load on school board members, and to avoid any appearances of impropriety, we recommend the approach above. However, the following alternative is available. We will consider a unique alternative; however, the process must be limited to two levels (i.e., CBO and Panel) and the second level (i.e., Panel) must have an odd number of members.*

"The Board shall serve as the District Procurement Review Panel."]

(3) Chairperson and Meetings. The panel shall meet as often as necessary to afford a swift resolution of the controversies submitted to it. In the case of a tie vote, the decision of the chief business official is final.

(4) Jurisdiction. (a) The Procurement Review Panel is vested with the authority to:

(i) establish its own rules and procedures for the conduct of its business and the holding of its hearings;

(ii) issue subpoenas;

(iii) interview any person it considers necessary; and

(iv) record all determinations.

(b) A party aggrieved by a subpoena issued pursuant to this provision shall apply to the panel for relief.

(5) Procedure. Within fifteen days of receiving a grievance filed pursuant to Section 4210(6), 4220(5), 4230(6), or 4410(1)(b), the chairman shall either convene the review panel to conduct an administrative review or schedule a hearing to facilitate its administrative review. Except for grievances filed pursuant to Section 4230(6), the review panel shall record its determination within ten working days and communicate its decision to those involved in the determination. In matters designated by the review panel as complex, the review panel shall record its determination within thirty days.

(6) Finality. Notwithstanding another provision of law, including the Administrative Procedures Act, the decision of the Procurement Review Panel is final as to administrative review and may be appealed only to the court of appeals pursuant to Section 1-23-380, and the filing of an appeal does not stay a decision of the panel.

SECTION 4425. Final order not appealed. (S.C. Code § 11-35-4425)

If a final order of the chief business official or the Procurement Review Panel is not appealed in accordance with the provisions of this code, upon request by a party to the proceedings, the chief business official or Procurement Review Panel may file a certified copy of the final ruling with a clerk of the circuit court, or a court of competent jurisdiction, as requested. After filing, the certified ruling has the same effect as a judgment of the court where filed and may be recorded, enforced, or satisfied in the same manner as a judgment of that court.

SECTION 4430. Communication of panel members. (S.C. Code § 11-35-4430)

Unless required for the disposition of ex parte matters authorized by law, members or employees of the panel assigned to render a decision or to make findings of fact and conclusions of law in a matter pending before the panel shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. A panel member: (a) may communicate with other members of the panel, and (b) may have the aid and advice of one or more personal assistants.

ARTICLE 19.

INTERGOVERNMENTAL RELATIONS

[Model Comment: (1) Consistent with Section 40(2), Article 19 of the South Carolina Consolidated Procurement Code applies, by its own terms, to all political subdivisions, including school districts. (2) Section 11-35-4810 provides the authority for Districts to participate in statewide term contracts established by the Division of Procurement Services of the State Fiscal Accountability Authority. (3) A District is not authorized to participate in a cooperative purchase unless the acquisition is conducted in accordance with the District's procurement code. (4) Please refer to Section 40, Model Comment No. 2.]

The District shall comply with Article 19 of Title 11, Chapter 35 of the South Carolina Code of Laws.

ARTICLE 21.

ASSISTANCE TO MINORITY BUSINESSES

[*Model Comment: (1) Section 11-35-5340 provides for certain school Districts to adopt a procurement code substantially similar to the Consolidated Procurement Code. In the opinion of Division of Procurement Services, a district's procurement code is substantially similar to the Consolidated Procurement Code if it relies on the Governor's Office of Small and Minority Business Assistance to certify businesses as minority firms. The Consolidated Procurement Code envisions a single, central state office that will be responsible for certifying businesses as minority firms and for assisting the Department of Revenue in carrying out the intent of Article 21 of the Procurement Code. Likewise, it provides, both in the Procurement Code and in Title 12, for a tax credit. Given this statutory intent, the tax implications, and the importance of uniform application of the minority firm standards, the Division of Procurement Services finds that individual Districts need not establish their own separate minority business assistance office in order to comply with Section 11-35-5340. Given the inability of Districts to grant tax credits against state income tax laws, Division of Procurement Services find that individual Districts need not adopt portions of the Procurement Code directed towards such credits. Accordingly, this model is drafted to exclude those portions of the Consolidated Procurement Code and the Procurement Regulations that create OSMBA, establish the standards for certification, and provide for a tax credit. Provisions directly applicable to a state agency, including a state CPO, have been left in and modified to apply to the District directly. (2) Division of Procurement Services will not provide an affirmative written opinion for a District's code if it substitutes a District MBE certification process for the process managed by OSMBA, unless OSMBA certifies in writing to Division of Procurement Services that the District's certification process is substantially similar to OSMBA's. Division of Procurement Services strongly recommends against this approach.*]

SUBARTICLE 1.

DEFINITIONS AND CERTIFICATION

SECTION 5010. Definitions of terms used in this article. (S.C. Code § 11-35-5010)

[*Alternative Text: In the alternative, Districts may establish their own process for approving minority business enterprises. If a District submits a letter from OSMBA approving its process as substantially similar to the process followed by OSMBA, MMO will work with the District to adapt Article 12 and Regulation 19-445.2160.*]

The definitions appearing in Section 11-35-5010 and Regulation 19-445.2160(A) of the South Carolina Code of Laws, as amended, shall apply to Article 21 of this code. On the date of this code's adoption, Section 11-35-5010 provided as follows:

(1) "Minority person" for the purpose of this article, means a United States citizen who is economically and socially disadvantaged.

(a) "Socially disadvantaged individuals" means those individuals who have been subject to racial or ethnic prejudice or cultural bias because of their identification as members of a certain group, without regard to their individual qualities. Such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans (including American Indians, Eskimos, Aleuts and Native Hawaiians), Asian Pacific Americans, and other minorities to be designated by the board or designated agency.

(b) "Economically disadvantaged individuals" means those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

(2) A "socially and economically disadvantaged small business" means any small business concern which:

(a) is at least fifty-one percent owned by one or more citizens of the United States who are determined to be socially and economically disadvantaged.

(b) in the case of a concern which is a corporation, fifty-one percent of all classes of voting stock of such corporation must be owned by an individual determined to be socially and economically disadvantaged.

(c) in the case of a concern which is a partnership, fifty-one percent of the partnership interest must be owned by an individual or individuals determined to be socially and economically disadvantaged and whose management and daily business operations are controlled by individuals determined to be socially and economically disadvantaged. Such individuals must be involved in the daily management and operations of the business concerned.

SUBARTICLE 3.

ASSISTANCE TO MINORITY BUSINESSES

SECTION 5210. Statement of policy and its implementation. (S.C. Code § 11-35-5210)

(1) Statement of Policy. As provided in Section 11-35-5210 of the South Carolina Code of Laws, the South Carolina General Assembly has declared that business firms owned and operated by minority persons have been historically restricted from full participation in our free enterprise system to a degree disproportionate to other businesses. The General Assembly believes that it is in the state's best interest to assist minority-owned businesses to develop fully as a part of the state's policies and programs which are designed to promote balanced economic and community growth throughout the State. The General Assembly, therefore, wishes to ensure that those businesses owned and operated by minorities are afforded the opportunity to fully participate in the overall procurement process of the State. The General Assembly, therefore, takes this leadership role in setting procedures that will result in awarding contracts and subcontracts to minority business firms in order to enhance minority capital ownership, overall state economic development and reduce dependency on the part of minorities.

(2) Implementation. Chief procurement officer shall implement the policy set forth in subsection (1) of this section in accordance with the provisions of Section 5220.

SECTION 5220. Duties of the chief procurement officer. (S.C. Code § 11-35-5220)

(1) Assistance from the Chief Procurement Officer. The chief procurement officer shall provide appropriate staffs to assist minority businesses with the procurement procedures developed pursuant to this code.

(2) Special Publications. The chief procurement officer in cooperation with other appropriate private and District agencies may issue supplementary instructions designed to assist minority businesses with the District procurement procedures.

(3) Source Lists. Chief procurement officer shall maintain special source lists of minority business firms detailing the products and services which they provide. These lists shall be made available to District purchasing personnel.

(4) Solicitation Mailing Lists. The chief procurement officer shall include and identify minority business on the District's bidders' list and shall ensure that these firms are solicited on an equal basis within nonminority firms.

(5) Training Programs. The chief procurement officer shall work with appropriate District offices and minority groups in conducting seminars to assist minority business owners in learning how to do business with the District.

(6) Fee Waivers. Upon request by an MBE certified by the Small and Minority Business Assistance Office, user or subscription fees for services provided by the chief procurement officer may be waived for an MBE.

SECTION 5230. Regulations for negotiation with District minority firms. (S.C. Code § 11-35-5230)

(A) The regulations may designate such procurement contracts as may be appropriate for negotiation with certified, South Carolina-based minority firms, as defined by this subarticle. Among the criteria that shall be used to determine such designations are:

(1) The total dollar value of procurement in South Carolina.

(2) The availability of South Carolina-based minority firms.

(3) The potential for breaking the contracts into smaller units, where necessary, to accommodate such firms.

(4) Ensuring that the District shall not be required to sacrifice quality of goods or services.

(5) Ensuring that the price has been determined to be fair and reasonable, and competitive both to the District and to the contractor.

(B)(1) [deleted]

[Drafting Note: The Department of Revenue's position is that the tax credit provided by Section 11-35-5230 (and the parallel provision in Section 12-6-3350) is available only for contractors that have a contract with the State. Contracts with a political subdivision do not qualify. Accordingly, subsection (B)(1) has been deleted as inapplicable. For questions on this matter, please contact the Department of Revenue directly.]

(2) [reserved]

(3) Any firm desiring to be certified as a minority firm shall make application to the Small and Minority Business Assistance Office (SMBAO) as defined by Section 11-35-5270 of the South Carolina Code of Laws, on such forms as may be prescribed by that office.

(4) [reserved]

SECTION 5240. Minority business enterprise (MBE) utilization plan. (S.C. Code § 11-35-5240)

(1) To emphasize the use of minority small businesses, the District shall develop a Minority Business Enterprise (MBE) Utilization Plan. The MBE Utilization Plan must include, but not be limited to:

(a) the name of the District;

(b) a policy statement expressing a commitment by the District to use MBEs in all aspects of procurement;

(c) the name of the coordinator responsible for monitoring the MBE Utilization Plan;

(d) goals that include expending with Minority Business Enterprises certified by the Office of Small and Minority Business Assistance an amount equal to ten percent of the District's total dollar amount of funds expended;

[*Model Comment: Due to the number of inquiries regarding the ten percent goal, Division of Procurement Services includes this comment here to make clear that changes to this goal will not be approved.*]

(e) solicitation of certified minority vendors, a current list of which must be supplied by the Office of Small and Minority Business Assistance, in each commodity category for which the minority vendor is qualified. The current listing of qualified minority vendors must be made available by the Office of Small and Minority Business Assistance on a timely basis;

(f) procedures to be used when it is necessary to divide total project requirements into smaller tasks which will permit increased MBE participation;

(g) procedures to be used when the District subcontracts the scope of service to another District; the responsible District may set goals for the subcontractor in accordance with the MBE goal and the responsible District may allow the subcontractor to present a MBE Utilization Plan detailing its procedure to obtain minority business enterprise participation.

(2) MBE utilization plans must be submitted to the Board for approval no later than the first Board meeting on or after July thirtieth, annually. Upon petition by the District, the Board may authorize an MBE utilization plan that establishes a goal of less than ten percent of the District's total dollar amount of funds expended. Progress reports must be submitted to the Board no later than thirty days after the end of each six-month fiscal period and contain the following information:

(a) number of minority firms solicited;

(b) number of minority bids received;

(c) total dollar amount of funds expended on contracts awarded to minority firms certified pursuant to Section 11-35-5230 of the South Carolina Code of Laws; and

(d) total dollar amount of funds expended.

(3) For purposes of this section, and notwithstanding the Administrative Procedures Act, the Board shall establish a definition for the phrase "total dollar amount of funds expended".

SECTION 5250. Progress payments and letters of credit. (S.C. Code § 11-35-5250)

(1) Progress Payments. The chief procurement officers may make special provisions for progress payments and letters of credit, as deemed reasonable to assist minority businesses to carry out the terms of a District contract pursuant to regulations.

(2) Letter of Contract Award. When a minority business firm certified by the Department of Revenue receives a contract with the District, the chief procurement officer shall furnish a letter, upon request, stating the dollar value and duration of, and other information about the contract, which may be used by the minority firm in negotiating lines of credit with lending institutions.

ARTICLE 23.

STATEWIDE PROVISIONS

[Model Comment: (1) With the exception of Section 11-35-5340, Article 23 of the South Carolina Consolidated Procurement Code, applies directly to all political subdivisions by its own terms. (2) Section 11-35-5340 applies only to so-called "large" school districts. This section was formerly codified as Section 11-35-70. (3) Generally, see Section 10, which includes the full text of Section 11-35-5340].

The District shall comply with Article 23 of Title 11, Chapter 35 of the South Carolina Code of Laws, as applicable.

2000. District Procurement Regulations.

A. General.

These Regulations establish policies, procedures, and guidelines relating to the procurement, management, control, and disposal of supplies, services, information technology, and construction, as applicable. These Regulations are designed to achieve maximum practicable uniformity in purchasing throughout the District. Hence, implementation of this code shall be consistent with these Regulations. Nothing contained in these Rules and Regulations shall be construed to waive any rights, remedies or defenses the District might have under any laws of the State of South Carolina. The Kershaw County School District Consolidated Procurement Code takes precedence over these regulations to the extent of any conflict between them. The procurement regulations shall have the same relationship to the District's Code as regulations promulgated under the administrative procedures act have to statutes enacted by the General Assembly.

[Model Comment: As noted in the model comment 4 to Section 40(4), this office has kept the regulations separate from the code rather than integrating them into a seamless document. Under state law, statutes and regulations have important differences from one another, and the only way to maintain these differences is to maintain the distinction by keeping the two separate.]

B. Organizational Authority.

The Chief Procurement Officer acting on behalf of the Board shall have the responsibility to audit and monitor the implementation of these Regulations and requirements of the South Carolina Consolidated Procurement Code. In accordance with Section 510 of the code, all rights, powers, duties and authority relating to the procurement of supplies, services, and information technology and to the management, control, warehousing, sale and disposal of supplies, construction, information technology, and services now vested in or exercised by the District under the provisions of law relating thereto, and regardless of source funding, are hereby delegated to the chief procurement officer by the Board. The chief business official shall be responsible for developing such organizational structure as necessary to implement the provisions of the District's Code and these Regulations.

C. Duty to Report Violations

The District shall comply in good faith with all applicable requirements of the consolidated procurement code and these procurement regulations. When any information or allegations concerning improper or illegal conduct regarding a procurement governed by this code comes to the attention of any employee of the District, immediate notice of the relevant facts shall be transmitted to the chief business official.

D. Application of the District's Procurement Code.

(1) [Reserved]

(2) Multiple Instruments Not Determinative. The application of this code does not depend on whether the parties memorialize the overall transaction into one or more contractual instruments. This code should be construed liberally to carry out its purposes. (Section 20) Accordingly, when multiple written agreements are part of an overall transaction to accomplish an overall purpose, the documents will be considered together for purposes of determining whether this code applies, even if the instruments have not been executed simultaneously or the parties are not the same.

(3) Revenue generating contracts. This code "applies to every procurement . . . by this District under contract . . .." (Section 40(2)) "The term 'contract' means "all types of agreements, regardless of what they may be called, for the procurement . . . of . . . supplies, services, information technology, or construction." (Section 310) In pertinent part, the term "procurement" is defined as "buying, purchasing, renting, leasing, or otherwise acquiring any . . . construction." (Section 310) Accordingly, this code applies even though the District does not make a payment of money. Without limitation, examples of such contracts include

revenue-generating contracts, concession agreements, and contracts structured as a design-build-finance-operate-maintain project. (Section 2910(8))

(4) Financed Construction. This code "applies to every procurement . . . by this District under contract. . .." (Section 40(2)) The term "contract" means "all types of agreements, regardless of what they may be called, for the procurement . . . of . . . construction." (Section 310) In pertinent part, the term "procurement" is defined as "buying, purchasing, renting, leasing, or otherwise acquiring any . . . construction." (Section 310) The term "construction" is defined as "the process of building . . . any . . . public improvements of any kind to real property." (Section 310) Read together, and absent an applicable exclusion (e.g., gifts) or exemption (e.g., Section 710), this code applies to every acquisition of the process of improving real property by the District, whether or not the acquisition involves an expenditure of money. Such acquisitions may be memorialized in a number of related agreements and, without limitation, may be structured as an in-kind exchange, lease-purchase, lease with purchase option, lease-lease-back, sale-lease-back, installment-purchase, or so-called public-private-partnership.

(5) Acquisition involving an interest in real property. Generally, this code does not apply to an acquisition solely of an interest in real property. For example, this code does not apply to an acquisition of land, even though it includes pre-existing improvements and fixtures (i.e., not built-to-suit), nor does it apply to an acquisition of a leasehold estate, even though it includes complementary subordinate supplies, services, information technology, or construction (e.g., landlord-performed tenant improvements for a lease not-to-own, building security, janitorial services). In contrast, this code does apply to an acquisition of an interest in real property if the transaction also involves a substantial acquisition of supplies, services, information technology, or construction. For example, and without limitation, this code would apply to an acquisition of food services, even though it involved the agency leasing its land to the contractor. As another example, as discussed in Regulation 2000D(4), a lease-purchase of custom-built, new construction must be acquired pursuant to this code. While not necessarily conclusive, the primary objective of the transaction may be determinative.

E. Notice.

(1) When adequate public notice is required by Article 5, the notice must contain sufficient information to allow a prospective offeror to make an informed business judgment as to whether she should compete (or would have competed) for the contract. At minimum the notice must contain the following information, as applicable:

(a) a description of the item(s) to be acquired;
(b) how to obtain a copy of the solicitation document or the anticipated contract;
(c) when and where responses are due; and
(d) the place of performance or delivery.

(2) In addition to the information above, the notices required by Section 1560 and Section 1570 must include the contract dollar amount of the proposed contract.

2005. Internal Procurement Procedures; Procurement Records.

A. Procedures Manual.

The District shall develop and maintain an internal procurement procedures manual. The Superintendent shall be responsible for the following:

Determine that written internal procurement procedures as submitted (a) are consistent with the District's code and regulations, (b) are consistent with any policies or procedures established by the Board, and (c) establish a clear means by which vendors can identify the District's procurement officers and the limits of their authority.

B. Procurement Records.

Each District must maintain procurement files sufficient to satisfy the requirements of external audit.

2010. Disclosure of Procurement Information.

A. Reserved.

B. Prior to the issuance of an award or notification of intent to award, whichever is earlier, District personnel involved in an acquisition shall forward or refer all requests for information regarding the procurement to the responsible procurement officer. The procurement officer will respond to the request.

C. Prior to the issuance of an award or notification of intent to award, whichever is earlier, District personnel involved in an acquisition shall not engage in conduct that knowingly furnishes source selection information to anyone other than the responsible procurement officer, unless otherwise authorized in writing by the responsible procurement officer. "Source selection information" means any of the following information that is related to or involved in the evaluation of an offer (e.g., bid or proposal) to enter into a procurement contract, if that information has not been previously made available to the public or disclosed publicly: (1) Proposed costs or prices submitted in response to an agency solicitation, or lists of those proposed costs or prices, (2) source selection plans, (3) technical evaluation plans, (4) technical evaluations of proposals, (5) cost or price evaluations of proposals, (6) information regarding which proposals are determined to be reasonably susceptible of being selected for award, (7) rankings of responses, proposals, or competitors, (8) reports, evaluations of source selection committees or evaluations panels, (9) other information based on a case-by-case determination by the procurement officer that its disclosure would jeopardize the integrity or successful completion of the procurement to which the information relates.

D. In procurements conducted pursuant to Section 1530, personnel with access to proposal information shall not disclose either the number of offerors or their identity prior to the issuance of an award or notification of intent to award, whichever is earlier, except as otherwise required by law.

E. Prior to the issuance of an award or notification of intent to award, whichever is earlier, the procurement officer shall not release to any individual information obtained in response to an RFP, without first obtaining from that individual a written agreement, in a form approved by the chief procurement officer, regarding restrictions on the use and disclosure of such information. Such agreements are binding and enforceable. Before allowing any individual to perform any role in discussions, negotiations, evaluation, or the source selection decision in a procurement conducted pursuant to Section 1530, the responsible procurement officer must obtain from that individual, in a form approved by the chief business official, a written acknowledgement of compliance and an agreement to comply with rules designed to protect the integrity of the procurement process.

F. The release of a proposal to non-District personnel for evaluation does not constitute public disclosure or a release of information for purposes of the Freedom of Information Act.

G. Except as prohibited by law, and subject to Regulation 2200, District contracts may include clauses restricting the District's release of documents and information received from a contractor if those documents are exempt from disclosure under applicable law.

H. Non-Public Solicitations. In accordance with Section 410(F), information that forms a part of a specific solicitation need not be publicly available if (a) the information is otherwise exempt from disclosure by law (e.g., Chapter 4, Title 30 (The Freedom of Information Act)), (b) the information is available to any prospective offeror that has executed a nondisclosure agreement (NDA), and (c) the chief business official has approved the use and terms of an NDA for the solicitation at issue. Prior to use in a specific solicitation, the terms of a proposed NDA must be published in the solicitation unless otherwise approved by the CBO. When requesting approval from the chief procurement officer, the District must identify the information to be released pursuant to the NDA, explain the reason for the request, cite the legal basis for not making the information publicly available, and provide any other information requested by the CBO. If the District declines a person's request to enter an NDA and acquire the information thereto, it must immediately notify the CBO. Consistent with Regulation 2030, the applicable solicitation should instruct bidders how to comply with the NDA when submitting their offer. Information to be released pursuant to the NDA may also be released in accordance with Regulation 2200 (Administrative Review Protective Orders).

2015. Unauthorized or Illegal Procurements.

A. Decision to Ratify or Declare Void

(1) Upon discovering after award either (a) that a District employee lacking actual authority has made an unauthorized award or modification of a contract or (b) that a contract award or modification is otherwise in violation of this code or these regulations, the appropriate official, as defined in section G below, must decide to either ratify the contract in accordance with this regulation or acknowledge and declare the contract null and void. If ratified, the contract may be continued or terminated. The contract may be ratified only if ratification is in the interest of the District.

(2) The factors pertinent in determining the District's interest include, but are not limited to: (a) the seriousness of the procurement deficiency; (b) the degree of prejudice to the integrity of the competitive procurement system; (c) the good faith of the District officials and contractors involved; (d) the extent of performance; (e) the costs to the District in either terminating the contract or declaring it null and void, if any; (f) the urgency of the acquisition; and (g) the impact on the District's mission.

B. Decision to Continue or Terminate Contract. If a contract is ratified, the appropriate official must decide to either (1) continue the contract, or (2) terminate the contract and proceed as provided in section C below. A contract award or modification that is in violation of this code or these regulations may be continued only if the appropriate official determines an urgent and compelling need exists that cannot otherwise be met without undue burden on the District. If no such urgent and compelling need exists, the ratified contract must be terminated and the District shall proceed as provided in section C below. A contract that was ratified solely because a District employee lacking actual authority made an unauthorized award or modification, as described in item A(1)(a) above, does not require an urgent and compelling need to support its continuation.

C. Settlement of Terminated Contracts. If a contract is terminated as allowed by this regulation, the District shall, as appropriate and by agreement with the supplier, return any supplies delivered for a refund at no cost to the District or at a minimal restocking charge. If a contract is terminated and a termination claim is made, settlement shall be made in accordance with the contract. If there are no applicable termination provisions in the contract, settlement shall be made on the basis of actual costs directly or indirectly allocable to the contract through the time of termination. Such costs shall be established in accordance with generally accepted accounting principles. Profit shall be proportionate only to the performance completed up to the time of termination and shall be based on projected gain or loss on the contract as though performance were completed. Anticipated profits are not allowed.

D. Settlement of Void Contracts. If a contract is acknowledged as null and void pursuant to section A above, the District shall endeavor to return those supplies delivered under the contract that have not been used or distributed, and no further payments shall be made under the contract. In addition, the District is entitled to recover the greater of (1) the difference between payments made under the contract and the contractor's actual costs up until the contract was declared null and void, or (2) the difference between payments under the contract and the value to the District of the supplies, services, information technology, or construction it obtained under the contract.

E. Bad Faith. Notwithstanding section D above, the District is entitled to recover all amounts paid if the appropriate official determines that the recipient of the contract acted in bad faith. Bad faith shall not be assumed. Without limitation, specific findings showing deception, dishonesty, reckless disregard of clearly applicable laws or regulations, or deliberate breach of contract scope limits, support a finding of bad faith.

F. District's Remedies Not Limited. Regardless of its ratification of a contract, the District shall be entitled to any damages it can prove under any theory including but not limited to contract and tort.

G. Appropriate Official. The appropriate official to make the decisions authorized by sections A, B, and E above, or the determination addressed in item H(2) below, is the Superintendent, or a designee above the level of the person responsible for the person committing or authorizing the act. If a contract award or modification is made in violation of this code or these regulations, and the value of the contract exceeds one hundred thousand dollars, the Board must concur in the written determination before any further action is taken, unless the contract is declared null and void. In all circumstances, the Board must concur in any determination finding bad faith.

H. Determinations.

(1) All decisions authorized by sections A, B, and E above shall be supported by a written determination of appropriateness conforming to the requirements of Section 210.

(2) The written determination must include the facts and circumstances surrounding the improper act, what corrective action is being taken to prevent recurrence, and the action taken against the individual committing the act.

(3) In most circumstances, the decisions authorized by sections A, B, and E above are unnecessary for a contract that has been completely performed. Accordingly, the determination in those instances maybe limited to the information required by subsection H(2).

J. Miscellaneous.

(1) In the context of an administrative review conducted under Article 17, sections G, H, and I above are inapplicable, and the appropriate official to make the decision authorized by sections A, B, and E is the chief business official or the Procurement Review Panel, as applicable.

(2) This Regulation does not apply to a determination pursuant to Regulation 2085C.

[Model Comment: See Section 4315]

2017. Pre-solicitation Procedures.

A. General.

(1) This regulation prescribes best practices for pre-solicitation activities in acquisitions of supplies, services, or information technology, including acquisition planning, market research, and exchanges with industry. Nothing in section A, B, or C of this regulation shall provide an independent basis for administrative review pursuant to Article 17.

(2) The District shall perform acquisition planning and conduct market research for all acquisitions of supplies, services, or information technology. The extent of planning and research will vary, depending on such factors as estimated dollar value, complexity, and past experience, as well as the nature of the supplies, services or information technology to be acquired.

(3) Except for procurements conducted pursuant to Section 1550, no solicitation for offers shall proceed until the District has certified in writing that it has complied with this regulation.

(4) The District must document its acquisition planning and market research in sufficient detail to satisfy the requirements of an audit. This documentation shall be made a part of the procurement file.

(5) [Reserved]

(6) The District shall provide guidance which shall be followed by the District in conducting acquisition planning and market research, including considerations pertinent to determining the adequacy of planning and research activities.

B. Acquisition Planning.

(1) The purpose of acquisition planning is to ensure that the using agency meets its needs in the most effective, economical, and timely manner. The planning should promote and provide for:

(a) Clearly defining the agency's needs;

(b) Acquisition of commercially available items to the maximum extent practicable;

(c) Full and open competition to the maximum extent practicable, with due regard to the nature of the supplies, services, or information technology to be acquired;

(d) Selection of appropriate source selection method and contract type; and

(e) Appropriate consideration of the use of term contracts to fulfill the requirement, before awarding new contracts.

(2) Acquisition planning should begin as soon as the agency need is identified, preferably well in advance of when contract award or order placement is necessary. Agency staff should avoid issuing requirements on an urgent basis or with unrealistic delivery or performance schedules, since it generally impedes advantageous outcomes, restricts competition, and increases prices.

(3) Acquisition planning shall integrate the efforts of all personnel responsible for significant aspects of the acquisition. If and as commensurate with the value and complexity of the acquisition, the agency

shall form a team consisting of all those who will be responsible for significant aspects of the acquisition, such as procurement, fiscal, legal, and technical personnel. If contract performance is to be in a designated operational area, the agency should also consider including operations staff or "end users," as appropriate.

C. Market Research.

(1) Acquisitions begin with a description of the District's needs stated in terms sufficient to allow conduct of market research. Districts shall conduct market research appropriate to the circumstances to arrive at the most suitable approach to acquiring supplies, services, and information technology. Districts should conduct market research when planning a new acquisition, or for a new type of supplies, services, or information technology; before requisitioning an acquisition; and on an ongoing basis (to the maximum extent practicable), to effectively identify the capabilities of small businesses, new entrants into government contracting, and new commercially available items, for meeting the District's requirements.

(2) Districts should use the results of market research to determine if sources capable of satisfying the District's requirements exist; determine if commercially available items exist that meet the District's requirements; and determine the practices of firms engaged in producing, distributing, and supporting the supplies, services or information technology to be acquired, such as type of contract, type and relationship of businesses involved in such contracts (e.g., subcontractors, suppliers, distributors, integrators) and, common industry contract terms or specifications, including without limitation, terms for contract duration, payment, warranties, maintenance and packaging, marking, and any other contract terms relevant to the proposed acquisition..

D. Exchanges with industry before receipt of proposals.

(1) Exchanges of information among all interested parties, from the earliest identification of a requirement through receipt of proposals, are encouraged. Any exchange of information must be consistent with Regulation 2010, Disclosure of Procurement Information. Interested parties include potential offerors, end users, District acquisition and supporting personnel, and others involved in the conduct or outcome of the acquisition. The purpose of exchanging information is to improve the understanding of District requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy the District's requirements, and enhancing the District's ability to obtain quality supplies, services, information technology, and construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.

(2) Districts are encouraged to promote early exchanges of information about future acquisitions. An early exchange of information among industry and the responsible procurement officer, and other participants in the acquisition process can identify and resolve concerns regarding the acquisition strategy, including proposed contract type, terms and conditions, and acquisition planning schedules; the feasibility of the requirement, including performance requirements, statements of work, and data requirements; the suitability of the proposal instructions and evaluation criteria; the availability of reference documents; and any other industry concerns or questions.

(3) Techniques to promote early exchanges of information include industry conferences; public hearings; market research, as described in section C above; presolicitation notices; draft RFPs; requests for information (RFIs); presolicitation conferences; and site visits. They may also include one-on-one meetings with potential offerors. In conducting exchanges, the District should take measures to comply with Chapter 13, Title 8 of the South Carolina Code (Ethics, Government Accountability and Campaign Reform Act); Regulation 2010 (Disclosure of Procurement Information); Regulation 2127 (Organizational Conflicts of Interest); and Regulation 2165 (Gifts). However, any such meetings that are substantially involved with potential specifications or contract terms and conditions must comply with the restrictions on disclosure of information in subsection D(6) below.

(4) To encourage industry response, the District may publish notice of its plans to conduct pre-solicitation exchanges in South Carolina Business Opportunities and other publications likely to reach potential offerors.

(5) RFIs may be used when the District does not presently intend to award a contract, but wants to obtain price, delivery, other market information, or capabilities for planning purposes. Responses to these

notices are not offers and cannot be accepted by the District to form a binding contract. There is no required format for RFIs.

(6) General information about agency mission needs and future requirements may be disclosed at any time. In addition to the controls in Regulation 2010, the responsible procurement officer must control any exchange with potential offerors after release of the solicitation. When specific information about a proposed acquisition that would be necessary or advantageous for the preparation of proposals is disclosed to one or more potential offerors, that information must be made available to the public as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage. When conducting a presolicitation conference, materials distributed at the conference should be made available to all potential offerors, upon request.

2025. Authority to Contract for Certain Services; Definitions.

A. Consultant Services.

(1) For the purposes of these Regulations, consultant services shall be defined as follows: An individual, partnership, corporation or any other legally established organization performing consulting services for or providing consulting advice to the District over whom the District has the right of control as to the result to be accomplished but not as to the details and means by which that result is to be accomplished.

(2) Services which fall within this definition shall be procured in accordance with the code and these Regulations.

B. Employee Services.

(1) For the purposes of these Regulations, employee services shall be defined as follows: An individual performing services directly for the District over whom the District has the right of control not only as to the result to be accomplished by the work but also as to the details and means by which that work is to be accomplished.

(2) Services which fall within this definition shall be procured in accordance with District personnel policies and procedures.

C. Employment Services.

(1) For the purposes of these Regulations, employment services shall be defined as follows: An individual performing services indirectly for the District whose services are obtained through a private employment agency. The employee employer relationship exists between the private employment agency and its employee. The District will contract with the private employment agency for the services of its employees.

(2) Services which fall within this definition shall be procured in accordance with the code and these Regulations.

D. Legal Services.

Prior to the award of any District contract for the services of attorneys, approval for such services shall be obtained from the Board.

E. Auditing Services.

Prior to the award of any District contract for auditing or accounting services, approval for such services shall be obtained from the Board.

2027. Electronic Commerce.

A. "Electronic commerce" means electronic techniques for accomplishing business transactions including electronic mail or messaging, World Wide Web technology, electronic bulletin boards, purchase cards, electronic funds transfer, and electronic data interchange.

B. General.

(1) The District may use electronic commerce whenever practicable or cost-effective. The use of terms commonly associated with paper transactions (e.g., "copy," "document," "page," "printed," "sealed

envelope," and "stamped") shall not be interpreted to restrict the use of electronic commerce. The responsible procurement officer may supplement electronic transactions by using other media to meet the requirements of any contract action governed by the District's Procurement Code (e.g., transmit hard copy of drawings).

(2) Districts may exercise broad discretion in selecting the information technology that will be used in conducting electronic commerce. However, the Superintendent shall ensure that systems, technologies, procedures, and processes used by the District to conduct electronic commerce—

(a) Are implemented uniformly throughout the District, to the maximum extent practicable;

(b) Are implemented only after considering the full or partial use of existing infrastructures;

(c) Facilitate access to District acquisition opportunities by as many persons as practicable, including small businesses, minority business enterprises, and socially and economically disadvantaged small businesses;

(d) Include a means of providing widespread public notice of acquisition opportunities and a means of responding to notices or solicitations electronically;

(e) Comply with applicable standards that broaden interoperability and ease the electronic interchange of information; and

(f) Are capable of ensuring authentication and confidentiality commensurate with the risk and magnitude of the harm from loss, misuse, or unauthorized access to or modification of the information.

(3) [Deleted]

(4) Consistent with provisions of the Uniform Electronic Transactions Act, Sections 26-6-10, et seq., Districts may accept electronic signatures and records in connection with District contracts.

C. Submission of Offers by Electronic Commerce. Subject to all other applicable regulations (e.g., Regulations 2045 and 2050), the responsible procurement officer may authorize use of electronic commerce for submission of bids and proposals. If electronic submissions are authorized, the solicitation shall specify the electronic commerce method(s) that offerors may use. Offers submitted by electronic commerce shall be considered only if the electronic commerce method was specifically stipulated or permitted by the solicitation.

2030. Competitive Sealed Bidding—The Invitation for Bids.

A. The invitation for bids shall be used to initiate a competitive sealed bid procurement and shall include the following, as applicable:

(1) instructions and information to bidders concerning the bid submission requirements, including the time and date set for receipt of bids, the individual to whom the bid is to be submitted, the address of the office to which bids are to be delivered, the maximum time for bid acceptance by the District, and any other special information;

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

(3) the contract terms and conditions, including warranty and bonding or other security requirements, as applicable; and

(4) Instructions to bidders on how to visibly mark information which they consider to be exempt from public disclosure.

B. Adequate notice of the invitation for bids must be given at a reasonable time before the date set forth in it for the opening of bids. Accordingly, bidding time will be set to provide bidders a reasonable time to prepare their bids. Without limiting the foregoing requirements, the date of opening may not be less than seven (7) days after notice of the solicitation is provided as required by Section 1520(3), unless a shorter time is deemed necessary for a particular procurement as determined in writing by the chief business official or his designee.

2040. Publication of District Business Opportunities.

As used in this code and these regulations “South Carolina Business Opportunities” means the periodical published by the Materials Management Office pursuant to Regulation 19-445.2040 of the South Carolina Code of Laws.

[Alternative Language: (1) If the District elects to rely on advertisement in a newspaper of general circulation, the language above must be designated as paragraph A and the following language must be included as paragraph B: "When the Code or these regulations require notice in a newspaper of general circulation in the District, the advertisement or notice shall be published in the single newspaper identified in the District's internal procurement procedures (Section 540)." Absent this requirement, those interested in doing business with the District would not have a single source to which they could turn.]

2042. Pre-Bid Conferences.

A. Pre-bid conferences may be conducted. The conference should be held long enough after the Invitation for Bids has been issued to allow bidders to become familiar with it, but sufficiently before bid opening to allow consideration of the conference results in preparing their bids. Notice of the conference must be included in the notice of the solicitation required by Articles 5 or 9 of this code.

B. Nothing stated at the pre-bid conference shall change the Invitation for Bids unless a change is made by written amendment. A potential bidder’s failure to attend an advertised pre-bid conference will not excuse its responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the District.

C. Pre-bid conferences may not be made mandatory absent a written determination by the Superintendent or his designee that the unique nature of the procurement justifies a mandatory pre-bid conference and that a mandatory pre-bid conference will not unduly restrict competition.

D. To minimize the time and expense imposed on industry by pre-bid conferences, the procurement officer should arrange for attendance by electronic means to the maximum extent practicable.

2045. Receipt, Safeguarding, and Disposition of Bids.

A. Procedures Prior to Bid Opening.
All bids (including modifications) received prior to the time of opening shall be kept secure and, except as provided in subsection B below, unopened. Necessary precautions shall be taken to ensure the security of the bid. Prior to bid opening, information concerning the identity and number of bids received shall be made available only to the District employees, and then only on a “need to know” basis. When bid samples are submitted, they shall be handled with sufficient care to prevent disclosure of characteristics before bid opening.

B. Unidentified Bids.
Unidentified bids may be opened solely for the purpose of identification, and then only by an official specifically designated for this purpose by the Chief Procurement Officer, the procurement officer of the District, or a designee of either officer. If a sealed bid is opened by mistake, the person who opens the bid will immediately write his signature and position on the envelope and deliver it to the aforesaid official. This official shall immediately write on the envelope an explanation of the opening, the date and time opened, the invitation for bids’ number, and his signature, and then shall immediately reseal the envelope.

C. When bids or proposals are rejected, or a solicitation cancelled after bids or proposals are received, the bids or proposals which have been opened shall be retained in the procurement file or, if unopened, otherwise disposed of. Unopened bids or proposals are not considered to be public information under Chapter 4 of Title 30 (Freedom of Information Act).

2050. Bid Opening.

A. Procedures.

The procurement officer of the District or his designee shall decide when the time set for bid opening has arrived, and shall so declare to those present. In the presence of one or more District witnesses, he shall then personally and publicly open all bids received prior to that time, and read aloud so much thereof as is practicable, including prices, to those persons present and have the bids recorded. The amount of each bid and such other relevant information, together with the name of each bidder, shall be tabulated and certified in writing as true an accurate by both the person opening the bids and the witness. The tabulation shall be open to public inspection.

B. If it becomes necessary to postpone a bid opening, the procurement officer shall issue the appropriate amendments to the solicitation postponing or rescheduling the bid opening. When the District is closed due to force majeure, bid opening will be postponed to the same time on the next official business day.

C. Disclosure of Bid Information.

Only the information disclosed by the procurement officer of the District or his designee at bid opening is considered to be public information under the Freedom of Information Act, Chapter 4 of Title 30, until after the issuance of an award or notification of intent to award, whichever is earlier.

2055. Bid Acceptance and Bid Evaluation.

When necessary for the best interest of the District, bid criteria to determine acceptability may include inspection, testing, quality, workmanship, delivery and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be measurable costs to include, but not be limited to, discounts, transportation costs, total or life cycle costs.

2060. Repealed.

2065. Rejection of Bids.

A. Unless there is a compelling reason to reject one or more bids, award will be made to the lowest responsible and responsive bidder. Every effort shall be made to anticipate changes in a requirement prior to the date of opening and to notify all prospective bidders of any resulting modification or cancellation, thereby permitting bidders to change their bids and preventing the unnecessary exposure of bid prices. As a general rule after opening, an invitation for bids should not be canceled and readvertised due solely to increased quantities of the items being procured; award should be made on the initial invitation for bids and the additional quantity required should be treated as a new procurement.

B. Cancellation of Bids Prior to Award.

(1) When it is determined prior to the issuance of an award or notification of intent to award, whichever is earlier, but after opening, that the requirements relating to the availability and identification of specifications have not been met, the invitation for bids shall be cancelled. Invitations for bids may be cancelled after opening, but prior to award, when such action is consistent with subsection A above and the procurement officer determines in writing that:

(a) inadequate or ambiguous specifications were cited in the invitation;

(b) specifications have been revised;

(c) the supplies, services, information technology, or construction being procured are no longer required;

(d) the invitation did not provide for consideration of all factors of cost to the District, such as cost of transporting District furnished property to bidders' plants;

(e) bids received indicate that the needs of the District can be satisfied by a less expensive article differing from that on which the bids were invited;

(f) all otherwise acceptable bids received are at unreasonable prices;

(g) the bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith; or

(h) for other reasons, cancellation is clearly in the best interest of the District.

(2) Determinations to cancel invitations for bids shall state the reasons therefor.

C. Extension of Bid Acceptance Period.

Should administrative difficulties be encountered after bid opening which may delay award beyond bidders' acceptance periods, the several lowest bidders should be requested, before expiration of their bids, to extend the bid acceptance period (with consent of sureties, if any) in order to avoid the need for re-advertisement.

2070. Rejection of Individual Bids.

A. General Application.

Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected.

B. Alternate Bids.

Any bid which does not conform to the specifications contained or referenced in the invitation for bids may be rejected unless the invitation authorized the submission of alternate bids and the supplies offered as alternates meet the requirements specified in the invitation.

C. Any bid which fails to conform to the delivery schedule, to permissible alternates thereto stated in the invitation for bids, or to other material requirements of the solicitation may be rejected as nonresponsive.

D. Modification of Requirements by Bidder.

(1) Ordinarily a bid should be rejected when the bidder attempts to impose conditions which would modify requirements of the invitation for bids or limit his liability to the District, since to allow the bidder to impose such conditions would be prejudicial to other bidders. For example, bids should be rejected in which the bidder:

(a) attempts to protect himself against future changes in conditions, such as increased costs, if total possible cost to the District cannot be determined;

(b) fails to state a price and in lieu thereof states that price shall be "price in effect at time of delivery;"

(c) states a price but qualified such price as being subject to "price in effect at time of delivery;"

(d) when not authorized by the invitation, conditions or qualifies his bid by stipulating that his bid is to be considered only if, prior to date of award, bidder receives (or does not receive) award under a separate procurement;

(e) requires the District to determine that the bidder's product meets District specifications; or

(f) limits the rights of the District under any contract clause.

(2) Bidders may be requested to delete objectionable conditions from their bid provided that these conditions do not go to the substance, as distinguished from the form, of the bid or work an injustice on other bidders. Bidder should be permitted the opportunity to furnish other information called for by the Invitation for Bids and not supplied due to oversight, so long as it does not affect responsiveness.

E. Price Unreasonableness.

Any bid may be rejected if the responsible procurement officer determines in writing that it is unreasonable as to price.

F. Bid Security Requirement.

When a bid security is required and a bidder fails to furnish it in accordance with the requirements of the invitation for bids, the bid shall be rejected.

G. Exceptions to Rejection Procedures.

Any bid received after the procurement officer or his designee has declared that the time set for bid opening has arrived, shall be rejected unless the bid had been delivered to the location specified in the solicitation or the governmental bodies' mail room which services that location prior to the bid opening.

2075. All or None Qualifications.

Unless the invitation for bids so provides, a bid is not rendered nonresponsive by the fact that the bidder specifies that award will be accepted only on all, or a specified group, of the items included in the invitation

for bids. However, bidders shall not be permitted to withdraw or modify "all or none" qualifications after bid opening since such qualification is substantive and affects the rights of the other bidders.

2077. Bid Samples and Descriptive Literature.

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

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

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

D. The Invitation for Bids shall state that bid samples or descriptive literature should not be submitted unless expressly requested and that, regardless of any attempt by a bidder to condition the bid, unsolicited bid samples or descriptive literature which are submitted at the bidder's risk will not be examined or tested, and will not be deemed to vary any of the provisions of the Invitation for Bids.

2080. Bid Reductions.

The responsible procurement officer may accept a voluntary reduction in price from a low bidder after bid opening but prior to award; provided that such reduction is not conditioned on, nor results in, the modification or deletion of any conditions contained in the invitation for bids.

2085. Correction or Withdrawal of Bids; Cancellation of Awards.

A. General Procedure.

(1) A bidder or offeror must submit in writing a request to either correct or withdraw a bid to the procurement officer. Each written request must document the fact that the bidder's or offeror's mistake is clearly an error that will cause him substantial loss. All decisions to permit the correction or withdrawal of bids shall be supported by a written determination of appropriateness made by the chief business official.

> [*Model Comment: (1) The authority granted in this paragraph must be exercised in compliance with Section 1520(7). (2) After opening, the correction or withdrawal of bids can undermine the integrity of the procurement process. Given this concern, such authority should be exercised by an official one step removed from procurement. Accordingly, this section places the final authority over these actions with the chief business official.*]

(2) Confirmation of Bid. When the responsible procurement officer knows or has reason to conclude that a mistake may have been made, the procurement officer should request the bidder to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. Consistent with Regulations 2010, 2050C, and 2095C, the responsible procurement officer should only disclose information that is publicly available when confirming a bid. If the bidder asserts a mistake, the bid may be corrected or withdrawn only if allowed by regulation (e.g., Regulation 2085A and B and Regulation 2095I(2)(d)).

B. Correction Creates Low Bid.

To maintain the integrity of the competitive sealed bidding system, a bidder shall not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid unless the mistake is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition.

C. Cancellation Of Award Prior To Performance.

After an award or notification of intent to award, whichever is earlier, has been issued but before performance has begun, the award or contract may be canceled and either re-awarded or a new solicitation issued or the existing solicitation canceled, if the chief business official determines in writing that:

(1) Inadequate or ambiguous specifications were cited in the invitation;

(2) Specifications have been revised;

(3) The supplies, services, information technology, or construction being procured are no longer required;

(4) The invitation did not provide for consideration of all factors of cost to the District, such as cost of transporting District furnished property to bidders' plants;

(5) Bids received indicate that the needs of the District can be satisfied by a less expensive article differing from that on which the bids were invited;

(6) The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith;

(7) Administrative error of the District discovered prior to performance, or

(8) For other reasons, cancellation is clearly in the best interest of the District.

[*Model Comment: (1) The authority to cancel awards or contracts after award but prior to performance is tantamount to revoking a contract. Because it takes place after offers have been received, it can have an unfair impact on the participating offerors if further competition is planned. In addition, this process takes place after the participating offerors have expended resources, sometimes considerable resources, in submitting an offer. Accordingly, this process should* <u>*not*</u> *be used as a normal administrative solution to defective procurement practices. Rather, it should be reserved for extraordinary circumstances. (2) The authority granted in this paragraph must be exercised in compliance with Section 1520(7). (3) To address questions asked, this provision is unrelated to contract administration actions such as a termination due to default or a termination for convenience.*]

2090. Award.

A. Application.

The contract shall be awarded to the lowest responsible and responsive bidder(s) whose bid meets the requirements and criteria set forth in the invitation for bids.

B. The procurement officer shall issue the notice of intent to award or award on the date specified in the solicitation, unless the procurement officer determines, and gives notice, that a longer review time is necessary. The procurement officer shall give notice of the revised posting date in accordance with Section 1520(10).

2095. Competitive Sealed Proposals.

A. Request for Proposals.

The provisions of Regulations 2030B and 2040 shall apply to implement the requirements of Section 1530 (2), Public Notice.

B. Receipt, Safeguarding, and Disposition of Proposals.

The provisions of Regulation 2045 shall apply to competitive sealed proposals.

C. Receipt of Proposals.

The provisions of Regulation 2050(B) shall apply to competitive sealed proposals. For the purposes of implementing Section 1530(3), Receipt of Proposals, the following requirements shall be followed:

(1) Proposals shall be opened publicly by the procurement officer or his designee in the presence of one or more witnesses at the time and place designated in the request for proposals. Proposals and modifications shall be time-stamped upon receipt and held in a secure place until the established due date. After the date established for receipt of proposals, a Register of Proposals shall be prepared which shall include for all proposals the name of each offeror, the number of modifications received, if any, and a description sufficient to identify the item offered. The Register of Proposals shall be certified in writing as true and accurate by both the person opening the proposals and the witness. The Register of Proposals shall be open to public inspection only after the issuance of an award or notification of intent to award, whichever is earlier. Proposals and modifications shall be shown only to District personnel having a legitimate interest in them and then only on a "need to know" basis. Contents and the identity of competing offers shall not be disclosed during the process of opening by District personnel.

(2) As provided by the solicitation, offerors must visibly mark all information in their proposals that they consider to be exempt from public disclosure.

D. [Repealed]

E. Clarifications and Minor Informalities in Proposals.

The provisions of Section 1520(13) shall apply to competitive sealed proposals.

F. Specified Types of Construction.

Consistent with Section 48-52-670, which allows the use of competitive sealed proposals, it is generally not practicable or advantageous to the District to procure guaranteed energy, water, or wastewater savings contracts by competitive sealed bidding.

G. Procedures for Competitive Sealed Proposals.

[*Model Comment: State regulation 19-445.2095(G), which is the state parallel to this paragraph, authorizes the state CPOs to issue procedures which must be followed by all state agencies using the competitive sealed proposal method of acquisition. Pursuant to this authority, the CPOs have issued mandatory procedures entitled "Competitive Sealed Proposals, Required Procedures and Guidance for Communications After Opening but Prior to Award" (eff. Sept. 2021), found at https://procurement.sc.gov. Division of Procurement Services believes these procedures reflect the agency's best interpretation of how these rules should be applied. While they are not mandatory for school districts, they are highly recommended.*]

H. Other Applicable Provisions.

The provisions of the following Regulations shall apply to competitive sealed proposals:

(1) Regulation 2042, Pre-Bid Conferences,

(2) Regulation 2060, Telegraphic and Electronic Bids,

(3) Regulation 2075, All or None Qualifications,

(4) Regulation 2085, Correction or Withdrawal of Bids; Cancellation of Awards, and Cancellation of Awards Prior to Performance.

I. Discussions with Offerors

(1) Classifying Proposals.

For the purpose of conducting discussions under Section 1530(6) and item (2) below, proposals shall be initially classified in writing as:

(a) acceptable (i.e., reasonably susceptible of being selected for award);

(b) potentially acceptable (i.e., reasonably susceptible of being made acceptable through discussions); or

(c) unacceptable.

(2) Conduct of Discussions.

If discussions are conducted, the procurement officer shall exchange information with all offerors who submit proposals classified as acceptable or potentially acceptable. The content and extent of each exchange is a matter of the procurement officer's judgment, based on the particular facts of each acquisition. In conducting discussions, the procurement officer shall:

(a) Control all exchanges;

(b) Advise in writing every offeror of all deficiencies in its proposal, if any, that will result in rejection as non-responsive;

(c) Attempt in writing to resolve uncertainties concerning the cost or price, technical proposal, and other terms and conditions of the proposal, if any;

(d) Resolve in writing suspected mistakes, if any, by calling them to the offeror's attention.

(e) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal, but only to the extent such revisions are necessary to resolve any matter raised by the procurement officer during discussions under items (2)(b) through (2)(d) above.

(3) Limitations. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. Ordinarily, discussions are conducted prior to final ranking. Discussions may not be conducted unless the solicitation alerts offerors to the possibility of such an

exchange, including the possibility of limited proposal revisions for those proposals reasonably susceptible of being selected for award.

J. Rejection of Individual Proposals.

(1) Proposals need not be unconditionally accepted without alteration or correction, and to the extent otherwise allowed by law, the District's stated requirements may be clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include but are not limited to:

(a) the business that submitted the proposal is nonresponsible as determined under Section 1810;

(b) the proposal ultimately (that is, after an opportunity, if any is offered, has passed for altering or clarifying the proposal) fails to meet the announced requirements of the District in some material respect; or

(c) the proposed price is clearly unreasonable.

(2) The reasons for cancellation or rejection shall be made a part of the procurement file and shall be available for public inspection.

[*Model Comment: Division of Procurement Services' three chief procurement officers have jointly issued guidance to assist procurement officers in conducting discussions pursuant to this Regulation 2095(I). See Competitive Sealed Proposals, Required Procedures and Guidance for Communications After Opening but Prior to Award (eff. Sept. 2021), found at https://procurement.sc.gov.*]

K. Negotiations.

(1) Prior to initiating negotiations under Section 1530(8), the District must document its negotiation objectives.

(2) The responsible procurement officer must participate in, control, and document all negotiations.

L. Delay in Posting Notice of Intent to Award or Award.

Regulation 2090B shall apply to competitive sealed proposals.

2097. Rejection of Proposals.

A. Unless there is a compelling reason to reject one or more proposals, award will be made to the highest ranked responsible offeror or otherwise as allowed by Section 1530. Every effort shall be made to anticipate changes in a requirement prior to the date of opening and to notify all prospective offerors of any resulting modification or cancellation.

B. Cancellation of Solicitation Prior to Award.

(1) When it is determined prior to the issuance of an award or notification of intent to award, whichever is earlier, but after opening, that the requirements relating to the availability and identification of specifications have not been met, the request for proposals shall be cancelled. A request for proposals may be cancelled after opening, but prior the issuance of an award or notification of intent to award, whichever is earlier, when such action is consistent with subsection A above and the procurement officer determines in writing that:

(a) inadequate or ambiguous specifications were cited in the solicitation;

(b) specifications have been revised;

(c) the supplies, services, information technology, or construction being procured are no longer required;

(d) the solicitation did not provide for consideration of all factors of cost to the District, such as cost of transporting District furnished property to bidders' plants;

(e) proposals received indicate that the needs of the District can be satisfied by a less expensive article differing from that on which the proposals were requested;

(f) all otherwise acceptable proposals received are at unreasonable prices;

(g) the proposals were not independently arrived at in open competition, were collusive, or were submitted in bad faith; or

(h) for other reasons, cancellation is clearly in the best interest of the District.

(2) Determinations to cancel a request for proposals shall state the reasons therefor.

C. Extension of Bid Acceptance Period.

Should administrative difficulties be encountered after opening which may delay award beyond offeror's acceptance periods, the relevant offerors should be requested, before expiration of their offers, to extend the acceptance period (with consent of sureties, if any).

2098. Rejection of Individual Proposals.

A. Proposals need not be unconditionally accepted without alteration or correction, and to the extent otherwise allowed by law, the District's stated requirements may be clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal.

B. Reasons for rejecting proposals include but are not limited to:

(1) the business that submitted the proposal is nonresponsible as determined under Section 1810;

(2) the proposal ultimately (that is, after an opportunity, if any is offered, has passed for altering or clarifying the proposal) fails to meet the announced requirements of the District in some material respect; or

(3) the proposed price is unreasonable.

C. The reasons for rejection shall be made a part of the procurement file and shall be available for public inspection.

D. Exceptions to Rejection Procedures.

Any proposal received after the procurement officer of the District or his designee has declared that the time set for opening has arrived, shall be rejected unless the proposal had been delivered to the location specified in the solicitation or the District's mail room which services that location prior to the bid opening.

2100. Small Purchases and Other Simplified Purchasing Procedures.

A. Authority.

(1) A District may make small purchases not exceeding the limits prescribed in Section 1550 in accordance with the procedures in that section and herein.

(2) These simplified acquisition procedures shall not be used for items available under mandatory state term contracts (see R.19-445-2020B(1) of the South Carolina Code of Laws).

(3) [Reserved]

(4) When required, adequate public notice must comply with Regulation 2000F.

(5) Section 4210(1)(d) makes the protest process inapplicable to contracts with an actual or potential value of up to $50,000. Because the protest process applies to all small purchases in excess of $50,000, notice of an award must be communicated to all bidders on the same date award is made and must be documented in the procurement file. Any method of communication may be used.

B. Purchases pursuant to Section 1550(2)(b) (Three Written Quotes).

(1) If a District does not receive responsive quotes from at least three responsible bidders, adequate public notice must be given and documented with the purchase requisition. So-called "no bids" are not bona fide and do not count as one of the three.

(2) Requests for quotes must be distributed equitably among qualified suppliers, unless adequate public notice is given in South Carolina Business Opportunities.

C. Purchases pursuant to Section 1550(2)(c) (Advertised Small Purchase) may be made by giving adequate public notice in South Carolina Business Opportunities and:

(1) issuing a written solicitation for written quotes, as described in Section 1550(2)(c);

(2) soliciting bids in accordance with Section 1520, Competitive Sealed Bidding, Section 1525, Competitive Fixed Price Bidding, or Section 1528, Competitive Best Value Bidding; or

(3) soliciting proposals in accordance with Section 1530, Competitive Sealed Proposals.

D. When conducting a small purchase over twenty-five thousand dollars for which adequate public notice is required, potential offerors must be provided reasonable time to prepare their bids, no less than seven (7) days after such notice is provided, unless a shorter time is deemed necessary for a particular procurement as determined in writing by the chief business official.

E. Establishment of Blanket Purchase Agreements.

(1) General. A blanket purchase agreement is a simplified method of filling repetitive needs for small quantities of miscellaneous supplies, services, or information technology by establishing "charge accounts" with qualified sources of supply. Blanket purchase agreements are designed to reduce administrative costs in accomplishing small purchases by eliminating the need for issuing individual purchase documents.

(2) Alternate Sources. To the extent practicable, blanket purchase agreements for items of the same type should be placed concurrently with more than one supplier. All competitive sources shall be given an equal opportunity to furnish supplies, services, or information technology under such agreements.

(3) Terms and Conditions. Blanket purchase agreements shall contain the following provisions:

(a) Description of agreement. A statement that the supplier shall furnish supplies, services, or information technology, described therein in general terms, if and when requested by the Procurement Officer, or his authorized representative, during a specified period and within a stipulated aggregate amount, if any. Blanket purchase agreements may encompass all items that the supplier is in a position to furnish.

(b) Extent of obligation. A statement that the District is obligated only to the extent of authorized calls actually placed against the blanket purchase agreement.

(c) Notice of individuals authorized to place calls and dollar limitations. A provision that a list of names of individuals authorized to place calls under the agreement, identified by organizational component, and the dollar limitation per call for each individual shall be furnished to the supplier by the Procurement Officer.

(d) Delivery tickets. A requirement that all shipments under the agreement, except subscriptions and other charges for newspapers, magazines, or other periodicals, shall be accompanied by delivery tickets or sales slips which shall contain the following minimum information:

(1) name of supplier;

(2) blanket purchase agreement number;

(3) date of call;

(4) call number;

(5) itemized list of supplies, services, or information technology furnished;

(6) quantity, unit price, and extension of each item less applicable discounts (unit price and extensions need not be shown when incompatible with the use of automated systems, provided that the invoice is itemized to show this information); and

(7) date of delivery or shipment.

(e) Invoices one of the following statements:

(1) A summary invoice shall be submitted at least monthly or upon expiration of the blanket purchase agreement, whichever occurs first, for all deliveries made during a billing period, identifying the delivery tickets covered therein, stating their total dollar value, and supported by receipted copies of the delivery tickets; or

(2) An itemized invoice shall be submitted at least monthly or upon expiration of the blanket purchase agreement, whichever occurs first, for all deliveries made during a billing period and for which payment has not been received. Such invoices need not be supported by copies of delivery tickets;

(3) When billing procedures provide for an individual invoice for each delivery, these invoices shall be accumulated provided that a consolidated payment will be made for each specified period; and the period of any discounts will commence on final date of billing period or on the date of receipt of invoices for all deliveries accepted during the billing period, whichever is later. This procedure should not be used if the accumulation of the individual invoices materially increases the administrative costs of this purchase method.

F. Competition Under Blanket Purchase Agreement.

Calls against blanket purchase agreements shall be placed after prices are obtained. When concurrent agreements for similar items are in effect, calls shall be equitably distributed. In those instances where there is an insufficient number of BPAs for any given class of supplies, services, or information technology to assure adequate competition, the individual placing the order shall solicit quotations from other sources.

G. Calls Against Blanket Purchase Agreement.

Calls against blanket purchase agreements generally will be made orally, except that informal correspondence may be used when ordering against agreements outside the local trade area. Written calls may be executed. Documentation of calls shall be limited to essential information. Forms may be developed for this purpose locally and be compatible with the Comptroller General's Office STARS system.

H. Receipt and Acceptance of Supplies or Services.

Acceptance of supplies, services, or information technology shall be indicated by signature and date on the appropriate form by the authorized District representative after verification and notation of any exceptions.

I. Review Procedures.

The District shall review blanket purchase agreement files at least semiannually to assure that authorized procedures are being followed. Blanket purchase agreements shall be issued for a period of no longer than 12 months.

2105. Sole Source Procurements.

A. Application.

The provisions of this Regulation shall apply to all sole source procurements unless emergency conditions exist as defined in Regulation 2110.

B. Exceptions.

Sole source procurement is not permissible unless there is only a single supplier. The following are examples of circumstances which could necessitate sole source procurement:

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

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

(3) [Repealed]

(4) [Repealed]

(5) where the item is one of a kind; and

(6) [Repealed]

C. Written Determination. (1) The written determination to conduct a procurement as a sole source shall be made by the Superintendent or designee above the level of the procurement officer. Any delegation of authority by the Superintendent with respect to sole source determinations shall be submitted in writing to the chief procurement officer. (2) The written determination must include a purchase description that states the District's actual needs, which shall not be unduly restrictive. In cases of reasonable doubt, competition should be solicited. The determination must contain sufficient factual grounds and reasoning to provide an informed, objective explanation for the decision and must be accompanied by market research that supports the decision. The determination must be authorized prior to contract execution.

D. Notice.

(1) Compliance with the notice requirements in Section 1560(A) must be documented in the procurement file.

(2) The public notice required by Section 1560(A) must include the written determination required by Section C(2) above or instructions how to obtain the written determination immediately upon request.

E. Other Applicable Provisions.

Sole source procurements must comply with all applicable statutes and regulations, including without limitation, Sections 30 (Obligation of good faith), 210 (Determinations), 410 (Public access to procurement information), 1810 (Responsibility of bidders and offerors), 1830 (Cost or pricing data), 2010 (Types of contracts), 2030 (Multiterm contracts), 1610 (Change order or contract modification), 2440 (Records of

procurement actions), 2730 (Assuring competition), and 4230 (Authority to resolve contract and breach of contract controversies).

2110. Emergency Procurements.

A. Application.
The provisions of this Regulation apply to every procurement made under emergency conditions that will not permit other source selection methods to be used.
B. Definition.
An emergency condition is a situation which creates a threat to public health, welfare, or safety such as may arise by reason of floods, epidemics, riots, equipment failures, fire loss, or such other reason as may be proclaimed by the Superintendent or a designee. The existence of such conditions must create an immediate and serious need for supplies, services, information technology, or construction that cannot be met through normal procurement methods and the lack of which would seriously threaten:
(1) the functioning of District government;
(2) the preservation or protection of property; or
(3) the health or safety of any person.
C. Limitations.
Emergency procurement shall be limited to those supplies, services, information technology, or construction items necessary to meet the emergency.
D. Conditions.
The District may make emergency procurements when an emergency condition arises and the need cannot be met through normal procurement methods, provided that whenever practical, approval by the Superintendent or his designee shall be obtained prior to the procurement.
E. Selection of Method of Procurement.
The procedure used shall be selected to assure that the required supplies, services, information technology, or construction items are procured in time to meet the emergency. Given this constraint, such competition as is practicable shall be obtained.
F. Notice.
Compliance with the notice requirements in Section 1570(B) must be documented in the procurement file.
G. Written Determination.
The Superintendent or a designee shall make a written determination stating the basis for an emergency procurement and for the selection of the particular contractor. The determination must contain sufficient factual grounds and reasoning to provide an informed, objective explanation for the decision.

2115. Information Technology Procurements.

The District, whether using District appropriations or other funds, shall rent, purchase, or lease any information technology, or software, or contract for consulting or other services in the field of information technology only in accordance with these Regulations.

2120. Cost or Pricing Data.

A. Definitions
(1) Adequate Price Competition. Price competition exists if competitive sealed proposals are solicited, at least two responsive and responsible offerors independently compete for a contract, and price is a substantial factor in the evaluation. If the foregoing conditions are met, price competition shall be presumed to be "adequate" unless the procurement officer determines in writing that such competition is not adequate.
(2) Commercial product has the meaning stated in Section 1410(1).
(3) Established catalog price has the meaning stated in Section 1410.

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

(5) Prices Set by Law or Regulation. The price of a supply or service is set by law or regulation if some governmental body establishes the price that the offeror or contractor may charge the District and other customers.

B. Thresholds

(1) Section 1830(1)(a) applies where the total contract price exceeds five hundred thousand dollars.

(2) Section 1830(1)(b) applies where the pricing of any change order, contract modification, or termination settlement exceeds five hundred thousand dollars, unless the procurement officer determines in writing that such information is necessary to determine that the pricing is reasonable. Price adjustment amounts shall consider both increases and decreases (e.g., a $150,000 modification resulting from a reduction of $350,000 and an increase of $200,000 is a pricing adjustment exceeding $500,000.). This requirement does not apply when unrelated and separately priced changes for which cost or pricing data would not otherwise be required are included for administrative convenience in the same modification.

(3) Ordinarily, cost and pricing data should not be required for the acquisition of any item that meets the definition of commercial product, including any modification that does not change the item from a commercial product to a non-commercial product. The contractor may be required to submit cost or pricing data for commercial products or COTS only if the purchase or modification exceeds the thresholds established in this section and the procurement officer determines in writing that no other basis exists to establish price reasonableness.

C. Conditions of Waiver

The requirements of Section 1830 may be waived if the Superintendent determines in writing that the price can be determined to be fair and reasonable without submission of cost or pricing data.

D. Refusal to Submit Data

A refusal by the offeror to supply the requested information may be grounds to disqualify the offeror or to defer award pending further review and analysis.

2122. Price Reasonableness.

A. General. The objective of offer analysis is to ensure that the final contract price is fair and reasonable. The procurement officer is responsible for evaluating the reasonableness of the offered prices. Normally, competition establishes price reasonableness. Therefore, when contracting on a firm-fixed-price basis, comparison of the proposed prices will usually satisfy the requirement to perform a price analysis, and a cost analysis need not be performed. In limited situations, a cost analysis (see subsection B(2)) may be appropriate to establish reasonableness of the otherwise successful offeror's price. The analytical techniques and procedures described in this regulation may be used, singly or in combination with others, to ensure that the final price is fair and reasonable. In addition, they should be used to analyze cost or pricing data required by Section 1830. The complexity and circumstances of each acquisition should determine the appropriate level of detail for the analysis. The Board or designee may develop and issue procedures which shall be followed by all schools in the District conducting offer analysis. The responsible procurement officer may request the advice and assistance of other experts to ensure that an appropriate analysis is performed.

B. Analytical techniques include, but are not limited to, the following:

(1) Price analysis is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit. Examples of price analysis criteria include but are not limited to: (a) price submissions of prospective bidders or offerors in the current procurement; (b) prior price quotations and contract prices charged by the bidder, offeror, or contractor; (c) prices published in catalogues or price lists; (d) prices available on the open market; and (e) in-house estimates of cost. The responsible procurement officer may use various price analysis techniques and procedures to ensure a fair and reasonable price.

(2) Cost analysis is the review and evaluation of any separate cost elements and profit or fee in an offeror's or contractor's proposal, as needed to determine a fair and reasonable price, and the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency. Cost analysis includes the appropriate verification of cost or pricing data, and the use of this data to evaluate: (a) specific elements of costs; (b) the necessity for certain costs; (c) the reasonableness of amounts estimated for the necessary costs; (d) the reasonableness of allowances for contingencies; (e) the basis used for allocation of indirect costs; (f) the appropriateness of allocations of particular indirect costs to the proposed contract; and (g) the reasonableness of the total cost or price. The responsible procurement officer may use various cost analysis techniques and procedures to ensure a fair and reasonable price, given the circumstances of the acquisition.

C. Unbalanced pricing. All offers with separately priced line items or subline items shall be analyzed to determine if the prices are unbalanced. Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more line items is significantly over or understated as indicated by the application of cost or price analysis techniques. If the responsible procurement officer determines that unbalanced pricing may increase performance risk (e.g., it is so unbalanced as to be tantamount to allowing an advance payment) or could result in payment of unreasonably high prices, she may conclude that the offer is unreasonable as to price.

2125. Responsibility of Bidders and Offerors.

A. District Standards of Responsibility.
Factors to be considered in determining whether the District standards of responsibility have been met include whether a prospective contractor has:

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

(2) a satisfactory record of performance;

(3) a satisfactory record of integrity;

(4) qualified legally to contract with the District; and

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

B. Obtaining Information; Duty of Contractor to Supply Information.
At any time prior to award, the prospective contractor shall supply information requested by the procurement officer concerning the responsibility of such contractor. If such contractor fails to supply the requested information, the procurement officer shall base the determination of responsibility upon any available information or may find the prospective contractor non responsible if such failure is unreasonable. In determining responsibility, the procurement officer may obtain and rely on any sources of information, including but not limited to the prospective contractor; knowledge of personnel within the District; commercial sources of supplier information; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; government agencies; and business and trade associations.

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

(1) evidence that such contractor possesses such necessary items;

(2) acceptable plans to subcontract for such necessary items; or

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

D. Duty Concerning Responsibility.

(1) Before awarding a contract or issuing a notification of intent to award, whichever is earlier, the procurement officer must be satisfied that the prospective contractor is responsible. The determination is not limited to circumstances existing at the time of opening.

(2) Consistent with Section 1529(3), the procurement officer must determine responsibility of bidders in competitive on-line bidding before bidding begins.

E. Written Determination of Nonresponsibility.

If a bidder or offeror who otherwise would have been awarded a contract is found nonresponsible, a written determination of nonresponsibility setting forth the basis of the finding shall be prepared by the procurement officer. A copy of the determination shall be sent promptly to the nonresponsible bidder or offeror. The final determination shall be made part of the procurement file.

F. Special Standards of Responsibility

When it is necessary for a particular acquisition or class of acquisitions, the procurement officer may develop, with the assistance of appropriate specialists, special standards of responsibility. Special standards may be particularly desirable when experience has demonstrated that unusual expertise or specialized facilities are needed for adequate contract performance. The special standards shall be set forth in the solicitation (and so identified) and shall apply to all offerors. A valid special standard of responsibility must be specific, objective and mandatory.

G. Subcontractor responsibility.

(1) Generally, prospective prime contractors are responsible for determining the responsibility of their prospective subcontractors. Determinations of prospective subcontractor responsibility may affect the procurement officer's determination of the prospective prime contractor's responsibility. A prospective contractor may be required to provide written evidence of a proposed subcontractor's responsibility.

(2) When it is in the District's interest to do so, the procurement officer may directly determine a prospective subcontractor's responsibility (e.g., when the prospective contract involves medical supplies, urgent requirements, or substantial subcontracting). In this case, the same standards used to determine a prime contractor's responsibility shall be used by the procurement officer to determine subcontractor responsibility.

2127. Organizational Conflicts of Interest.

A. General.

(1) "Organizational conflict of interest" occurs when, because of other activities or relationships with the District or with other businesses:

(a) a business is unable or potentially unable to render impartial assistance or advice to the District, or

(b) the business' objectivity in performing the contract work is or might be otherwise impaired, or

(c) a business has an unfair competitive advantage.

(2) This regulation applies to acquisitions of supplies, services and information technology, except for acquisitions made pursuant to Section 1550. Unless the procurement uses a project delivery method identified in Section 3005(1)(e), 1(f), or (2)(a), this regulation does not apply to acquisitions under Article 9 (Construction, Architect-Engineer, Construction Management, and Land Surveying Services).

(3)The general rules in sections B (Providing systems engineering and technical direction), C (Preparing specifications or work statements), and D (Providing evaluation of offers) below prescribe limitations on contracting as the means of avoiding organizational conflicts of interest that might otherwise exist in the stated situations. Conflicts may arise in situations not expressly covered in sections B, C, and D. Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it. The two underlying principles are

(a) Preventing the existence of conflicting roles that might bias a contractor's judgment; and

(b) Preventing unfair competitive advantage. Without limitation, an unfair competitive advantage exists where a business competing for award of a District contract possesses (i) proprietary information that was obtained from the District without authorization; or (ii) source selection information (Regulation

2010C) that is relevant to the contract but is not available to all competitors, and such information would assist that business in obtaining the contract.

(4) The terms "contractor" and "subcontractor" are defined by Section 310.

B. Providing systems engineering and technical direction.

(1) A business shall not be awarded a contract to supply a system or any of its major components, or be a subcontractor or consultant, if that business, as a contractor, provided or provides a combination of substantially all of the following activities:

(a) determining specifications or developing work statements,
(b) determining parameters,
(c) identifying and resolving interface problems,
(d) developing test requirements,
(e) evaluating test data,
(f) supervising design,
(g) directing other contractors' operations, and
(h) resolving technical controversies.

(2) This section B does not prohibit a contractor providing systems engineering and technical direction, from developing or producing a system if the entire effort is conducted under a single contract.

C. Preparing specifications or work statements.

(1) If a contractor prepares and furnishes specifications for a specific acquisition of tangible supplies or information resources, or their components, that contractor shall not be allowed to furnish these items, either as a contractor or as a subcontractor at any tier, for a reasonable period of time including, at least, the duration of the initial contract for purchase of the items.

(2) If a contractor prepares, or assists in preparing, a work statement to be used in a specific acquisition of a system or services—or provides material leading directly, predictably, and without delay to such a work statement—that contractor may not supply the system, major components of the system, or the services, either as a contractor or as a subcontractor at any tier, unless (a) the acquisition is a sole source under Regulation 2105; (b) it has participated in the development and design work; or (c) more than one contractor has been involved in preparing the work statement.

D. Providing evaluation of offers. If a contractor evaluates or supports the evaluation of a bid or proposal for a contract with the District, that contractor and its affiliates are barred from performing under that contract as either a contractor or as a subcontractor at any tier.

E. Procurement Officer Responsibilities.

(1) The responsible procurement officer shall (a) analyze planned acquisitions in order to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and (b) review plans to avoid, neutralize, or mitigate significant potential conflicts before contract award.

(2) The responsible procurement officer shall determine whether the apparent successful offeror has an organizational conflict of interest. The responsible procurement officer shall award the contract to the apparent successful offeror unless (i) a conflict of interest is determined to exist that cannot be avoided or mitigated, or (ii) the conflict is not waived as provided in section F. Before determining to withhold award based on conflict of interest considerations, the procurement officer shall notify the contractor, provide the reasons therefor, and allow the contractor a reasonable opportunity to respond.

F. Waiver. With respect to the award of an individual contract, the District may waive an organizational conflict of interest by determining that the application of these rules in a particular situation would not be in the District's interest. A determination to waive a conflict of interest must be in writing, shall set forth the extent of the conflict, and requires approval by the Superintendent or designee above the level of the District's senior procurement official. If a waiver involves an acquisition with a value that exceeds one million dollars, the Board must concur in the waiver and the written determination must be published with the notice of intent to award. Any report required by Regulation 2020A(2) must include every waiver addressing a procurement during the audit period.

2130. Prequalification of Supplies and Suppliers.

A. Qualified Products Lists.
A qualified products list may be developed with the approval of the Chief Procurement Officer or the procurement officer of the District authorized to develop qualified products lists, when testing or examination of the supplies or construction items prior to issuance of the solicitation is desirable or necessary in order to best satisfy District requirements. The procedures for the inclusion of a product on the qualified products list ("QPL") must be available to prospective vendors for consideration of their product to the list.

B. Prospective suppliers may be prequalified, and distribution of the solicitation may be limited to prequalified suppliers. Suppliers who meet the prequalification standards at any time shall be added to the prequalified list for subsequent solicitations. The fact that a prospective supplier has been prequalified does not necessarily represent a finding of responsibility.

2132. Prequalification for a Single Solicitation.

A. Application.
The pre-qualification process shall not be used to unduly limit competition. Any mandatory minimum requirements shall comply with Section 2730. In a competitive bid, the pre-qualification process is not intended to eliminate bidders capable of completing the work being procured. Before a request for qualifications may be issued pursuant to Section 1520(11) or 1530(4), the chief business official or designee shall prepare a written justification stating the necessity for pre-qualifying offerors. Prior to issuance of the solicitation, each potential offeror seeking qualification must be promptly informed as to whether qualification is attained and, in the event qualification is not attained, is promptly furnished specific information why qualification was not attained.

B. Receipt and Safeguarding of Responses.
Prior to opening submittals received in response to a request for prequalification, the provisions of Regulation 2045 shall apply to the receipt and safeguarding of all such submittals received.

2135. Conditions for Use of Multi-term Contracts.

A. General.
A multi-term contract is a contract for the acquisition of supplies, services, or information technology for more than one year. A contract is not a multi-term contract if no single term exceeds one year and each term beyond the first requires the District to exercise an option to extend or renew. A multi-term contract is appropriate when it is in the best interest of the District to obtain uninterrupted services for a period in excess of one year, where the performance of such services involves high start up costs, or when a changeover of service contracts involves high phase in/phase out costs during a transition period. The multi-term method of contracting is also appropriate when special production of definite quantities of supplies for more than one year is necessary to best meet District needs but funds are available only for the initial fiscal period. Special production refers to production for contract performance when it requires alteration in the contractor's facilities or operations involving high start up costs.

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

C. Exceptions.
This Regulation 2135 applies only to contracts for supplies, services, or information technology and does not apply to contracts for construction.

D. Conditions for Use.

(1) A multi-term contract may be used if, prior to issuance of the solicitation, the Procurement Officer determines in writing that:

(a) Special production of definite quantities or the furnishing of long term services are required to meet District needs; or

(b) a multi-term contract will serve the best interests of the District by encouraging effective competition or otherwise promoting economies in District procurement.

(2) The following factors are among those relevant to such a determination:

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

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

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

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

(3) The determination must contain sufficient factual grounds and reasoning to provide an informed, objective explanation for the decision.

E. Solicitation.

The solicitation shall state:

(1) the estimated amount of supplies or services required for the proposed contract period;

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

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

(4) that the procurement officer must notify the contractor on a timely basis that the funds are, or are not, available for the continuation of the contract for each succeeding fiscal period;

(5) whether bidders or offerors may submit prices for:

(a) the first fiscal period only;

(b) the entire time of performance only; or

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

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

(7) that, in the event of cancellation as provided in (E) (3) of this subsection, the contractor will be reimbursed the unamortized, reasonably incurred, nonrecurring costs.

F. Award.

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

G. Maximum Contract Periods

Every contract with a total potential duration in excess of five years must be approved as required by Section 2030(4) or Section 2030(5). No solicitation shall be issued for a contract with a total potential duration in excess of five years, nor shall any contract with a total potential duration in excess of five years be awarded pursuant to Section 1560, until such approval is granted.

2140. Specifications.

A. Definitions.

(1) "Brand Name Specification" means a specification limited to one or more items by manufacturers' names or catalogue number.

(2) "Brand Name or Equal Specification" means a specification which uses one or more manufacturer's names or catalogue numbers to describe the standard of quality, performance, and other characteristics needed to meet District requirements, and which provides for the submission of equivalent products.

(3) "Qualified Products List" means an approved list of supplies, services, information technology, or construction items described by model or catalogue number, which, prior to competitive solicitation, the District has determined will meet the applicable specification requirements.

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

(5) "Specification for a Common or General Use Item" means a specification which has been developed and approved for repeated use in procurements.

B. Issuance of Specifications.

The purpose of a specification is to serve as a basis for obtaining a supply, service, information technology, or construction item adequate and suitable for the District's needs in a cost effective manner, taking into account, to the extent practicable, the cost of ownership and operation as well as initial acquisition costs. It is the policy of the District that specifications permit maximum practicable competition consistent with this purpose. Specification shall be drafted with the objective of clearly describing the District's requirements. All specifications shall be written in a non restrictive manner as to describe the requirements to be met.

C. Use of Functional or Performance Descriptions.

(1) Specifications shall, to the extent practicable, emphasize functional or performance criteria while limiting design or other detailed physical descriptions to those necessary to meet the needs of the District. To facilitate the use of such criteria, using agencies shall endeavor to include as a part of their purchase requisitions the principal functional or performance needs to be met. It is recognized, however, that the preference for use of functional or performance specifications is primarily applicable to the procurement of supplies, services, and information technology. Such preference is often not practicable in construction, apart from the procurement of supply type items for a construction project.

(2) Brand Name or Equal Specifications.

(a) Brand name or equal specifications shall include a description of the particular design, functional, or performance characteristics which are required.

(b) Where a brand name or equal specification is used in a solicitation, the solicitation shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance, and characteristics desired and is not intended to limit or restrict competition.

D. Preference for Commercially Available Products.

It is the general policy of this District to procure standard commercial products whenever practicable. In developing specifications, accepted commercial standards shall be used and unique requirements shall be avoided, to the extent practicable.

2141. Commercial Products.

A. Definitions.

(1) Commercial product has the meaning stated in Section 1410 and does not include printing or insurance.

(2) Commercially available off-the-shelf product ("COTS") has the meaning stated in Section 1410 and does not include printing or insurance.

B. General.

The District shall conduct market research to determine whether commercial products or COTS are available that could meet the District's requirements, and should endeavor to acquire commercial products or COTS when they are available to meet District needs (see Regulation 2140D (Preference for commercially available products)).

C. Price reasonableness.

(1) An advantage of COTS is that a competitive market, evidenced by substantial commercial sales, helps to determine price reasonableness. Substantial sales of a COTS product may establish catalog prices (see Section 1410) and market prices. Market prices are current prices that are established in the usual and ordinary course of trade between buyers and sellers (see Regulation 2120A(3)). A characteristic of both catalog prices and market prices is that they can be substantiated from sources independent of the offeror—for example, through market research.

(2) "Items customarily sold in bulk" means products that are loaded and carried in bulk without mark or count. COTS does not include bulk materials, like fuel and grain, because the prices for those items fluctuate, making it difficult or impossible to rely on short-term pricing to establish price reasonableness for purchase contracts that may be for a longer term.

D. Purchase description or specification.

The District's purchase description must contain sufficient detail for potential offerors of commercial products or COTS to know which products may be suitable. Generally, a District's specification for COTS should describe the type of product to be acquired and explain how the District intends to use the product in terms of function to be performed, performance requirement or physical characteristics. Describing the District's needs in these terms allows offerors to propose products that will best meet the District's needs.

E. Simplified purchasing procedures for COTS.

(1) Section 1550(2)(b) authorizes the use of simplified procedures for the acquisition of supplies and information resources in amounts up to $100,000, if the responsible procurement officer reasonably expects, based on the nature of the supplies or information resources sought, and on market research, that offers will include only COTS. The purpose of these simplified procedures is to vest procurement officers with additional procedural discretion and flexibility, so that COTS acquisitions in this dollar range may be solicited, offered, evaluated, and awarded in a simplified manner that maximizes efficiency and economy and minimizes burden and administrative costs for both the District and industry (see Regulation 2100).

(2) The procurement officer should be aware of customary commercial terms and conditions when pricing COTS. COTS prices are affected by factors that include, but are not limited to, speed of delivery, length and extent of warranty, limitations of seller's liability, quantities ordered, length of the performance period, and specific performance requirements. The procurement officer should review the District's standard contract terms and conditions, along with commercial terms appropriate for the acquisition of the particular item. The procurement officer should consider avoiding terms inconsistent with commercial practice, unless those terms are required by law (see Regulation 2143) or are essential to the District's requirements.

(3) Section 2040 provides that COTS purchases made using any of the simplified procedures of Section 1550 are exempt from a number of statutory provisions that vendors have complained are overly burdensome. The procurement officer should consider Section 2040 and Regulation 2143 when preparing the solicitation or written request for quotes.

(4) Regulation 2120B(3) prohibits requiring cost or pricing data when acquiring a commercial product, including COTS, unless the purchase or modification exceeds the thresholds established in that section and the procurement officer determines in writing that no other basis exists to establish price reasonableness.

2143. Contract clauses and administration.

A. Contracts formed pursuant to the District's code are deemed to incorporate all applicable provisions thereof and the ensuing regulations.

B. Prohibited Terms. Unless otherwise specifically provided by or authorized by law, if a contract contains any of the following terms, the term shall be void, and the contract is otherwise enforceable as if it did not contain such term or condition:

(1) Terms (a) subjecting the District to the jurisdiction of the courts of other states; or (b) requiring the District to bring or defend a legal claim in a venue outside this State. (Sections 2050 and 4230)

(2) Terms limiting the time in which the District may bring a legal claim under the contract to a period shorter than that provided in South Carolina law. (Sections 4230(2) and 15-3-140)

(3) Terms imposing a payment obligation, including a rate of interest for late payments, inconsistent with the terms of Section 45.

(4) Terms that require the District to defend, indemnify, or hold harmless another person. (Section 2050)

(5) Terms requiring that the contract be governed or interpreted by other than South Carolina law. (Section 2050)

C. A material change is a change order or contract modification that is beyond the general scope of the original contract, such that the subject of the modification should be competitively procured absent a valid sole-source justification. Material changes are inconsistent with the underlying purposes and policies of this code.

[*Model Comment: (1) For the enforceability of a District's Code, see* D.W. Flowe & Sons, Inc. v. Christopher Const. Co., *327 S.C. 17, 482 S.E.2d 558 (1997), overruled on other grounds by* Evins v. Richland County Historic Preservation Comm'n, *341 S.C. 15, 532 S.E.2d 876 (2000). (2) See Section 40 for determining whether contracts are "formed pursuant to the District's code."*]

2145. Construction, Architect Engineer, Construction Management, and Land Surveying Services.

A. Definitions

(1) Designer, as used in these regulations, means a person who has been awarded, through the qualifications-based process set forth in Section 3220, a contract with the District for the design of any infrastructure facility using the design-bid-build project delivery method defined in Section 2910(6).

(2) Builder, as used in these regulations, means a person who has been awarded, through competitive sealed bidding, a separate contract with the District to construct (alter, repair, improve, or demolish) any infrastructure facility using the design-bid-build project delivery method defined in Section 2910(6).

(3) Design-Builder, as used in these regulations, means a person who has been awarded a contract with the District for the design and construction of any infrastructure facility using the design-build project delivery method defined in Section 2910(7).

(4) DBO Producer, as used in these regulations, means a person who has been awarded a contract with the District for the design, construction, operation, and maintenance of any infrastructure facility using the design-build-operate-maintain project delivery method defined in Section 2910(9).

(5) DBFO Producer, as used in these regulations, means a person who has been awarded a contract with the District for the design, construction, finance, operation, and maintenance of any infrastructure facility using the design-build-finance-operate-maintain project delivery method defined in Section 2910(8).

(6) Guaranteed Maximum Price (GMP) means a price for all costs for the construction and completion of the project, or designated portion thereof, including all construction management services and all mobilization, general conditions, profit and overhead costs of any nature, and where the total contract amount, including the contractor's fee and general conditions, will not exceed a guaranteed maximum amount.

(7) Independent Peer Reviewer means a person who has been awarded a contract with the District for an independent, contemporaneous, peer review of the design services provided to the District by a DBO or

DBFO Producer. In the event the District does not elect to contract with the Independent Peer Reviewer proposed by the successful DBO or DBFO Producer, the Independent Peer Reviewer shall be selected as provided in Section 2910(11).

(8) Operator, as used in these regulations, means a person who has been awarded, through competitive sealed bidding, a separate contract with the District for the routine operation, routine repair, and routine maintenance (Operation and Maintenance) of any infrastructure facility, as defined in Section 2910(13).

B. Choice of Project Delivery Method.

(1) This Subsection contains provisions applicable to the selection of the appropriate project delivery method for constructing infrastructure facilities, that is, the method of configuring and administering construction projects which is most advantageous to the District and will result in the most timely, economical, and otherwise successful completion of the infrastructure facility. The District shall have sufficient flexibility in formulating the project delivery approach on a particular project to fulfill the District's needs. Before choosing the project delivery method, a careful assessment must be made of requirements the project must satisfy and those other characteristics that would be in the best interest of the District.

(2) Selecting An Appropriate Project Delivery Method.

In selecting an appropriate project delivery method for each of the District's Infrastructure Facilities , the District should consider the results achieved on similar projects in the past and the methods used. Consideration should be given to all authorized project delivery methods, the comparative advantages and disadvantages of each, and how these methods may be appropriately configured and applied to fulfill District requirements. Additional factors to consider include:

(a) the extent to which the District's design requirements for the Infrastructure Facility are known, stable, and established in writing;

(b) the extent to which qualified and experienced District personnel are available to the District to provide the decision-making and administrative services required by the project delivery method selected;

(c) the extent to which decision-making and administrative services may be appropriately assigned to designers, builders, construction-managers at-risk, design-builders, DBO producers, DBFO producers, peer reviewers, or operators, as appropriate to the project delivery method;

(d) the extent to which outside consultants, including construction manager agent, may be able to assist the District with decision-making and administrative contributions required by the project delivery method;

(e) the District's projected cash flow for the Infrastructure Facility to be acquired (both sources and uses of the funds necessary to support design, construction, operations, maintenance, repairs, and demolition over the facility life cycle);

(f) the type of infrastructure facility or service to be acquired - for example, public buildings, schools, water distribution, wastewater collection, highway, bridge, or specialty structure, together with possible sources of funding for the infrastructure facility - for example, state or federal grants, federal loans, local tax appropriations, special purpose bonds, general obligation bonds, user fees, or tolls;

(g) the required delivery date of the infrastructure facility to be constructed;

(h) the location of the infrastructure facility to be constructed;

(i) the size, scope, complexity, and technological difficulty of the infrastructure facility to be constructed;

(j) the District's current and projected sources and uses of public funds that are currently generally available (and will be available in the future) to support operation, maintenance, repair, rehabilitation, replacement, and demolition of existing and planned infrastructure facilities;

(3) Except for guaranteed energy, water, or wastewater savings contracts (Section 48-52-670), design-bid-build (acquired using competitive sealed bidding) is hereby designated as an appropriate project delivery method for any infrastructure facility and may be used by any District without further project specific justification.

(4) District Determination.

The Superintendent shall make a written determination. The determination shall describe the project delivery method (Section 3005), source selection method (Section 3015 and 1510), any additional procurement procedures (3023 and 3024(2)(c)), and types of performance security (Sections 3030 and 3037) selected and set forth the facts and considerations leading to those selections. This determination shall demonstrate either reliance on paragraph (3) above, or that the considerations identified in paragraphs (1) and (2) above, as well as the requirements and financing of the project, were all considered in making the selection. Any determination to use a project delivery method other than design-bid-build must explain why the use of design-bid-build is not practical or advantageous to the District. Any determination to use any of the additional procedures allowed by Section 3024(2)(c) must explain why the use of such procedures are in the best interests of the District. Any request to use the prequalification process in a design-bid-build procurement must be in writing and must set forth facts sufficient to support a finding that pre-qualification is appropriate and that the construction involved is unique in nature, over ten million dollars in value, or involves special circumstances.

C. Bonds and Security.

(1) Bid Security. Bid Security required by Section 3030 shall be a certified cashier's check or a bond, in a form to be specified in the District's internal procurement procedures (Section 540), provided by a surety company licensed in South Carolina with an "A" minimum rating of performance as stated in the most current publication of "Best Key Rating Guide, Property Liability", which company shows a financial strength rating of at least five (5) times that portion of the contract price that does not include operations, maintenance, and finance. In the case of a construction contract under $100,000, the District may, upon written justification, allow the use of a "B+" rated bond when bid security is required. Each bond shall be accompanied by a "Power of Attorney" authorizing the attorney in fact to bind the surety.

(2) Contract Performance and Payment Bonds. Unless waived pursuant to Section 3030(2)(iii), the contractor shall provide a certified cashier's check in the full amount of the Performance and Payment Bonds or may provide, and pay for the cost of, Performance and Payment Bonds in a form to be specified in the District's internal procurement procedures (Section 540). Each bond shall be issued by a Surety Company licensed in South Carolina with an "A" minimum rating of performance as stated in the most current publication of "Best Key Rating Guide, Property Liability", which company shows a financial strength rating of at least five (5) times that portion of the contract price that does not include operations, maintenance, and finance. Where the District requires a payment bond for construction of $50,000 or less, the bond must be issued by a surety meeting the requirements of Section 29-6-270. Each bond shall be accompanied by a "Power of Attorney" authorizing the attorney in fact to bind the surety.

D. Architect Engineer, Construction Management and Land Surveying Services Procurement.

(1) The Advertisement of Project Description

The provisions of Regulation 2040 shall apply to implement the requirements of Section 3220(2), Advertisement of Project Description.

E. Contract Forms.

(1) Pursuant to Section 2010(2), the following contract forms shall be used as applicable, as amended by the District and as provided in the District's internal procurement procedures (Section 540). Subject to the foregoing:

(a) If the District conducts a competitive sealed bid to acquire construction independent of architect-engineer or construction management services, the District may use a document in the form of AIA Document A701.

(b) If the District acquires architect-engineer services independent of construction, the District may use a document in the form of AIA Document B151.

(c) If the District acquires construction independent of architect-engineer or construction management services, the District may use documents in the form of AIA Document A101 and A201. Other contract forms may be used as are approved by the chief business official.

(d) If the District acquires architect-engineer services, construction management services, and construction on the same project, each under separate contract, the District may use documents in the form of AIA Documents Al0l/CMa, A201/CMa, B141/CMa, and B801/CMa. This paragraph does not apply if

the District acquires both construction and construction management services from the same business under the same contract.

(2) The District may supplement the contract forms identified in paragraph (1).

(3) Paragraph (1) does not apply to a contract entered into pursuant to Sections 11-35-1530, 11-35-1550, 11-35-3230, or 11-35-3310.

(4) For any contract forms specified herein, the District's internal procurement procedures (Section 540) may specify the appropriate edition or, if applicable, replacement form.

(5) For any contract forms not specified herein or otherwise required by law, the District's internal procurement procedures (Section 540) may, without limitation, require the use of any appropriate contract document, standard industry contract form, standard state amendments to such documents or forms, or publish state specific contract forms. Absent contrary instructions, the District may use a contract written for an individual project.

(6) Construction under Section 1550 and 1530 may be in a format and description of services approved by the chief business official.

F. Reserved.

G. Prequalifying Construction Bidders.

The State Engineer's Office has developed procedures for a prequalification process and these procedures are included in the District's internal procurement procedures (Section 540). The provisions of Regulation 2132 shall apply to implement Section 3023.

H. With regard to Section 3310, the District will establish working procedures for indefinite quantity contracts for professional services, and shall include them in the District's internal procurement procedures (Section 540).

[Drafting Note: In order to acquire an affirmative written opinion for a school's code, it must include the following document, which is incorporated by reference into the District's internal operating procedures: Indefinite Delivery Contracts: *Office of State Engineer's 2020 Manual for Planning and Execution of State Permanent Improvements*, Chapters 9.3 and 9.4, Indefinite Quantity contracts for professional services, and Chapters 9.5 and 9.6, Task Order Contracts for construction services, as published by the South Carolina Office of the State Engineer.].

I. Construction Procurement-The Invitation for Bids.

The provisions of Regulation 2040 shall apply to implement the requirements of Section 3020(a), Invitation for Bids. The provisions of Regulation 2090(B) shall not apply to implement the requirements of code Section 3020.

J. Participation in Prior Reports or Studies.

(1) Before awarding a contract for a report or study that could subsequently be used in the creation of design requirements for an infrastructure facility or service, the procurement officer should address, to the extent practical, the contractor's ability to compete for follow-on work.

(2) Before issuing a request for proposals for an infrastructure facility or service, the procurement officer should take reasonable steps to determine if prior participation in a report or study could provide a firm with a substantial competitive advantage, and, if so, the procurement officer should take appropriate steps to eliminate or mitigate that advantage.

(3) In complying with items (1) and (2) above, the procurement officer shall consider the requirements of Section 3245.

K. Additional Procedures for Design-Build; Design-Build-Operate-Maintain; and Design-Build-Finance -Operate-Maintain.

(1) Content of Request for Proposals. Each request for proposals (RFP) issued by the District for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain services shall contain a cover sheet that: (a) confirms that design requirements are included in the RFP, (b) confirms that proposal development documents are solicited in each offeror's response to the RFP, and (c) states the District's determination for that procurement (i) whether offerors must have been prequalified through a

previous request for qualifications; (ii) whether the District will select a short list of responsible offerors prior to discussions and evaluations (along with the number of proposals that will be short-listed); and (iii) whether the District will pay stipends to unsuccessful offerors (along with the amount of such stipends and the terms under which stipends will be paid).

(2) Purpose of Design Requirements. The purpose and intent of including design requirements in the RFP is to provide prospective and actual offerors a common, and transparent, written description of the starting point for the competition and to provide the District with the benefit of having responses from competitors that meet the same RFP requirements. In order to be effective, the District must first come to understand and then to communicate its basic requirements for the infrastructure facility to those who are considering whether they will participate in the procurement competition.

(3) Purpose of Requirement for Proposal Development Documents. The purpose and intent of including the requirement for submittal of proposal development documents in each RFP for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain is to provide actual offerors with a common, and transparent, written description of the finish point for the competition. To be responsive, each offeror must submit drawings and other design related documents that are sufficient to fix and describe the size and character of the infrastructure facility to be acquired, including price (or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements).

(4) Content of Request for Proposals: Evaluation Factors. Each request for proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain shall state the relative importance of (1) demonstrated compliance with the design requirements, (2) offeror qualifications, (3) financial capacity, (4) project schedule, (5) price (or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements), and (6) other factors, if any by listing the required factors in descending order of importance (without numerical weighting), or by listing each factor along with a numerical weight to be associated with that factor in the District's evaluation. Subfactors, if any, must be stated in the RFP and listed, pursuant to the requirements of this Regulation, either in descending order, or with numerical weighting assigned to each subfactor. The purpose and intent of disclosing the relative importance of factors (and subfactors) is to provide transparency to prospective and actual competitors from the date the RFP is first published.

(5) The District's internal procurement procedures (Section 540) must include guidelines for the proper drafting of design requirements, proposal development documents, and requests for proposals.

L. Errors and Omissions Insurance.

(1) For design services in design-bid-build procurements. A District shall include in the solicitation such requirements as the procurement officer deems appropriate for errors and omissions insurance (commonly called "professional liability insurance" in trade usage) coverage of architectural and engineering services in the solicitation for design services in design-bid-build procurements.

(2) For design services to be provided as part of design-build procurements. A District shall include in the solicitation for design-build such requirements as the procurement officer deems appropriate for errors and omissions insurance coverage of architectural and engineering services to be provided as part of such procurements. Prior to award, the Superintendent, or his delegee, shall review and approve the errors and omissions insurance coverage for all design-build contracts in excess of $25,000,000.

(3) For design services to be provided as part of design-build-operate-maintain and design-build-finance-operate-maintain procurements. A District shall include in the solicitation for design-build-operate-maintain and design-build-finance-operate-maintain such requirements as the procurement officer deems appropriate for errors and omissions insurance coverage of architectural and engineering services to be provided as part of such procurements. Prior to award, the Superintendent, or his delegee, shall review and approve the errors and omissions insurance coverage for all design-build-operate-maintain and design-build-finance-operate-maintain contracts in excess of $25,000,000.

(4) For Construction Management (Agency) services. A District shall include in the solicitation for construction management agency services such requirements as the procurement officer deems appropriate for errors and omissions insurance coverage.

(5) Errors and omissions (or professional liability) insurance coverage for construction management services is typically not required when the District is conducting a construction management at-risk procurement.

M. Other Security; Operations Period Performance Bonds.

(1) Purpose.

To assure the timely, faithful, and uninterrupted provision of operations and maintenance services procured separately, or as one element of design-build-operate-maintain or design-build-finance-operate-maintain services, the District shall identify, in the solicitation, one or more of the other forms of security identified in Section 3037 that shall be furnished to the District by the offerors (or bidders) in order to be considered to be responsive.

(2) Operations Period Performance Bonds.

(a) If required in a solicitation for operation and maintenance, design-build-operate-maintain, or design-build-finance-operate-maintain, each offeror shall demonstrate in its offer that it is prepared to provide, and upon award of the contract, to maintain in effect an operations period performance bond that secures the timely, faithful, and uninterrupted performance of operations and maintenance services required under the contract, in the amount of 100% of that portion of the contract price that includes the cost of such operation and maintenance services during the period covered by the bond. In those procurements in which the contract period for operation and maintenance is longer than 5 years, the procurement officer may accept an operations period performance bond of five years' duration, provided that such bond is renewable by the contractor every five (5) years during the contract, and provided further, that the contractor has made a firm contractual commitment to maintain such bond in full force and effect throughout the contract term.

(b) The operations period performance bond shall be delivered by the contractor to the District at the same time the contract is executed. If a contractor fails to deliver the required bond, the contractor's bid (or offer) shall be rejected, its bid security shall be enforced, award of the contract shall be made to the next ranked bidder (or offeror), or the contractor shall be declared to be in default, as otherwise provided by these regulations.

(c) Operations period performance bond shall be in a form to be specified in the District's internal procurement procedures (Section 540). Each bond shall be issued by a Surety Company licensed in South Carolina with an "A" minimum rating of performance as stated in the most current publication of "Best Key Rating Guide, Property Liability", which company shows a financial strength rating of at least five (5) times the bond amount.

(3) Letters of Credit to Cover Interruptions in Operation.

(a) If required in a solicitation for operation and maintenance, design-build-operate-maintain, or design-build-finance-operate-maintain, each offeror shall demonstrate in its offer that it is prepared to post, and upon award of the contract shall post, and in each succeeding year adjust and maintain in place, an irrevocable letter of credit with a banking institution in this State that secures the timely, faithful, and uninterrupted performance of operations and maintenance services required under the contract, in an amount established under the contract that is sufficient to cover 100% of the cost of performing such operation and maintenance services during the next 12 months.

(b) The letter of credit required under this Section shall be posted by the contractor at the same time the contract is executed, and thereafter, shall be annually adjusted in amount and maintained by the contractor. If an offeror or bidder fails to demonstrate in its offer that it is prepared to post the required letter of credit, the bid (or offer) shall be rejected, the bid security shall be enforced, and award of the contract shall be made to the next ranked bidder (or offeror), as otherwise provided by these regulations. If the contractor fails to place and maintain the required letter of credit, the contractor shall be declared to be in default, as otherwise provided by these regulations.

(c) If required by the solicitation, letters of credit shall be in a form to be specified in the District's internal procurement procedures (Section 540).

(4) Guarantees.

(a) If required in a solicitation for operation and maintenance, design-build-operate-maintain, or design-build-finance-operate-maintain, the contractor and affiliated organizations (including parent

corporations) shall provide a written guarantee that secures the timely, faithful, and uninterrupted performance of operations and maintenance services required under the contract, in an amount established under the contract that is sufficient to cover 100% of the cost of performing such operation and maintenance services during the contract period.

(b) The written guarantee required under this Section shall be submitted by each offeror at the time the proposal is submitted. If the contractor fails to submit the required guarantee, the contractor's bid (or offer) shall be rejected, its bid security shall be enforced, and award of the contract shall be made to the next ranked bidder (or offeror) as otherwise provided by these regulations.

(c) If required by the solicitation, guarantees shall be in a form to be specified in the District's internal procurement procedures (Section 540).

N. Construction Management At-Risk.

(1) Absent the approval required by Section 2010, a contract with a construction manager at-risk may not involve cost reimbursement.

(2) Prior to contracting for a GMP, all construction management services provided by a construction manager at-risk must be paid as a fee based on either a fixed rate, fixed amount, or fixed formula.

(3) As required by Section 3030(2)(a)(iv), construction may not commence until the bonding requirements of Section 3030(2)(a) have been satisfied. Subject to the foregoing, bonding may be provided and construction may commence for a designated portion of the construction.

(4) In a construction management at-risk project, construction may not commence for any portion of the construction until after the District and the construction manager at risk contract for a fixed price or a GMP regarding that portion of the construction. Prior to executing a contract for a fixed price or a GMP, a District shall comply with Section 1830 and Regulation 2120, if applicable. For purposes of Section 1830(3)(a), adequate price competition exists for all components of the construction work awarded by a construction manager at-risk on the basis of competitive bids.

(5) When seeking competitive sealed proposals in a construction management at-risk procurement, the solicitation shall include a preliminary budget, and if applicable, completed programming and the conceptual design. The solicitation shall request information concerning the prospective offeror's qualifications, experience, and ability to perform the requirements of the contract, including but not limited to, experience on projects of similar size and complexity, and history of on-time, on-budget, on-schedule construction. The offeror's proposed fee may be a factor in determining the award.

(6) After all preconstruction services and final construction drawings have been completed, or prior thereto upon written determination by the procurement officer, a District must negotiate with and contract for a GMP with a construction manager at-risk. If negotiations are unsuccessful, the District may issue an invitation for bids, as allowed by this code, for the remaining construction.

(7) A District shall have the right at any time, and for three years following final payment, to audit the construction manager at-risk to disallow and to recover costs not properly charged to the project. Any costs incurred above the GMP shall be paid for by the construction manager at-risk.

(8) A construction manager at-risk may not self-perform any construction work for which subcontractor bids are invited, unless no acceptable bids are received or a subcontractor fails to perform. Ordinarily, the contract with a construction manager at-risk should require the construction manager at-risk to invite bids for all major components of the construction work. Section 4210 does not apply to any subcontractor bid process conducted by a construction manager at-risk.

2150. Surplus Property Management.

A. Definition, Authority and Mission.

(1) Definition.

Surplus property is all District-owned supplies and equipment, not in actual public use, with remaining useful life and available for disposal. This definition and the regulations exclude the disposal of solid and hazardous wastes as defined by any federal, state or local statutes and regulations.

B. [Reserved]

C. Transfer of Surplus Property to Governmental Bodies, Political Subdivisions, and Eligible Nonprofit Health or Education Institutions.

(1) Eligibility.

The District may relocate surplus property to eligible Donees which includes governmental bodies, political subdivisions and nonprofit health and educational institutions.

The term governmental bodies means any State government department, commission, council, board, bureau, committee, institution, college, university, technical school, legislative body, agency government corporation, or other establishment or official of the executive, judicial, or legislative branches of the State. The term political subdivisions includes counties, municipalities, school districts or public service or special purpose districts. The term eligible nonprofit health or educational institutions means tax-exempt entities, duly incorporated as such by the State. The chief procurement officer shall be responsible for determining an applicant's eligibility prior to any transfer of property.

The chief procurement officer will maintain sufficient records to support the eligibility status of these entities.

(2) Determination of Sale Price.

The sale price for all items will be established by the chief procurement officer or the chief procurement officer's designee. The chief procurement officer or the chief procurement officer's designee shall have the final authority to accept or reject bids received via public sale. The following categories and methods will be used:

(a) Vehicles: NADA loan value shall be used for the sale price. In certain instances, the most recent public sale figures shall be the basis for a sale price.

(b) Boats, motors, heavy equipment, farm equipment, airplanes and other items with an acquisition cost in excess of $5,000: The sale price shall be set from the most recent public sale figures and/or any other method necessary to establish a reasonable value.

(c) Miscellaneous items with an acquisition cost of $5,000 or less such as office furniture and machines, shop equipment, cafeteria equipment, etc.: A sale price will be assessed based on current market conditions.

(3) Terms and Conditions on Property Transferred from Warehouse.

For any purchases made under this subsection, the purchasing entity will certify that all items acquired will be for the sole benefit of the buying institution and that no personal use will be involved. This certification will be formalized by the agreement signed at the time eligibility is established. The following terms and conditions will be set forth therein:

(1) Property must be placed into public use within one (1) year of acquisition and remain in use one (1) year from the date placed into actual use.

(2) Property which becomes unusable may be disposed of prior to the one-year limitation with the approval of the chief procurement officer.

A utilization visit may be made by authorized personnel of the chief procurement officer. All vehicles and property with an acquisition cost in excess of $5,000 require a utilization review during the twelve-month period from date of transfer to ensure the property is in public use.

(A) Any misuse of property will be reported in writing to the chief procurement officer by the utilization staff of the chief procurement officer. The chief procurement officer shall have the authority to suspend all further purchases until a determination can be made under Subsection B. If warranted, the matter shall be referred to the proper law enforcement authority for full investigation.

(B) Upon determination that misuse of property has occurred, purchasing privileges will be terminated and not restored until the buying governmental body, political subdivision, or nonprofit health or educational institution pays to the District the fair market value of the item(s) misused or returns the misused property to the District.

(4) Disposition Cycles for Surplus Property.

An appropriate cycle methodology as determined in the chief procurement officer's sole discretion shall be used for the disposal process of surplus property. Governmental bodies, political subdivisions and nonprofit

health and educational institutions, and any other qualifying donees will be given priority over the general public to acquire the property.

Special items and heavy equipment, will generally follow the same disposal procedures as other property.

D. Public Sale of Surplus Property.

(1) Public Sale Cycle.

Upon completion of the Donee sales cycle, the remaining items shall be made available to the public. Donees and the general public may purchase in this period, but without priority. This period has no minimum or maximum length and is determined by warehouse space and scheduled incoming property. There will also be times when property will not be made available for a Public Cycle Sale.

(2) Final Disposition by Competitive Public Sale.

When surplus property is sold via the competitive sealed bid process, notification of such sale shall be given through a Notice of Sale to be posted at the District office at least fifteen (15) days prior to the bid opening date. The sale shall also be announced through advertisement in newspapers of general circulation, the South Carolina Business Opportunities publication and such electronic or other media as deemed appropriate by the chief procurement officer. The Notice of Sale shall list the supplies or property offered for sale; designate the location and how property may be inspected; and state the terms and conditions of sale and instructions to bidders including the place, date, and time set for bid opening. Bids shall be opened publicly.

Award shall be made in accordance with the provisions set forth in the Notice of Sale and to the highest responsive and responsible bidder provided that the price offered by such bidder is deemed reasonable by the chief procurement officer or his designee. Where such price is not deemed reasonable, the bids may be rejected in whole, or in part, and the sale negotiated beginning with the highest bidder provided the negotiated sale price is higher than the highest responsive and responsible bid. In the event of a tie bid the award will be made in accordance with the tie bid procedure set forth in Section 1520(9).

Property may also be sold at a public auction by an experienced auctioneer. The Notice of Sale shall include, at a minimum, all terms and conditions of the sale and a statement clarifying the authority of the chief procurement officer, or his designee, to reject any and all bids. These auctions will be advertised in a newspaper of general circulation or on the radio, or both.

(3) Other Means of Disposal.

Some types and classes of items can be sold or disposed of more economically by some other means of disposal including barter, appraisal, electric commerce and web based sales. In such cases, and also where the nature of the supply or unusual circumstances necessitate its sale to be restricted or controlled, the Superintendent may employ such other means provided the Superintendent makes a written determination that such procedure is advantageous to the District.

(4) Designation of Surplus Property.

Upon written determination by the Superintendent that surplus property items are needed to comply with programs authorized by the legislature or by executive order of the governor exercising his statutory authority, the Superintendent may designate surplus property items for disposal in order to comply with the program requirements. The Superintendent will develop and implement internal guidelines and procedures for the disposal of surplus property items designated as necessary to comply with the program requirements established by the legislature or the governor.

All items sold by the District to governmental bodies, political subdivisions and nonprofit health or educational institutions shall be recorded on a Bill of Sale and all required information shall be listed on the document. The Bill of Sale must be signed by the signatory authority of the governmental body, political subdivision or nonprofit health or educational institution as defined in Subsection C, Item 1 of these regulations. At the time of sale, the eligible entity shall receive a copy of the Bill of Sale.

(5) Invoicing.

Invoices shall be generated and mailed to the acquiring agency. All cash and accounts receivable transaction records shall be properly maintained. All transfers of funds to various accounts will be performed in accordance with these regulations.

(6) Property sold to the public shall be paid for in full at the time of purchase.

Transactions shall be documented by a Bill of Sale enumerating all conditions of the sale i.e., "as is, where is," etc. and must be signed by the purchaser. Personal checks with proper identification, certified checks, or money orders made payable to the State of South Carolina or cash or credit cards shall be accepted as a form of payment. **A** copy of the Bill of Sale shall be presented to the purchaser as a receipt.

G. Trade In Sales.

The District may trade in personal property, whose original unit purchase price did not exceed $5,000, the trade in value of which must be applied to the purchase of new items. When the original unit purchase price exceeds $5,000, the governmental body shall refer the matter to the chief business official, or his designee, for disposition.

The chief business official, or his designee, shall have the authority to determine whether the property shall be traded in and the value applied to the purchase of new like items or classified as surplus and sold in accordance with the provisions of Section 3820. When the original purchase price exceeds $100,000, the chief business official shall make a written determination as to its reasonableness and document such trade-in transaction.

H. Definition of Junk.

Junk is District-owned supplies and equipment having no remaining useful life in public service and the cost to repair or to refurbish the property exceeds the value of like used equipment, or the cost of transporting the property for sale exceeds the likely recovery from a sale. Property that may be recycled is not considered junk. The classification of property as junk is at the sole discretion of the chief business official.

I. Unauthorized Disposal.

(1) The ratification of an act of unauthorized and/or improper disposal of District property by any persons without the requisite authority to do so by an appointment or delegation under this code rests with the Superintendent.

(2) Corrective Action and Liability.

In all cases, the Superintendent shall prepare a written determination describing the facts and circumstances surrounding the act, corrective action being taken to prevent recurrence, and action taken against the individual committing the act and shall report the matter in writing to the Board within ten (10) days after the determination.

J. Authority to Debar or Suspend.

The procedures and policies set forth in Section 4220 of this code shall apply to the disposal of District property. The authority to debar a person from participation in the public sales of District-owned property shall rest with the chief business official.

2152. Leases, Lease/Payment, Installment Purchase, and Rental of Personal Property.

A. Justification. A District proposing to enter into an agreement other than an outright purchase is responsible for the justification of such action. Lease, lease/purchase, installment purchase, or rental agreements are subject to the procedures of this code and regulations.

B. Procedures. Upon written justification by the procurement officer of the District of such alternate method, the following procedures will be followed:

(1) A Standard Equipment Agreement will be used in all cases unless modifications are approved by the chief business official. A District may enter into an agreement for the rental of equipment without using the Standard Equipment Agreement when the agreement has a total potential value of fifteen thousand dollars or less or the agreement does not exceed ninety days in duration.

[*Model Comment: State agencies use the South Carolina Standard Equipment Agreement, which is available at www.procurement.sc.gov.*]

(2) Installment purchases will require a written determination of appropriateness.

(3) All lease/purchase and installment sales contracts must contain an explicitly stated rate of interest to be incurred by the District under the contract.

2160. Assistance to Minority Businesses.

Regulation 19-445.2160 of the South Carolina Code of Laws, as amended, shall apply to Article 21 of this Code. On the date of this code's adoption, Regulation 19-445.2160 provided as follows:

A. Definitions

(1) "Minority Person" means a United States citizen who is economically and socially disadvantaged.

(2) "Socially disadvantaged individuals" means those individuals who have been subject to racial or ethnic prejudice or cultural bias because of their identification as members of a certain group without regard to their individual qualities. Such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans (including American Indians, Eskimos, Aleuts and Native Hawaiians), Asian Pacific Americans, Women and other minorities to be designated by the South Carolina Budget and Control Board or designated agency.

(3) "Economically disadvantaged individuals" means those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

(4) "A socially and economically, disadvantaged small business" means any small independent business concern which:

(a) At a minimum is fifty one (51) percent owned by one or more citizens of the United States who are determined to be socially and economically disadvantaged and who also exercise control over the business per 49 CFR Part 26, Subpart D (2006), as amended.

(b) In the case of a corporation, at a minimum, fifty-one (51) percent of all classes of voting stock of such corporation must be owned by an individual or individuals determined to be socially and economically disadvantaged who also exercise control over the business.

(c) In the case of a partnership, at a minimum, fifty-one (51) percent of the partnership interest must be owned by an individual or individuals determined to be socially and economically disadvantaged who also exercise control over the business.

(5) "Small Business" means a for-profit concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on government contracts, and qualified as a small business under the criteria and size standards in 13 C.F.R. Section 121 (1996), as amended. Such a concern is "not dominant in its field of operation" when it does not exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged. In determining whether dominance exists, consideration shall be given to all appropriate factors, including volume of business, number of employees, financial resources, competitive status or position, ownership or control of materials, processes, patents, license agreements, facilities, sales territory, and nature of business activity.

(6) "Minority Business Enterprise" is a business which has been certified as a socially and economically disadvantaged small business.

(7) "OSMBA" means the Office of Small and Minority Business Assistance.

B. Certification as a Minority Business Enterprise (MBE)

(1) A South Carolina business seeking certification as a Minority Business Enterprise must submit to OSMBA an application and any supporting documentation as may be required.

(2) Certification Process. The Certification Board within OSMBA will determine if the business is controlled and operated by socially and economically disadvantaged individuals. Upon recommendation of the Certification Board, OSMBA will certify the business as a socially and economically disadvantaged small business and issue a Certification as authorized by Section 11-35-5270 of the Procurement Code. Firms may re-apply to OSMBA one year after denied certification. Certifications are valid for five years. Firms may apply for re-certification by submitting an application and required supporting documents of eligibility.

C. Certification Board/Procedures

(1) The certification board, as defined below, is responsible for reviewing files and applications in order to determine whether a business should be recommended for approval or disapproval by the Director of the OSMBA (hereinafter referred to as the Director) as a certified business in compliance with Article 21.

(2) The certification board shall include three (3) members of the Office in which the OSMBA is located and is chaired by a member selected by the Director. The board will meet at the request of the Director.

(3) Applications for certification must be addressed to the Director. Upon receipt, OSMBA shall conduct an investigation of the applicant and provide the results to the Certification Board. Failure to furnish requested information will be grounds for denial or revocation of certification.

D. Eligibility

In order for a firm to be certified, the business must have an office in South Carolina, duly registered and licensed as a South Carolina business, it must be found to be a small independent business owned and controlled by a person or persons who are socially and economically disadvantaged. The following factors will be considered in determining whether the applicant is eligible for certification:

(1) Small Business

The business must meet the definition of small business contained in Subsection A hereof.

(2) Independent Business

a. Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient for certification under Article 21. In determining whether an applicant for certification is an independent business, OSMBA shall consider all relevant factors, including the date the business was established, the adequacy of its resources, and relationships with other businesses.

b. A joint venture is eligible if one of the certified business partners of the joint venture meets the standards of a socially and economically disadvantaged small business and this partner's share in the ownership, control and management responsibilities, risks and profits of the joint venture is at least 51 percent, and this partner is also responsible for a clearly defined portion of the work to be performed.

(3) Ownership and Control

a. The business must be 51 percent owned by socially and economically disadvantaged persons. The OSMBA will examine closely any recent transfers of ownership interests to insure that such transfers are not to be made for the sole purpose of obtaining certification.

b. Ownership shall be real, substantial and continuing and shall go beyond the pro forma structure of the firm as reflected in its ownership documents. The minority owners shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with their ownership interests, as demonstrated by an examination of the substance rather than form of ownership arrangements.

c. The contribution of capital or expertise by the minority or women owners to acquire their interest in the business shall be real and substantial. Examples of insufficient contributions include gifts, inheritance, a promise to contribute capital, a note payable to the business or its owners who are not socially disadvantaged and economically disadvantaged, or the participation as an employee, rather than as a manager.

d. The minority owners must have management responsibilities and capabilities including the ability to hire and fire personnel at the highest level and to exercise financial control. A previous and/or continuing employer-employee relationship between or among present owners is carefully reviewed.

e. Where the actual management of the firm is contracted out to individuals other than the owner, those persons who have the ultimate power to hire and fire the managers can, for the purpose of this part, be considered as controlling the business.

f. Any relationship between a business that is applying for certification under Article 21 and a business which is not certified will be carefully reviewed to determine if there are conflicts with the ownership and control requirement of this section.

g. All securities which constitute ownership and/or control of a business for purposes of establishing it as a Minority shall be held directly by minorities. No securities held in trust, or by any guardian for a minor, shall be considered in determining ownership or control.

(4) Socially Disadvantaged

The only factor to be considered in determining whether a firm is socially disadvantaged is membership in a minority group which is listed in Subsection A hereof. Membership shall be established on the basis of the individual's claim that he or she is a member of one of the minority groups included in the definition of socially disadvantaged in Subsection A above and is so regarded by that particular group.

(5) Economically Disadvantaged

a. OSMBA will make a determination of whether a firm is socially disadvantaged before proceeding to make a determination of economic disadvantage. If OSMBA determines that the business owner is not socially disadvantaged, it is not necessary to make the economically disadvantaged determination.

b. OSMBA may consider as evidence of the business owner's economic disadvantage the following: unequal access to credit or capital; acquisition of credit under unfavorable circumstances; difficulty in meeting requirements to receive government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have restricted the owner's business development.

c. In determining the degree of diminished credit and capital opportunities of a socially disadvantaged individual, consideration will be given to both the disadvantaged individual and the business with which he or she is affiliated.

d. In considering the economic disadvantages of businesses and owners, OSMBA will make a comparative judgement about relative disadvantage. The test is not absolute deprivation, but rather whether the individuals and businesses owned by such individuals are disadvantaged in this respect.

e. It is the responsibility of an applicant business and its owner(s) to provide information to OSMBA about its economic situation when it seeks certification. OSMBA will be making a judgement about whether the applicant business and its socially disadvantaged owner(s) are in a more difficult economic situation than most businesses (including established businesses) and owners who are not socially disadvantaged. OSMBA is not required to make a detailed, point-to-point, accountant like comparison of the businesses involved.

E. Decertification

OSMBA reserves the right to cancel a certification at any time if a business becomes ineligible after certification. OSMBA will take action to ensure that only firms meeting the eligibility requirements stated herein qualify for certification. OSMBA will also review the eligibility of businesses with existing certifications to ensure that they remain eligible. A business organization's, ownership or control can change over time resulting in a once eligible business becoming ineligible. Certified businesses must notify OSMBA, in writing within 30 days, of changes in organization, ownership or control. When OSMBA determines that an existing business may no longer be eligible, it will file a Complaint with the Certification Board, and send a copy of the Complaint by certified mail to the business. Upon receipt of such a complaint, the Certification Board shall conduct a hearing in accordance with the procedures set forth in the Administrative Procedures Act (Section 1-23-310, et seq., Code of Laws of South Carolina, 1976, as amended).

2165. Gifts

A. Policy

It is the policy of the District that a District should not accept or solicit a gift, directly or indirectly, from a donor if the District has reason to believe the donor has or is seeking to obtain contractual or other business or financial relationships with the District.

B. Future Contracts with Donors

Prior to accepting a gift, care should be taken to determine whether acceptance of the gift will provide the donor, directly or indirectly, an undue competitive advantage in subsequent procurements.

C. Definition

For purposes of this Regulation 2165, the term "donor" means the business donating the gift and all divisions or other organizational elements of the business and any principals and affiliates of the business. For purposes of this Regulation, business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or a third party controls or has the power to control both. Indications of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized subsequent to the gift which has the same or similar management, ownership, or principal employees as the business that made the gift. For purposes of this section, the term 'principals' means officers, directors, owners, partners, and persons having primary management or supervisory responsibilities within a business entity including, but not limited to, a general manager, plant manager, head of a subsidiary, division, or business segment, and similar positions.

2180. Assignment, Novation, and Change of Name.

A. "Novation agreement" is a contractual amendment by which the District recognizes a successor in interest to a District contract as provided in this regulation. The successor in interest assumes all the obligations under the contract and the transferor, when still in existence, typically guarantees the performance of the contract by the transferee.

B. No Assignment.

No District contract is transferable, or otherwise assignable, without the written consent of the chief business official; provided, however, that a contractor may assign monies receivable under a contract after due notice from the contractor to the District.

C. Recognition of a Successor in Interest; Novation.

When in the best interest of the District, a successor in interest may be recognized in a novation agreement in which the transferor and the transferee shall agree that:

(1) the transferee assumes all of the transferor's obligations;

(2) the transferor waives all rights under the contract as against the District; and

(3) unless the transferor guarantees performance of the contract by the transferee, the transferee shall, if required, furnish a satisfactory performance bond.

D. Change of Name.

When a contractor requests to change the name in which it holds a contract with the District, the procurement officer responsible for the contract may, upon receipt of a document indicating such change of name (for example, an amendment to the articles of incorporation of the corporation), enter into an agreement with the requesting contractor to effect such a change of name. The agreement changing the name shall specifically indicate that no other terms and conditions of the contract are thereby changed.

2200. Administrative Review Protective Orders.

A. At the request of any party or on its own initiative, the chief business official or the Procurement Review Panel may issue a protective order controlling the treatment of protected information for purposes of a protest or other proceeding currently pending before it. Such information may include any information exempt from public disclosure by law, such as information exempt from disclosure under Sections 410 and 30-4-40. The protective order shall establish procedures for application for access to protected information and for identification and safeguarding of that information. Because a protective order serves to facilitate the pursuit of a protest or other administrative proceeding by a protester through counsel, it is the responsibility of protester's counsel to request that a protective order be issued and to submit timely applications for admission under that order. Protected information received by a person pursuant to a protective order issued under this regulation shall be released only pursuant to and in compliance with the protective order.

B. A protective order may not prohibit a public body from releasing information which the public body must release under applicable law. A protective order may not require the release of any public record that a public body is prohibited from releasing by law. Issuance of a protective order does not preclude a party from asserting any legally cognizable privilege to withhold any document or information.

C. Before being permitted to view any protected information, counsel and any consultants retained by counsel who will review or utilize any protected information must file an application for access in accordance with the conditions of the protective order. To be entitled to access, an applicant must establish that the applicant is not involved in competitive decision-making for any firm that could gain a competitive advantage from access to the protected information and that there will be no significant risk of inadvertent disclosure of protected information. A consultant will not be permitted access to protected information if he or she is employed by a party to the action or is working under a contract to a party. Objections to granting an applicant access to protected information must be in writing and filed within two business days after the person receives a copy of the application for access.

D. Any violation of the terms of a protective order may result in the imposition of such sanctions as the chief business official or Procurement Review Panel, as applicable, deems appropriate, including referral to appropriate bar associations or other disciplinary bodies and restricting the individual's practice before the chief business official or Panel. A business aggrieved by violation of a protective order may seek enforcement of such order in any available judicial or administrative forum.

[*Model Comment: The state's three chief procurement officers have a form protective order available for use.*]

District Internal Operating Procedures

The following documents, as updated, are incorporated by reference into the District's Internal Operating Procedures:

□ *Guidance & Best Practices for Permissible Communications in a Competitive Sealed Proposal After Opening but Prior to Award: Appendix I of the Office of State Engineer's 2020 Manual for Planning and Execution of State Permanent Improvements.* (*See also* Competitive Sealed Proposals, Required Procedures and Guidance for Communications After Opening but Prior to Award (eff. Sept. 2021), found *at* https://procurement.sc.gov.)

□ *Pre-Qualification: Chapter 3.5 of the Office of State Engineer's 2020 Manual for Planning and Execution of State Permanent Improvements.* (The Superintendent grants any approval required by reference to "OSE" or the "State Engineer".)

□ *Indefinite Delivery Contracts*: *Office of State Engineer's 2020 Manual for Planning and Execution of State Permanent Improvements, Chapter 9.3 and 9.4, Indefinite Quantity contracts for professional services, and Chapter 9.5 and 9.6, Task Order Contracts for construction services.* (The Superintendent grants any approval required by reference to "OSE" or the "State Engineer".)

Attachment - B -

South Carolina Model School District Procurement Code

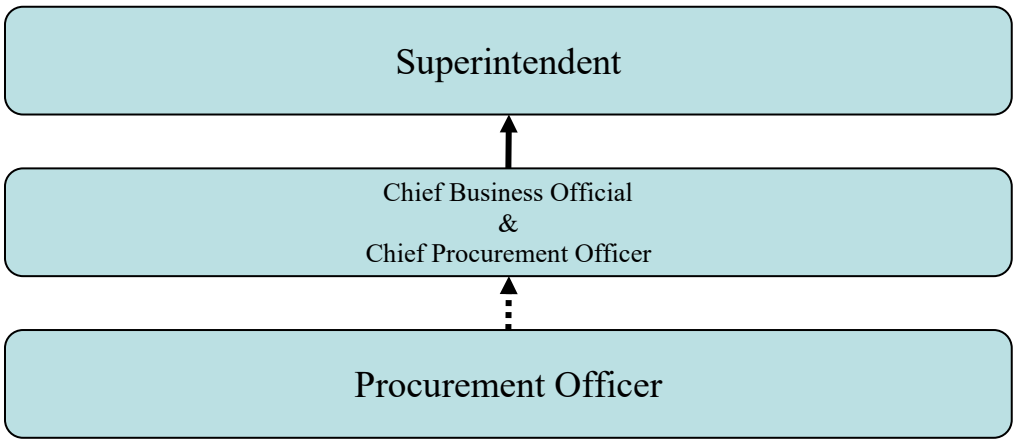
ORGANIZATIONAL STRUCTURE
&
ASSIGNMENT OF AUTHORITY SUMMARY

Officials
Board = School Board
Superintendent
CBO = Chief Business Official
CPO = Chief Procurement Officer
PO = Procurement Officer

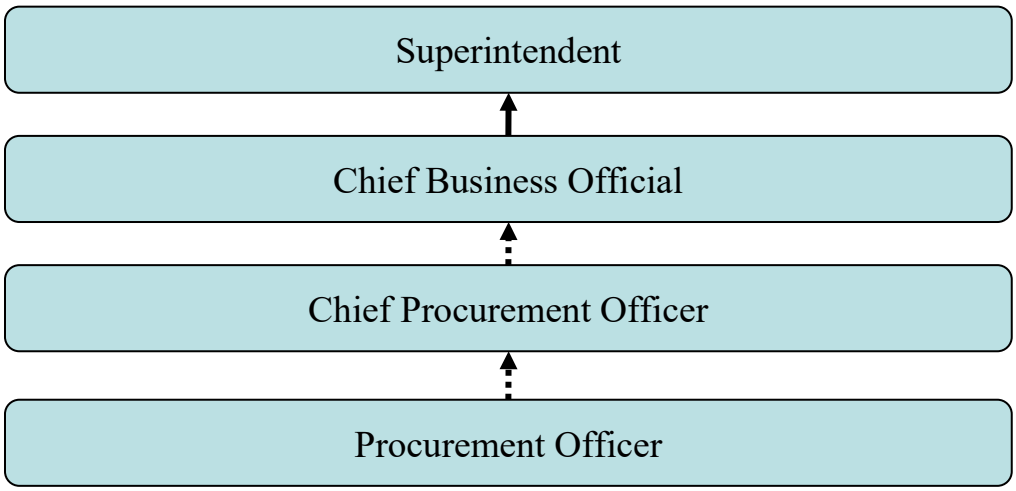
Notes
Superintendents have a role limited to those items specifically requiring their action.
CBO must be designated in writing by superintendent, must have primary management responsibility for District business operations and finance, must report directly to the superintendent, and may not delegate his authority to anyone (except as expressly provided in the section granting the authority, e.g., 4210(3)). By default, CBO is also CPO.
CPO must be designated in writing by superintendent and must have primary management responsibility for supervising procurement or disposal by district. Multiple CPOs may be identified, e.g., facilities director, IT director, surplus property director, and goods and services agent. Can delegate most authority. Some authority can be delegated only to a person above the level of PO.
PO is the person that issues solicitations, makes written determinations regarding the process, awards and administers contracts.

Chart Key
Arrows reflect a bottom-up flow of organizational responsibility.
Solid arrows reflect a direct relationship with no other person between the positions at each end of the arrow.
Dotted arrows reflect the flow of organizational authority, but the relationship may be direct or indirect, i.e., there may be one or more people between the two positions shown.

Option #1 – CBO & CPO Same Official



Option #2 – CBO & CPO Different Officials



Summary of Special Responsibilities by Position

<u>Board</u>
□ Approve contracts for auditing or accounting – 1250; R.2025
□ Approve contracts for legal services – 1250; R.2025
□ Approves newspaper of general circulation – 1520(3) (alternative text only)
□ Approve contracts over 7 years - 2030
□ Request CPO to require protest bond – 4215
□ Ratification over $100,000 – R.2015(G)
□ Ensures suitability of systems, technologies, procedures, and processes for electronic commerce – R.2027
□ Develop offer analysis procedures for District – R.2122(A)
□ Waive conflicts of interest in acquisitions exceeding $1,000,000 – R.2127(F)

<u>Superintendent</u>
Items marked with an asterisk may be delegated
□ Approve Internal Procurement Procedures - 540(2)
□ Approve contracts for auditing or accounting – 1250; R.2025 (alternative text; default to Board)
□ Approve contracts for legal services – 1250; R.2025 (alternative text; default to Board)
□ *Sole source approval – 1560; R.2105
□ *Emergency approval – 1570; R.2110
□ Approve cost-plus-a-percentage-of-cost contracts – 2010
□ Approve contracts over 5 years – 2030
□ Approve use of prequalification in construction (other than design-bid-build) – 3023
□ Appoint A/E Selection Committee – 3220
□ *Member of A/E Selection Committee – 3220
□ List of Stay Consultation with CBO – 4210(7)
□ Review internal operating procedures manual – R.2005(A)
□ *Ratification up to $100,000 – R.2015(G)
□ *Pre-bid Conf – R.2042(C)
□ Waiver of cost information – R.2120(C).

□ *Prequalification – R.2132
□ Project Delivery Method Determination – R.2145(B)(4)
□ *E&O Coverage Review over $25,000,000 – R.2145(L)
□ Approving other (non-competitive) means of disposal – R.2150(D)(3)
□ Ratify unauthorized disposal – R. 2150(I)
□ *Waive conflicts of interest in acquisitions that do not exceed $1,000,000 – R.2127(F)

Chief Business Official
□ Approves cancelations after award – 1520(7); R.2085(c)
□ Approves correction or withdrawal of bids – 1520(8); R.2085
□ Termination of contract for invalid preference certification – 1524(6)
□ Approves negotiation after unsuccessful sealed bidding – 1540
□ Reviews samples of written determinations – 2410(B)
□ Approves negotiation after unsuccessful sealed bidding in construction – 3020(d)
□ Approve trade-in sales above $5,000 – 3830(2); R.2150(G)
□ Protests – 4210
□ Protest Settlement Process and Approvals – 4210(3) (delegable)
□ Debarments – 4220
□ Contract controversies – 4230
□ Develop organizational structure for procurement – R.2000(B)(1)
□ Approve form to acknowledge by persons conducing procurements under Section 1530 – R.2010(E)
□ Approve use and terms of a Nondisclosure Agreement (NDA) – R.2010(H)
□ Shorten Bidding Time – R.2030 (B); R.2100(D)
□ Approve procurement official to conduct discussions – R.2095(I)(4)
□ Bond Rating – R.2145(c)(2)
□ Specify appropriate contract forms for design-bid-build – R.2145(E)(1)(c)
□ Specify appropriate contract forms for small purchases and competitive sealed proposals – R.2145(E)(6)
□ Approve alternations to Standard Equipment Agreement – R.2152
□ Approve contract transfers / assignments – R.2180

Chief Procurement Officer
□ Approval of protective orders – 410(E)
□ All contracting authority, pursuant to delegation from Board by 540; R.2000(B)
□ Maintains all sole source delegations – 1560(B)
□ Approval of accounting systems – 2020
□ Inspect Plants (or designee) – 2210
□ Duration contractor's maintain records – 2220
□ Submit semi-annually sole source & emergency reports to Superintendent – 2440
□ Approve variation of clauses by regulation – 3040(4)
□ Approve establishment of contracts providing for indefinite quantity – 3305
□ Approve variation of construction clauses by regulation – 3410(4)
□ Control over surplus sales – 3820
□ MBE responsibilities of State CPO – 5210
□ Submits semi-annual listing of ratification decisions – R.2015(B)