



The Construction Law Committee of  
The New York City Bar Association

# 21st Century Construction 20th Century Construction Law

*Update*

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# 21st Century Construction 20th Century Construction Law

## *Update*

### I. Introduction

The Construction Law Committee has prepared this Update to its 2008 report, *21st Century Construction 20th Century Construction Law*, in conjunction with the pro bono event, *Developing the 21st Century: Land Use, Construction Law and Project Finance in the Built Environment*, it is co-hosting with the Land Use Planning and Zoning and Project Finance Committees. The purposes of this Update are several:

- to highlight the continuing need to modernize public construction procurement law for all public owners in the State;
- to provide an example of modern public construction procurement legislation for illustrative purposes; and
- to articulate a conceptual road map to estimate the fiscal impact of modern public construction procurement legislation.

The recently concluded decade has been characterized as the "decade of infrastructure" when

infrastructure [crystallized] as a subject for the first time in the hearts and minds of the country's citizens and opinion leaders as a subject worthy of attention and focus. A decade ago, the word 'infrastructure' was hardly known outside the specialized worlds of public works departments. Now editorial writers bandy it about without explanation and debate how much we should spend on it.<sup>1</sup>

For some time now, there have been reports of a "crisis" in infrastructure. The American Society of Civil Engineers released its most recent report on the state of American infrastructure in March 2009; yet this report is the fifth in a series of infrastructure reviews since 1988.<sup>2</sup> While the state of the nation's infrastructure is reported to be increasingly worse over time, the state of the nation's infrastructure was dismal over 20 years ago. The word "crisis" implies an acute episode. In the built environment dictionary, the collapsed I-35W

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<sup>1</sup> Alex Marshall, "Becoming into Being: Infrastructure in Mind, *Regional Plan Association Spotlight on the Region*, Vol. 9, No. 3. <http://www.rpa.org/2010/02/spotlight-vol-9-no-3-becoming-into-being-infrastructure-in-mind.html?tr=y&auid=5911349>. For an example of an editorial bandying the term around, see Bob Hebert, "What's Wrong with Us?" *The New York Times*, February 15, 2010, p. A-27. [http://www.nytimes.com/2010/02/16/opinion/16herbert.html?\\_r=1&ref=opinion](http://www.nytimes.com/2010/02/16/opinion/16herbert.html?_r=1&ref=opinion)

<sup>2</sup> American Society of Civil Engineers, *2009 Report Card for America's Infrastructure*, March 25, 2009, Appendix A ([www.asce.org/reportcard](http://www.asce.org/reportcard)).

Mississippi River bridge in Minnesota is the most recent picture beside the word “crisis”. In the context of this country’s long history of financing and building public works, however, any single crisis is but an acute episode of a chronic civic condition. The causes of any single moment of crisis are not particularly new nor are they unique to any particular jurisdiction.

While highly developed industrial economies face similar burdens of unmet public infrastructure needs—both necessary maintenance on existing assets and new asset needs—in New York, the backlog of deferred repair, rehabilitation and maintenance has been exacerbated, in part, by the mandated methodology for procuring construction-related services.<sup>3</sup> In New York a significant portion of the blame can be laid at the feet of archaic laws governing construction—its participants, its processes and its products. The State’s current public construction regulatory scheme that applies to all public owners at both state and local government levels was largely enacted in the last century and reflects the dominant mode of construction at that time—design-bid-build—as did the statutes of most other states. It also represents 19th and mid-20th century thinking about how best to avoid bad moments in public construction by guarding against the three archetypal furies—fraud, waste and abuse. Other states across the country have managed to accomplish something that New York has so far not been able to—they have modernized their public procurement laws to permit a variety of approaches that satisfy valid public policy concerns of fairness in process, a competitive construction market, safety in construction and a focus on life-cycle costs necessary for both financial and environmental sustainability.<sup>4</sup>

## II. Background

While obvious, it bears noting that the purpose of public finance is the construction of “public works,” an old term of art that defines New York State’s public construction laws.<sup>5</sup> In economic terms, the public works or capital programs of government are work orders for facilities relating to “social” or “public” goods and to “mixed goods” that correct for negative and positive externalities.<sup>6</sup> Public capital programs build infrastructure, such as

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<sup>3</sup> This mandated procurement methodology consists of the design-bid-build service delivery methodology with the award of the construction contract(s) to the bidder with the lowest competitive initial price, with no consideration of related life-cycle operation and maintenance costs allowed as part of the contracting decision.

<sup>4</sup> In 2004, Massachusetts enacted public construction law reform for all public owners in the Commonwealth by authorizing construction management at-risk for non-transportation projects and design-build for transportation projects estimated to cost \$5 million or more, subject to various approvals. Public owners include a department, agency, board, commission, authority, or other instrumentality of the commonwealth or political subdivision of the commonwealth, or two or more subdivisions thereof but not including the Massachusetts Bay Transportation Authority.

<sup>5</sup> The term public works is not defined in the statutes in which they are located; as a result, case law defines them.

<sup>6</sup> Musgrave, Richard A. and Peggy B. Musgrave. *Public Finance in Theory and Practice*, 5/e (New York: McGraw-Hill Book Company, 1989), pp. 5-9, 41-58, 446-453; Myers, Danny.

roads, bridges, water, sewer and sanitation facilities—the arteries and veins of modern society—that the private sector would build in insufficient quantities, if at all. Public capital programs also build structures that house services provided or subsidized by government that the private sector, again, would build in insufficient quantities, if at all, such as schools, libraries, public safety providers, social and health services providers, and, in New York, cultural institutions. Yet, in New York, when government exercises its regulatory powers, it often enacts laws at odds with its role as owner and client that can unnecessarily increase project costs and later debt services costs and blunt its unique role in providing the infrastructure and structures necessary in our mixed economy.<sup>7</sup> To the extent the State's public construction laws limit the efficient provision of social goods through the State and local capital programs, government does not use its own public capital funds efficiently.<sup>8</sup> In order to maximize the efficiency of public funds spent—whether general obligation or revenue bonds issued to finance projects and later the related debt service paid by taxes or fees—and the effectiveness of projects on which the funds are spent, both public construction procurement laws and public finance laws must complement each other and work toward the same ends.

New York State's creation of authorities to finance state and local government public projects in the mid-20th century, despite recent concerns about transparency and accountability, was, at the time, a rational response to both the historical lack of a direct federal role in public infrastructure,<sup>9</sup> constitutional debt limits imposed by the State Constitution on both the State and its local governments, and a general attempt to avoid negative consequences flowing from the external and internal (bureaucratic) politics of public works. The creation of both state and local government authorities to finance and/or construct their respective public works was the result of a "strategy of circumvention that has tempered the need to attack anachronistic state restrictions directly."<sup>10</sup> The State Constitution of 1938 expanded the State's public welfare, medical care and housing obligations, while making "no effort to reform the 19th century restrictions on state and local debt retained in whole in the 1938 Constitution from its 1846 and 1894 antecedents."<sup>11</sup> Under the current Constitution, which requires a referendum for the State to issue "indebtedness" and which restricts the "indebtedness" by limiting the payment source as well as the outstanding amount, authorities are a necessary

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*Construction Economics: A New Approach* (London: Spon Press, 2004), pp. 39-40, 147-159, 184-186, 191.

<sup>7</sup> While this report focuses on laws related to construction procurement, the same issues and analysis could be applied to all built environment regulation, including land use laws.

<sup>8</sup> Myers, *op. cit.*, p. 15; Fairclough, Sir John, *Rethinking Construction Innovation and Research: A Review of Government R&D Policies and Practices*. (London: Department of Trade and Industry, 2002), p. 14.

<sup>9</sup> The role of the federal government, from its inception, in the direction, initiation and finance of public infrastructure has been subordinate to the roles of state and local governments. See Sbragia, Alberta M., *Debt Wish: Entrepreneurial Cities, U.S. Federalism, and Economic Development* (Pittsburgh: University of Pittsburgh Press, 1996), pp. 22-24 and *et seq.*

<sup>10</sup> Sbragia, *op. cit.*, p. 215.

<sup>11</sup> Bond, Kenneth, *Conduit Financing: A Primer and Look Around the Corner*, NSYBA Government, "Law and Policy Journal," Fall 2009, Vol. 11, p. 73.

means to the necessary end of financing both the State's and local governments' capital programs.

The legislative story behind public works construction laws has been different. The public construction procurement statutes in New York, enacted in the last century, reflect the dominant mode of construction at that time, as did the statutes of most other states. This traditional service delivery methodology consists of a public solicitation using what are termed final drawings and specifications and selection methodology mandating the award to the bidder proposing the lowest initial cost to construct (the "public design-bid-build methodology"). Complicating prior attempts to move away from the public design-bid-build methodology is the fact that the methodology is embedded in a series of laws that were enacted, or were perceived to have been enacted, in response to earlier instances of corruption in public works. In particular, this scheme reflects a strong bias against negotiation as a way to obtain the best value for construction services and products, despite evidence that this mandated methodology no longer insures either the best work or the lowest combination of initial and life-cycle costs.<sup>12</sup> Counter-productive features of this methodology that government, as regulator, has imposed on itself, as a public owner, that tend to make effective principal-agent alignment<sup>13</sup> less likely consist of: awards to the bidder with little discretion to take other factors into account beyond price and plans and specifications purported to be final that are prepared by professional designers in the absence of the contractor, and multiple prime bidding requirements. Modern service delivery methodologies, with process safeguards, can often better satisfy the public policies that underlie New York's current laws than the current mandated approach. Other states have modernized their public procurement frameworks, permitting modern approaches that satisfy other valid public policy concerns.<sup>14</sup>

Unlike other jurisdictions that give appropriate tools to all levels of government to which important functions are delegated—a way of "funding" mandates—New York has a long-standing practice of delegating functions to local government while maintaining a paternalistic control of their operational methodologies. New York's public construction procurement laws are examples of this pattern of practice. On the public authority side, the attempt to maximize efficiencies by granting access to certain private sector practices was less than complete, in part because design-bid-build was the standard methodology at the time most of these authorities were created—there were

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<sup>12</sup> For complex public projects, modern service delivery methodologies can often better satisfy the public policies that underlie current laws than the traditional mandated approach, which is also at odds with the need to focus on life cycle costs highlighted by the environmental sustainability agenda, embraced by the State and many of its local government.

<sup>13</sup> See Stiglitz, Joseph E. "Principal and Agent," *The New Palgrave: A Dictionary of Economics*, Vol. 3 (London: Macmillan, 1987), pp. 966-71.

<sup>14</sup> In addition, since the traditional design-bid-build statutes were enacted, most public owners employ professional staff with project experience and there exists an apparatus of in-house and outside oversight to evaluate competing proposals within the modern procurement environment.

no other service delivery methodologies. While some State authorities were expressly exempted from certain public procurement provisions, and case law suggests that authorities are not limited to stated procurement provisions in the absence of express language requiring them,<sup>15</sup> there is no broad express authority in New York to permit public owners to utilize the alternative service delivery methodologies<sup>16</sup> that have evolved in the last quarter of the last century and that the private sector and other public sector owners elsewhere have used successfully for some time.

### III. New Opportunities

A new administration and a new legislative session in New York, in the face of ongoing budget and infrastructure challenges, present an opportunity for the State to complete the initial reform of public construction procurement commenced four years ago. The Construction Law Committee released its report, *21st Century Construction 20th Century Construction Law*, almost four years ago in the context of the proposed reform to the Wicks Law that was made law later that year.<sup>17</sup> In early 2009, the Committee submitted its comments, *Modernizing Public Construction Procurement for New York's Public Owners—If Not Now, When*, to the State Asset Maximization Commission, which held a series of hearings across the State on the topic of public private partnerships as a solution to the infrastructure crisis.<sup>18</sup> The Committee also co-sponsored, with the New York State Chapter of the American Institute of Architects, first in November 2008 and then, with Albany Law School, the following year in November 2009, multi-disciplinary educational events on the need to modernize the State's built environment laws.<sup>19</sup> In all of this work, the position of the Construction Law Committee has been consistent and clear. All New York public owners—the State and the authorities it controls, the State's local governments and the authorities they control, and school boards—need access to all modern tools of capital program execution in order to make their expenditure of public funds as efficient as possible.

Along a spectrum of service delivery methodologies, between the currently mandated public design-bid-build methodology and the public private partnership model, are basic tools that have been used elsewhere by public owners to increase the efficiency and effectiveness of their capital programs.

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<sup>15</sup> *Thompson Const. Corp. v. Dormitory Authority*, 264 NYS2d 841 (Sup. Ct. Albany, 1965). See also, *Schumacher & Forelle, Inc. v. Johnson*, 261 NYS2d 943 (Sup. Ct. Albany, 1965); *Plumbing, Heating, Piping & A.C.C. Assoc. v. New York State Thruway Authority*, 167 NYS2d 756, 759 (3<sup>rd</sup> Dep. 1957); *Lancaster Development Inc. v. Power Authority of New York*, 145 AD2d 806, 807 (3<sup>rd</sup> Dep. 1988). See also, *L.I. Waldman & Co. v. Power Authority of New York*, 190 NYS2d 88 (Sup. Ct. NY, 1959).

<sup>16</sup> As is the case in other states, New York State's license requirements for architects have an impact on the implementation of the design-build methodology.

<sup>17</sup> See <http://www.nycbar.org/pdf/report/ConstructionLaw.pdf>

<sup>18</sup> See [http://www.nycbar.org/pdf/report/Response\\_SAM.pdf](http://www.nycbar.org/pdf/report/Response_SAM.pdf)

<sup>19</sup> See <http://www.nycbar.org/pdf/report/Proceedings.pdf>; and [http://podcasts.classcaster.org/blog/event\\_podcasts/2009/11/20/building\\_in\\_the\\_21st\\_century\\_conference](http://podcasts.classcaster.org/blog/event_podcasts/2009/11/20/building_in_the_21st_century_conference)

Implicit, and sometimes explicit, in the recent advocacy for the public-private-partnership methodology is the assumption that the private sector is more efficient and effective than the public sector. In New York, the criticism leveled at public owners for not producing construction performance results that the private sector can produce is largely due to public sector owners being denied, by State law, access to the same methodologies private sector owners have used successfully for some time. The objectives sought by New York's archaic public construction laws are valid and worthwhile, but well-intentioned provisions, unexamined over time can have unintended, and unaffordable, negative economic consequences. For the purposes of efficient economic policy and budget objectives, for itself as owner and as the provider of subsidies to other public owners in New York, the State should strive to permit all public owners in New York to have flexibility in deciding, like private owners, what service delivery method is appropriate for their various capital projects.<sup>20</sup> Public owners, like private owners, are concerned with project budget, schedule, safety and quality, a function of value, and should have access to innovative ways to increase the chances of aligning their interests in budget, schedule, safety and quality with the interests of its agents in construction, especially since the construction milieu is the very definition of asymmetric information.<sup>21</sup>

Public construction is, by definition, a form of public private partnership. Recently, proponents of "public private partnerships" have been advocating a form that has been imported from European countries, which are highly centralized and do not have our federated tax system that gives rise to the concept of tax-exempt finance. This imported form of public private partnerships seamlessly blends two conceptual constructs—finance and procurement—that in the United States are two separate legal constructs. Unlike European countries, the United States is able to take advantage of its tax structure to target tax exemptions to subsidize certain public goods. The exemption from federal taxation of interest on state and local government bonds is deemed a tax expenditure that subsidizes state and local government capital construction projects. The federal tax code determines what level of private sector involvement is permitted for long-lived assets, if the federal government is to subsidize some of the interest costs for the public owner, and New York State and its local governments have, for years, successfully utilized this federal subsidization program as they execute their capital programs.<sup>22</sup> In

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<sup>20</sup> In New York, the state level is the only level of government that can effect meaningful built environment reform. See Cole, James D. "Constitutional Home Rule in New York: The Ghost of Home Rule," *St. John's Law Review*, 1985, Vol. 59, pp. 713-749.

<sup>21</sup> "[A] situation where two parties to a transaction involving a good or service have unequal knowledge of the properties or risks involved in making that transaction." Myers, *op. cit.*, pp. 149-150, 251.

<sup>22</sup> To expand the public private partnership construct in New York, on a tax-exempt basis, would involve revising the federal tax code, either by freeing up the ownership issue or adding new things to the "exempt facility" category. This would be, in essence, a redefinition of what is an acceptable level of public-private partnership that can be subsidized by the federal government. To the extent a particular asset is financed in a public private partnership in a

New York, though, certain projects, such as airport facilities and waste-to-energy facilities<sup>23</sup> have already been financed and constructed along the lines of the public private partnership model on a tax-exempt basis, taxable basis or some combination of both, and have been operated and maintained by private-sector entities.<sup>24</sup>

Thus, the public private partnership model is at once, paradoxically, both complex and quite simple. On the complex side, the European-based public private partnership seamlessly blends procurement and finance, something the federal tax code constrains in the United States. Yet, on the simple side, the public private partnership model is merely one of several alternative service delivery methods for public construction projects. A critical feature of the private public partnership model is the embedded design-build methodology that permits the designer and the contractor to work together on the design and its constructability, maximizing the utility of building information modeling technology as well as integrated project delivery tools, greatly enhancing the project team's control over schedule and, thus, costs to stay within the parameters of the owner's stated functional scope and price. Since New York's public finance laws already permit the financing of public private partnerships, subject to federal tax limitations, the conversation about public private partnerships can help focus attention on the need to modernize public construction procurement laws by highlighting the one essential feature that has been missing for the majority of New York public owners—the service delivery methodologies that have developed since the heyday of design-bid-build.

Optimum efficiency and cost effectiveness in construction requires the integration of owners, designers and constructors on collaborative teams from project conception until commissioning at project completion, focusing on the owner's needs as the yardstick against which to measure performance. Additionally, the benefits of building information modeling technology and integrated project management techniques (if not the contract form) are maximized by the earliest possible collaboration of project team stakeholders. This working environment is simply not possible for public projects under the currently mandated public design-bid-build methodology. In addition, the selection methodology requiring award to the bidder with the lowest initial cost exacerbates the public sector's lack of focus on operation and maintenance costs after initial construction, which contributes to inadequate investment in state of good repair activities for existing capital assets. Among the factors that conspire against the explicit and early assumption and planning for project life cycle costs as part of the initial public investment decision

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way that goes beyond the federal tax code, it will be primarily financed at higher taxable levels, increasing the rates of fees to be paid by users.

<sup>23</sup> For example, the Port Authority and solid waste districts.

<sup>24</sup> As discussed further in this report, the service delivery methodology corresponding to public private partnerships executed in New York is the design-build-operate-maintain model, with either all public or mixed public/private finance.

processes, such as the politics of capital programs,<sup>25</sup> the public design-bid-build methodology's single-minded focus on initial costs is a significant abettor.

Yet, while the design-build methodology embedded in public private partnership methodology is a useful arrangement, there is no single optimal project delivery methodology for all types of construction projects. It is the owner's ability to select a service delivery method from among all available methods and match it with specific project circumstances, such as the extent of scope definition, the need for schedule speed as well as certainty, the need for flexibility to make changes to the project during construction, the capacity of the owner to participate in the process and general market conditions, that enables a project team to increase its chances of meeting project performance goals of budget, schedule, quality and safety.<sup>26</sup> A mismatch of service delivery methodology and the specific project circumstances will generate costs that could have been avoided with a better match. When the law constrains an owner's ability to use modern project management techniques, the owner will be less likely to be to deliver a project within its estimated budget, schedule and quality parameters.<sup>27</sup>

#### IV. A Modern Public Construction Procurement Construct

To authorize methodologies beyond design-bid-build and selection criteria that permit a focus on life cycle costing would require a statutory "sea change" away from the public design-bid-build methodology. In stark contrast to features such as the public solicitation based on purported final design and specifications and a selection methodology based on the lowest initial cost, modern procurement methodologies use a competitive request for proposal process ending with a negotiated award to the respondent proposing the best value<sup>28</sup> to the public owner, with price as one consideration among others which include qualifications and life cycle costs. Statutes specifically authorizing all categories of service delivery methodologies, while setting conditions for the use of each methodology, would be useful to public owners across a spectrum of institutional capacities. It has been the Committee's

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<sup>25</sup> Bent Flyvbjerg, Mette Skamris Holm and Soren Buhl, "Underestimating Costs in Public Works Projects: Error or Lie?" *APA Journal*, Summer 2002, Vol. 68, No.3, pp. 279-295.

<sup>26</sup> C. William Ibbs, Young Hoon Kwak, Tzeyu and A. Murat Odabasi, "Project Delivery Systems and Project Change: Quantitative Analysis," *Journal of Construction Engineering and Management* (Reston: American Society of Civil Engineers, July/August 2003), p. 382.

<sup>27</sup> Analysis that captured "the interactions among changes, disruptions, productivity losses" demonstrates the capacity of techniques to manage change, whether owner- or contractor-directed, and related costs. William Ibbs; Long D. Nguyen; and Seulkee Lee, Quantified Impacts of Project Change, *Journal of Professional Issues in Engineering Education and Practice*, American Society of [Civil] Engineers, January 2007, p. 46. See also Love, Peter E. D., Irani, Zahir and Edwards, David J., "A Rework Reduction Model for Construction Projects," *IBEE Transactions on Engineering Management*, Vol. , 51, No. 4, November 2004, pp. 435-37.

<sup>28</sup> Value is created by the interplay between a project's functions—use and aesthetics, primary and secondary—and the costs of such functions, which are collectively bounded by what the client/user wants and what the client/user is able and/or willing to pay. Lawrence D. Miles, Lawrence D. *Techniques of Value Analysis and Engineering*, 3rd ed. (Washington, D.C.: Lawrence D. Miles Value Foundation, 1989), pp. 3-29.

position that access to the broad spectrum of service delivery methodologies, as well as to best value selection criteria, should not be a function of special legislation on a case-by-case basis, but rather should be authorized by general legislation for all public owners: state agencies, state authorities controlled by the state, local governments—counties, cities, towns and other subdivisions—and those authorities controlled by local governments, and school boards. To such end, the Committee identified the American Bar Association’s Model Code for Public Infrastructure Procurement (MCPIP) as an appropriate conceptual model for accomplishing such goal.

The MCPIP, based upon the experiences of state and local governments across the country that enacted provisions from the earlier 1979 Model Code as well as upon academic research, provides model statutory language to authorize all modern service delivery methods as options for public owners to match service delivery with project needs and owner capacity. It expresses these options in general functional terms that can accommodate changes in practice over time and it specifically authorizes public owners to use competitive sealed proposals awarded based on best value criteria. All MCPIP methods depend upon the public owner first establishing the functional requirements of a project, which are to be part of any solicitation document. The MCPIP authorizes the traditional design-bid-build methodology, which will continue to remain an appropriate option for a significant proportion of any public capital program, but it also permits authorization of construction manager at risk, as a variation of design-bid-build. It authorizes design-build, which permits an earlier collaboration among the designer, contractor and owner, permitting changes to the project during the early design phase when change is effectively cost-free. It also authorizes design-build-finance-operate-and-maintain and design-build-operate-and-maintain, which are types of public private partnerships that highlight the finance aspect. The design-build-finance-operate-and-maintain methodology specifically prohibits any public funding, while the design-build-operate-and-maintain methodology can be financed exclusively on a public funds basis or on a mixed public and private funds basis. All methodologies except design-bid-build require a competitive sealed proposal solicitation process with an award based on best value criteria, permitting an integrated focus on a project’s initial construction cost and its life cycle costs.

The drafters of the MCPIP were careful to make clear that implementing modern service delivery methodologies would not undo current labor protections. But while existing labor laws would continue unchanged under the MCPIP, the comprehensive nature of the MCPIP approach would bring into relief the archaic nature of other statutes related to construction, such as performance and payment guaranty mechanisms. Further, as the MCPIP pulls out the construction-related provisions from the earlier 2003 Model Procurement Code that covers both non-construction and construction procurement, modernizing public construction procurement laws begs the question of modernizing similarly archaic non-construction procurement laws, which is beyond the scope of this Committee. Thus, for the limited purpose of illustrating what a modern public construction procurement statute looks like

and providing an objective backdrop for what the Committee hopes is a conversation in Albany among all stakeholders about public construction procurement reform, a mock draft statute implementing the MCPIP is attached to this report. Nonetheless, the approach taken in the attached construct, namely applying it to all public owners would also illustrate how to reduce some of the regulatory complexity in the fragmented construction market. Construction vendors would have one set of procedures for all public owners, reducing their compliance costs as well eliminating one source of inadvertent barriers to effective competition and increasing the realistic possibility of competition across markets to mitigate the negative impacts of the fragmented construction market.<sup>29</sup>

## V. Methodology to Estimate Fiscal Impact of Legislation

The attempt to outline a methodology to estimate the fiscal impact of legislation aimed at increasing the efficiency of public capital programs must proceed in steps: the first step, articulating the nature of avoided costs accruing to the capital budget due to the change in law, the second step, translating, to the extent possible, avoided costs to savings in debt service accruing to the expense budget, and a third step, allocating savings among the various levels of government covered by the change in law.

### *Nature of avoided costs.*

As noted earlier, there is no single optimal project delivery methodology for all types of construction projects. The objective of an owner and project team is to match the service delivery methodology to specific project circumstances, such as the extent of scope definition, the need for schedule speed as well as certainty, the need for flexibility to make changes to the project during construction, the capacity of the owner to participate in the process and general market conditions. In addition, the integration of the owner, designer and constructor on a collaborative team from project conception until commissioning at project completion can lead to increases in efficiency and cost effectiveness by increasing shared knowledge about the project as early as possible. Analysis that captured "the interactions among changes, disruptions, productivity losses" demonstrated the capacity of techniques to manage change, whether owner- or contractor-directed, and their related costs.<sup>30</sup> But the ability to manage change requires access to the full menu of service delivery methodologies, with their attendant management techniques. The inability to (1) match project delivery methodology to project needs and owner capacity and/or (2) bring the benefits of contractor experience, judgment and skill to the project as soon as possible during the design phase generates avoidable costs because changes occasioned later in the construction process from the progressive increase in project knowledge are more costly than

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<sup>29</sup> Myers, *op. cit.*, pp. 121-126; Fairclough, *op. cit.*, p. 14.

<sup>30</sup> Ibbs *et al.*, *op. cit.*, p. 46. See also, Love *et al.* pp. 435-437.

similar changes incorporated earlier in the design phase.<sup>31</sup> Thus, a public owner's ability to choose the optimal project delivery methodology, some of which permit earlier collaboration between the designer and contractor, would facilitate the ability to avoid costs due to changes. Avoided costs translate into marginally lower construction costs that are financed with long term debt and marginally lower related debt service costs over the life of the debt.

In addition, the award to the bidder with the lowest initial cost, in contrast to an award based on best value criteria, exacerbates the public sector's lack of focus on operation and maintenance costs after initial construction, which contributes to problems with state of good repair of capital assets. Among the factors that conspire against the explicit and early assumption and planning for such life cycle costs as part of the initial public investment decision processes, the current procurement law's single-minded focus on initial costs is a significant contributor. The impact of inadequate budgeting for state of good repair activities or necessary operation and maintenance in the expense budget, while periodically surfacing in the press, is "largely invisible, encouraging the continuing cycle of deferred maintenance, until much higher than necessary capital replacement costs become necessary."<sup>32</sup> The costs of failing to budget "to properly perform operations and maintenance services throughout the life cycle results in substantial additional overall expense, lower levels of service, damage to existing equipment, additional energy consumption and shortened useful life of existing facilities."<sup>33</sup> Life cycle costs that could have been avoided by the analysis of such costs as part of the investment decision or, at the latest, the decision to award the construction contract, appear in the expense budget as marginally higher operation and maintenance costs and eventually as capital expenses for major repair or replacement.

#### *Foundation for quantifying avoided costs.*

A small number of studies have attempted to quantify the performance of projects using the design-bid-build methodology as compared to those using the design-build methodology. One study has asserted that, assuming the public owner, in a competitive procurement process, has committed itself to "stable design requirements", using the design-build methodology can yield "typical cost savings [of] 10% over DBB and typical time savings [of] 12% over DBB."<sup>34</sup> These findings are not inconsistent with an earlier statistical evaluation, using

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<sup>31</sup> Ibbs, Kwak *et al.*, p. 382; Love *et al.*, p. 426.

<sup>32</sup> John B. Miller, "Life Cycle Delivery of Public Infrastructure: Precedents and Opportunities for the Commonwealth" (Boston: Pioneer Institute December 2008), No. 44. p. 22.

<sup>33</sup> *Idem.*

<sup>34</sup> Concerning the disadvantages of the design-bid-build methodology, "[b]ecause the designer typically does not consider the cost of construction, segmenting the design function from the construction function causes the public owner to lose substantial control over the construction price, typically 15-20 times the cost of initial design. And, more importantly, unless it is extraordinarily sophisticated, the public owner has essentially no control over long-term operations and maintenance costs, which are typically 10 times the cost of initial construction, or 150-200 times the cost of initial design." *Ibid.*, p. 20.

multivariate regression analysis, of approximately 300 projects, as summarized below.<sup>35</sup>

Metric	DB:DBB	DB:CM@Risk <sup>36</sup>	CM@Risk:DBB
Unit Cost	at least 6.1% less	at least 4.5% less	at least 1.6% less
Construction Speed	at least 12% faster	at least 7% faster	at least 5.8% faster
Delivery Speed	at least 33.5% faster	at least 23.5% faster	at least 13.3% faster
Cost Growth	at least 5.2% less	at least 12.6% less	at least 7.8% less
Schedule Growth	at least 11.37% less	at least 2.18% less	at least 9.19% less

This foundational analysis was intended to be a tool for owners in evaluating various service delivery methods and is limited by the fact that it measured "whether or not the job was completed on budget and on schedule" rather than evaluated the root causes of cost and/or schedule growth.<sup>37</sup> The findings from this foundational analysis were, however, slightly at odds with a later study, which did focus on cost changes.<sup>38</sup> In particular, the later study found different results for regarding costs and productivity as measured by schedule.<sup>39</sup> Further, this comparison of design-bid-build and design-build did not take into account the "costs for and the time required for owner planning, management, advertisement, procurement and administrative activities."<sup>40</sup>

Finally, since only a percentage of projects<sup>41</sup> within a public owner's capital program portfolio will benefit from a service delivery methods other than the public design-bid-build methodology, to which avoided costs will accrue, it is critical to identify that percentage to which to apply any of the above performance-related percentages. A recent study hypothesized the future of service delivery methodology use over the next 30 years and noted that "[t]he vast majority of public infrastructure projects (75%) will continue to use design-bid-build (and Construction Management at Risk)", "while [t]he use of

<sup>35</sup> Mark Konchar and Victor Sanvido, "Comparison of U.S. Project Delivery Systems," *Journal of Construction Engineering and Management* (Reston: American Society of Civil Engineers, November/December 1998), p. 435; see also, pp. 441-443. Materials related to chart are from pp. 441-443.

<sup>36</sup> CM@Risk stands for Construction Manager at Risk. The MCPIP deems CM@Risk as a contract form variant of Design-Bid-Build for which competitive sealed proposals are required instead of competitive sealed bidding. See Model Code §§ 5-101(1)(a), 5-102(2)(a). "The Construction Management at Risk variation can eliminate the "bidding" period - saving time (if things go well) - BUT, there is no price competition as to the cost of construction - typically, the public owner makes an estimate of total budget for the project, and the design and construction costs are "fit" into that budget. So, there is little opportunity for a comparison of whether CMatRisk is "cheaper" or "more expensive" than DBB. Basically - the CMatRisk approach turns the budget exercise inside out - the public owner is hiring designers and constructors to fit the scope of the work to a given budget ceiling. The budget becomes the constraint, and the scope of the work is adjusted to meet that constraint." From e-mail correspondence, dated October 21, 2009, from John B. Miller, Co-Reporter, ABA 2007 MCPIP.

<sup>37</sup> Konchar and Sandvido, *op. cit.*, pp. 443-444.

<sup>38</sup> Ibbs, Kwak *et al.*, *op. cit.*, pp. 384-387. "In contrast to the findings of other studies, this paper presents a case in which D/B did not perform much better than D/B/B." *Ibid.*, p. 387.

<sup>39</sup> *Idem.*

<sup>40</sup> *Ibid.*, p. 444.

<sup>41</sup> Miller, *op. cit.*, p. 10.

design-build will continue to expand (to 10% of all projects and approximately 5% of all expenditures)."<sup>42</sup>

A literature review has revealed one study describing the sources and order of magnitude of savings from alternative delivery methodologies such as design-build-operate-maintain and design-build-finance-operate-maintain, which require a focus on life cycle operation and maintenance costs as part of the initial investment decision. Life cycle costs, some of which could be avoided as the result of a best value award methodology, are "150-200 times the cost of initial design,"<sup>43</sup> and will appear in government budgets in the long-term, long after the initial investment, analytically circumscribed by the mechanics of the initial delivery methodologies, has been made. As a measure of magnitude of avoided long-term costs that can realized by taking into consideration life cycle costs at the moment of the initial investment decision, "[c]ompetitive pricing for long term operations and maintenance can typically produce savings of 10 to 20% percent of life cycle costs."<sup>44</sup>

#### *Translating from capital to expense budgets.*

Public capital program costs are financed with the proceeds of bonds, typically on a tax-exempt basis. Regardless of whether the governmental entity budgets on the basis of generally accepted accounting principles, expenditures from bond proceeds do not compete with other expenditures in the expense budget until they appear in the form of debt service, where they become a non-discretionary expense.<sup>45</sup> This temporal feature of the capital program creates the illusion, especially at the operating agency level during the planning and construction phases, that capital projects are "free". Since public budget protocols tend to treat debt service on an aggregated entity-wide basis, there is little opportunity for the line agencies responsible for generating particular capital projects to comprehend the impact of debt service occasioned by their capital programs on their annual operating budgets. The weak connection between capital program decisions at the agency level and their impact on the operating budget is made more tenuous by the length of time from the planning of a project, scoping a project, awarding the contracts, constructing and commissioning the project and, finally, debt service payments. But incremental increases in debt service occasioned by projects can, especially in times of decreasing or flat revenues, crowd out discretionary operating expenditures, often referred to as agency programs.

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<sup>42</sup> Miller, *op. cit.*, pp. 34-35. The author predicted that "[a] relatively small percentage (10%) of the total number of infrastructure projects will use the life cycle delivery methods [such as design-build-operate-and-maintain], but the life cycle cash flow through these projects will be quite large (50% of expenditures)." *Idem.*

<sup>43</sup> *Ibid.*, p. 20.

<sup>44</sup> *Ibid.*, p. 23.

<sup>45</sup> While it is possible to quibble about differences in the nature of payment obligation among the forms of constitutional general obligation debt and other revenue-based debt that is non-recourse to the issuer, public debt is generally considered to be a non-discretionary expense.

*Allocation of avoided costs among levels of government.*

Authorizing modern service delivery methodologies for all public owners in the State creates a final wrinkle in assessing the fiscal impacts within the interdependent system of State and local governments. At each governmental level, avoided costs would permit the public owner either to plan for reductions in future debt service costs or, keeping the planned level of capital expenditure the same, stretch available resources to meet planned incrementally increased capital needs. In an interdependent system in which the higher level of government subsidizes the capital programs of the lower levels in various ways, modernizing public procurement laws for subordinate levels of government can operate as mandate relief or a form of subsidization, creating the possibility of incrementally reducing the level of State subsidy expenditures without negatively impacting local service levels.

# APPENDIX 1

## 2007 Model Code for Public Infrastructure Procurement for Illustrative Purposes

AN ACT to authorize public owners to use modern service delivery methodologies for public infrastructure projects, compiling such provisions into one chapter of the consolidated laws, for the purpose increasing the efficiency of public capital programs by permitting the optimal matching of service delivery methodology with project needs and public owner capacity, thereby avoiding construction costs and related debt service costs attributable to prior mandated mismatches among service delivery methodology, project needs and owner capacities, while also providing for the fair and equitable treatment of all persons involved in public infrastructure procurement in New York State, maximizing the purchasing value of public funds in procuring infrastructure facilities and related services and providing safeguards for maintaining a procurement system of quality and integrity.

Section 1. Legislative findings. [to be developed via legislative process]

§ 2. [Version 1] The following provisions of law are hereby REPEALED to the extent they are consistent with the provisions of this act:

[to be developed via legislative process]

[Version 2] Insofar as the provisions of this act conflict with the provisions of any other act, general or special, the provisions of this act shall be controlling.

§ 3. There shall be created a new chapter of the consolidated laws entitled, "PUBLIC INFRASTRUCTURE PROCUREMENT", constituting chapter [ ] of the [ ] laws, which shall read as follows:

### CHAPTER [ ] OF THE [ ] LAWS

[Table of Contents to be generated]

#### Article 1—Short Title

##### § 1. Short title

This chapter shall be known as the [public infrastructure procurement law].

## **Article 2-General Provisions**

### **§ 2. Purposes, Rules of Construction.**

1. The provisions of this chapter shall be construed and applied to promote its underlying purposes and policies, which are to simplify, clarify, and modernize procurement, as well as to increase the confidence of both the persons who deal with the procurement system and the general public in the procurement activities of all Public Procurement Units.

2. In this chapter, unless the context requires otherwise:

(a) words in the singular number include the plural, and those in the plural include the singular; and

(b) words of a particular gender include any gender and the neuter, and when the sense so indicates, words of the neuter gender may refer to any gender.

### **§ 3. Supplementary General Principles of Law Applicable.**

Unless displaced by the particular provisions of this chapter, the principles of law and equity, [including the Uniform Commercial Code of [State], the law merchant, and law relative to capacity to contract, agency, fraud, misrepresentation, duress, coercion, mistake, or bankruptcy] shall supplement the provisions of this chapter.

### **§ 4. Requirement of Good Faith.**

This chapter requires all parties involved in the negotiation, performance, or administration of Public Procurement Unit contracts to act in good faith.

### **§ 5. Application.**

This chapter applies only to contracts for the design, construction, routine operation, routine repair, and routine maintenance of Infrastructure Facilities solicited or entered into after the effective date of this chapter. It shall apply irrespective of the source of funds, and shall also apply to the disposal of Infrastructure Facilities within the State. Nothing in this chapter or in regulations authorized to be promulgated hereunder shall prevent any governmental body or political subdivision from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement.

### **§ 6. Determinations.**

Written determinations required by this chapter shall be retained in the appropriate official contract file of the Chief Procurement Officer and/or the Purchaser Sub-unit.

#### § 7. Regulations.

Any Governmental Body may establish a procurement policy board, composed of such members as the Governmental Body shall determine, which procurement policy board shall be authorized to adopt Regulations consistent with this chapter. In the absence of a procurement policy board, the Chief Procurement Officer is authorized to adopt Regulations, consistent with this chapter.

Any Governmental Body may establish an ethics board, composed of such members as the Governmental Body shall determine, which ethics board shall be authorized to adopt Regulations consistent with article 12 of this chapter. In the absence of an ethics board, the Chief Procurement Officer is authorized to adopt Regulations related to article 12 of this chapter.

#### § 8. Definitions.

Words in this chapter shall have the meanings set forth below, unless:

(a) the context in which they are used clearly requires a different meaning; or

(b) a different definition is prescribed for a particular provision of this chapter.

1. "Architectural and Engineering Services" means:

(a) professional services of an architectural or engineering nature, as defined in section [ ] of [ ], which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this subsection;

(b) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and

(c) such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including: studies, investigations, surveying, mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

2. "Blind Trust" means an independently managed trust in which the employee-beneficiary has no management rights and in which the employee-beneficiary is not given notice of alterations in, or other dispositions of, the property subject to the trust.
3. "Business" means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity.
4. "Change Order" means a written order signed by the Procurement Officer, directing the contractor to make changes which the contract authorizes the Procurement Officer to order without the consent of the contractor.
5. "Chief Procurement Officer" means the person holding the position created in Article 3 of this chapter, as the head of the procurement office for Infrastructure Facilities of the Public Procurement Unit or Purchaser Sub-unit.
6. "Confidential Information" means any information which is available to an employee only because of the employee's status as an employee of the Public Procurement Unit and is not a matter of public knowledge or available to the public on request.
7. "Conspicuously" means written in such special or distinctive format, print, or manner that a reasonable person against whom it is to operate ought to have noticed it.
8. "Construction" means the process of building, altering, repairing, improving, or demolishing any public infrastructure facility, including any structure, building, or other improvements of any kind to real property. It does not include the routine operation, routine repair, or routine maintenance of any existing public infrastructure facility, including structures, buildings, or real property.
9. "Contract" or "contract" means all types of Public Procurement Unit agreements, regardless of what they may be called, for the procurement or disposal of supplies, services, or construction. Collective bargaining agreements between the respective Governmental Body and its employees are expressly excluded.
10. "Contract Modification" 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 action of the parties to the contract.

11. "Contractor" means any person having a contract with Public Procurement Unit.
12. "Cooperative Purchasing" means procurement conducted by, or on behalf of, one or more Public Procurement Units or Purchaser Sub-units, as defined in article 10 of this chapter.
13. "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 chapter, and a fee, if any.
14. "Data" means recorded information, regardless of form or characteristic.
15. "Design-bid-build" (and "Construction Management At-Risk") means a project delivery method in which the Public Procurement Unit or Purchaser Sub-unit sequentially awards separate contracts, the first for architectural and engineering services to design the project and the second for construction of the project according to the design.
16. "Design-build" means a project delivery method in which the Public Procurement Unit or Purchaser Sub-unit enters into a single contract for design and construction of an infrastructure facility, after having established the design requirements (or design criteria) of the project.
17. "Design-build-finance-operate-maintain" means a project delivery method in which the Public Procurement Unit or Purchaser Sub-unit enters into a single contract for design, construction, finance, maintenance, and operation of an infrastructure facility over a contractually defined period, integrating long term operation and maintenance, as well as project finance, into a single competition, after the Public Procurement Unit's prior establishment of design requirements of a project as well as a prior preliminary determination that project revenues are sufficient, over the length of the proposed contract, to cover design, construction, finance, and operations. No Public Procurement Unit funds shall be appropriated to pay for any part of the services provided by the contractor during the contract period.
18. "Design-build-operate-maintain" means a project delivery method in which the Public Procurement Unit or Purchaser Sub-unit enters into a single contract for design, construction, maintenance, and operation of an infrastructure facility over a contractually defined period, integrating long term operation and maintenance into a single competition, after the Public Procurement Unit's or Purchaser Sub-unit's prior establishment of the design requirements of the project. All or a portion of the funds required to pay for the services provided by the contractor during the contract period are either appropriated by

the Public Procurement Unit or Purchaser Sub-unit prior to award of the contract or secured by the Public Procurement Unit or Purchaser Sub-unit through fare, toll, or user charges.

19. "Design requirements" means the written description of the infrastructure facility or service to be procured under this chapter, including:
  - (a) required features, functions, characteristics, qualities, and properties that are required by the Public Procurement Unit or Purchaser Sub-unit;
  - (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. For the integrated procurement methods - design-build, design-build-operate-maintain, and design-build-finance-operate-maintain, the Public Procurement Unit or Purchaser Sub-unit may prepare 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 in order to use the competitive process to test for higher quality, lower price, and quicker delivery.

20. "Designee" means a duly authorized representative of a person holding a superior position.
21. "Direct or Indirect Participation" means involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity.
22. "Disadvantaged Business" means a small business which is owned or controlled by a majority of persons, not limited to members of minority groups, who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social disadvantages.
23. "Electronic" means electrical, digital, magnetic, optical, electromagnetic, or any other similar technology.
24. "Employee" means an individual drawing a salary from a Governmental Body, whether elected or not, and any non-compensated individual performing personal services for any Governmental Body.

25. "Established Catalogue Price" means the price included in a catalogue, price list, schedule, or other form that:
- (a) is regularly maintained by a manufacturer or contractor;
  - (b) is either published or otherwise available for inspection by customers, and
  - (c) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved.
26. "External Procurement Unit" means any buying organization not located in the state of New York which, if located in the state, would qualify as a Public Procurement Unit or Purchaser Sub-unit. Agencies of the United States and of any other State in the United States of America are External Procurement Units.
27. "Financial Interest" means:
- (a) ownership of any interest or involvement in any relationship from which, or as a result of which, a person within the past [year] has received, or is presently or in the future entitled to receive, more than [\$\_\_\_\_\_] per year, or its equivalent;
  - (b) ownership of such interest in any property or any business as may be specified by Regulations promulgated pursuant to articles 7 and 12 of this chapter; or
  - (c) holding a position in a business such as an officer, director, trustee, partner, employee, or the like, or holding any position of management.
28. "Governmental Body" means the (a) state of [ ], including its executive, legislative and judicial sub-components, and any department, agency or commission of the state of [ ], (b) any public authority, public benefit corporation, local development corporation or public instrumentality created by general or special law and governed by persons appointed by elected public officials, whether at the state or municipal corporation level or both, (c) any municipal corporation as defined in the [ ] law, and (d) any special purpose district, including public school districts, created by general or special law and governed by members elected themselves or appointed by elected public officials, whether at the state or municipal corporation level or both.
29. "Grant" means the furnishing by a Governmental Body of assistance, whether financial or otherwise, to any person to support a program authorized by law. It does not include an award whose primary purpose is to procure an end product, whether in the form of supplies, services,

or construction; a contract resulting from such an award is not a grant but a procurement contract.

30. "Gratuity" means a payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received.
31. "Immediate Family" means a spouse, children, parents, brothers and sisters, and such other relatives as may be designated by Regulations promulgated pursuant to articles 7 and 12 of this chapter.
32. "Independent Peer Reviewer Services" mean additional Architectural and Engineering services provided to the Public Procurement Unit or Purchaser Sub-unit in 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.
33. "Infrastructure Facility" means a building; structure; or networks of buildings, structures, pipes, controls, and equipment 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.
34. "Invitation for Bids" means all documents, whether attached or incorporated by reference, utilized for soliciting bids.
35. "May" denotes the permissive.
36. "Official Responsibility" means direct administrative or operating authority, whether intermediate or final, either exercisable alone or with others, either personally or through subordinates, to approve, disapprove, or otherwise direct Public Procurement Unit or Purchaser Sub-unit action.
37. "Operations and Maintenance" means a project delivery method whereby the Public Procurement Unit or Purchaser Sub-unit enters into a single contract for the routine operation, routine repair, and routine maintenance of an Infrastructure Facility.

38. "Person" means any business, individual, union, committee, club, other organization, or group of individuals.
39. "Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring any supplies, services or construction. It also includes all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.
40. "Procurement Officer" means any person duly authorized to enter into and administer contracts and make written determinations with respect thereto. The term also includes an authorized representative acting within the limits of authority.
41. "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.
42. "Public Notice" means the distribution or dissemination of information to interested parties using methods that are reasonably available and pursuant to Regulations providing criteria and general guidelines for the method and duration of public notice. Such methods will often include publication in newspapers of general circulation, electronic or paper mailing lists, and web site(s) designated by the Public Procurement Unit or Purchaser Sub-unit and maintained for that purpose.
43. "Public Procurement Unit" means, to the extent it expends public funds for the procurement of supplies, services, and construction, a Governmental Body, as further clarified below, a Purchaser Sub-unit, or an External Procurement Unit. The term "Public Procurement Unit" relates to each entity within a Governmental Body that carries out procurement functions for such Governmental Body: (a) in a Governmental Body where procurement is completely centralized, the term "Public Procurement Unit" refers to the centralized procurement unit of such Governmental Body; (b) in a Governmental Body where procurement is partially centralized, the term "Public Procurement Unit" describes the established primary procurement unit of such Governmental Body and such other units within such Governmental Body as are authorized to conduct procurement functions independent of the established primary Public Procurement Unit; and (c) in a Governmental Body where procurement activities are completely decentralized, the term "Public Procurement Unit" refers to any and all units of such Governmental Body that are authorized to carry out procurement functions for such Governmental Body. Each Public

Procurement Unit shall be subject to this chapter and Regulations promulgated by pursuant to article 7 of this chapter.

44. "Purchase Description" means the words used in a solicitation to describe the supplies, services, or construction to be purchased, and includes specifications attached to, or made a part of the solicitation.
45. "Purchase Request" means that document whereby a User Sub-unit requests that a contract be entered into for a specified need, and may include, but is not limited to, the technical description of the requested item, delivery schedule, transportation, criteria for evaluation, suggested sources of supply, and information supplied for the making of any written determination required by this chapter.
46. "Purchaser Sub-unit" means any department, agency or group of employees within a Governmental Body or Public Procurement Unit that is authorized by law to enter into contracts for supplies, services and construction.
47. "Regulation" or "Regulations" means the rules, promulgated by (a) a policy procurement board establish by a Governmental Body or a Chief Procurement Officer, pursuant to section 7 of this chapter, and (b) an ethics board, established by a Governmental Body or a Chief Procurement Officer, pursuant to section 7 of this chapter, having general or particular applicability and future effect and designed to implement, interpret, or prescribe law or policy, or describing organization, procedure, or practice requirements, all with respect to the provisions of this chapter, and which have been promulgated in accordance with the administrative procedures laws applicable to such Governmental Body.
48. "Request for Proposals" means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.
49. "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.
50. "Responsive Bidder" means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.
51. "Services" means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. This term shall not include employment agreements or collective bargaining agreements.

52. "Shall" denotes the imperative.
53. "Signature" means a manual or electronic identifier, or the electronic result of an authentication technique attached to or logically associated with a record that is intended by the person using it to have the same force and effect as a manual signature, authorized pursuant to the provisions of section 10 of this chapter.
54. "Small Business" means a United States business which is independently owned and which is not dominant in its field of operation or an affiliate or subsidiary of a business dominant in its field of operation.
55. "Specification" means any description of the physical or functional characteristics, or of the nature of a supply, service, or construction item for an Infrastructure Facility. It may include a description of any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery.
56. "Supplies" means all property, including but not limited to equipment, materials, printing, insurance, and leases of real property, excluding land or a permanent interest in land.
57. "User Sub-unit" means any group of employees within a Public Procurement Unit, but not within the Purchaser Sub-unit, who utilize supplies, services or construction procured under this chapter.
58. "Written" or "In Writing" means the product of any method of forming characters on paper, other materials, or viewable screens, which can be read, retrieved, and reproduced, including information that is electronically transmitted and stored.

## **§ 9. Public Access to Procurement Information**

Procurement information with respect to any Public Procurement Unit shall be a public record to the extent provided in the freedom of information laws applicable to the related Governmental Body and shall be available to the public as provided in such laws.

## **§ 10. Authorization for the Use of Electronic Transmissions.**

For procurements of Infrastructure Facilities pursuant to this chapter, a Public Procurement Unit's or Purchaser Sub-unit's use of electronic media, including acceptance of electronic signatures, is hereby authorized, subject to rules that each Governmental Body shall promulgate regarding:

- (a) appropriate means to authenticate and verify the sender;

- (b) appropriate means to evaluate message integrity in order to confirm that the message or signature was properly received in the original format of the sender;
- (c) appropriate means to prevent a sender from repudiating a message or signature sent pursuant to the rules;
- (d) appropriate security to prevent unauthorized access to the bidding, approval, and award processes; and
- (e) accurate retrieval or conversion of electronic forms of such information into a medium which permits inspection and copying.

### Article 3-Office of Chief Procurement Officer

#### § 11. Establishment, Appointment and Qualifications, Tenure, Compensation.

- (a) *Establishment.* Each Governmental Body shall create, within the Public Procurement Unit, an Office of the Chief Procurement Officer, to be headed by the Chief Procurement Officer.
- (2) *Appointment and Qualifications.* Each Governmental Body shall appoint the Chief Procurement Officer in accordance with applicable laws and regulations concerning the hiring of staff at the Governmental Body. The Chief Procurement Officer shall have relevant, recent experience in public procurement and in the large-scale procurement of Infrastructure Facilities, including supplies, services, and construction, and shall be a person with demonstrated executive and organizational ability.
- (3) *Other Matters.* The Chief Procurement Officer shall be a full-time public official of the Public Procurement Unit, subject to the Governmental Body's laws and regulations that govern its employees.

#### § 12. Authority and Duties of the Chief Procurement Officer.

- (a) *Principal Contracting Officer of the Public Procurement Unit.* The Chief Procurement Officer shall serve as the principal Procurement Officer of the Public Procurement Unit for the award of contracts for the design, construction, routine operation, routine repair, and routine maintenance of Infrastructure Facilities, including, without limitation, the contracts using the project delivery methods authorized in section 41 and for the award of contracts for supplies and services in connection with the operation, maintenance, and repair, by the Public Procurement Unit or Purchaser Sub-unit, of existing Infrastructure Facilities.

(b) *Power to Adopt Operational Procedures.* Consistent with the provisions of this chapter, the Chief Procurement Officer may adopt operational procedures governing the internal functions of the Office of the Chief Procurement Officer.

(c) *Duties.* In accordance with this chapter, and subject to the supervision of the head of the Public Procurement Unit or Purchaser Sub-unit, the Chief Procurement Officer shall:

(1) procure or supervise the procurement of all services, supplies, and construction for Infrastructure Facilities needed or facilitated by the Governmental Body;

(2) ensure compliance with this chapter, the Regulations promulgated hereunder and operational procedures by reviewing and monitoring procurements conducted by any designee, department, agency or official delegated authority.

### **§ 13. Delegation of Authority by the Chief Procurement Officer**

Subject to Regulations related to delegation, the Chief Procurement Officer may delegate authority to designees or to any department, agency, or official.

## **Article 4-Source Selection and Contract Formation**

### **§ 14. Methods of Source Selection**

Unless otherwise authorized by law, all Public Procurement Unit or Purchaser Sub-unit contracts shall be awarded by one of the following methods:

- (a) § 15 Competitive Sealed Bidding;
- (b) § 16 Competitive Sealed Proposals;
- (c) § 17 Small Purchases;
- (d) § 18 Sole Source Procurement;
- (e) § 19 Emergency Procurements;
- (f) § 20 Special Procurements;
- (g) § 21 Architectural and Engineering Services.

### **§ 15. Competitive Sealed Bidding.**

- (a) *Conditions for Use.* Contracts shall be awarded by competitive sealed bidding except as otherwise provided in Section 14 (Methods of Source Selection) or in section 42 (Source Selection Methods Assigned to Project Delivery Methods).
- (b) *Invitation for Bids.* An Invitation for Bids shall be issued and shall include a purchase description, and all contractual terms and conditions applicable to the procurement.
- (c) *Public Notice.* Adequate public notice of the Invitation for Bids shall be given a reasonable time prior to the date set forth therein for the opening of bids, sufficiently in advance of bid opening to permit potential bidders to prepare and submit their bids in a timely manner, in accordance with the Regulations.
- (d) *Bid Opening.* Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the Invitation for Bids. The amount of each bid, and such other relevant information as may be specified by the Regulations, together with the name of each bidder shall be recorded; the record and each bid shall be open to public inspection.
- (e) *Bid Acceptance and Bid Evaluation.* Bids shall be unconditionally accepted without alteration or correction, except as authorized in this chapter. Bids shall be evaluated based on the requirements set forth in the Invitation for Bids, which may include criteria to determine acceptability such as 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 objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The Invitation for Bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the Invitation for Bids.
- (f) *Correction or Withdrawal of Bids; Cancellation of Awards.* Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such bid mistakes, shall be permitted in accordance with the Regulations. After bid opening, no changes in bid prices or other provisions of bids prejudicial to the interest of the Public Procurement Unit or Purchaser Sub-unit or fair competition shall be permitted. Except as otherwise provided by the Regulations, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, shall be supported by a written determination made by the Chief Procurement Officer or the head of the Public Procurement Unit or Purchaser Sub-unit.

- (g) *Award.* The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids. In the event all bids for a construction project exceed available funds as certified by the appropriate fiscal officer, and the low responsive and responsible bid does not exceed such funds by more than [five] percent, the Chief Procurement Officer, or the head of the Public Procurement Unit or Purchaser Sub-unit, is authorized in situations where time or economic considerations preclude re-solicitation of work of a reduced scope to negotiate an adjustment of the bid price, including changes in the bid requirements, with the low responsive and responsible bidder, in order to bring the bid within the amount of available funds.
- (h) *Multi-Step Sealed Bidding.* When it is considered impractical to initially prepare a purchase description to support an award based on price, an Invitation for Bids may be issued requesting the submission of unpriced offers to be followed by an Invitation for Bids limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.

## § 16. Competitive Sealed Proposals

### (a) *Conditions for Use.*

- (1) A contract may be entered into by competitive sealed proposals when the Chief Procurement Officer, the head of the Public Procurement Unit or Purchaser Sub-unit, or a designee of either officer above the level of the Procurement Officer determines in writing, pursuant to the Regulations, that the use of competitive sealed bidding is either not practicable or not advantageous to the Governmental Body.
- (2) Regulations may provide that it is either not practicable or not advantageous to the Governmental Body to procure specified types of supplies, services, or construction by competitive sealed bidding.
- (3) Contracts for the design-build, design-build-operate-maintain, or design-build-finance-operate-maintain project delivery methods specified in article 6 shall be entered into by competitive sealed proposals, except as otherwise provided in subsections (c), (d), (e), and (f) of section 14 (Methods of Source Selection).

### (b) *Request for Proposals.* Proposals shall be solicited through a Request for Proposals. Each Request for Proposals for design-build (section 42(d)), design-build-operate-maintain (section 42 (e)), and design-build-finance-operate-maintain (section 42(f)):

- (1) shall include design requirements;

- (2) shall solicit proposal development documents; and
- (3) may, when the Public Procurement Unit or Purchaser Sub-unit determines that the cost of preparing proposals is high in view of the size, estimated price, and complexity of the procurement:
  - (A) prequalify offerors by issuing a Request for Qualifications in advance of the Request for Proposals; and
  - (B) select a short list of responsible offerors prior to discussions and evaluations under subsection f, provided that the number of proposals that will 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
  - (C) pay stipends to unsuccessful offerors, provided that the amount of such stipends and the terms under which stipends will be paid are stated in the Request for Proposals.
    - (c) *Public Notice.* Adequate public notice of the Request for Proposals shall be given in the same manner as provided in section 15(c) (Competitive Sealed Bidding, Public Notice).
    - (d) *Receipt of Proposals.* Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A Register of Proposals shall be prepared in accordance with the Regulations, and shall be open for public inspection after contract award.
    - (e) *Evaluation Factors.*
      - (1) *General.* The Request for Proposals shall state the relative importance of price and other factors and subfactors, if any.
      - (2) *Additional Requirements.* Each Request for Proposals for design-build (section 42(d)), design-build-operate-maintain (section 42(e)), and design-build-finance-operate-maintain (section 42(f)):
        - (A) shall 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
        - (B) shall require each offeror, when the contract price is estimated to exceed \$10,000,000, when the contract period of operations and maintenance is ten years or longer, or in circumstances established by regulation, to identify an Independent Peer Reviewer whose competence and qualifications to provide

such services shall be an additional evaluation factor in the award of the contract.

- (f) *Discussion with Responsible Offerors and Revisions to Proposals.* As provided in the Request for Proposals, and under the Regulation, discussions may be conducted with responsible 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 shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.
- (g) *Award.* Award shall be made to the responsible offeror whose proposal conforms to the solicitation and is determined in writing to be the most advantageous to the Governmental Body taking into consideration price and the evaluation factors set forth in the Request for Proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made. Written notice of the award of a contract to the successful offeror shall be promptly given to all offerors.
- (h) *Debriefings.* The Procurement Officer is authorized to provide debriefings that furnish the basis for the source selection decision and contract award.

#### § 17. Small Purchases.

Any procurement not exceeding the amount established by the Regulation may be made in accordance with small purchase procedures, provided, however, that procurement requirements shall not be artificially divided so as to constitute a small purchase under this section.

#### § 18. Sole Source Procurement.

A contract may be awarded for a supply, service, or construction item without competition when, pursuant to the Regulations, the Chief Procurement Officer, the head of the Public Procurement Unit or Purchaser Sub-unit, or a designee of either officer above the level of the Procurement Officer determines in writing that there is only one source for the required supply, service, or construction item.

#### § 19. Emergency Procurements.

Notwithstanding any other provision of this chapter, the Chief Procurement Officer, the head of the Public Procurement Unit or Purchaser Sub-unit, or a designee of either officer may make or authorize others to make emergency procurements when there exists a threat to public health, welfare, or safety under emergency conditions as defined in the Regulations; provided that such emergency procurements shall be made with such 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.

#### **§ 20. Special Procurements.**

Notwithstanding any other provision of this chapter, the Chief Procurement Officer or the head of the Public Procurement Unit or Purchaser Sub-unit may, with prior public notice, initiate a procurement above the small purchase amount specified in section 17 where the officer determines that an unusual or unique situation exists that makes the application of all requirements of competitive sealed bidding or competitive sealed proposals contrary to the public interest. Any special procurement under this section shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the procurement and for the selection of the particular contractor shall be included by the Chief Procurement Officer or the head of the Public Procurement Unit or Purchaser Sub-unit in the contract file, and a report shall be made publicly available at least annually describing all such determinations made subsequent to the prior report.

#### **§ 21. Cancellation of Invitations for Bids or Requests for Proposals.**

An Invitation for Bids, a Request for Proposals, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, when it is in the best interests of the Governmental Body in accordance with the Regulations. The reasons therefor shall be made part of the contract file.

#### **§ 22. Responsibility of Bidders and Offerors.**

- (a) *Determination of Nonresponsibility.* A written determination of nonresponsibility of a bidder or offeror shall be made in accordance with the Regulations. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of non-responsibility with respect to such bidder or offeror.
- (b) *Right of Nondisclosure.* Confidential information furnished by a bidder or offeror pursuant to this section shall not be disclosed outside of the Office of the Chief Procurement Officer or the Public Procurement Unit or Purchaser Sub-unit without prior written consent by the bidder or offeror.

### **§ 23. Prequalification of Suppliers.**

Prospective suppliers may be prequalified for particular types of supplies, services, and construction. The method of submitting prequalification information and the information required in order to be prequalified shall be determined by the Regulations.

### **§ 24. Substantiation of Offered Prices.**

The Procurement Officer may request factual information reasonably available to the bidder or offeror to substantiate that the price or cost offered, or some portion of it, is reasonable, if:

- (a) the price is not:
  - (1) based on adequate price competition;
  - (2) based on established catalogue or market prices;or
  - (3) set by law or Regulation; and
- (b) the price or cost exceeds an amount established in the Regulations or operational procedures.

### **§ 25. Types of Contracts.**

Subject to the limitations of this section, any type of contract which will promote the best interests of the Governmental Body may be used; provided that the use of a cost-plus-a-percentage-of-cost contract is prohibited. A cost-reimbursement contract may be used only when a determination is made in writing that such contract is likely to be less costly to the Governmental Body than any other type or that it is impracticable to obtain the supplies, services, or construction required except under such a contract.

### **§ 26. Approval of Accounting System.**

Regulations shall be issued requiring that contractors submit appropriate documentation prior to the award of contracts in which the Public Procurement Unit or Purchaser Sub-unit agrees to reimburse costs, confirming that:

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

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

#### § 27. Multi-Year Contracts.

(a) *Specified Period.* Unless otherwise provided by law, a contract for supplies or services may be entered into for any period of time deemed to be in the best interests of the Governmental Body, provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.

(b) *Use.* A multi-year contract is authorized where:

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

(2) such a contract will serve the best interests of the Governmental Body by encouraging effective competition or otherwise promoting economies in the respective Public Procurement Unit's or Purchaser Sub-unit's procurement.

(c) *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 shall be cancelled and the contractor shall be reimbursed for the reasonable value of any non-recurring costs incurred but not amortized in the price of the supplies or services delivered under the contract. The cost of cancellation may be paid from any appropriations available for such purposes.

#### § 28. Right to Inspect Plant.

The Public Procurement Unit or Purchaser Sub-unit may, at reasonable times, inspect the part of the plant or place of business of a contractor or any subcontractor which is related to the performance of any contract awarded or to be awarded by the Public Procurement Unit.

#### § 29. Right to Audit Records

(a) *Audit of Cost or Pricing Data.* The Public Procurement Unit or Purchaser Sub-unit may, at reasonable times and places, audit the books and records of any person who has submitted data in substantiation of offered prices pursuant to section 24 (Substantiation of Offered Prices) to the extent that such books and records relate to that data. Any person who receives a contract, change order, or

contract modification for which such 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.

- (b) *Contract Audit.* The Public Procurement Unit or Purchaser Sub-unit 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.

### **§ 30. Finality of Determinations.**

The determinations required by section 15(f) (Competitive Sealed Bidding, Correction or Withdrawal of Bids; Cancellation of Awards), section 16(a) (Competitive Sealed Proposals, Conditions for Use), section 16(g) (Competitive Sealed Proposals, Award), section 18 (Sole Source Procurement), section 19 (Emergency Procurements), section 20 (Special Procurements), section 22(a) (Responsibility of Bidders and Offerors, Determination of Non-responsibility), section 24 (Substantiation of Offered Prices), section 25 (Types of Contracts), section 26 (Approval of Accounting System), section 27(b) (Multi-Term Contracts, Determination Prior to Use) and section 43 (Choice of Project Delivery Methods) are final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.

### **§ 31. Reporting of Anticompetitive Practices.**

When, for any reason, collusion or other anticompetitive practices are suspected among any bidders or offerors, a notice of the relevant facts shall be transmitted to the appropriate investigatory or law enforcement official(s) with jurisdiction over the Public Procurement Unit or Purchaser Sub-unit.

### **§ 32. Retention of Procurement Records.**

All procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules required by the laws covering the Public Procurement Unit. All retained documents shall be made available to the appropriate investigatory or law enforcement official(s) with jurisdiction over the Public Procurement Unit upon request and proper receipt therefor.

### **§ 33. Record of Procurement Actions Taken Under Section 18 (Sole Source Procurement), Section 19 (Emergency Procurements), and Section 20 (Special Procurements).**

(a) *Contents of Record.* The Chief Procurement Officer shall maintain a record listing all contracts made under section 18 (Sole Source Procurement), section 19 (Emergency Procurements), or 20 (Special Procurements) for a minimum of [five] years. The record shall contain:

- (1) each contractor's name;
- (2) the amount and type of each contract; and
- (3) a listing of the supplies, services, or construction procured under each contract.

(b) *Submission to the Governmental Body.* A copy of the record required by Subsection (1) shall be submitted to the legislative or governing body of the Public Procurement Unit or Purchaser Sub-unit on an annual basis. Such record shall be available for public inspection.

## **Article 5-Specifications**

### **§ 34. Maximum Practicable Competition.**

All specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the Purchaser Public Procurement Unit's or Purchaser Sub-unit's needs, and shall not be unduly restrictive.

### **§ 35. Duties of the Chief Procurement Officer.**

The Chief Procurement Officer shall monitor the use of specifications for supplies, services, and construction required by the Public Procurement Unit or Purchaser Sub-unit.

### **§ 36. Relationship with User Sub-units.**

The Chief Procurement Officer shall obtain expert advice and assistance from personnel of User Sub-units in the development of specifications and may delegate in writing to a User Sub-unit the authority to prepare and utilize its own specifications.

### **§ 37. Specifications Prepared by Other Than Purchaser Sub-unit Personnel.**

The requirements of this article regarding the purposes and non-restrictiveness of specifications shall apply to all specifications prepared other than by the Purchaser Sub-unit personnel, including, but not limited to, those prepared by architects, engineers, and, when the design-build, design-build-operate-maintain, or design-build-finance-operate-maintain project delivery method are used, those persons preparing specifications for the project.

**§ 38. Qualified Products List. [Reserved]**

**§ 39. Brand Name or Equal Specification.**

(a) *Use.* Brand name or equal specifications may be used when the Chief Procurement Officer (or the Chief Procurement Officer's delegate) determines in writing that:

- (1) no other design or performance specification or qualified products list is available;
- (2) time does not permit the preparation of another form of purchase description, not including a brand name specification;
- (3) the nature of the product or the nature of the Public Procurement Unit's or Purchase Subrequirements makes use of a brand name or equal specification suitable for the procurement; or
- (4) use of a brand name or equal specification is in the Public Procurement Unit's or Purchaser Sub-unit's best interests.

(b) *Designation of Several Brand Names.* Brand name or equal specifications shall seek to designate three, or as many different brands as are practicable, as "or equal" references and shall further state that substantially equivalent products to those designated will be considered for award.

(c) *Required Characteristics.* Unless the Purchaser Sub-unit determines in writing that the essential characteristics of the brand names included in the specifications are commonly known in the industry or trade, brand name or equal specifications shall include a description of the particular design, functional, or performance characteristics which are required.

(d) *Nonrestrictive Use of Brand Name or Equal Specifications.* 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.

**§ 40. Brand Name Specification.**

(a) *Use.* Since use of a brand name specification is restrictive of product competition, it may be used only when the Chief Procurement Officer makes a written determination that only the identified brand name item or items will satisfy the Public Procurement Unit's needs.

- (b) *Competition.* The Purchaser Sub-unit shall seek to identify sources from which the designated brand name item or items can be obtained and shall solicit such sources to achieve whatever degree of price competition is practicable. If only one source can supply the requirement, the procurement shall be made under section 18 (Sole Source Procurement).

## Article 6-Procurement of Infrastructure Facilities and Services

### § 41. Project Delivery Methods Authorized

- (a) The following project delivery methods are authorized for procurements relating to the design, construction, routine operation, routine repair, and routine maintenance of infrastructure facilities and services within the jurisdiction of the Governmental Body.:
  - (1) Design-bid-build (including construction management at-risk);
  - (2) Operations and maintenance;
  - (3) Design-build;
  - (4) Design-build-operate-maintain;
  - (5) Design-build-finance-operate-maintain.
- (b) Participation in a report or study that is subsequently used in the preparation of design requirements for a project shall not disqualify a firm from participating as a member of a proposing team in a design-build, design-build-operate-maintain, or design-build-finance-operate-maintain procurement unless such participation would provide the firm with a substantial competitive advantage.

### § 42. Source Selection Methods Assigned to Project Delivery Methods.

#### (a) *Scope*

This section specifies the source selection methods applicable to procurements for the project delivery methods identified in section 41 (Project Delivery Methods Authorized), except as provided in sections 17 (Small Purchases), 18 (Sole Source Procurement), 19 (Emergency Procurements), and 20 (Special Procurements).

#### (b) *Design-bid-build (and Construction Management At-Risk)*

- (1) *Design: Architectural and Engineering Services.*

The qualifications based selection process set forth in section 44 (Design: Architectural and Engineering Services) shall be used to procure architectural and engineering services in design-bid-build procurements.

(2) *Construction.*

Competitive sealed bidding, as set forth in section 15 (Competitive Sealed Bidding), shall be used to procure construction in design-bid-build procurements, except the use of competitive sealed proposals, as set forth in section 16 (Competitive Sealed Proposals), is authorized to procure construction management at-risk services.

(c) *Operations and Maintenance.*

Contracts for operations and maintenance shall be procured as set forth in section 14 (Methods of Source Selection).

(d) *Design-build.*

Contracts for design-build shall be procured by competitive sealed proposals, as set forth in section 16 (Competitive Sealed Proposals), except that the Regulations may describe the circumstances under which particular design-build procurements will not require the submission of proposal development documents as required in section 16(3)(2).

(e) *Design-build-operate-maintain.*

Contracts for design-build-operate-maintain shall be procured by competitive sealed proposals, as set forth in section 16 (Competitive Sealed Proposals).

(f) *Design-build-finance-operate-maintain.*

Contracts for design-build-finance-operate-maintain shall be procured by competitive sealed proposals, as set forth in section 16 (Competitive Sealed Proposals).

**§ 43. Choice of Project Delivery Methods.**

Regulations shall be promulgated describing the project delivery methods listed in section 41 (Project Delivery Methods Authorized). These Regulations shall:

(a) set forth criteria to be used in determining which project delivery method is to be used for a particular project;

(b) grant to the Chief Procurement Officer, or the head of the Public Procurement Unit or Purchaser Sub-unit responsible for carrying out the project, the discretion to select an appropriate project delivery method for a particular project;

- (c) describe the bond, insurance, and other security provisions contained in sections 45 to 49 that apply to each project;
- (d) describe the appropriate contract clauses and fiscal responsibility requirements contained in sections 50 to 52 that apply to each project; and
- (e) require the Procurement Officer to execute and include in the contract file a written statement setting forth the facts which led to the selection of a particular project delivery method for each project.

#### § 44. Architectural and Engineering Services

(a) *Policy.*

The policy of the Public Procurement Unit or Purchaser Sub-unit shall be to publicly announce all requirements for Architectural and Engineering Services and to negotiate contracts for Architectural and Engineering Services on the basis of demonstrated competence and qualification for the type of services required, and at fair and reasonable prices.

(b) *Architectural and Engineering Selection Committee.*

In the procurement of Architectural and Engineering Services, the Chief Procurement Officer or the head of the Public Procurement Unit or the Purchaser Sub-unit shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. For Architectural and Engineering Services contracts at least equal to [\$ ], an Architect-Engineer Selection Committee for evaluations shall be comprised of at least (i) the Chief Procurement Officer or the head of the Public Procurement Unit or a Purchaser Sub-unit, (ii) the Procurement Officer, and (iii) the architect at the Public Procurement Unit or the Purchaser Sub-unit for the project; for Architectural and Engineering Services contracts less than [\$ ], the Architect-Engineer Selection Committee shall be established in accordance with Regulations. The Architect-Engineer Selection Committee shall evaluate current statements of qualifications and performance data on file with the Public Procurement Unit, together with those that may be submitted by other firms regarding the proposed contract. The Architect-Engineer Selection Committee shall conduct discussions with no less than three firms regarding the contract and the relative utility of alternative methods of approach for furnishing the required services, and then shall select therefrom, in order of preference, based upon criteria established and published by the Architect-Engineer Selection Committee, no less than three of the firms deemed to be the most highly qualified to provide the services required.

(c) *Negotiation.*

The Procurement Officer shall negotiate a contract with the highest qualified firm for Architectural and Engineering Services at compensation which the Procurement Officer determines in writing to be fair and reasonable to the Public Procurement Unit or Purchaser Sub-unit. In making this decision, the Procurement Officer shall take into account the estimated value, the scope, the complexity, and the professional nature of the services to be rendered. Should the Procurement Officer be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price the Procurement Officer determines to be fair and reasonable to the Public Procurement Unit, negotiations with that firm shall be formally terminated. The Procurement Officer shall then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the Procurement Officer shall formally terminate negotiations. The Procurement Officer shall then undertake negotiations with the third most qualified firm. Should the Procurement Officer be unable to negotiate a contract at a fair and reasonable price with any of the selected firms, the Procurement Officer shall select additional firms in order of their competence and qualifications, and the Procurement Officer shall continue negotiations in accordance with this section until an agreement is reached.

§ 45. **Bid Security.**

(a) *Requirement for Bid Security.* Bid security shall be required for all competitive sealed bidding for construction contracts in a design-bid-build procurement when the price is estimated by the Procurement Officer to exceed [\$100,000] [an amount established by regulation]. Bid security shall be a bond provided by a surety company authorized to do business in this State, or the equivalent in cash, or otherwise supplied in a form satisfactory to the Public Procurement Unit or the Purchaser Sub-unit. Nothing herein prevents the requirement of such bonds on such contracts under [\$100,000] [the amount set by regulation] when the circumstances warrant.

(b) *Amount of Security.* Bid security shall be in an amount equal to at least [5%] of the amount of the bid.

(c) *Rejection of Bids for Noncompliance with Bid Security Requirements.* When the Invitation for Bids requires security, noncompliance requires that the bid be rejected unless, pursuant to the Regulations, it is determined that the bid fails to comply in a non-substantial manner with the security requirements.

(d) *Withdrawal of Bids.* After bids are opened, they shall be irrevocable for the period specified in the Invitation for Bids (except as provided for bids in section 15(f)). If a bidder is permitted to withdraw its bid (or proposal) before award, or is excluded from the competition before award, no action shall be had against the bidder or the bid security.

## § 46. Contract Performance and Payment Bonds

(a) *When Required -- Amounts.* When a construction, design-build, design-build-operate-maintain, or design-build-finance-operate-maintain contract is awarded in excess of [\$100,000], the following bonds or security shall be delivered to the Public Procurement Unit or the Purchaser Sub-unit and shall become binding on the parties upon the execution of the contract:

(1) a performance bond satisfactory to the Public Procurement Unit or the Purchaser Sub-unit, executed by a surety company authorized to do business in this state or otherwise secured in a manner satisfactory to the Public Procurement Unit or the Purchaser Sub-unit, in an amount equal to 100% of the portion of the contract price that does not include the cost of operation, maintenance, and finance; and

(2) a payment bond satisfactory to the Public Procurement Unit or the Purchaser Sub-unit, executed by a surety company authorized to do business in the state or otherwise secured in a manner satisfactory to the Public Procurement Unit or the Purchaser Sub-unit, 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 shall be in an amount equal to 100% of the portion of the contract price that does not include the cost of operation, maintenance, and finance.

(b) *Reduction of Bond Amounts.* Regulations may authorize the Chief Procurement Officer or head of Public Procurement Unit or the Purchaser Sub-unit to reduce the amount of performance and payment bonds to no more than [50%] of the amounts established in subsection (a)(1) of this section.

(c) *Authority to Require Additional Bonds.* Nothing in this section shall be construed to limit the authority of the Public Procurement Unit or the Purchaser Sub-unit to require a performance bond or other security in addition to such bonds, or in circumstances other than specified in subsection (1) of this section.

(d) *Suits on Payment Bonds--Right to Institute.* Every person who has furnished labor or material to the contractor or its subcontractors for the work provided in the contract, in respect of which a payment bond is furnished under this section, and who has not been paid in full therefor before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by such person or material was furnished or supplied by such person for which such claim is made, shall have the right to sue on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action for the sum or sums justly due such person; provided, however, that any person having a direct contractual relationship with a subcontractor of the contractor, but no contractual relationship express or implied with the contractor furnishing said payment bond, shall have a right of action upon the payment bond upon giving

written notice to the contractor within 90 days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material upon which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be personally served or served by other form of receipted transmittal that confirms actual delivery to the contractor at any place the contractor maintains an office or conducts its business.

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

#### **§ 47. Bond Forms and Copies.**

(a) *Bond Forms.* The Public Procurement Unit shall promulgate by Regulation the form of the bonds required by sections 45, 46 and 49.

(b) *Certified Copies of Bonds.* Any person may request and obtain from the Public Procurement Unit or the Purchaser Sub-unit, 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 shall be prima facie evidence of the contents, execution, and delivery of the original.

#### **§ 48. Errors and Omissions Insurance**

Regulations shall be promulgated that specify when the Chief Procurement Officer or head of the Public Procurement Unit or a Purchaser Sub-unit 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 41(a)(1) (3), (4) and (5).

#### **§ 49. Other Forms of Security**

Regulations shall be promulgated authorizing the Chief Procurement Officer or the head of a Public Procurement Unit or a Purchaser Sub-unit to require a Request for Proposals to include 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 design-build-operate-maintain or design-build-finance-operate-maintain services:

(a) Operations period surety bonds that secure the performance of the contractor's operations and maintenance obligations under the project delivery methods set forth in section 41(a)(2), (4) and (5);

(b) Letters of credit in an amount appropriate to cover the cost to the Public Procurement Unit of preventing infrastructure service interruptions for a period up to twelve months under the project delivery methods set forth in section 41(a)(2),(4) and (5); and

(c) Appropriate written guarantees from the contractor (or depending upon the circumstances, from parent corporations) to secure the recovery of re-procurement costs to the Public Procurement Unit or Purchaser Sub-unit in the event of a default in performance by the contractor.

## § 50. Contract Clauses and Their Administration.

### (a) *Contract Clauses.*

Regulations shall be promulgated requiring the inclusion in Public Procurement Unit or Purchaser Sub-unit contracts issued under this article of clauses providing for adjustments in prices, time of performance, or other contract provisions, as appropriate, and covering the following subjects:

(1) the unilateral right of the Public Procurement Unit or Purchaser Sub-unit to order in writing:

(A) changes in the work within the scope of the contract; and

(B) changes in the time of performance of the contract that do not alter the scope of the contract work;

(2) variations occurring between estimated quantities of work in a contract and actual quantities;

(3) suspension of work ordered by the Public Procurement Unit or Purchaser Sub-unit; and

(4) site conditions differing from those indicated in the contract, or ordinarily encountered, except that differing site conditions clauses need not be included in a contract:

(A) when the contract is negotiated;

(B) when the contractor provides the site or the design; or

(C) when the parties have otherwise agreed with respect to the risk of differing site conditions.

### (b) *Price Adjustments.*

(1) Adjustments in price pursuant to clauses promulgated under subsection (a) of this section shall be computed in one or more of the following ways:

- (A) by agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
  - (B) by unit prices specified in the contract or subsequently agreed upon;
  - (C) by the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;
  - (D) in such other manner as the contracting parties may mutually agree; or
  - (E) in the absence of agreement by the parties, by a unilateral determination by the Procurement Officer of the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as computed by the Procurement Officer in accordance with applicable sections of the Regulations.
- (2) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of section 24 (Substantiation of Offered Prices).

(c) *Additional Contract Clauses.*

Regulations shall be promulgated requiring the inclusion in Public Procurement Unit or Purchaser Sub-unit contracts of clauses providing for appropriate remedies and covering the following subjects:

- (1) liquidated damages as appropriate;
- (2) specified excuses for delay or nonperformance;
- (3) termination of the contract for default; and
- (4) termination of the contract in whole or in part for the convenience of the Public Procurement Unit or Purchaser Sub-unit.

(d) *Modification of Required Clauses.*

The Chief Procurement Officer or the head of Public Procurement Unit or Purchaser Sub-unit may vary the clauses promulgated under subsection (a) and Subsection (c) of this section for inclusion in any particular Public Procurement Unit or Purchaser Sub-unit contract, provided that any variations are supported by a written determination that states the circumstances justifying such variations, and provided that notice of any such material variation be stated in the Invitation for Bids or Request for Proposals.

## § 51. Fiscal Responsibility.

Every contract modification, change order, or contract price adjustment under a contract with the Public Procurement Unit or Purchaser Sub-unit in excess of [\$ \_\_\_\_] shall be subject to prior written certification by the fiscal officer of the entity responsible for funding the project or the contract, or other official responsible for monitoring and reporting upon the status of the costs of the total project budget or contract budget, as to the effect of the contract modification, change order, or adjustment in contract price on the total project budget or the total contract budget. In the event that the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget and/or the total contract budget, the Procurement Officer shall not execute or make such contract modification, change order, or adjustment in contract price unless sufficient funds are available therefor, or the scope of the project or contract is adjusted so as to permit the degree of completion that is feasible within the total project budget and/or total contract budget as it existed prior to the contract modification, change order, or adjustment in contract price under consideration; provided, however, that with respect to the validity, as to the contractor, of any executed contract modification, change order, or adjustment in contract price which the contractor has reasonably relied upon, it shall be presumed that there has been compliance with the provisions of this section.

## Article 7-Modification and Termination of Contracts for Supplies and Services

### § 52. Contract Clauses and Their Administration.

(a) *Contract Clauses.* Regulations may be promulgated permitting or requiring the inclusion of clauses providing for adjustments in prices, time of performance, or other contract provisions as appropriate covering the following subjects:

(1) the unilateral right of the Public Procurement Unit or Purchaser Sub-unit to order in writing:

(A) changes in the work within the scope of the contract;

and

(B) temporary stopping of the work or delaying performance; and

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

(b) *Price Adjustments.*

(1) Adjustments in price pursuant to clauses promulgated under subsection (a) of this section shall be computed in one or more of the following ways:

(A) by agreement on a fixed-price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;

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

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

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

(E) in the absence of agreement by the parties, by a unilateral determination by the Public Procurement Unit or Purchaser Sub-unit of the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as computed by the Public Procurement Unit or Purchaser Sub-unit in accordance with applicable sections of the regulations promulgated under article 8 (Cost Principles) and subject to the provisions of article 9 (Appeals and Remedies).

(2) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of section 50(b).

(c) *Additional Contract Clauses.* Regulations may be promulgated, without limiting the nature of the following, permitting or requiring the inclusion in Public Procurement Unit or Purchaser Sub-unit contracts of clauses providing for appropriate remedies and covering the following subjects:

(1) liquidated damages as appropriate;

(2) specified excuses for delay or nonperformance;

(3) termination of the contract for default; and

(4) termination of the contract in whole or in part for the convenience of the Public Procurement Unit or Purchaser Sub-unit.

(d) *Modification of Clauses.* The Chief Procurement Officer or the head of a Public Procurement Unit or Purchaser Sub-unit may vary the clauses promulgated under subsection (a) and subsection (c) of this section for inclusion in any particular Public Procurement Unit or Purchaser Sub-unit contract; provided that any variations are supported by a written determination that states the circumstances justifying such variation

and provided that notice of any such material variation be stated in the Invitation for Bids or Request for Proposals.

## Article 8-Cost Principles

### § 53. Cost Principles Regulations Required.

Regulations shall be promulgated setting forth cost principles which shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions which provide for the reimbursement of costs, provided that if a written determination is by the head of the Public Procurement Unit or the Purchaser Sub-unit, such cost principles may be modified by contract.

- (a) Such cost principles regulations may be authorized for use by Public Procurement Unit or the Purchaser Sub-unit officials as guidelines: when negotiating estimated costs or fixed prices; when the absence of open market competition precludes the use of competitive sealed bidding; when negotiating adjustments for Public Procurement Unit- or Purchaser Sub-unit-directed changes or modifications in contract performance; when negotiating settlements of contracts which have been terminated; or as appropriate in other situations where the determination of estimated or incurred costs is involved.
- (b) Such cost principles regulations should not be construed as establishing requirements to be used when negotiating. In such negotiations, the basic consideration should be whether the cost information used to determine prices, adjustments, and settlements is based on generally accepted accounting principles.
- (c) In cost-reimbursement contracts, the cost principles may be modified by contract as a matter of legislative right.
- (d) The authority to promulgate Regulations conferred in section 7 includes the power to promulgate regulations providing for price analysis and using cost principles for guidance in negotiations, adjustments, and settlements.

## Article 9-Appeals and Remedies

### § 54. Authority to Resolve Protested Solicitations and Awards.

- (a) *Right to Protest.* Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract pursuant to this Code may protest to the Chief Procurement Officer or the head of the Public Procurement Unit or the Purchaser Sub-unit. The protest shall be submitted in writing within

[14 days] after such aggrieved person knows or should have known of the facts giving rise thereto.

- (b) *Authority to Resolve Protests.* The Chief Procurement Officer, the head of the Public Procurement Unit or the Purchaser Sub-unit, or a designee of either officer, shall have the authority, prior to the commencement of an action in court concerning the controversy, to settle and resolve a protest of an aggrieved bidder, offeror, or contractor, actual or prospective, concerning the solicitation or award of a contract. This authority shall be exercised in accordance with the Regulations.
- (c) *Decision.* If the protest is not resolved by mutual agreement, the Chief Procurement Officer, the head of the Public Procurement Unit or the Purchaser Sub-unit, or a designee of either officer, shall promptly issue a decision in writing. The decision shall:
  - (1) state the reasons for the action taken; and
  - (2) inform the protestant of its right to judicial review as provided in this article.
- (d) *Notice of Decision.* A copy of the decision under subsection (c) of this section shall be mailed or otherwise furnished immediately to the protestant and any other party intervening.
- (e) *Finality of Decision.* A decision under subsection (c) of this section shall be final and conclusive, unless fraudulent, or any person adversely affected by the decision commences an action in court in accordance with section 60 (Access to Courts).
- (f) *Stay of Procurements During Protests.* In the event of a timely protest under subsection (a) of this section, or under section 60 (Access to Courts), the Public Procurement Unit or the Purchaser Sub-unit shall not proceed further with the solicitation or with the award of the contract until the Chief Procurement Officer, after consultation with the head of the Public Procurement Unit or the Purchaser Sub-unit, makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the Governmental Body.
- (g) *Entitlement to Costs.* In addition to any other relief, when a protest is sustained and the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror shall be entitled to the reasonable costs incurred in connection with the solicitation, including bid preparation costs other than attorney's fees.

§ 55. Authority to Debar or Suspend.

- (a) *Authority.* After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Chief Procurement Officer, after consultation with the Public Procurement Unit or the Purchaser Sub-unit, [and the investigatory or law enforcement official(s) with jurisdiction over the Public Procurement Unit], shall have authority to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than [three years]. The same officer, after consultation with the Public Procurement Unit or the Purchaser Sub-unit [and the investigatory or law enforcement official(s) with jurisdiction over the Public Procurement Unit], shall have authority to suspend a person from consideration for award of contracts if there is probable cause for debarment. The suspension shall not be for a period exceeding [three months]. The authority to debar or suspend shall be exercised in accordance with the Regulations.
- (b) *Causes for Debarment or Suspension.* The causes for debarment or suspension include the following:
- (1) conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;
  - (2) conviction under State or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a Public Procurement Unit or Purchaser Sub-unit contractor;
  - (3) conviction under state or federal antitrust statutes arising out of the submission of bids or proposals,
  - (4) violation of contract provisions, as set forth below, of a character which is regarded by the Chief Procurement Officer to be so serious as to justify debarment action:
    - (A) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or
    - (B) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;
  - (5) any other cause the Chief Procurement Officer determines to be so serious and compelling as to affect responsibility as a Public Procurement Unit

or Purchaser Sub-unit contractor, including debarment by another governmental entity for any cause listed in the Regulations; and

(6) for violation of the ethical standards set forth in article 12 (Ethics in Public Contracting).

(c) *Decision.* The Chief Procurement Officer or the head of the Public Procurement Unit or Purchaser Sub-unit shall issue a written decision to debar or suspend. The decision shall:

(1) state the reasons for the action taken; and

(2) inform the debarred or suspended person involved of its rights to judicial review as provided in this article.

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

(e) *Finality of Decision.* A decision under subsection (c) of this section shall be final and conclusive, unless fraudulent, or the debarred or suspended person commences an action in court in accordance with section 60 (Access to Courts).

#### § 56. Authority to Resolve Contract and Breach of Contract Controversies.

(a) *Applicability.* This section applies to controversies between the Public Procurement Unit or Purchaser Sub-unit and a contractor and which arise under, or by virtue of, a contract between them. This includes without limitation controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.

(b) *Authority.* The Chief Procurement Officer, the head of the Public Procurement Unit or the Purchaser Sub-unit, or a designee of either officer, is authorized, prior to commencement of an action in a court concerning the controversy, to settle and resolve a controversy described in subsection (a) of this section. This authority shall be exercised in accordance with the Regulations.

(c) *Decision.* If such a controversy is not resolved by mutual agreement, the Chief Procurement Officer, the head of the Public Procurement Unit or the Purchaser Sub-unit, or the designee of either officer, shall promptly issue a decision in writing. The decision shall:

(1) state the reasons for the action taken; and

(2) inform the contractor of its right to judicial review as provided in this article.

(d) *Notice of Decision.* A copy of the decision under subsection (c) of this section shall be mailed or otherwise furnished immediately to the contractor.

(e) *Finality of Decision.* The decision under subsection (c) of this section shall be final and conclusive, unless fraudulent, or the contractor commences an action in court in accordance with section 60 (Access to Courts).

(f) *Failure to Render Timely Decision.* If the Chief Procurement Officer, the head of the Public Procurement Unit or the Purchaser Sub-unit, or the designee of either officer, does not issue the written decision required under subsection (c) of this section within [120 days] after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

#### **§ 57. Remedies prior to an Award for Solicitations or Awards in Violation of Law.**

If, prior to award, it is determined, administratively or upon administrative or judicial review, that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:

- (a) cancelled; or
- (b) revised to comply with the law.

#### **§ 58. Remedies after an Award for Solicitations or Awards in Violation of Law.**

If, after an award, it is determined, administratively or upon administrative or judicial review, that a solicitation or award of a contract is in violation of law, then:

- (a) if the person awarded the contract has not acted fraudulently or in bad faith:
  - (1) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the Public Procurement Unit or the Purchaser Sub-unit; or
  - (2) the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.

- (b) if the person awarded the contract has acted fraudulently or in bad faith:
- (1) the contract may be declared null and void; or
  - (2) the contract may be ratified and affirmed if such action is in the best interests of the Public Procurement Unit or the Purchaser Sub-unit, without prejudice to the Public Procurement Unit's or the Purchaser Sub-unit's rights to such damages as may be appropriate.

#### § 59. Interest.

Interest on amounts ultimately determined to be due to a contractor or the Public Procurement Unit or the Purchaser Sub-unit shall be payable at the statutory rate applicable to judgments from the date the claim arose through the date of decision or judgment, whichever is later.

#### § 60. Access to Courts.

- (a) *Solicitation and Award of Contracts.* The [designated court or courts of the state] shall have jurisdiction over an action between the Public Procurement Unit or the Purchaser Sub-unit and a bidder, offeror, or contractor, prospective or actual, to determine whether a solicitation or award of a contract is in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation. The [designated court or courts of the state] shall have such jurisdiction, whether the actions are at law or in equity, and whether the actions are for monetary damages or for declaratory, injunctive, or other equitable relief.
- (b) *Debarment or Suspension.* The [designated court or courts of the state] shall have jurisdiction over an action between the Public Procurement Unit or the Purchaser Sub-unit and a person who is subject to a suspension or debarment proceeding, to determine whether the debarment or suspension is in accordance with the Constitution, statutes, and regulations. The [designated court or courts of the state] shall have such jurisdiction, whether the actions are at law or in equity, and whether the actions are for declaratory, injunctive, or other equitable relief.
- (c) *Actions under Contracts or for Breach of Contract.* The [designated court or courts of this state] shall have jurisdiction over an action between the Public Procurement Unit or the Purchaser Sub-unit and a contractor, for any cause of action which arises under, or by virtue of, the contract, whether the action is at law or in equity, whether the action is on the contract or for a breach of the contract, and whether

the action is for monetary damages or declaratory, injunctive, or other equitable relief.

- (d) *Limited Finality for Administrative Determinations.* In any judicial action under this Section, factual or legal determinations by employees, agents, or other persons appointed by the Public Procurement Unit or the Purchaser Sub-unit shall have no finality and shall not be conclusive, notwithstanding any contract provision, regulation, or rule of law to the contrary, except to the extent provided in section 30 (Finality of Determinations).

#### § 61. Time Limitations on Actions.

- (a) *Protested Solicitations and Awards.* Any action under section 60 shall be initiated as follows:
  - (1) within [30] days after the aggrieved person knows or should have known of the facts giving rise to the action; or
  - (2) within [14] days after receipt of a final administrative decision pursuant to section 54(c) (Authority to Resolve Protested Solicitations and Awards, Decision).
- (b) *Debarments and Suspensions for Cause.* Any action under section 60 shall be commenced within [six] months after receipt of the decision of the Chief Procurement Officer under section 55(c) (Authority to Debar or Suspend, Decision), or the decision of the entity responsible for Regulations pursuant to sections 7 and 12 under Section 82 (Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards, Supplemental Remedies), whichever is applicable.
- (c) *Actions under Contracts or for Breach of Contract.* The statutory limitations on an action between private persons on a contract or for breach of contract shall apply to any action commenced pursuant to section 60.

### Article 10-Cooperative Purchasing

#### § 62. Cooperative Purchasing Authorized for Infrastructure Facilities.

- (a) Any Public Procurement Unit or Purchaser Sub-unit may participate in, sponsor, conduct, or administer a Cooperative Purchasing agreement for the procurement of Infrastructure Facilities with one or more Public Procurement Units in accordance with an agreement entered into between the participants. Such Cooperative Purchasing may include, but is not limited to, joint or multi-party contracts between Public Procurement Units and/or Purchaser Sub-units and open-ended Public Procurement Unit contracts that are made available to other Public Procurement Units and/or Purchaser Sub-units.

(b) All Cooperative Purchasing conducted under this Article shall be through contracts awarded through full and open competition, including use of source selection methods substantially equivalent to those specified in article 4 (Source Selection and Contract Formation).

**§ 63. Supply of Personnel, Information, and Technical Services.**

(a) *Supply of Personnel.* Any Public Procurement Unit or Purchaser Sub-unit is authorized, in its discretion, upon written request from another Public Procurement Unit to provide personnel to the requesting Public Procurement Unit. The Public Procurement Unit making the request shall pay the Public Procurement Unit providing the personnel the direct and indirect cost of furnishing the personnel, in accordance with an agreement between the parties.

(b) *Supply of Services.* The informational, technical, and other services of any Public Procurement Unit may be made available to any other Public Procurement Unit or Purchaser Sub-unit. The requesting Public Procurement Unit or Purchaser Sub-unit shall pay for the expenses of the services so provided, in accordance with an agreement between the parties.

**§ 64. Use of Payments Received by a Supplying Public Procurement Unit or Purchaser Sub-unit.**

All payments from any Public Procurement Unit received by a Public Procurement Unit supplying personnel or services shall be available to the supplying Public Procurement Unit as authorized by applicable law.

**§ 65. Public Procurement Units or Purchaser Sub-Units in Compliance with Chapter Requirements.**

Where the Public Procurement Unit or Purchaser Sub-Unit administering a Cooperative Purchase complies with the requirements of this chapter, any Public Procurement Unit participating in such a purchase shall be deemed to have complied with this chapter. Public Procurement Units may not enter into a Cooperative Purchasing agreement for the purpose of circumventing this chapter.

**§ 66. Contract Controversies.**

(a) *Public Procurement Unit Subject to Article 9 (Appeals and Remedies).* Under a Cooperative Purchasing agreement, controversies arising between an administering Public Procurement Unit and its bidders, offerors, or contractors shall be resolved between the ordering Public Procurement Unit and the supplying bidders, offerors, or contractors in accordance with article 9 (Appeals and Remedies)].

- (b) *Public Procurement Unit Not Subject to Article 9 (Legal and Contractual Remedies).* Any Public Procurement Unit which is not subject to article 9 (Appeals and Remedies), is authorized to enter into an agreement with another Public Procurement Unit to establish procedures or use such unit's or activity's existing procedures to resolve controversies with contractors, whether or not such controversy arose under a cooperative purchasing agreement.

## **Article 11-Assistance to Small and Disadvantaged Businesses**

### **§ 67. Statement of Policy and Its Implementation.**

- (a) *Statement of Policy.* It shall be the policy of this Public Procurement Unit to assist small and disadvantaged businesses in learning how to do business with the Public Procurement Unit.
- (b) *Implementation.* The Chief Procurement Officer shall implement the policy set forth in Subsection (a) of this section in accordance with Regulations.

### **§ 68. Mandatory Duties of the Chief Procurement Officer.**

- (a) *Assistance within Purchaser Sub-units.* Where feasible, the Chief Procurement Officer shall provide appropriate staff who shall be responsible to the Chief Procurement Officer and who shall serve within designated Purchaser Sub-units to assist small and disadvantaged businesses in learning how to do business with the Public Procurement Unit.
- (b) *Special Publications.* The Chief Procurement Officer shall give special publicity to procurement procedures and issue special publications designed to assist small and disadvantaged businesses in learning how to do business with the Public Procurement Unit or Purchaser Sub-unit.
- (c) *Source Lists.* The Chief Procurement Officer shall compile, maintain, and make available source lists of small and disadvantaged businesses for the purpose of encouraging procurement from small and disadvantaged businesses.
- (d) *Solicitation Mailing Lists.* To the extent deemed by such officer to be appropriate and as may be required by regulation, the Chief Procurement Officer shall include small and disadvantaged businesses on solicitation mailing lists.
- (e) *Solicitation of Small and Disadvantaged Businesses.* The Chief Procurement Officer shall assure that small and disadvantaged

businesses are solicited on each procurement for which such businesses may be suited.

- (f) *Training Programs.* The Chief Procurement Officer shall develop special training programs to be conducted by the Public Procurement Unit to assist small and disadvantaged businesses in learning how to do business with the Public Procurement Unit or Purchaser Sub-unit.

#### **§ 69. Discretionary Duties of the Chief Procurement Officer.**

- (a) *Bonding.* Notwithstanding other provisions of this chapter, the Chief Procurement Officer may reduce the level or change the types of bonding normally required or accept alternative forms of security to the extent reasonably necessary to encourage procurement from small and disadvantaged businesses.
- (b) *Progress Payments.* The Chief Procurement Officer may make such special provisions for progress payments as such officer may deem reasonably necessary to encourage procurement from small and disadvantaged businesses.

#### **§ 70. Business Assistance Offices.**

The Chief Procurement Officer may establish, as such officer may deem appropriate, business assistance offices throughout the jurisdiction covered by the Governmental Body to assist in carrying out the provisions of this article.

#### **§ 71. Report to the Legislature Body related to the Public Procurement Unit or Purchaser Sub-unit**

The Chief Procurement Officer shall annually, before [insert appropriate date], report in writing to the legislature body related to the Public Procurement Unit or Purchaser Sub-unit concerning the awarding of contracts to small and disadvantaged businesses during the preceding fiscal year.

#### **§ 72. Compliance with Federal Requirements.**

Where a procurement involves the expenditure of federal assistance or contract funds, the Chief Procurement Officer shall comply with such federal law and regulations that are mandatorily applicable and are not presently reflected in this chapter.

### **Article 12-Ethics in Public Contracting**

#### **§ 73. Statement of Policy.**

Public employment is a public trust. It is the policy of the state to promote and balance the objective of protecting government integrity and the objective

of facilitating the recruitment and retention of personnel needed by all Public Procurement Units in the state. Such policy is implemented by prescribing essential standards of ethical conduct without creating unnecessary obstacles to entering public service.

Public employees must discharge their duties impartially so as to assure fair competitive access to governmental procurement by responsible contractors. Moreover, they should conduct themselves in such a manner as to foster public confidence in the integrity of Public Procurement Units.

To achieve the purpose of this article, it is essential that those doing business with Public Procurement Units also observe the ethical standards prescribed herein.

#### **§ 74. General Standards of Ethical Conduct.**

##### *(a) General Ethical Standards for Employees.*

Any attempt to realize personal gain through public employment by conduct inconsistent with the proper discharge of the employee's duties is a breach of a public trust.

In order to fulfill this general prescribed standard, employees must also meet the specific standards set forth in: section 76 (Employee Conflict of Interest); section 77 (Employee Disclosure Requirements); section 78 (Gratuities and Kickbacks); section 79 (Prohibition Against Contingent Fees); section 80 (Restrictions on Employment of Present and Former Employees); and section 81 (Use of Confidential Information).

##### *(b) General Ethical Standards for Non-Employees.*

Any effort to influence any public employee to breach the standards of ethical conduct set forth in this section and in section 76 through section 81 of this article is also a breach of ethical standards.

#### **§ 75. Criminal Sanctions.**

To the extent that violations of the ethical standards of conduct set forth in this article constitute violations of the [State Criminal Code], they shall be punishable as provided therein. Such sanctions shall be in addition to the civil remedies set forth in this article.

#### **§ 76. Employee Conflict of Interest.**

- (a) *Conflict of Interest.* It shall be a breach of ethical standards for any employee to participate directly or indirectly in a procurement when the employee knows that:

(1) the employee or any member of the employee's Immediate Family has a Financial Interest pertaining to the procurement;

(2) a business or organization in which the employee, or any member of the employee's Immediate Family, has a Financial Interest pertaining to the procurement; or

(3) any other person, business, or organization with whom the employee or any member of the employee's Immediate Family is negotiating or has an arrangement concerning prospective employment is involved in the procurement.

(b) *Financial Interest in a Blind Trust.* Where an employee or any member of the employee's Immediate Family holds a Financial Interest in a Blind Trust, the employee shall not be deemed to have a conflict of interest with regard to matters pertaining to that Financial Interest, provided that disclosure of the existence of the Blind Trust has been made to the entity responsible for Regulations pursuant to sections 7 and 12.

(c) *Discovery of Actual or Potential Conflict of Interest, Disqualification, and Waiver.* Upon discovery of an actual or potential conflict of interest, an employee shall promptly file a written statement of disqualification and shall withdraw from further participation in the transaction involved. The employee may, at the same time, apply to the entity responsible for Regulations pursuant to sections 7 and 12 in accordance with Section 85 (Entity Responsible for Regulations pursuant to Sections 7 and 12, Waiver) for an advisory opinion as to what further participation, if any, the employee may have in the transaction.

(d) *Notice.* Notice of this prohibition shall be provided in accordance with regulations promulgated by the entity responsible for Regulations pursuant to sections 7 and 12.

#### § 77. Employee Disclosure Requirements.

(a) *Disclosure of Benefit Received from Contract.* Any employee who has, or obtains any benefit from, any Public Procurement Unit contract with a business in which the employee has a Financial Interest shall report such benefit to the entity responsible for Regulations pursuant to sections 7 and 12; provided, however, this section shall not apply to a contract with a business where the employee's interest in the business has been placed in a disclosed Blind Trust.

(b) *Failure to Disclose Benefit Received.* Any employee who knows or should have known of such benefit, and fails to report such benefit to the entity responsible for Regulations pursuant to sections 7 and 12, is in breach of the ethical standards of this section.

- (c) *Notice.* Notice of this requirement shall be provided in accordance with regulations promulgated by the entity responsible for Regulations pursuant to sections 7 and 12.

**§ 78. Gratuities and Kickbacks.**

- (a) *Gratuities.* It shall be a breach of ethical standards for any person to offer, give, or agree to give any employee or former employee, or for any employee or former employee to solicit, demand, accept, or agree to accept from another person, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, preparation of any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter, pertaining to any program requirement or a contract or subcontract, or to any solicitation or proposal therefor.
- (b) *Kickbacks.* It shall be a breach of ethical standards for any payment, gratuity, or offer of employment to be made by or on behalf of a subcontractor under a contract to the prime contractor or higher tier subcontractor or any person associated therewith, as an inducement for the award of a subcontract or order.
- (c) *Contract Clause.* The prohibition against gratuities and kickbacks prescribed in this section shall be conspicuously set forth in every contract and solicitation therefor.

**§ 79. Prohibition against Contingent Fees.**

- (a) *Contingent Fees.* It shall be a breach of ethical standards for a person to be retained, or to retain a person, to solicit or secure a Public Procurement Unit or Purchaser Sub-unit contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies for the purpose of securing business.
- (b) *Representation of Contractor.* Every person, before being awarded a Public Procurement Unit or Purchaser Sub-unit contract, shall represent, in writing, that such person has not retained anyone in violation of Subsection (a) of this section. Failure to do so constitutes a breach of ethical standards.

- (c) *Contract Clause.* The representation prescribed in Subsection (b) of this section shall be conspicuously set forth in every contract and solicitation therefor.

**§ 80. Restrictions on Employment of Present and Former Employees.**

- (a) *Contemporaneous Employment Prohibited.* Except as may be permitted by regulations or rulings of the entity responsible for Regulations pursuant to sections 7 and 12, it shall be a breach of ethical standards for any employee who is participating directly or indirectly in the procurement process to become or be, while such an employee, the employee of any person contracting with the governmental body by whom the employee is employed. Notice of this provision shall be provided in accordance with regulations promulgated by the entity responsible for Regulations pursuant to sections 7 and 12.
- (b) *Restrictions on Former Employees in Matters Connected with Their Former Duties.*

(1) *Permanent Disqualification of Former Employee Personally Involved in a Particular Matter.* It shall be a breach of ethical standards for any former employee knowingly to act as a principal, or as an agent for anyone other than the Public Procurement Unit, in connection with any:

- (A) judicial or other proceeding, application, request other determination;
- (B) contract;
- (C) claim; or
- (D) charge or controversy,

in which the employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise while an employee, where the Public Procurement Unit is a party or has a direct and substantial interest.

(2) *One Year Representation Restriction Regarding Matters for Which a Former Employee Was Officially Responsible.* It shall be a breach of ethical standards for any former employee, within one year after cessation of the former employee's official responsibility, knowingly to act as a principal, or as an agent for anyone other than the Public Procurement Unit or Purchase Sub-unit, in connection with any:

- (A) judicial or other proceeding, application, request for a ruling, or other determination;
- (B) contract;

- (C) claim; or
- (D) charge or controversy,

in matters which were within the former employee's official responsibility, where the Public Procurement Unit or Purchaser Sub-unit is a party or has a direct or substantial interest.

(c) *Disqualification of Business When an Employee Has a Financial Interest.*

It shall be a breach of ethical standards for a business in which an employee has a financial interest knowingly to act as a principal, or as an agent for anyone other than the Public Procurement Unit or Purchaser Sub-unit, in connection with any:

- (1) judicial or other proceeding, application, request for a ruling, or other determination;
- (2) contract;
- (3) claim; or
- (4) charge or controversy,

in which the employee either participates personally and substantially through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of the employee's official responsibility, where the Public Procurement Unit or Purchaser Sub-unit is a party or has a direct and substantial interest.

(d) *Selling to the Public Procurement Unit after Termination of Employment is Prohibited.*

It shall be a breach of ethical standards for any former employee, unless the former employee's last annual salary did not exceed [\$\_\_\_\_\_] to engage in selling or attempting to sell supplies, services, or construction to the Public Procurement Unit for one year following the date employment ceased.

The term "sell" as used herein means signing a bid, proposal, or contract; negotiating a contract; contacting any employee for the purpose of obtaining, negotiating, or discussing changes in specifications, price, cost allowances, or other terms of a contract; settling disputes concerning performance of a contract; or any other liaison activity with a view toward the ultimate consummation of a sale although the actual contract therefor is subsequently negotiated by another person; provided, however, that this section is not intended to preclude a former employee from accepting employment with

private industry solely because the former employee's employer is a contractor with the Public Procurement Unit, nor shall a former employee be precluded from serving as a consultant to the Public Procurement Unit.

**§ 81. Use of Confidential Information.**

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

**§ 82. Civil and Administrative Remedies against Employees Who Breach Ethical Standards.**

- (a) *Existing Remedies Not Impaired.* Civil and administrative remedies against employees which are in existence on the effective date of this chapter shall not be impaired.
- (b) *Supplemental Remedies.* In addition to existing remedies for breach of the ethical standards of this article or Regulations promulgated hereunder, the entity responsible for Regulations pursuant to sections 7 and 12 may impose any one or more of the following:
  - (1) oral or written warnings or reprimands;
  - (2) suspension with or without pay for specified periods of time; and
  - (3) termination of employment.
- (c) *Right to Recovery from Employee Value Received in Breach of Ethical Standards.* The value of anything received by an employee in breach of the ethical standards of this article or Regulations promulgated hereunder shall be recoverable by the Public Procurement Unit or Purchaser Sub-unit provided in Section 84 (Recovery of Value Transferred or Received in Breach of Ethical Standards).
- (d) *Due Process.* All procedures under this section shall be in accordance with due process requirements and existing law. In addition, notice and an opportunity for a hearing shall be provided prior to imposition of any suspension or termination of employment.

**§ 83. Civil and Administrative Remedies against Non-Employees Who Breach Ethical Standards.**

- (a) *Existing Remedies Not Impaired.* Civil and administrative remedies against non-employees which are in existence on the effective date of this chapter shall not be impaired.

(b) *Supplemental Remedies.* In addition to existing remedies for breach of the ethical standards of this article or Regulations promulgated hereunder, the entity responsible for Regulations pursuant to sections 7 and 12 may impose any one or more of the following:

- (1) written warnings or reprimands;
- (2) termination of transactions; and
- (3) debarment or suspension from being a contractor or subcontractor under Public Procurement Unit contracts.

(c) *Right to Recovery from Non-Employee Value Transferred in Breach of Ethical Standards.* The value of anything transferred in breach of the ethical standards of this article or Regulations promulgated hereunder by a non-employee shall be recoverable by the Public Procurement Unit or Purchaser Sub-unit as provided in 84 (Recovery of Value Transferred or Received in Breach of Ethical Standards).

(d) *Right of the Public Procurement Unit to Debar or Suspend.* Debarment or suspension may be imposed by the Public Procurement Unit in accordance with the procedures set forth in section 55 (Authority to Debar or Suspend) for breach of the ethical standards of this article 12.

(e) *Due Process.* All procedures under this section shall be in accordance with due process requirements, including, but not limited to, a right to notice and an opportunity for a hearing prior to imposition of any termination, debarment, or suspension from being a contractor or subcontractor under a Public Procurement Unit or Purchaser Sub-unit contract.

#### **§ 84. Recovery of Value Transferred or Received in Breach of Ethical Standards.**

(a) *General Provisions.* The value of anything transferred or received in breach of the ethical standards of this article or Regulations promulgated hereunder by an employee or a non-employee may be recovered from both the employee and non-employee.

(b) *Recovery of Kickbacks by the Public Procurement Unit.* Upon a showing that a subcontractor made a kickback to a prime contractor or a higher tier subcontractor in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the amount thereof was included in the price of the subcontract or order and ultimately borne by the Public Procurement Unit or Purchaser Sub-unit and will be recoverable hereunder from the recipient. In addition, said value may also be recovered from the subcontractor making such

kickbacks. Recovery from one offending party shall not preclude recovery from other offending parties.

**§ 85. Entity responsible for Regulations pursuant to Sections 7 and 12.**

- (a) *Regulations.* The entity responsible for Regulations pursuant to sections 7 and 12 shall promulgate regulations to implement this article 12 and shall do so in accordance with the applicable provisions of the administrative procedures law applicable to the related Governmental Body.
- (b) *Advisory Opinions.* On written request of employees or contractors, the entity responsible for Regulations pursuant to sections 7 and 12 may render written advisory opinions regarding the appropriateness of the course of conduct to be followed in proposed transactions. Such requests and advisory opinions must be duly published in the manner in which regulations of the Public Procurement Unit or Purchaser Sub-unit are published. Compliance with requirements of a duly promulgated advisory opinion of the entity responsible for Regulations pursuant to sections 7 and 12 shall be deemed to constitute compliance with the ethical standards of this article 12.
- (c) *Waiver.* On written request of an employee, the entity responsible for Regulations pursuant to sections 7 and 12 may grant an employee a written waiver from the application of section 76 (Employee Conflict of Interest) and grant permission to proceed with the transaction to such extent and upon such terms and conditions as may be specified. Such waiver and permission may be granted when the interests of the Public Procurement Unit or Purchaser Sub-unit so require or when the ethical conflict is insubstantial or remote.

**§ 86. Appeal of Decisions of the Entity Responsible for Regulations pursuant to Sections 7 and 12.**

- (a) *General.* Except as provided under subsection (b) of this section, a decision of the entity responsible for Regulations pursuant to sections 7 and 12 under section 82 (Civil and Administrative Remedies Against Employees Who Breach Ethical Standards) or section 83 (Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards) shall be reviewable in accordance with the administrative procedure law applicable to the related Governmental Body.
- (b) *Debarment or Suspension.* A decision of the entity responsible for Regulations pursuant to sections 7 and 12 regarding debarment or suspension under section 83 (Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards, Supplemental Remedies) shall be reviewable as provided in section 61 (Time Limitations on Actions).

§ 4. The chapter entitled "PUBLIC INFRASTRUCTURE PROCUREMENT" shall become effective one hundred eighty (180) days after the date of enactment of this law.