

## TITLE 70: DEPARTMENT OF FINANCE

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Subchapter Authority: 1 CMC § 2553(j); 1 CMC § 2557; 1 CMC § 7404.

Subchapter History: Amdts Adopted 30 Com. Reg. 28745 (Sept. 25, 2008); Amdts Proposed 30 Com. Reg. 28554 (July 28, 2008); Amdts Emergency and Proposed 27 Com. Reg. 25282 (Dec. 30, 2005) (effective for 120 days from December 5, 2005);\*\* Amdts Emergency and Proposed 27 Com. Reg. 24657 (July 20, 2005) (effective for 120 days from June 30, 2005);\*\* Amdts Proposed 27 Com. Reg. 24444 (May 18, 2005);\*\* Amdts Emergency and Proposed 27 Com. Reg. 23921 (Feb. 17, 2005) (effective for 120 days from Feb. 14, 2005);\*\* Amdts Emergency and Proposed 26 Com. Reg. 22617 (June 24, 2004) (effective for 120 days from June 18, 2004);\*\* Amdts Adopted 26 Com. Reg. 22331 (Apr. 23, 2004); Amdts Emergency and Proposed 26 Com. Reg. 21781 (Feb. 23, 2004) (effective for 120 days from Feb. 2, 2004); Amdts Emergency and Proposed 25 Com. Reg. 20253 (July 15, 2003) (effective for 120 days from June 27, 2003); Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 22 Com. Reg. 17383 (Aug. 18, 2000); Amdts Proposed 22 Com. Reg. 17036 (Feb. 15, 2000); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Amdts Emergency 12 Com. Reg. 7394 (Sept. 15, 1990) (effective for 120 days from Sept. 7, 1990); Amdts Emergency 9 Com. Reg. 5243 (Sept. 15, 1987) (effective for 120 days from Sept. 8, 1987); Amdts Adopted 8 Com. Reg. 4207 (Feb. 17, 1986);\* Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

\*A notice of proposed regulations for the 1986 amendments was not published.

\*\*As of December 2005, notices of permanent adoption for the June 2004, February 2005, May 2005, June 2005 and December 2005 amendments had not been published.

Commission Comment: 1 CMC § 2551 creates the Department of Finance within the Commonwealth government. 1 CMC § 2553(j) authorizes the Department to be in control of and be responsible for procurement and supply in the Commonwealth. The Department is authorized to adopt rules and regulations regarding those matters within its jurisdiction. See 1 CMC § 2557.

1 CMC § 7404, as amended by PL 13-24 § 602(b) (effective Sept. 10, 2002), provides for a bidding preference for local businesses in public contracting. PL 11-87 § 2 (effective July 30, 1999) repealed and reenacted 1 CMC § 7404. PL 11-87 contained procurement regulations preserved and regulations provisions as follows:

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Section 3. Procurement Regulations Preserved. Notwithstanding Section 2 of this Act, any procurement regulations validated by 1 CMC § 7404(a) as it existed prior to the effective date of this Act shall continue to the same extent to be lawful regulations following the effective date of this Act, subject to subsequent amendment, repeal, or other action according to law.

Section 4. Regulations. The Secretary of Finance shall promulgate rules and regulations for the implementation of this Act within 180 days of this Act becoming law. No local preference shall be granted or available pursuant to 1 CMC § 7404, as enacted by this Act, until valid regulations, duly promulgated in accordance with the Administrative Procedure Act, are in effect.

PL 11-87 §§ 3 and 4, reprinted in the commission comment to 1 CMC § 7404.

On October 15, 1984, the Department of Finance proposed “Bid Protest and Appeal Procedures Regulations.” See 6 Com. Reg. 3185 (Oct. 15, 1984). A notice of adoption was never published.

In May 2005, the Department of Finance proposed to repromulgate the Procurement Regulations in this subchapter with comprehensive amendments. See 27 Com. Reg. 24444 (May 18, 2005). As of December 2005, a notice of adoption had not been published.

On July 29, 2010, the Department of Finance proposed to repromulgate the Procurement Regulations in this subchapter with comprehensive amendments. See 32 Com. Reg. 30602 (Aug. 16, 2010). A notice of adoption has not been published to date.

PL 15-118 (effective December 14, 2007) amended PL 15-95 (effective October 3, 2007 pursuant to override action by the House of Representatives and Senate) to include U.S. permanent residents and citizens of any state or territory of the U.S. in the local bidder preference law, and exempted capital improvements and procurement of goods and services funded in whole or in part with federal funds from the local bidder preference laws and regulations of the Commonwealth upon certification by a federal agency that such preference law conflicts with federal regulations.

### **Part 001 - General Provisions**

#### **Subpart A - General**

##### **§ 70-30.3-001 Purposes**

- (a) Interpretation. The regulations in this subchapter shall be construed and applied to promote their underlying purposes and policies.
- (b) Purposes and Policies. The underlying purposes and policies of the regulations in this subchapter are:
  - (1) To simplify, clarify, and modernize the procurement policies and practices of the Commonwealth and its agencies;
  - (2) To make as consistent as possible the procurement policies and practices among the various branches, activities, and agencies of the Commonwealth;
  - (3) To provide for increased public confidence in the procedures followed in public procurement;
  - (4) To insure the fair and equitable treatment of persons who deal with the procurement system of the Commonwealth;

- (5) To provide increased economy in Commonwealth procurement activities and to maximize to the fullest extent practicable the purchasing value of public funds;
- (6) To foster effective broad-based competition within the free enterprise system; and
- (7) To provide safeguards for the maintenance of a procurement system of quality and integrity.

Modified, 1 CMC § 3806(d), (f).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 1990 and 2001 amendments to the Procurement Regulations readopted and republished the existing procurement regulations in their entirety. The Commission, therefore, cites the 1990 and 2001 Procurement Regulations in the section histories throughout this subchapter.

The 1990 amendments added new subsections (a) and (b) and redesignated the remaining subsections accordingly.

The Commission inserted a comma after the word “activities” in subsection (b)(2) pursuant to 1 CMC § 3806(g).

### **§ 70-30.3-005 Authority**

The regulations in this subchapter are promulgated under the authority of 1 CMC § 2553(j) which gives the Secretary of Finance the duty to be in control of and be responsible for procurement and supply in the Commonwealth.

Modified, 1 CMC § 3806(d).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

### **§ 70-30.3-010 Supplementary General Principles of Law Applicability**

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

Modified, 1 CMC § 3806(d), (f).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

### **§ 70-30.3-015 Requirement of Good Faith**

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The regulations in this subchapter require all parties, including government employees, contractors, and suppliers, involved in the negotiation, bidding, performance, or administration of government contracts to act in good faith.

Modified, 1 CMC § 3806(d).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The Commission inserted commas after the words “contractors” and “performance” pursuant to 1 CMC § 3806(g).

### **§ 70-30.3-020 Application of Regulations**

The regulations in this subchapter apply to every expenditure of public funds irrespective of source, including federal assistance monies and Covenant funds. These regulations apply to all agencies, departments, branches of the government, political subdivisions, public corporations and agencies of local government of the Commonwealth, all collectively, referred to herein as “public agencies.” Any public agency which adopts the regulations in this subchapter or identical regulations may be authorized by the Department of Finance to administer procurement functions pursuant to the provisions of § 70-30.3-101 of this subchapter. These regulations do not apply to contracts between the government and its political subdivisions or other governments, nor do they apply to a public corporation or autonomous agency of the Commonwealth which has been authorized to conduct its own procurement by enabling statute or other law. Nothing in this subchapter shall be construed to prevent any governmental body or political subdivision from complying with the terms and conditions of any grant, cooperative agreement or memoranda. The regulations in this subchapter do not apply to employment contracts or contracts for personal services under an excepted service.

Modified, 1 CMC § 3806(c), (d), (f), (g).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Amdts Emergency 9 Com. Reg. 5243 (Sept. 15, 1987) (effective for 120 days from Sept. 8, 1987); Amdts Adopted 8 Com. Reg. 4207 (Feb. 17, 1986); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The Commission moved the comma after “agencies” inside of the closing quotation mark.

A notice of proposed regulations for the 1986 amendments was not published.

### **§ 70-30.3-025 Severability**

If any provision of the regulations in this subchapter or any application thereof to any person or circumstances is held invalid by a court of competent jurisdiction, such invalidity shall not affect other provisions or application of the regulations in this

subchapter which can be given effect without the invalid provision or application, and to this end, the provisions of this subchapter are declared to be severable.

Modified, 1 CMC § 3806(d).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

### **§ 70-30.3-030 Validity of Contract**

No government contract shall be valid unless it complies with the regulations in this subchapter.

Modified, 1 CMC § 3806(d).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

### **§ 70-30.3-035 Remedy Against Employee**

Any procurement action of an employee of the government or its agencies or political subdivisions in violation of the regulations in this subchapter is an action outside the scope of his or her employment. The government will seek to have any liability asserted against it by a contractor which directly results from these improper acts to be determined judicially to be the individual liability of the employee who committed the wrongful act.

Modified, 1 CMC § 3806(d).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

## **Subpart B - Definitions**

### **§ 70-30.3-040 Definitions**

As used in the regulations in this subchapter, unless the context otherwise requires, the following meanings apply:

(a) “Attorney General” means the Attorney General of the Commonwealth of the Northern Mariana Islands.

(b) “Construction” means the process of building, altering, repairing, improving, or demolishing of a public structure or building or public improvements commonly known as “capital improvements.” It does not include the routine maintenance of existing structures, buildings, or public real property.

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- (c) “Contract” means all types of agreements, regardless of what they may be called for the procurement of supplies, services, or construction, including purchase orders.
- (d) “Cost-reimbursement contract” means a contract under which a contractor is reimbursed for costs which are allowable and in accordance with the contract terms and the regulations in this subchapter, and a fee, if any.
- (e) “Definite-quantity contract” means a contract which provides for delivery of a definite quantity of specific supplies or services for a fixed period. This type of contract may be used when it can be determined in advance that a definite quantity of supplies or services will be required during the contract period.
- (f) “Dispute” means a disagreement concerning the legal rights and obligations of contracting parties, which, if not settled by mutual agreement, must be referred to a neutral third party for resolution.
- (g) “Employee” means an individual receiving a salary from the government, including appointive and elective officials and non-salaried individuals performing personal services for the government. This definition extends to the Governor, Lt. Governor and members of their staff. Consultants, independent contractors, and part-time workers shall be considered employees only with respect to the ethics in public contracting provisions in part 700.
- (h) “Firm-fixed-price contract” means a contract which provides for a price that is not subject to any subsequent adjustment as a result of the contractor’s cost experience in performing the contract. This type of contract places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss.
- (i) “Goods” means all property, including but not limited to equipment, materials, supplies, and other tangible personal property of any kind or nature, printing, insurance, and leases of real and personal property.
- (j) “Government” or “Commonwealth” means the government of the Commonwealth of the Northern Mariana Islands which includes the executive, legislative, and judicial branches. It also includes government agencies, political subdivisions, public corporations and agencies of local government, all collectively referred to herein as “public agencies.”
- (k) “Governor” means the Governor of the Commonwealth of the Northern Mariana Islands.
- (l) “Invitation for bids” means all documents, whether attached or incorporated by reference, utilized for soliciting bids.

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- (m) “Official with expenditure authority” means that public official who may expend, obligate, encumber, or otherwise commit public funds under the Planning and Budgeting Act or under any annual appropriation act.
- (n) “Person” means an individual, sole proprietorship, partnership, joint venture, corporation, other unincorporated association or a private legal entity.
- (o) “Procurement” means buying, purchasing, renting, leasing, or acquiring construction, goods, or services. It also includes all functions that pertain to the obtaining of construction, goods, or services, including description of requirements, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration.
- (p) “P&S Director” means the Director of the Division of Procurement and Supply within the Department of Finance.
- (q) “Purchase description” means the words used in a solicitation to describe the goods, services, or construction to be purchased and includes specifications attached to, or made part of, the solicitation.
- (r) “Requirements contract” means a contract which provides for filling all actual purchase requirements of designated Government activities for supplies or services during a specified contract period, with deliveries or performance to be scheduled with the contractor.
- (s) “Responsible” in reference to a bidder, 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.
- (t) “Responsive” in reference to a bidder, means a person who has submitted a bid which conforms in all material respects to the invitation for bids.
- (u) “Secretary” means the Secretary of Finance.
- (v) “Services” means the furnishing of time, labor, or effort by a person other than an employee, and not involving the delivery of a specific end product other than reports, plans, and incidental documents.

Modified, 1 CMC § 3806(c), (d), (f), (g).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 1990 amendments added former subsection (b), redesignated the then-existing subsections and amended subsections (a), (c), (i), (j) and (k). The 2001 amendments added subsections (e), (h), (p), (r) and (u), deleted former subsections (b) and (c), redesignated the remaining subsections accordingly and amended subsections (c), (g) and (i).

In subsection (j), the Commission moved the period after “agencies” inside of the closing quotation mark. The Commission inserted commas after the words “improving” in subsection (b), “services” in subsection (c), “contractors” in subsection (g), “legislative” in subsection (j), “encumber” in subsection (m), “leasing” and “goods” in subsection (o), “services” in subsection (q), and “labor” and “plans” in subsection (v) pursuant to 1 CMC § 3806(g). The Commission placed quotation marks around terms defined.

## **Subpart C - Public Access**

### **§ 70-30.3-050 Public Access to Procurement Information**

Procurement information shall be a matter of public record and shall be available for public inspection. Procurement information may be kept confidential when necessary to insure proper bidding procedures. This decision shall be made only by the P&S Director.

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

## **Part 100 - Procurement Organization**

### **Subpart A - Director of Procurement and Supply**

#### **§ 70-30.3-101 Creation of Procurement and Supply Division**

There is created in the Department of Finance a Division of Procurement and Supply to assist the Secretary of Finance in the execution of those duties authorized under 1 CMC § 2553(j) and 1 CMC §§ 2581-2590.

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

#### **§ 70-30.3-105 Director of Procurement and Supply (P&S)**

The Secretary of Finance shall appoint a P&S Director to administer and supervise the day-to-day activities of the Division. The Director of Procurement and Supply shall be assisted in carrying out his functions and duties by employees of the Procurement and Supply Division.

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

#### **§ 70-30.3-110 Duties of the P&S Director**

The duties and responsibilities of the P&S Director include, but are not limited to, the following:

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

Modified, 1 CMC § 3806(d), (f).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 1990 amendments added new subsections (c) and (e), reordered and redesignated the remaining subsections and amended subsection (f). The 2001 amendments added a new subsection (j) and amended the opening paragraph and subsections (a) and (i).

The Commission corrected the spelling of “ensure” in subsection (a) pursuant to 1 CMC § 3806(g). The Commission inserted commas after the words “goods” in subsection (c), “negotiation” in subsection (d), “trade” in subsection (e), and “testing” in subsection (h) pursuant to 1 CMC § 3806(g).

### **§ 70-30.3-115 Contract Review, Processing and Oversight**

- (a) All contracts must first be prepared by the official with expenditure authority who shall certify that he has complied with Procurement Regulations, codified in this subchapter, and that the proposed contract is for a public purpose, and does not constitute a waste or abuse of public funds. All contract documents must be complete including attachments and exhibits, if they are incorporated into the contract by reference. The

contract documents prepared by the official with expenditure authority shall be submitted to the P&S Director.

(b) The next step in the contract process is the review by the P&S Director. Upon his own initiative or upon the request of the Public Auditor, the P&S Director may refer any contract to the Public Auditor for a recommendation before he approves or disapproves of the contract. The P&S Director shall cause such review to occur in a prompt and timely manner.

(c) The contract shall next be approved by the Secretary of Finance or his designee who shall certify the availability of funds. If the Secretary finds any aspect of the contract to be deficient or defective in any respect, he shall return the contract to the P&S Director for appropriate resolution with the official with expenditure authority. The contract shall also be approved by other government agencies that need to certify the availability of funds for the contract.

(d) The fourth review is that of the Attorney General or his designee who shall certify the contract as to form and legal capacity.

(e) The contract shall then be approved by the Governor.

(f) After the Governor's approval, the P&S Director shall forward the contract to the contractor for his approval and signature.

(g) After the signature of the contractor, the P&S Director shall review the contract documents for completeness. If he is satisfied, he shall sign in the appropriate space and shall:

(1) Inform in writing the official with the expenditure authority that the contract has been signed by all parties and that he may proceed with contract implementation according to the terms contained therein; and

(2) Provide copies of said contract to the:

(i) Secretary of Finance

(ii) Attorney General

(iii) Contractor.

(h) A contract may be referred back to the P&S Director by the Secretary of Finance or the Attorney General for further review based on additional evidence that it may not comply with this subchapter. If the P&S Director withdraws approval or refuses to approve a contract, he shall state in writing the basis for his determination.

(i) It is the responsibility of the official with expenditure authority to ensure that the contractor does not sign the contract or incur any expenses under it until all necessary government signatures have been obtained. The supervision, inspection, and administration of a government contract is the primary responsibility of the official with expenditure authority. However, the supervision, inspection, and administration of construction contracts (including architect-engineer services) shall be performed by the

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Secretary of the Department of Public Works or his designee unless the Secretary certifies that the expenditure authority has the capability to handle his own construction and A&E contracts.

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

Modified, 1 CMC § 3806(d), (f), (g).

History: Amdts Emergency and Proposed 26 Com. Reg. 22617 (June 24, 2004) (effective for 120 days from June 18, 2004); Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 1990 amendments added new subsection (a) and reordered and readopted the remaining subsections with extensive amendments. The 2001 amendments readopted and republished this section in its entirety with numerous amendments.

The June 2004 emergency and proposed amendments proposed to amend subsection (i). As of December 2004 a notice of permanent adoption had not been published.

In subsection (g)(2)(iii), the Commission inserted the final period.

### **§ 70-30.3-120 Split Contracts**

If the P&S Director determines that a contract has been split into two or more contracts for the purpose of avoiding bidding, then he may require the contract to be competitively bid.

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

### **§ 70-30.3-125 Acceptance of Gratuities by the P&S Director and Procurement and Supply Division Employees**

In addition to the restrictions found in § 70-30.3-725, the P&S Director and the employees of the Procurement and Supply Division shall not accept from any person any gift of value given to them with the intent to influence their business judgment.

Modified, 1 CMC § 3806(c).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 1990 amendments amended former subsection (b). The 2001 amendments combined former subsections (a) and (b).

**Subpart B - Procurement Function**

**§ 70-30.3-130 Decentralized Procurement**

(a) All purchases under § 70-30.3-225, § 70-30.3-230, and § 70-30.3-235 shall be centralized through the P&S Director. However, upon approval by the Secretary, the P&S Director may delegate, in writing, other procurement functions and responsibilities to public agencies upon satisfying the following requirements:

(1) The procurement regulations in this subchapter have been duly adopted pursuant to the procedures required for adopting official business of such agencies.

(2) The agency has adequate staff capability necessary to carry out the functions of the P&S Director.

(3) The agency shall certify to the P&S Director that it is in compliance with subsections (a)(1) and (a)(2) above.

(b) Where the P&S Director has delegated his authority under this section, the official with expenditure authority may conduct bidding, procurement, negotiation, and the administration of contracts involving funds appropriated to their own office, department, agency, or branch. All such activity must be shown to the reasonable satisfaction of the P&S Director to be in compliance with the regulations in this subchapter.

Modified, 1 CMC § 3806(c), (d).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 1990 amendments added a new subsection (a) and redesignated and amended subsection (b). The 2001 amendments amended subsections (a), (a)(2), (a)(3) and (b).

The Commission inserted commas after the words “negotiation” and “agency” in subsection (b) pursuant to 1 CMC § 3806(g).

**§ 70-30.3-135 Procurement Services**

Notwithstanding the decentralized procurement authority of any agency, upon request by the official with expenditure authority, the P&S Director shall provide assistance or conduct the bidding, procurement, negotiation, or administration of a particular contract.

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

**§ 70-30.3-140 Centralized Procurement of Supplies**

The P&S Director may, with the approval of the Secretary of Finance, purchase certain government supplies in large quantities to be relied upon by all departments, agencies, offices and branches. No separate contract or purchase order for these supplies will be approved.

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History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

### **Part 200 - Source Selection and Contract Formation**

#### **Subpart A - Source Selection**

##### **§ 70-30.3-201 Requirements for Competition**

Officials with expenditure authority shall provide for full and open competition through use of the competitive procedure that is best suited to the circumstances of the contract action. The competitive procedures available for use in fulfilling the requirement for full and open competition are as follows:

- (a) Competitive sealed bidding (§ 70-30.3-205)
- (b) Competitive sealed proposals (§ 70-30.3-210)
- (c) Architect-engineer services (§ 70-30.3-305); and
- (d) Competitive selection procedures for professional services (§ 70-30.3-310).

Modified, 1 CMC § 3806(c), (f), (g).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001).

Commission Comment: The 2001 amendments deleted and replaced former § 3-101 in its entirety. See 12 Com. Reg. at 7287 (Sept. 15, 1990); 7 Com. Reg. at 3743-44 (July 22, 1985).

In subsection (d), the Commission inserted the final period.

##### **§ 70-30.3-205 Competitive Sealed Bidding**

- (a) All government procurement shall be awarded by competitive sealed bidding under this section, except as provided in:
  - (1) § 70-30.3-210 (Competitive Sealed Proposals);
  - (2) § 70-30.3-220 (Small Purchases);
  - (3) § 70-30.3-225 (Sole Source Procurement);
  - (4) § 70-30.3-230 (Emergency Procurement);
  - (5) § 70-30.3-235 (Expedited Purchasing in Special Circumstances);
  - (6) § 70-30.3-305 (Architect-Engineer Services); and
  - (7) § 70-30.3-310 (Competitive Selection Procedures for Professional Services)
- (b) Invitation for Bids.
  - (1) An invitation for bids shall be issued and shall include at the minimum:
    - (i) An invitation for bids number;

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

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

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

(d) **Bid Solicitation Accuracy.** The bid solicitation shall accurately reflect the government requirement. It shall adequately state what is to be done or what is to be delivered to the government in order to allow bidders to properly respond and evaluations to be made on a uniform basis. Exact quantities shall be stated in the statement of deliverables, unless use of a requirements contract is justified under § 70-30.3-265.

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

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

(2) **Extended Bidding Period.** Because of limited bidding time in certain cases, potential sources may be precluded from bidding and others may be forced to include

contingencies that, with additional time, could be eliminated. To avoid unduly restricting competition or paying higher-than-necessary prices, the P&S Director may increase the 30-day bidding period by not more than 60 additional calendar days, considering such factors as:

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

(f) **Public Notice.** The P&S Director shall advertise the invitation for bids in a newspaper of general circulation in the Commonwealth at least once in each week from the time the solicitation is issued, including the week when the bidding period expires.

(1) Before advertising the invitation for bids, the official with expenditure authority shall certify in writing to the P&S Director whether there is adequate local competition for the solicited goods or services based on past experience, or if necessary, based on a survey of available local vendors. If there is adequate local competition (i.e., evidence of two or more vendors preliminarily determined to be responsible bidders or offerors), the advertisement shall be made only within the Commonwealth. The P&S Director may choose to have a separate solicitation package for bid details which cannot be practically stated within the advertisement; in such case, the advertisements shall state that solicitation package(s) are available at the particular agency. For solicitations amounting to \$25,000 and above, the advertisement shall be printed in a separate box and shall appear prominently among other advertisements.

(2) If there is no adequate local competition, the invitation for bids shall also be advertised in at least one regional newspaper or at least one national publication or on the internet; in such case, the P&S Director shall consider extending the bidding period as provided in § 70-30.3-205(e)(2).

(g) **Bid Receipt.**

(1) All bids shall be submitted to the office of the Director of the Division of Procurement and Supply. Bids shall be received prior to the time set for opening and shall be maintained sealed in a locked receptacle at the office. Bids submitted from vendors outside the Commonwealth must be postmarked by the date set in the invitation for bids and must be received within seven working days of that date. Bidders outside the Commonwealth must notify the P&S Director in writing of their intent to bid in order to receive this additional seven days for the receipt of the actual bid documents. This notice of intent to bid may be by any mode of written communication including telex, facsimile, or other electronic transmission.

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

(h) **Bid Opening.** The bid opening shall be conducted by the P&S Director at the office of the Division of Procurement and Supply. Bids shall be opened publicly in the

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presence of one or more witnesses at the time and place designated in the invitation for bids. The P&S Director shall be present at the bid opening. The bids received prior to the bid closing date shall be publicly opened. The amount of each bid, together with the name of each bidder shall be recorded, the record and each bid shall be open to public inspection. The P&S Director shall prepare a written summary of the bid opening.

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

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

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

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

- (1) Failure to conform to essential requirements of the invitation for bids such as specifications or time of delivery;
- (2) Imposition of conditions or restrictions in the bid which modify requirements of the invitation or limit the bidder's liability to the government. For example, bids shall be rejected in which the bidder:
  - (i) Protects against future changes in conditions, such as increased costs;
  - (ii) Fails to state a price and indicates that price shall be the price in effect at the time of delivery;
  - (iii) States a price but qualifies it as subject to price in effect at time of delivery; or
  - (iv) Limits the rights of government.
- (3) Unreasonableness as to price;
- (4) A bid from a non-responsible bidder as defined in § 70-30.3-245.

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

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

- (i) An obvious clerical mistake is clearly evident from examining the bid document. Examples of such mistakes are errors in addition or the obvious misplacement of a decimal point; or

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(ii) The otherwise low bidder alleges a mistake and the intended bid is evident from the bid document or is otherwise supported by clear and convincing evidence as to the bid intended and the corrected bid remains the low bid. A low bidder shall not be permitted to correct a bid mistake resulting from an error in judgment.

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

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

(i) Evidence as to the existence of the mistake is not discovered until after the award;

(ii) There exists no clear and convincing evidence to support the bid intended; and

(iii) Performance of the contract at the award price would be unconscionable.

(m) Award.

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

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

(3) In the event all bids exceed available funds and the bid of the lowest responsive and responsible bidder does not exceed those funds by more than five percent, and time or economic considerations preclude re-solicitation of work of a reduced scope, the official with expenditure authority may be authorized by the P&S Director to negotiate an adjustment of the bid price including changes in bid requirements, with the lowest responsive and responsible bidder in order to bring the bid price within the amount of available funds. The negotiation shall be documented in writing and attached to the bidding documents.

Modified, 1 CMC § 3806(c), (d), (e), (f), (g).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The original paragraphs of subsections (b) and (g) were not designated. The Commission designated subsections (b)(1) and (b)(2) and (g)(1) and (g)(2).

The 1990 amendments amended former subsections (d) and (i)(2). The 2001 amendments added subsections (a), (b)(2), (c), (d), (e)(2), (f)(1), (f)(2) and (j), moved former subsection (b) to subsection (f), moved former subsection (c) to subsection (e)(1) and re-designated the remaining subsections accordingly with numerous amendments.

In subsection (f)(1), the Commission inserted the closing parenthesis after “offerors.” In subsection (b)(2), the Commission corrected the spelling of “fulfill.” The Commission inserted commas after the words “address” in subsection (b)(1)(iii), “hour” in subsection (b)(1)(v), “place” in subsection (b)(1)(viii), and “facsimile” in subsection (g)(1) pursuant to 1 CMC § 3806(g).

**§ 70-30.3-210 Competitive Sealed Proposals**

(a) Conditions for use. When the official with expenditure authority determines in writing that the use of a competitive sealed bidding is either not practical or not advantageous to the government and receives the approval of the P&S Director, a contract may be entered into by competitive sealed proposals.

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

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

(d) Receipt of proposals. Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals shall be prepared and opened for public inspection after contract award.

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

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

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

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

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

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

(i) The basis for the evaluation;

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- (ii) An assessment of each offeror's ability to accomplish the technical requirements;
  - (iii) A summary, matrix, or quantitative ranking of each technical proposal in relation to the best rating possible; and
  - (iv) A summary of findings. The supporting documentation prepared for the selection decision shall show the proposals' comparative strengths, weaknesses, and risks in terms of the evaluation factors.
- (4) When technical criteria (generally, criteria other than price) are involved, the P&S Director shall determine in writing that appropriate qualified personnel are assigned to conduct a technical evaluation of the proposals. In forming an evaluation team, the P&S Director shall insure that --
- (i) The evaluators, including any other personnel responsible for the selection of competitive range offerors or final selection of an offeror, are formally designated to exercise such responsibility by the official with expenditure authority in consultation with the P&S Director; and
  - (ii) Before conducting any evaluation, the official with expenditure authority in consultation with the P&S Director, approves an evaluation plan which as a minimum shall include --
    - (A) A statement of the evaluation factors and any significant subfactors and their relative importance;
    - (B) A description of the evaluation process, methodology, and techniques to be used; and
    - (C) Documentation requirements.
- (f) Notification to offerors excluded in the competitive range. The P&S Director shall promptly notify offerors when they are excluded from the competitive range or otherwise excluded from further consideration. The notice shall state the basis for the exclusion.
- (g) Discussion with responsible offerors and revisions to proposals. As provided in the request for proposals, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification and to insure full understanding of, and responsiveness to, solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals and such revisions may be permitted after submission and prior to award for the purpose of obtaining the best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.
- (h) Award. Award shall be made to the responsible offeror whose proposal is determined in writing to be most advantageous to the government taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation and the contract file shall contain the basis on which the award is made. Within three working days after the date of contract award, the P&S Director shall provide written notification to each unsuccessful offeror (unless pre-award notice was given under § 70-30.3-210(f)). The notice shall include, as applicable --
- (1) The number of offerors solicited;

- (2) The number of proposals received;
- (3) The name and address of each offeror receiving an award;
- (4) The items, quantities, and unit prices of each award (if the number of items or other factors makes listing unit prices impracticable, only the total contract price need be furnished); and
- (5) In general terms, the reason the offeror's proposal was not accepted, unless the price information in item (h)(4) of this subsection readily reveals the reason. In no event shall an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.

Modified, 1 CMC § 3806(c), (f).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990);

Commission Comment: The 2001 amendments moved this section from former § 3-106. See 12 Com. Reg. at 7293 (Sept. 15, 1990); 7 Com. Reg. at 3748 (July 22, 1985). The 2001 amendments added new subsections (e)(1) through (e)(4), (f), and (h)(1) through (h)(5), redesignated the remaining subsections and amended subsections (a), (e) and (h).

### **§ 70-30.3-215 Circumstances Permitting Other than Full and Open Competition**

- (a) The following procurement methods permit contracting without using full and open competition.
  - (1) Small purchases (§ 70-30.3-220);
  - (2) Sole source procurement (§ 70-30.3-225);
  - (3) Emergency procurement (§ 70-30.3-230); and
  - (4) Expedited purchasing in special circumstances (§ 70-30.3-235).
- (b) Use of the methods in (a)(2), (a)(3), and (a)(4) above is subject to the following requirements.
  - (1) Officials with expenditure authority, before executing the contract, shall justify to the P&S Director in writing the following:
    - (i) The need for contracting, the purpose of the contract, how the expected outcome would help the agency achieve its objectives, and that the services do not unnecessarily duplicate any previously performed work or services.
    - (ii) The non-availability of resources within and without the agency;
    - (iii) Vendor qualifications. The official with expenditure authority shall review any contractor evaluation on file with the P&S Director. For professional services contract, a completed resume for each contractor participant who will exercise a major role in the completion of the contract will be required; and
    - (iv) Reasonableness of price. No presumption of reasonableness shall be attached to the incurring of costs by a contractor. The following factors will be used in determining whether costs are justified: cost information in sufficient detail to support and justify the contract; cost information for similar services, with differences noted and explained; and special factors affecting the costs under the contract. For contract amendments, the

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agency shall examine price considerations in the same manner as one would examine them for a basic contract. If the independent government estimate appears to be defective, other means of comparison, such as a history of contracts with similar requirements, or current market prices, shall be used.

(v) Documentation of the above should be contained in a form prescribed by the P&S Director.

(2) If the P&S Director's written determination was that the request for contract execution was not justified based on the analysis of items in subsection (b)(1) above, he shall promptly notify the official with the expenditure authority of his disapproval in writing.

Modified, 1 CMC § 3806(c), (f).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001).

Commission Comment: The final paragraph of subsection (b)(1) was not designated. The Commission designated subsection (b)(1)(v).

### § 70-30.3-220 Small Purchases

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

(b) Bidding is not required for procurement under \$2,500.

(c) Bidding is not required but is encouraged for procurement over \$2,500 and under \$10,000. The official with expenditure authority must obtain price quotations from at least three vendors and base the selection on competitive price and quality for procurement valued at \$2,500 to \$10,000. Any price quotations obtained must be written, documented, and submitted to the P&S Director for approval.

(d) Purchase orders may be utilized for small purchasers subsections (b) and (c).

(e) Any lease or purchase of vehicles shall be procured pursuant to § 70-30.3-315. Any lease or purchase of machinery and equipment in excess of \$2,500 shall be procured pursuant to § 70-30.3-205 or other applicable provisions of the regulations in this subchapter.

Modified, 1 CMC § 3806(c), (d), (e).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 1990 amendments added a new subsection (e) and amended subsections (b), (c) and (d). The 2001 amendments amended subsections (c) and (e).

**§ 70-30.3-225 Sole Source Procurement**

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

- (1) The Director determines in writing that there is only one source for the required supply, service, or construction; or
- (2) For the purpose of procuring equipment and services identified as interoperable for the use of enhancing and protecting the Commonwealth homeland security from suppliers determined capable to deliver such equipment and services for the purpose specified and/or for purposes relating to the needs of agencies designated as homeland providers; or
- (3) To obtain professional services for the purpose of facilitating the process of obtaining needed critical infrastructure funding in order to harden and enhance the capability of protecting critical infrastructure of the Commonwealth; or
- (4) To obtain professional services for the purpose of facilitating the establishment of a unit authorized in a federal defense appropriation act; or
- (5) Solely for the purpose of obtaining expert witnesses for litigation; or
- (6) For legal services; or
- (7) For policy consultants of the Governor, Lt. Governor, and presiding officers of the Legislature.

(b) For any sole source procurement pursuant to subsection (a)(1), a written justification for sole source procurement shall be prepared by the official with expenditure authority and shall contain the specific unique capabilities required; the specific unique capabilities of the contractor; the efforts made to obtain competition; and the specific considerations given to alternative sources and specific reasons why alternative sources were not selected.

(c) For any sole source procurement pursuant to subsections (a)(2), (a)(3) or (a)(4), the official with expenditure authority shall provide a written copy of the applicable federal grant or act under which the services are authorized or required.

Modified, 1 CMC § 3806(c), (f).

History: Amdts Adopted 26 Com. Reg. 22331 (Apr. 23, 2004); Amdts Emergency and Proposed 26 Com. Reg. 21781 (Feb. 23, 2004) (effective for 120 days from Feb. 2, 2004); Amdts Emergency and Proposed 25 Com. Reg. 20253 (July 15, 2003) (effective for 120 days from June 27, 2003); Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 1990 amendments amended subsections (a) and (b). The 2001 amendments added subsection (c) and amended subsections (a) and (b). The 2004 amendments repealed and reenacted this section in its entirety.

**§ 70-30.3-230 Emergency Procurement**

(a) Notwithstanding any other provision of the regulations in this subchapter, the government may make emergency procurement when there exists a threat to public

health, safety or welfare under emergency conditions. An emergency procurement must be as competitive as practicable under the circumstances.

(b) A written justification of the basis for the emergency and for the selection of the particular contractor must be made by the official with expenditure authority.

(c) If the P&S Director is satisfied, he shall state his approval in writing.

Modified, 1 CMC § 3806(d).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 1990 amendments added new subsection (c) and amended subsection (b). The 2001 amendments amended subsection (c).

The 2001 amendments moved former § 3-106 to § 3-103, codified at § 70-30.3-210, and deleted former § 3-107, entitled “Competitive Selection Procedures for Professional Services.” See 12 Com. Reg. at 7294-95 (Sept. 15, 1990); 7 Com. Reg. at 3749-50 (July 22, 1985).

### **§ 70-30.3-235 Expedited Purchasing in Special Circumstances**

(a) When special circumstances require the expedited procurement of goods or services including professional services for the purpose of facilitating the process of obtaining needed critical infrastructure funding in order to harden and enhance the capability of protecting critical infrastructures of the Commonwealth, the official with expenditure authority may request that the Director approve expedited procurement without the solicitation of bids for proposals.

(b) The factor to be considered by the Director in approving or disapproving this request shall be:

(1) The urgency of the government’s need for the good or services especially if procuring vehicles and equipment specifically designed for chemical, biological, nuclear exposure and bomb detection and critically needed emergency supplies as described by the Office of Domestic Preparedness;

(2) The comparative costs of procuring the goods or service from a sole source or through the competitive process;

(3) The availability of the goods or service in the Commonwealth and the timeliness in acquiring it; and

(4) Any other factors establishing the expedited procurement is in the best interest of the Commonwealth government.

(c) Upon the Director’s written determination that the factors in (b) above justify an expedited purchase, he shall process the necessary document(s) and assist the official with the expenditure authority in procuring the required goods or services in the most efficient manner.

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(d) If the Director determines that the request for the expedited procurement did not meet the criteria in (b) above, he should promptly notify the official with the expenditure authority of his disapproval in writing.

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

(f) The total amount of goods or service that may be approved under this section shall not exceed \$25,000 except when such goods or services are procured for the purpose of facilitating the process of obtaining needed critical infrastructure funding in order to harden and enhance the capability of protecting critical infrastructures of the Commonwealth including procuring vehicles and equipment specifically designed for chemical, biological, nuclear exposure and bomb detection and critically needed emergency medical supplies as described by the Office of Domestic Preparedness.

Modified, 1 CMC § 3806(c), (f), (g).

History: Amdts Emergency and Proposed 27 Com. Reg. 25282 (Dec. 30, 2005) (effective for 120 days from December 5, 2005); Amdts Emergency and Proposed 27 Com. Reg. 24657 (July 20, 2005) (effective for 120 days from June 30, 2005); Amdts Proposed 27 Com. Reg. 24444 (May 18, 2005); Amdts Emergency and Proposed 27 Com. Reg. 23921 (Feb. 17, 2005) (effective for 120 days from Feb. 14, 2005); Amdts Adopted 26 Com. Reg. 22331 (Apr. 23, 2004); Amdts Emergency and Proposed 26 Com. Reg. 21781 (Feb. 23, 2004) (effective for 120 days from Feb. 2, 2004); Amdts Emergency and Proposed 25 Com. Reg. 20253 (July 15, 2003) (effective for 120 days from June 27, 2003); Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Amdts Emergency 12 Com. Reg. 7394 (Sept. 15, 1990) (effective for 120 days from Sept. 7, 1990).

Commission Comment: The 2001 amendments amended subsections (a), (b), (c) and (d). The 2004 amendments repealed and reenacted this section in its entirety and amended subsections (a), (b)(1), (c), (d) and (f).

In subsection (b)(1), the Commission changed the final period to a semi-colon.

The February 2005 emergency and proposed amendments proposed to repeal and reenact this section in its entirety. As of December 2005, a notice of permanent adoption had not been published.

In May 2005, the Department of Finance proposed to re-promulgate the Procurement Regulations in this subchapter with comprehensive amendments. See 27 Com. Reg. 24444 (May 18, 2005). As of December 2005, a notice of adoption had not been published.

The June 2005 and December 2005 emergency and proposed amendments proposed to repeal and reenact this section in its entirety. As of December 2005, notices of permanent adoption had not been published.

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

#### **§ 70-30.3-240 Cancellation**

An invitation for bids or request for proposals may be canceled, and any and all bids or proposals may be rejected, when such action is determined in writing by the official with

expenditure authority and approved by the P&S Director to be in the best interest of the government based on:

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

Modified, 1 CMC § 3806(f).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 1990 amendments added a new subsection (h). The 2001 amendments amended the opening paragraph.

### **Subpart C - Qualifications and Duties**

#### **§ 70-30.3-245 Responsibility of Bidders and Offerors**

- (a) Awards shall be made only to responsible contractors. To be determined responsible, a prospective contractor must:
  - (1) Have adequate financial resources to perform the contract, or the ability to obtain them;
  - (2) Be able to comply with the required delivery or performance schedule;
  - (3) Have a satisfactory performance record;
  - (4) Have a satisfactory record of integrity and business ethics;
  - (5) Have the necessary organization, experience, and skills, (or the ability to obtain them), required to successfully perform the contract;
  - (6) Have the necessary production, construction, and technical equipment facilities, or the ability to obtain them; and
  - (7) Be otherwise qualified and eligible to receive an award under applicable laws and rules.

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(b) Obtaining information. Prior to award, the P&S Director shall obtain information from the bidder or offeror necessary to make a determination of responsibility using the factors in subsection (a) above. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for determination of non-responsibility with respect to that bidder or offeror.

(c) Right of non-disclosure. Information furnished by a bidder or offeror pursuant to subsection (b) may not be disclosed outside of the office of the P&S Director, or any other government official involved without prior consent by the bidder or offeror.

(d) Non-responsibility determination. When a bid or proposal on which a contract award would otherwise be made is rejected because the prospective contractor is found to be non-responsible, a written determination shall be signed by the P&S Director stating the basis for the determination and this shall be placed in the contract file.

Modified, 1 CMC § 3806(c), (d), (f).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 1990 amendments amended subsections (b) and (c). The 2001 amendments amended subsections (b), (c) and (d). The Commission inserted commas after the words “experience” in subsection (a)(5) and “construction” in subsection (a)(6) pursuant to 1 CMC § 3806(g).

Public Law 15-95 (effective Oct. 4, 2007), 1 CMC § 7404, restricts contract awards for capital improvements, public works, and procurement of goods and services for the amount of \$500,000 or less to business owned by US citizens. PL 15-95 sets forth the specific requirements for local preference in government contract awards. Public Law 15-118 (effective Dec. 14, 2007) amends PL 15-95 to exempt federally funded projects or procurement of goods and services governed by federal regulations that conflict with CNMI local preference requirements. The provisions of PL 15-95 and PL 15-118 supersede this section to the extent that they conflict.

### **§ 70-30.3-250 Pre-qualification of Contractors**

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

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

### **Subpart D - Types of Contracts**

#### **§ 70-30.3-255 Permissible Types of Contracts**

Government contracts shall utilize a firm fixed price unless the use of a cost reimbursement contract is justified under § 70-30.3-260. Government contracts shall also use definite-quantity contracts unless a requirements contract is justified under § 70-30.3-265. Use of cost-plus-a-percentage-of-cost and percentage of construction cost methods of contracting are prohibited.

Modified, 1 CMC § 3806(c).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 1990 amendments deleted former subsection (c)(2) and amended former subsection (c). The 2001 amendments amended former subsections (a) and (b) and moved former subsection (c) to § 70-30.3-260(b).

### **§ 70-30.3-260 Cost-reimbursement Contracts**

(a) Policy. Cost-reimbursement contracts must contain a ceiling which the contractor shall not exceed without the recommendation of the official with expenditure authority and approval by the P&S Director.

(b) Application. A cost-reimbursement contract may be used when the P&S Director attaches to the contract a written determination that --

- (1) Uncertainties in the work to be performed make the cost of performance too difficult to estimate with the degree of accuracy required for a firm fixed price contract;
- (2) Use of a cost reimbursement contract is likely to be less costly to the government than any other type due to the nature of the work to be performed under the contract.

(c) Limitations.

(1) A cost-reimbursement contract may only be used when the P&S Director determines that the contractor's accounting system is adequate for determining costs applicable to the contract, and government surveillance in the form of a construction management contract will be obtained to ensure the use of efficient methods and effective cost controls in the performance of the contract.

(2) The use of cost-reimbursement contracts is prohibited for the acquisition of commercially available items.

(d) Cost-plus-fixed-fee contracts.

(1) Description. A cost-plus-fixed-fee contract is a cost-reimbursement contract that provides for payment to the contractor of a negotiated fee that is fixed at the inception of the contract. The fixed fee does not vary with actual cost, but may be adjusted as a result of changes in the work to be performed under the contract, authorized pursuant to § 70-30.3-410(a).

(2) Application.

(i) A cost-plus-fixed-fee contract is suitable for use when the conditions of § 70-30.3-260(b) are present and the contract is for the performance of research or preliminary exploration or study, and the level of effort required is unknown.

(ii) A cost-plus-fixed-fee contract normally must not be used in development of major systems once preliminary exploration, studies, and risk reduction have indicated a high degree of probability that the development is achievable and the government has established reasonably firm performance objectives and schedules.

(3) Limitations. No cost-plus-fixed-fee contract shall be awarded unless the official with expenditure authority complies with all limitations in § 70-30.3-260(c).

Modified, 1 CMC § 3806(c), (f).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 2001 amendments moved subsection (b) from former § 3-401(c) and added new subsections (a), (c) and (d).

### **§ 70-30.3-265 Requirements Contracts**

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

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

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

Modified, 1 CMC § 3806(c), (f).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001).

## **Subpart E - Inspection and Audit**

### **§ 70-30.3-270 Right to Inspect Place of Business**

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

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

**§ 70-30.3-275 Right to Audit Records**

As required by § 404 of Public Law No. 3-91 (1 CMC § 7845), the contractor and subcontractor or grantee and subgrantee at all levels shall provide the Public Auditor of the Commonwealth with access to and the right to examine and copy any records, data, or papers relevant to a government contract or grant for a period of three years after the final payment under the contract or grant. A clause to this effect shall appear in all government contracts and obligations.

Modified, 1 CMC § 3806(e).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The Commission inserted a comma after the word “data” pursuant to 1 CMC § 3806(g).

**Subpart F - Reports and Records**

**§ 70-30.3-280 Report of Anti-competitive or Deceptive Practices**

(a) When for any reason any person suspects the following practices are occurring among bidders, offerors, contractors, or subcontractors, a notice of the relevant facts shall be transmitted by the P&S Director to the Attorney General without delay:

- (1) Unfair methods of competition;
- (2) Deceptive acts; or
- (3) Unfair business practices.

(b) These acts are more fully defined at 4 CMC § 5101 through § 5206.

Modified, 1 CMC § 3806(f).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The original paragraphs were not designated. The Commission designated subsections (a) and (b). The Commission inserted a comma after the word “contractors” in subsection (a) pursuant to 1 CMC § 3806(g).

The 1990 and the 2001 amendments amended the opening paragraph of subsection (a).

**§ 70-30.3-285 Retention of Procurement Records**

(a) All procurement records shall be retained by the P&S Director for a period of 5 years after completion of construction, or full delivery of the goods or services under the contract. The official with expenditure authority shall also keep copies of all procurement records for their respective agencies.

(b) The P&S Director shall maintain a record listing all contracts for a minimum of five years. The records shall contain:

- (1) Each contractor's name;
- (2) The amount and type of each contract; and
- (3) A listing of the supplies, services, or construction procured under each contract; and
- (4) A listing of contracts per agency and by fiscal year.

(c) All procurement records, except those designated herein as not subject to disclosure, shall be available to public inspection.

Modified, 1 CMC § 3806(e), (f), (g).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 1990 amendments amended subsections (a) and (b). The 2001 amendments added new subsection (b)(4) and amended subsections (a) and (b).

In subsection (a), the Commission deleted the unnecessary word "Chief" before "P & S Director." In subsection (b)(1), the Commission changed "contractors" to "contractor's" to correct a manifest error. The Commission inserted a comma after the word "services" in subsection (b)(3) pursuant to 1 CMC § 3806(g).

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

**§ 70-30.3-301 Construction Procurement**

(a) Invitation for Bids.

(1) Deposit. The P&S Director shall determine the amount of deposit required for potential bidders to obtain the invitation for bids.

(2) Contents. The invitation for bids shall be prepared in accordance with § 70-30.3-205(b). In addition, the following items shall be included in the invitation for bids:

- (i) Notice to Bidders. General information regarding the project;
- (ii) Instructions to Bidders. Information on the preparation of bids, bid security requirements and forms and certifications that must be submitted with the bid;
- (iii) General Conditions. Standard contract clauses governing the performance of work;

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- (iv) Special Conditions. Special contract clauses depending on the nature and dollar amount of the work to be performed; and
- (v) Technical Specifications. Specifications governing the technical aspects of the work to be performed.

(b) Bid Security.

(1) Requirement. Bid security shall be required for all competitive sealed bidding construction contracts where the price is estimated by the P&S Director to exceed \$25,000.00 or when the P&S Director determines it is in the interest of the Commonwealth. Bid security shall be on a bid bond, in cash, by certified check, cashiers' check or other form acceptable to the government. A surety company shall hold the certificate of authority from the U.S. Secretary of the Treasury as an acceptable surety or other surety acceptable to the Attorney General.

(2) Amount. Bid security shall be an amount equal to at least fifteen percent of the amount of the bid or other amount as specified in the invitation for bids depending upon the source of funding.

(3) Rejection of Bid. Failure to furnish bid security, when required by the invitation, shall result in rejection of the bid as non-responsive.

(c) Contract Performance and Payment Bonds.

(1) When a construction contract is awarded in excess of \$25,000.00, the following bonds or security shall be delivered to the government and shall become binding on the parties upon the execution of the contract:

(i) A performance bond satisfactory to the government pursuant to subsection (c)(2) below, executed by a surety company authorized to do business in the Commonwealth or otherwise secured in a manner satisfactory to the government, in an amount equal to one hundred percent of the price specified in the contract; and

(ii) A payment bond satisfactory to the government pursuant to subsection (c)(2) below, executed by a surety company authorized to do business in the Commonwealth or otherwise secured in a manner satisfactory to the government, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract. The bond shall be in an amount equal to one hundred percent of the price specified in the contract.

(2) Acceptability of payment and performance bonds. The P&S Director shall ensure that the bonding company's pledged assets are sufficient to cover the bond obligation. Prior to the execution of the contract, the P&S Director shall require the selected contractor to submit --

(i) A current license from the bonding company showing that it has authority to issue bonds, and

(ii) A certification from the bonding company that the unencumbered value of its assets (exclusive of all outstanding commitments on other bond obligations) exceed the penal amount of each bond.

(3) A contractor submitting an unacceptable payment or performance bond may be permitted a reasonable time, as determined by the P&S Director, to substitute an acceptable bond prior to executing a contract. When evaluating payment and performance bonds, the P&S Director shall confirm the acceptability of the bonding company from

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other government agencies, such as the Insurance Office under the Department of Commerce.

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

(e) **Suits on Payment Bonds; Where and When Brought.** Every suit instituted upon a payment bond shall be brought in a court of competent jurisdiction for the Commonwealth. The obligee named in the bond need not be joined as a party in any such suit.

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

Modified, 1 CMC § 3806(c), (e), (f), (g).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 1990 amendments amended subsections (a)(1), (c)(1)(i) and (c)(1)(ii). The 2001 amendments added new subsections (c)(2) and (c)(3) and amended subsections (a)(1), (a)(2), (b)(1), (c)(1)(i), (e) and (f).

In subsection (a)(2)(v), the Commission changed the final semi-colon to a period to correct a manifest error. The Commission corrected the phrase “cashiers check” in subsection (b)(1) to “cashiers’ check” pursuant to 1 CMC § 3806(g).

### **§ 70-30.3-305 Architect-Engineer Services**

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

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

(c) Selection. The P&S Director and the Technical Services Division of the Department of Public Works shall jointly maintain files of current statements of qualifications of architect-engineer firms. After public announcement of requirement for architect-engineer services, current statements shall be reviewed together with those that may be submitted by other firms in response to the announcement. Discussions shall be conducted with at least three of the firms regarding the contract requirements and technical approach and selection made therefrom, in order of preference, of no less than three firms determined to be the most highly qualified to perform the services required. Fee proposals may be solicited upon public announcement; however, this information shall not be considered in the selection of the most highly qualified firms. Such fee proposals may be used by the P&S Director in determining a fair and reasonable contract price.

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

Modified, 1 CMC § 3806(e), (f).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 1990 amendments amended subsection (d). The 2001 amendments amended subsections (a), (c) and (d).

**§ 70-30.3-310 Competitive Selection Procedures for Professional Services**

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

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

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

(d) Discussions. The official with expenditure authority may conduct discussions with any offeror who has submitted a proposal to determine such offerors qualifications for further consideration. Discussions shall not disclose any information derived from proposals submitted by other offerors.

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

Modified, 1 CMC § 3806(f).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 1990 amendments amended subsections (a), (b) and (e). The 2001 amendments moved this section from former § 3-107. See 12 Com. Reg. at 7294-95 (Sept. 15, 1990); 7 Com. Reg. at 3749-50 (July 22, 1985). The 2001 amendments amended subsections (b) and (e). The Commission inserted commas after the words “physicians” in subsection (a) and “offeror” in subsection (c) pursuant to 1 CMC § 3806(g).

**§ 70-30.3-315 Lease or Purchase of Vehicles**

(a) Policy. Any lease or purchase of government vehicles shall be governed by this section. It applies to both the initial acquisition of vehicles and the renewal or extension of vehicle leases. The lease or purchase of vehicles shall be procured using an invitation for bids, unless it qualifies for other procurement methods. The P&S Director shall establish standard vehicle specifications which shall be updated on a regular basis (not less frequently than every 2 years). All vehicles leased or purchased shall be procured in the name of the government, and shall conform to CNMI and federal laws, including the CNMI Government Vehicle Act (1 CMC § 7406), and associated rules and regulations.

(b) Whether to Lease or Purchase. Agencies shall consider whether to lease or purchase vehicles based on a case-by-case evaluation of comparative costs and other factors. The following factors are the minimum that shall be considered, and a record reflecting the application of these factors shall be provided in a form prescribed by the P&S Director and shall be included in the file:

- (1) Estimated length of the period in which the vehicle is to be used and the extent of use within that period.
- (2) Financial and operating advantages of alternative types and makes of vehicles.
- (3) Cumulative rental payments for the estimated period of use.
- (4) Net purchase price.
- (5) Maintenance and other service costs.
- (6) The following additional factors shall be considered, as appropriate,
  - (i) Availability of purchase options,
  - (ii) Potential for use of the vehicle by other agencies after its use by the acquiring agency is ended,
  - (iii) Trade-in or salvage value,
  - (iv) Imputed interest, and
  - (v) Availability of a servicing capability; e.g., can the vehicles be serviced by the government or other sources if it is purchased?

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

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

(e) Lease with Option to Purchase. If a lease is justified, a lease with option to purchase is preferable. Generally, a long term lease shall be avoided, but may be appropriate if an option to purchase or other favorable terms are included. If a lease with option to purchase is used, the contract shall state the purchase price or provide a formula which shows how the purchase price will be established at the time of purchase. The option to purchase may only be exercised by a government entity. The expenditure authority shall notify the P&S Director 30 days in advance if it does not intend to exercise the purchase option.

Modified, 1 CMC § 3806(f).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001).

**§ 70-30.3-320 Computer Software and Hardware**

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

(b) Commercial computer software, including commercial computer software documentation, may be acquired under a license customarily provided to the public to the extent such license is lawful and satisfies the government's needs.

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

(1) Furnish technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public;

(2) Transfer intellectual property rights or otherwise relinquish to, or otherwise provide, the government the rights to use, modify, reproduce, release, perform, display, or disclose commercial computer software or commercial computer software documentation, except as mutually agreed to by the parties. With regard to commercial computer software and commercial software documentation, the Government shall have only those rights specified in the license therefor.

(d) Competitive bidding, or competitive procurement shall not be required for commercial software upon a showing that:

(1) the software is advertised for sale to the public at prices which are readily determinable from public sources, including but not limited to, sources on the internet;

(2) proof of contemporaneous pricing which is actually available to CNMI purchasers is supplied in the contract package; and

(3) the other prices shown are within 10% of the pricing selected, or, the selected vendor will provide support for the software of a value which compensates for the difference in price.

(e) Competitive bidding, or competitive procurement shall not be required with respect to software for the following:

(1) software purchased is an updated version of software previously purchased;

(2) an extension of the license for previously-purchased software;

(3) an extension of maintenance services for previously-purchased software; or

(f) The purchase of computer hardware, software, and/or related services, which is/are purchased pursuant to a US General Services Administration (GSA) blanket contract which had been negotiated by the federal government, shall be presumptively concluded to be in compliance with the competitive procurement requirements of these

Regulations. This presumption shall apply not only to commercially available products, but also to products which are designed, manufactured and/or assembled according to GSA specifications.

Modified 1 CMC § 3806(d), (f).

History: Amdts Adopted 30 Com. Reg. 28745 (Sept. 25, 2008); Amdts Proposed 30 Com. Reg. 28554 (Jul. 28, 1980); Amdts Emergency 30 Com. Reg. 28529 (Jul. 28, 2008) (effective for 120 days from July 3, 2008).

Commission Comment: In May 2005, the Department of Finance proposed to re-promulgate the Procurement Regulations in this subchapter with comprehensive amendments. See 27 Com. Reg. 24444 (May 18, 2005). A notice of adoption has not been published.

Public Law 15-95 (effective Oct. 4, 2007), codified at 1 CMC § 7404, restricts contract awards for capital improvements, public works, and procurement of goods and services for the amount of \$500,000 or less to business owned by US citizens. PL 15-95 sets forth the specific requirements for local preference in government contract awards. Public Law 15-118 (effective Dec. 14, 2007) amends PL 15-95 to exempt federally funded projects or procurement of goods and services governed by federal regulations that conflict with CNMI local preference requirements.

## **Part 400 - Contract Terms and Administration of Contracts**

### **§ 70-30.3-401 Contract Clauses**

(a) **Price.** In executing contracts, agencies shall set the maximum amount that can be charged under the contract and disallow open-ended contracts, i.e. contracts which do not specify the maximum contract price. Whatever contract type is selected, agencies shall limit contracts to a fixed price or a ceiling price, and the contractor shall not exceed the price set unless a change order is approved (See § 70-30.3-410, change order). Provided, however, in the case of contracts for legal or lobbying services obtained pursuant to a contingency fee agreement, the agency shall put a fixed price on any costs to be borne by the agency out of the general fund, including but not limited to any price to be charged by the contractor in lieu of a percentage of an award obtained as a result of the contractor's services.

(b) **Payment Terms.** Payments shall be made only upon submission of evidence of work performed and adherence to contract terms and specifications. Generally, a one-time payment shall be made after the official with expenditure authority has certified completion of work or delivery of goods or services. Other types of payments are as follows:

(1) **Advance Payments.** Advance payments shall be authorized only in certain circumstances as provided in (b)(1)(i), in (b)(1)(ii), or in (b)(1)(iii) below.

(i) The contractor fails to qualify as a responsible contractor due solely to the absence of financial capability, and it is justified under § 70-30.3-225 that the contractor is the only available source, subject to the following conditions:

(A) **General requirements** - the contractor pledges adequate security, and the official with expenditure authority determines, based on written findings, that the advance payment is in the public interest.

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(B) The standards for advance payment determination are:

(I) The advance payments will not exceed the contractor's interim cash needs based on an analysis of the cash flow required for contract performance, consideration of the reimbursement or other payment cycle, and employment of the contractor's own working capital;

(II) The advance payments are necessary to supplement other funds or credit available for the contract;

(III) The recipient is otherwise qualified as a responsible contractor in all areas other than financial capability; and

(IV) Paying the contractor in advance will result in specific advantages to the government.

(C) Advance payments shall be limited to not more than 25 percent of the contract price or an amount equivalent to a 60 day working capital requirement, whichever is lower.

(ii) The official with expenditure authority demonstrates in writing that the common business practice of a particular industry requires buyers to pay on an advance payment basis. Such advance payment shall be limited to not more than 50 percent of the contract price. Pertinent documents supporting such business practice shall be attached to the written justification.

(iii) The official with expenditure authority demonstrates in writing that the advance payment is made pursuant to procurement of goods and services as provided in § 70-30.3-225(a)(2), (a)(3), or (a)(4), or § 70-30.3-235(b)(1).

(2) Progress Payments. Contracts may provide for progress payments to contractors for work performed or costs incurred in the performance of the contract. Not less than 10 percent of the contract amount shall be withheld pending final completion of the contract and an evaluation of the contractor's performance. However, if the contract consists of the performance of separate and distinct tasks, then any funds so withheld with regard to a particular task may be paid upon completion of that task and an evaluation of the contractor's performance. No official with expenditure authority shall make progress payments on a contract unless it has first been established that the covered work or service has been delivered in accordance with the contract. Payments shall be allowed on stored materials only upon arrival of materials in the CNMI, not prior to shipment, and only after inspection by the official with expenditure authority.

(c) The contract shall accurately reflect the actual government requirement, stating adequately what is to be done or to be delivered to the government. For instance, definite quantities shall be stated in the statement of deliverables, unless use of a requirements contract was justified under § 70-30.3-265. Contracts with general requirements shall be disallowed.

Modified, 1 CMC § 3806(c), (f).

History: Amdts Adopted 26 Com. Reg. 22331 (Apr. 23, 2004); Amdts Emergency and Proposed 26 Com. Reg. 21781 (Feb. 23, 2004) (effective for 120 days from Feb. 2, 2004); Amdts Emergency and Proposed 25 Com. Reg. 20253 (July 15, 2003) (effective for 120 days from June 27, 2003); Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001).

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Commission Comment: The 2001 amendments added part 400 and re-designated the remaining parts accordingly. The 2004 amendments amended subsections (a), (b)(1) and (b)(1)(i)(B) and added new subsection (b)(1)(iii). The original subsections (b)(2) and (c) were not addressed and, therefore, the Commission has retained them.

Original subsection (b)(1)(iii) cross-referenced § 3-104, codified at § 70-30.3-215. The intent to reference § 3-106, codified at § 70-30.3-225, was clear and the Commission changed the citation accordingly. The Commission corrected the spelling of the word “borne” in subsection (a) pursuant to 1 CMC § 3806(g).

### **§ 70-30.3-405 Contract Administration**

(a) The primary responsibility for ensuring compliance in contracting rests with the official with expenditure authority. The official with expenditure authority must comply with requirements for advertising the availability of contracts, soliciting bids from potential contractors, evaluating the bidding contractors, drafting the contracts to conform with applicable requirements, obtaining the appropriate approvals, approving payment for services, and evaluating the contractors upon completion of the contracts.

(b) The oversight responsibility for the government’s administration and enforcement of its contracts rests primarily with the P&S Director. He or she shall be responsible for developing standard contract administration procedures to be used by officials with expenditure authority, maintaining a central depository of contractor evaluations, and making the evaluations available to other agencies upon request.

(c) Contract Monitoring.

(1) Contract monitoring shall be accomplished through “production surveillance and reporting.” Production surveillance is a function which the official with expenditure authority uses to determine contractor progress and to identify any factors that may delay performance. It shall involve government review and analysis of

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

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

(2) When information on contract performance status is needed, officials with expenditure authority shall require contractors to submit production progress reports. The official with expenditure authority shall review and verify the accuracy of contractor reports and advise the P&S Director of any action he plans to take because of any potential or actual delay in performance, including withholding of payments.

(d) The P&S Director shall verify, whenever necessary and practicable, the results of monitoring by the official with expenditure authority. The P&S Director shall determine the extent of surveillance based on several factors such as the contractor’s history of contract performance, the contractor’s experience with the contract supplies or services, and the contractor’s financial capability. For construction contracts (including architect-engineer services), contract monitoring is performed by the Secretary of the Department of Public Works or his designee pursuant to § 70-30.3-115(i).

(e) Evaluating Results.

(1) Officials with expenditure authority shall complete, within 15 days of the end of the contract, a post-evaluation of each contractor which shall be kept on file for 36

months. The official with expenditure authority shall report at least the following information to the P&S Director on a prescribed form:

- (i) Whether the contracted work or service was completed as specified in the contract, and the reasons for and amount of any cost overruns or delayed completions.
  - (ii) Whether the contracted work or services met the quality standards specified in the contract.
  - (iii) Whether the contractor fulfilled all the requirements of the contract, and if not, in what ways the contractor did not fulfill the contract.
  - (iv) Factors outside the control of the contractor that caused difficulties in contractor performance.
  - (v) How the contract results and findings will be utilized to meet the goals of the official with expenditure authority.
- (2) The post evaluation of each contractor shall be submitted before final payment and close-out of the contract is done.
  - (3) Final payment shall not be made unless the contractor has submitted a tax clearance verifying the filing of all required Commonwealth employment, excise, gross revenue, and income tax returns and payment of all amounts owing on such returns.
  - (4) The P&S Director shall establish and maintain a central depository of all contract administration documents, which should include, but not be limited to, progress performance and post-evaluation documents. These documents shall be made available to any expenditure authority upon request to the P&S Director.

Modified, 1 CMC § 3806(c), (f).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001).

Commission Comment: The original paragraphs of subsection (c) were not designated. The Commission designated subsections (c)(1) and (c)(2).

### **§ 70-30.3-410 Change Order**

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

(b) Before adding significant new work to existing contracts, the agency shall thoroughly assess whether or not it would be more prudent to seek competition. Change orders on construction and A&E contracts which exceed 25 percent of the cumulative contract price shall automatically be procured through competitive procedures pursuant to § 70-30.3-201, except when the procurement of the additional work is authorized without using full and open competition under § 70-30.3-215.

(c) Contractors shall not be allowed to continue working beyond the expiration term of an original contract in the absence of an approved new contract or change order.

Change orders shall be processed using the procedures for processing new contracts in § 70-30.3-115.

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

Modified, 1 CMC § 3806(c).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001).

Commission Comment: The final paragraph was not designated. The Commission designated it subsection (d).

## **Part 500 - Protests and Disputes**

### **Subpart A - Bid Protests and Appeals**

#### **§ 70-30.3-501 Protests to the P&S Director**

(a) General

(1) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the P&S Director. The protest shall be received by the P&S Director in writing within ten days after such aggrieved person knows or should have known of the facts giving rise thereto. The P&S Director shall consider all protests or objections to the award of a contract, whether submitted before or after award. If a protest is oral and the matter cannot be resolved, written confirmation of the protest shall state fully the factual and legal grounds for the protest;\*

(2) Other persons, including bidders involved in or affected by the protest shall be given notice of the protest and its basis in appropriate cases. These persons shall also be advised that they may submit their views and relevant information to the P&S Director within a specified period of time. Normally, the time specified will be one week. Exceptions are to be considered exceptional and will be granted sparingly;

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

(4) When a protest, before or after award, has been appealed to the Public Auditor, as provided in these procedures, and the P&S Director is requested to submit a report, the P&S Director should include with his report a copy of;

(i) The protest;

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

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- (iii) The solicitation, including the specifications on portions relevant to the protest;
  - (iv) The abstract of offers or relevant portions;
  - (v) Any other documents that are relevant to the protest; and
  - (vi) The P&S Director's signed statement setting forth findings, actions, and recommendations and any additional evidence or information deemed necessary in determining the validity of the protest. The statement shall be fully responsive to the allegation of the protest. If the award was made after receipt of the protest, the P&S Director's report will include the determination prescribed in subsection (b)(4) below.
- (5) Since timely action on protests is essential, they should be handled on a priority basis. Upon receipt of notice that an appeal from the P&S Director's decision has been taken to the Public Auditor, the P&S Director shall immediately begin compiling the information necessary for a report as provided in subsection (a)(4) above. To further expedite processing, the official who furnishes the agency's report should, upon request of the appellant or the Public Auditor, simultaneously furnish a complete copy (except for information privileged by law or which the P&S Director deems must be confidential in order to benefit from competitive bidding) to the appellant. In such instances, the appellant shall be requested to furnish a copy of any comments on the administrative report directly to the Public Auditor as well as the P&S Director.

\*So in original; see the commission comment to this section.

### (b) Protest Before Award

- (1)(i) The P&S Director shall require that written confirmation of an oral protest be submitted by the time specified in subsection (a)(1) and may inform the protester that the award will be withheld until the specified time. If the written protest is not received by the time specified, the oral protest may be disregarded.
  - (ii) An award may be made in the normal manner unless the P&S Director finds it necessary in his discretion to take remedial action.
- (2) When a proper protest against the making of an award is received, the award will be withheld pending disposition of the protest. The bidders whose bids might become eligible for award shall be informed of the protest. In addition, those bidders shall be requested, before expiration of the time for acceptance of their bids, to extend the time for acceptance to avoid the need for re-advertisement. In the event of failure to obtain such extensions of bids, consideration shall be given to proceeding with an award under subsection (b)(3) below.
- (3) When the P&S Director receives a protest, a contract may not be awarded pending the resolution of the protest and appeal to the Public Auditor, if any, (including the time period for filing an appeal), unless it is determined in writing that urgent and compelling circumstances which significantly affect the interest of the Commonwealth will not permit awaiting the decision of the P&S Director and the Public Auditor.
- (4) The P&S Director is authorized to make the determination in subsection (b)(3) above after receiving the recommendation of the expenditure authority. The determination of the urgent and compelling situation shall be submitted to the Attorney General for review, and absent objection from the Attorney General within five working days of such submittal, the P&S Director's determination becomes final. A contract award shall not be authorized until the P&S Director has notified the Public Auditor of

his determination in subsection (b)(3) above. The P&S Director also shall give written notice to the protester and others concerned of the decision to proceed with the award.

(c) **Protests After Award**

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

(d) **Computation of Time**

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

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

Modified, 1 CMC § 3806(c), (d), (e), (f).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The original paragraphs of subsection (b)(1) were not designated. The Commission designated subsections (b)(1)(i) and (ii).

The starred final sentence in subsection (a)(1) contains an error. It should probably read: "If a protest is oral and the matter cannot be resolved, written confirmation of the protest shall be requested by the Chief. The written protest shall state fully the factual and legal grounds for the protest." Compare 7 Com. Reg. at 3757 (July 22, 1985) and 12 Com. Reg. at 7304 (Sept. 15, 1990).

The 1990 amendments amended subsections (a)(2) and (a)(3). The 2001 amendments readopted and republished this section in its entirety with numerous amendments.

**§ 70-30.3-505 Appeals of P&S Director's Decisions to the Public Auditor**

(a) **Jurisdiction; Exhaustion of Remedies.** A written appeal to the Public Auditor from a decision by the P&S Director may be taken provided that the party taking the appeal has first submitted a written protest to the P&S Director as provided in section § 70-30.3-501 of these procedures, and the P&S Director has denied the protest or has failed to act on the protest within the time provided for in § 70-30.3-501(a)(3) above.

(b) **Form of Appeal.** No particular form of pleading is required for filing an appeal to the Public Auditor. The appeal shall, however:

(1) Include the name and address of the appellant;

(2) Identify the contracting agency and the number of the solicitation or contract;

- (3) Contain a concise, logically arranged, and direct statement of the grounds for appeal; and
- (4) Specifically request a ruling by the Public Auditor.

(c) **Time for Filing Appeal.** An appeal from the P&S Director's decision must be received by the office of the Public Auditor not later than ten days after the appellant receives the decision of the P&S Director, or, in the event that the P&S Director has not decided the protest within ten days from the date that he should have decided the protest pursuant to § 70-30.3-501(a)(3) above. Any appeal received after these time limits shall not be considered by the Public Auditor unless good cause is shown or unless the Public Auditor determines that the appeal presents issues significant to procurement practices that are not outweighed by the detriment to the Commonwealth should the appeal be considered.

(d) **Notice of Appeal, Submission of P&S Director's Report and Time for Filing of Comments on Report**

(1) The Public Auditor shall notify the P&S Director by telephone and in writing within one day of the receipt of an appeal, requesting the P&S Director to give notice of the appeal to the contractor if award has been made or, if no award has been made, to all bidders or proposers who appear to have a substantial and reasonable prospect of receiving an award if the appeal is denied. The P&S Director shall be requested to furnish in accordance with § 70-30.3-501(a)(2) of these procedures copies of the protest and appeal documents to such parties with instructions to communicate further directly with the Public Auditor.

(2) Material submitted by an appellant will not be withheld from any Commonwealth or federal agency which may be involved in the appeal except to the extent that the withholding of information is permitted or required by law or regulation. If the appellant considers that the protest contains material which should be withheld, a statement advising of this fact must be affixed to the front page of the appeal document and the allegedly proprietary information must be so identified wherever it appears.

(3) The Public Auditor shall request the P&S Director to submit a complete report on the appeal to the Public Auditor as expeditiously as possible (generally within 10 working days) in accordance with § 70-30.3-501(a)(4) of these procedures and to furnish a copy of the report to the appellant and other interested parties.

(4) Comments on the agency report shall be filed with the Public Auditor within ten days after the Public Auditor's receipt of the report, with a copy to the agency which furnished the report and to other interested parties. Any rebuttal an appellant or interested party may make shall be filed with the Public Auditor within five days after receipt of the comments to which rebuttal is directed, with a copy to the agency office which furnished the report, the appellant, and interested parties, as the case may be. Unsolicited agency rebuttals shall be considered if filed within five days after receipt by the agency of the comments to which rebuttal is directed.

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

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(e) **Withholding of Award.** When an appeal has been filed before award, the P&S Director, will not make an award prior to resolution of the protest except as provided in this section. In the event the P&S Director determines that award is to be made during the pendency of an appeal, the P&S Director will notify the Public Auditor.

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

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

(h) **Conference.**

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

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

(3) Any written comments to be submitted and as deemed appropriately by the Public Auditor as a result of the conference must be received in the office of the Public Auditor within five days of the date on which the conference was held.

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

(i) **Request for Reconsideration.**

(1) Reconsideration of a decision of the Public Auditor may be requested by the appellant, any interested party who submitted comments during consideration of the protest, the P&S Director, and any agency involved in the protest. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

(2) Request for reconsideration of a decision of the Public Auditor shall be filed not later than ten days after the basis for reconsideration is known or should have been known, whichever is earlier. The term "filed" as used in this section means receipt in the Office of the Public Auditor.

(3) A request for reconsideration shall be subject to these bid protest procedures consistent with the need for prompt resolution of the matter.

Modified, 1 CMC § 3806(c), (e), (f), (g).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 2001 amendments readopted and republished this section in its entirety with numerous amendments.

In subsection (f), the Commission changed “extend” to “extent” to correct a manifest error.

### **§ 70-30.3-510 Remedies**

(a) Remedies Prior to Award. If prior to award the P&S Director or the Public Auditor determines that a solicitation or proposed award of a contract is in violation of law or regulation, then the P&S Director or the Public Auditor shall have the solicitation or proposed award:

- (1) Canceled; or
- (2) Revised to comply with law or regulation.

(b) Remedies After an Award. If after an award the P&S Director or the Public Auditor determines that a solicitation or award of a contract is in violation of law or regulation, then the P&S Director or the Public Auditor may:

- (1) If the person awarded the contract has not acted fraudulently or in bad faith:
  - (i) Ratify or affirm the contract provided it is determined that doing so is in the best interest of the Commonwealth; or
  - (ii) Terminate the contract and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to termination;
- (2) If the person awarded the contract has acted fraudulently or in bad faith:
  - (i) Declare the contract null and void; or
  - (ii) Ratify or affirm the contract if such action is in the best interests of the Commonwealth, without prejudice to the Commonwealth’s rights to such damages as may be appropriate.

Modified, 1 CMC § 3806(f).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 2001 amendments deleted former subsection (c) and amended subsections (a), (b)(1) and (b)(2).

### **§ 70-30.3-515 Effective Date**

All protests as to the manner of bidding, the failure to properly award a bid, the failure of government to contract with a business after bidding, or the cancellation of bids which may or may not be subject of lawsuit but have not reached final judgment as of the effective date of the regulations in this subchapter shall be heard in accordance with this subpart upon the request of the actual or prospective bidder, offeror, or contractor who is aggrieved.

Modified, 1 CMC § 3806(d).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

## **Subpart B - Disputes**

### **§ 70-30.3-520 Disputes**

(a) Any dispute between the government and a contractor relating to the performance, interpretation of or compensation due under a contract, which is the subject of the regulations in this subchapter, must be filed in writing with the P&S Director and the official with the expenditure authority within ten calendar days after knowledge of the facts surrounding the dispute.

(b)(1) The official with contracting authority will attempt to resolve the dispute by mutual agreement. If the dispute cannot be settled either party may request a decision on the dispute from the P&S Director. The P&S Director shall review the facts pertinent to the dispute, secure necessary legal assistance and prepare a decision that shall include:

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

(2) The P&S Director may require a hearing or that information be submitted on the record, in his discretion.

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

Modified, 1 CMC § 3806(d), (e), (f).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The original paragraphs of subsection (b) were not designated. The Commission designated subsections (b)(1) and (b)(2).

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The 1990 amendments deleted and replaced former subsection (c) and amended subsections (a) and (b). The 2001 amendments amended subsections (a), (b)(1), (b)(2) and (c).

### **Part 600 - Socio-economic Programs**

[Reserved.]

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 22 Com. Reg. 17383 (Aug. 18, 2000); Amdts Proposed 22 Com. Reg. 17036 (Feb. 15, 2000).

Commission Comment: The 2000 amendments added a new article 7, entitled “Socio-economic Programs,” which included part A, “Preferences for Local Businesses,” to implement PL 11-87. The 2001 amendments deleted part A, but reserved part 600 for future programs.

### **Part 700 - Ethics in Public Contracting**

#### **Subpart A - Definitions**

##### **§ 70-30.3-701 Definitions of Terms**

(a) “Confidential information” means any information which is available to an employee only because of the employee’s status as an employee of this government and is not a matter of public knowledge or available to the public on request.

(b) “Conspicuously” means written in such special or distinctive form, print, or manner that a reasonable person against whom it is to operate ought to have noticed it.

(c) “Direct or indirect participation” means involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing or in any other advisory capacity.

(d) “Financial interest” means:

(1) Ownership of any interest or involvement in any relationship from which or as a result of which, a person within the past year has received or is presently or in the future entitled to receive compensation; or

(2) Holding a position in a business such as an officer, director, trustee, partner, employee or the like or holding any position of management.

(e) “Gratuity” means a payment, loan, subscription, advance, deposit of money, services or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received.

(f) “Immediate family” means spouse, children, parents, brothers, and sisters.

Modified, 1 CMC § 3806(f).

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History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 2001 amendments amended subsection (a). The Commission inserted quotation marks around terms defined. The Commission inserted commas after the words “print” in subsection (b), “auditing” in subsection (c), and “brothers” in subsection (f) pursuant to 1 CMC § 3806(g).

### **Subpart B - Standards of Conduct**

#### **§ 70-30.3-705 Policy**

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

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

Modified, 1 CMC § 3806(f).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 1990 amendments amended subsection (b). The Commission corrected the spelling of the word “ensure” in subsection (a) pursuant to 1 CMC § 3806(g).

#### **§ 70-30.3-710 General Standards**

- (a) Employees. Any attempt to realize personal gain through public employment by conduct inconsistent with the proper discharge of the employee’s duties is a breach of a public trust. In order to fulfill this ethical standard, employees must meet the requirements of the regulations in this subchapter.
- (b) Contractors. Any effort to influence any public employee to breach the standards of ethical conduct set forth in this subchapter is also a breach of ethical standards.

Modified, 1 CMC § 3806(d), (g).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: In subsection (b), the Commission changed “standard” to “standards” to correct a manifest error.

#### **§ 70-30.3-715 Employee Disclosure Requirements**

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(a) Disclosure of benefit received from contract. Any employee who has, or obtains any benefit from, any government contract with a business in which the employee has a financial interest shall report such benefit to the P&S Director.

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

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 2001 amendments amended subsection (a).

### **§ 70-30.3-720 Employee Conflict of Interest**

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

(1) The employee or any member of the employee's immediate family has a financial interest pertaining to the procurement; or

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

(b) Discovery of actual or potential conflict of interest, disqualification and waiver. Upon discovery of an actual or potential conflict of interest, an employee shall promptly file with the P&S Director 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 Public Auditor for an advisory opinion as to what further participation, if any, the employee may have in the transaction.

Modified, 1 CMC § 3806(f).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 1990 amendments deleted former subsection (a)(2). The 2001 amendments amended subsection (b).

### **§ 70-30.3-725 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 subcontractor or order.

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The Commission inserted a comma after the word “gratuity” in subsection (b) pursuant to 1 CMC § 3806(g).

### **§ 70-30.3-730 Prohibition Against Contingent Fees**

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

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

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

### **§ 70-30.3-735 Contract Clauses**

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

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

### **§ 70-30.3-740 Restrictions on Employment of Present and Former Employees**

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

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

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

Modified, 1 CMC § 3806(f).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

### **§ 70-30.3-745 Use of Confidential Information**

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

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

### **§ 70-30.3-750 Collusion by Bidders**

Collusion or secret agreements between bidders for the purpose of securing an advantage to the bidders against the authorizing agent in the awarding of contracts is prohibited. The official with the expenditure authority may declare the contract void if he finds sufficient evidence after a contract has been let that contract was obtained by a bidder or bidders by

reason of collusive or secret agreement among the bidders to the disadvantage of the government.

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

**§ 70-30.3-755 Civil and Administrative Remedies**

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

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

Modified, 1 CMC § 3806(d), (g).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The original paragraphs of subsection (a) were not designated. The Commission designated subsections (a)(1) and (a)(2).

The 1990 amendments added the opening paragraph.

In the opening paragraph, the Commission changed “maybe” to “may be” to correct a manifest error. The Commission inserted a comma after the word “contract” in subsection (b) pursuant to 1 CMC § 3806(g).

**§ 70-30.3-760 Authority to Debar or Suspend**

- (a) Authority. After reasonable notice to the person involved and reasonable opportunity for the person to be heard under the Administrative Procedure Act [1 CMC §§ 9101, et seq.], the P&S Director after consultation with the official with expenditure

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authority and the Attorney General, shall have authority to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than three years. The same officer, after consultation with the official with authority and the Attorney General, shall have authority to suspend a person from consideration for award of contracts if there is probable cause for debarment. The suspension shall not be for a period exceeding three months.

(b) Causes for debarment or suspension. The causes for debarment or suspension include the following:

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

(2) Conviction under Commonwealth or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, violation of the Consumer Protection Act (4 CMC §§ 5101, et seq.), violation of any unfair business practices as prescribed by 4 CMC § 5202, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects its responsibility as a government contractor;

(3) Conviction under Commonwealth or federal antitrust statutes arising out of the submission of bids or proposals such as in chapter 2 of division 5 of title 4 of the Commonwealth Code;

(4) Violation of contract provisions, as set forth below, of a character which is regarded by the P&S Director to be so serious as to justify debarment action:

(i) Deliberate failure without good cause to perform in accordance with the specifications within the time limits provided in the contract; or

(ii) A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered a basis for debarment;

(5) Any other cause that the P&S Director determines to be so serious and compelling as to affect responsibility as a government contractor, including debarment by another governmental entity; or

(6) For violation of any of the ethical standards set forth in part 700.

(c) Decision. The P&S Director shall issue a written decision to debar or suspend. The decision shall state the reasons for the action taken.

(d) Notice of decision. A copy of the decision shall be mailed or otherwise furnished immediately to the debarred or suspended person. A copy of the decision shall also be provided to other Commonwealth procurement offices.

Modified, 1 CMC § 3806(c), (e), (f), (g).

History: Amdts Adopted 23 Com. Reg. 17855 (May 24, 2001); Amdts Proposed 23 Com. Reg. 17640 (Feb. 23, 2001); Amdts Adopted 12 Com. Reg. 7436 (Oct. 15, 1990); Amdts Proposed 12 Com. Reg. 7274 (Sept. 15, 1990); Adopted 7 Com. Reg. 3736 (July 22, 1985); Proposed 7 Com. Reg. 3646 (May 21, 1985).

Commission Comment: The 2001 amendments amended subsections (a), (b)(4), (b)(5), (c) and (d).

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In subsection (a), the Commission changed “Procedures” to “Procedure” to correct a manifest error.