



MRCOG PROCUREMENT POLICY

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Mid-Region Council of Governments Policy R-05-06

PROCUREMENT POLICY

1. **SCOPE.** This policy pertains to all procurement initiated by or on behalf of the Mid-Region Council of Governments (MRCOG) including those initiated by a contractor or subgrantee to the MRCOG when there is a use of federal funds involved. All entities involved in procuring items of tangible personal property, services or construction shall adhere to attendant federal and state laws and regulations including applicable OMB circulars; and MRCOG policies.
2. **AUTHORITY & REFERENCES.** The state Procurement Code (Code), Sections 13-1-28 through 13-1-199 NMSA 1978; and applicable OMB circulars, federal, state and laws, regulations, and guidelines and MRCOG policy.
3. **OBJECTIVE.**
 - 3.1. The purpose of the Code and this policy are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity.
 - 3.2. The MRCOG and its contractor or subgrantees must comply with any requirement imposed by federal and state law and regulations, MRCOG policy, and the terms of the federally funded grants. Compliance with the standards promulgated in the OMB circulars and the Code and this policy that governs procurement will ensure that procurement practices are acceptable.
 - 3.3. The objective of this policy is to have the force and effect of law to implement, interpret or make policy specific as it applies to federal procurement law and the Code, and the purposes stated therein.
4. **DEFINITIONS.**
 - 4.1. Most of the terms that appear in this policy are defined in the Code.
 - 4.2. In this policy the following definitions also apply:
 - 4.2.1. "Procurement officer or manager" means the person or designee authorized by the central purchasing officer to manage procurement requiring the evaluation of competitive sealed proposals.
 - 4.2.2. "Determination" means the written documentation of a decision of a procurement officer including findings of fact to support a decision. A determination becomes part of the procurement file to which it pertains.
 - 4.2.3. "Contractor or subgrantee" means any entity contracting with the MRCOG to provide services on behalf of the MRCOG in fulfillment of the specific program. The use of the term "MRCOG" also infers the term "contractor or subgrantee", where applicable.

4.2.4. "Region" means the area served by the MRCOG consisting of Sandoval, Bernalillo, Torrance and Valencia counties.

4.2.5. "Policy" as used in this document also infers "local regulation" or "regulation" as used in the Code (Section 13-1-80 NMSA 1978).

5. **APPLICATION OF PROCUREMENT LAW.** When procurement involves the expenditure of federal funds, the procurement shall be conducted in accordance with mandatory applicable federal and state laws and regulations. When mandatory applicable federal law or regulations are inconsistent with the provisions of the state Procurement Code, the more restrictive laws and regulations shall apply.

5.1. Funds provided under federal or state grants may not be used to duplicate facilities or services available with or without reimbursement from federal, state, or local sources.

6. **CENTRALIZATION OF PROCUREMENT ACTIVITY.**

6.1. *Central Purchasing Office.* The Central Purchasing Office for the MRCOG is the Administrative Services office of the Mid-Region Council of Governments. The central purchasing officer of the MRCOG shall oversee all procurement for the MRCOG.

6.2. *Central Purchasing office or officer* also means the office or officer responsible for procurement under this policy.

6.3. *Cooperative procurement.* Nothing in this section should be interpreted as limiting the ability of the MRCOG to make procurements under existing contracts or enter into cooperative procurement agreements.

6.4. *Authority of the Executive Director.* With the approval of this resolution, the Executive Director hereby has the authority to modify and/or update the MRCOG Procurement Policy provided the confines of the state Procurement Code (Section 13-1-30 NMSA 1978) are adhered to.

7. **INSPECTION OF PUBLIC RECORDS.** The inspection of public records is governed by the Inspection of Public Records Act, Sections 14-2-1 through 14-2-12 NMSA 1978. To the extent that any provision of this policy conflicts with the Inspection of Public Records Act, as interpreted by the courts of this state, that act shall control. Furthermore, no obligation to keep data confidential that is contained in this policy is intended to create any liability that would not otherwise exist under federal or state law.

8. **DOLLAR AMOUNTS.** Whenever a dollar amount appears in this policy, such amount is exclusive of applicable gross receipts and local option taxes as the term is defined in Section 7-9-3 (Q) NMSA 1978.

9. **INDEMNIFICATION AND INSURANCE.**

9.1. *Tort liability.* Except as provided for in the Tort Claims Act, Sections 41-4-1 through 41-4-27 NMSA 1978, no contract governed by this policy shall contain any provision whereby the MRCOG agrees to indemnify or provide tort liability insurance for any contractor. The indemnification and insurance provisions of contracts provided for in the Tort Claims Act shall be approved in writing by the MRCOG legal counsel before they become effective.

- 9.2. *Other risks.* No contract governed by this policy shall contain any provision whereby the MRCOG agrees to indemnify or provide a contractor with insurance for non-tort risks unless the provision has been approved in writing by the MRCOG legal counsel.
- 9.3. *Contract provisions void.* Any indemnification or insurance provision in any contract executed in violation of this section shall be void and of no effect.
10. **SEVERABILITY.** If any provision of this policy, or any application thereof, to any person or circumstance, is held invalid, such invalidity shall not affect any other provision or application of this policy which can be given effect without the invalid provision or application.
11. **EXEMPTIONS FROM PROCUREMENT THROUGH THE CODE.** The provisions of this policy and the Code shall not apply to:
 - 11.1 Procurement of items of tangible personal property or services by the MRCOG from a state agency, a local public body or external procurement unit except as otherwise provided in Sections 13-1-135 through 13-1-137 NMSA 1978;
 - 11.2 Printing or duplicating contracts involving materials that are required to be filed in connection with proceedings before administrative agencies or state or federal courts;
 - 11.3 Purchases of publicly provided or publicly regulated gas, electricity, water, sewer and refuse collection systems;
 - 11.4 Purchases of books and periodicals from the publishers or copyright holders thereof;
 - 11.5 Travel or shipping by common carrier or by private conveyance or to meals and lodging;
 - 11.6 Minor purchases not exceeding the dollar amount specified in Section 13-1-98(J) NMSA 1978, which consists of magazine subscriptions, conference registration fees and other similar purchases where prepayments are required; and
 - 11.7 Contracts and expenditures for litigation expenses in connection with proceedings before administrative agencies or state or federal courts, including experts, mediators, court reporters, process servers and witness fees, but not including attorney contracts.
12. **APPLICATION -- COMPETITIVE SEALED BIDS.** The following provisions of this section apply to any procurement made by competitive sealed bids.
 - 12.1 *Competitive Sealed Bids Required.* All procurement shall be achieved by competitive sealed bids except procurement achieved pursuant to the following methods:
 - 12.1.1 Competitive sealed proposals, see section 15 of this policy;
 - 12.1.2 Small purchases, see section 16 of this policy;
 - 12.1.3 Sole source procurement, see section 17 of this policy;
 - 12.1.4 Emergency procurement, see section 18 of this policy;
 - 12.1.5 Procurement under existing contracts, see section 19 of this policy; and

- 12.1.6 Purchases from anti-poverty program businesses.
- 12.2 Invitation for Bids (IFB).
- 12.2.1 General. The invitation for bids (IFB) is used to initiate competitive sealed bid procurement. The IFB shall include the following: a) the specifications for the services, construction or items of tangible personal property to be procured; b) all contractual terms and conditions applicable to the procurement; c) the term of the contract and conditions of renewal or extension, if any; d) instructions and information to bidders, including the location where bids are to be received and the date, time and place of the bid opening; e) a notice that the IFB may be canceled and that any and all bids may be rejected in whole or in part when it is in the best interest of the MRCOG; f) a notice that reads substantially as follows: "The Procurement Code, Sections 13-1-28 through 13-1-199 NMSA 1978, imposes civil and misdemeanor criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for bribes, gratuities and kick-backs"; and g) required federal certifications – see section 27 of this policy, if applicable.
- 12.3 Incorporation by reference. The IFB may incorporate documents by reference, provided that the IFB specifies where such documents can be obtained.
- 12.4 Evaluation criteria. The IFB shall set forth the evaluation criteria that will be used to determine acceptability such as inspection, testing, quality, workmanship, delivery and suitability for a particular purpose. Those criteria such as discounts, transportation costs and total or life cycle costs that will affect the bid price shall be objectively measurable. No criteria may be used in bid evaluation that is not set forth in the IFB.
- 12.5 Bid form. The IFB shall provide a form which shall include space in which the bid price shall be inserted and which the bidder shall sign and submit along with all other necessary submissions. A bidder may submit a reasonable facsimile of the bid form. Oral, telephonic and telegraphic bids except as provided in this subsection are invalid and shall not be considered. Telegraphic or bids sent via FAX to a third party and delivered in a sealed envelope to the location where bids are to be received by the date and time shown in the bid, will be accepted for consideration.
- 12.6 Bid samples and descriptive literature.
- 12.6.1 "Descriptive literature" means information available in the ordinary course of business that shows the characteristics, construction, or operation of an item.
- 12.6.2 "Bid sample" means a sample furnished by a bidder that shows the characteristics of an item offered in the bid.
- 12.6.3 Bid samples or descriptive literature may be required when it is necessary to evaluate required characteristics of the item bid.
- 12.6.3 Bid samples, when required, shall be furnished free of expense to the MRCOG and prior to the time set for the opening of bids. Samples not destroyed or mutilated in testing will be returned upon request by mail, express or freight, collect. Each sample must be labeled to clearly show the bid number and the bidder's name.
- 12.7 Bidding time. Bidding time is the period of time between the date of distribution of the IFB and the time and date set for receipt of bids. In each case bidding time shall be set

to provide bidders a reasonable time to prepare their bids. In no case shall the bidding time be shorter than the time required for publication under the following section.

12.8 Public Notice, Publication. The IFB or notice thereof shall be published not less than ten (10) calendar days prior to the date set for the opening of bids. The IFB or notice must be published once in at least one newspaper of general circulation in the Region.

12.8.1 These requirements of publication are in addition to any other procedures that may be adopted by the MRCOG to notify prospective bidders that bids will be received, including but not limited to publication in trade journals, if available.

12.8.2 Bidder lists. The central purchasing officer shall send copies of the notice or IFB involving the expenditure of more than the dollar amount specified in Section 13-1-104(B) NMSA 1978 to those businesses which have signified in writing an interest in submitting bids for particular categories of items of tangible personal property, construction and services and which have paid any required fees.

12.8.3 Public availability. A copy of the IFB shall be made available for public inspection at the office of the AE.

12.9 *Pre-Bid Conferences.* Pre-bid conferences may be conducted to explain the procurement requirements. They shall be announced to all prospective bidders known to have received the IFB. The conference should be held long enough after the IFB has been issued to allow bidders to become familiar with it, but sufficiently before bid opening to allow consideration of the conference results in preparing their bids. Nothing stated at the pre-bid conference shall change the IFB unless a change is made by written amendment as provided in this policy.

12.10 *Amendments to the Invitation for Bids.*

12.10.1 Form. An amendment to the IFB shall be identified as such and shall require that bidders acknowledge its receipt. The amendment shall refer to the portions of the IFB it amends.

12.10.2 Distribution. Amendments shall be sent to all prospective bidders known to have received the IFB.

12.10.3 Timeliness. Amendments shall be distributed within a reasonable time to allow prospective bidders to consider them in preparing their bids. If the time and date set for receipt of bids will not permit such preparation, the time shall be increased to the extent possible in the amendment or, if necessary, by telegram or telephone or by other electronic means and confirmed in the amendment.

12.10.4 Use of amendments. Amendments should be used to: a) make any changes in the IFB such as changes in quantity, purchase descriptions, delivery schedules, and opening dates; b) correct defects or ambiguities; or c) furnish to other bidders information given to one bidder if such information will assist the other bidders in submitting bids or if the lack of such information would prejudice the other bidders.

12.11 *Pre-opening Modification or Withdrawal of Bids.*

12.11.1 Procedure. A bid may be modified or withdrawn by a bidder prior to the time set for bid opening by delivering written or telegraphic notice to the location designated in the IFB as the place where bids are to be received.

12.11.2 Disposition of bid security. If a bid is withdrawn in accordance with this section, the bid security, if any, shall be returned to the bidder.

12.11.3 Records. All documents relating to the modification or withdrawal of bids shall be made a part of the appropriate procurement file.

12.12 *Late Bids, Late Withdrawals and Late Modifications.*

12.12.1 Definition. Any bid or any withdrawal or modification of a bid received after the time and date for opening of bids at the place designated for opening is late.

12.12.2 General policy. No late bid, late modification, or late withdrawal will be considered unless received before contract award, and the bid, modification, or withdrawal would have been timely but for the action or inaction of the central purchasing office personnel directly serving the procurement activity. Exception, a late bid may be considered for award if it is the only bid received.

12.12.3 Records. All documents relating to late bids, late modifications, or late withdrawals shall be made a part of the appropriate procurement file.

12.13 *Bid Opening.*

12.13.1 Receipt. Upon its receipt, each bid and modification shall be time-stamped but not opened and shall be stored in a secure place until the time and date set for bid opening.

12.13.2 No bids received. If no bids are received or if all bids received are rejected in accordance with the provisions of sections 20 and 21 of this policy, a new IFB shall be issued. If upon re-bidding with no change in specifications from the first IFB, the bids received are unacceptable, or if no bids are secured, the central purchasing officer may purchase (i.e., as opposed to procure) the items of tangible personal property, construction or services in the open market at the best obtainable price.

12.13.3 Opening and recording. Bids and modifications shall be opened publicly in the presence of one or more witnesses at the time and place designated in the IFB. The name of each bidder, the amount of each bid and each bid item, if appropriate, the names and addresses of the required witnesses, and such other relevant information as may be specified by the central purchasing officer shall be recorded. The record shall be open for public inspection. Each bid, except those portions for which a bidder has made a written request for confidentiality, shall also be open to public inspection. Any data, which a bidder believes should be kept confidential shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the non-confidential portion of the bid. Prices and makes and models or catalogue numbers of the items offered, deliveries, and terms of payment shall be publicly available at the time of bid opening regardless of any designation to the contrary.

12.14 *Mistakes in Bids.*

- 12.14.1 Consideration for award. Bids shall be unconditionally accepted for consideration for award without alteration or correction, except as authorized in sections 12 through 14 of this policy.
- 12.14.2 General principles. Correction or withdrawal of a bid because of an inadvertent, nonjudgmental mistake in the bid requires careful consideration to protect the integrity of the competitive bidding system, and to assure fairness. If the mistake is attributable to an error in judgment, the bid may not be corrected. Bid correction or withdrawal by reason of a nonjudgmental mistake is permissible but only to the extent authorized in sections 12 through 14 of this policy.
- 12.14.3 Mistakes discovered before opening. A bidder may correct mistakes discovered before bid opening by withdrawing or correcting the bid as provided in subsection 12.11 of this policy.
- 12.14.4 Confirmation of bid. When the procurement officer knows or has reason to conclude that a mistake has been made in the low bid, the procurement officer should request the low bidder to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the low bid or a bid unreasonably lower than the other bids submitted. If the low bidder alleges mistake, the bid may be corrected or withdrawn if the conditions set forth in subsection 12.14.5 are met.
- 12.14.5 Mistakes discovered after opening. This subsection sets forth procedures to be applied in three situations in which mistakes in bids are discovered after the time and date set for bid opening:
- a) Technical irregularities. Technical irregularities are matters of form rather than substance evident from the bid document, or insignificant mistakes that can be waived or corrected without prejudice to other bidders; that is, when there is no effect on price, quality or quantity. The procurement officer may waive such irregularities or allow the low bidder to correct them if either is in the best interest of the MRCOG. Examples include the failure of the low bidder to: 1) return the number of signed bids required by the IFB; 2) sign the bid, but only if the unsigned bid is accompanied by other material indicating the low bidder's intent to be bound; or 3) acknowledge receipt of an amendment to the IFB, but only if: it is clear from the bid that the low bidder received the amendment and intended to be bound by its terms; or the amendment involved had no effect on price, quality or quantity.
 - b) Mistakes where intended correct bid is evident. If the mistake and the intended correct bid are clearly evident on the face of a bid document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of a bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors. It is emphasized that mistakes in unit prices cannot be corrected.
 - c) Mistakes where intended correct bid is not evident. A low bidder alleging a material mistake of fact which makes the bid non-responsive may be permitted to withdraw the bid if: 1) a mistake is clearly evident on the face of the bid document but the intended correct bid is not; or 2) the low bidder submits evidence which clearly and convincingly demonstrates that a mistake was made.

- d) Written determination. When a bid is corrected or withdrawn, or a correction or withdrawal is denied, the procurement officer shall prepare a written determination showing that the relief was granted or denied in accordance with this section.

12.15 *Bid Evaluation and Award.*

- 12.15.1 General. A contract solicited by competitive sealed bids shall be awarded with reasonable promptness by written notice to the lowest responsible bidder. The IFB shall set forth the requirements and criteria that will be used to determine the lowest responsive bid. No bid shall be evaluated for any requirement or criterion that is not disclosed in the IFB. Contracts solicited by competitive sealed bids shall require that the bid amount *exclude* the applicable state gross receipts tax or local option tax but that the contracting agency shall be required to pay the tax including any increase in the tax becoming effective after the contract is entered into. The tax shall be shown as a separate amount on each billing or request for payment made under the contract.
- 12.15.2 Product acceptability. The IFB shall set forth all evaluation criteria to be used in determining product acceptability. It may require the submission of bid samples, descriptive literature, technical data, or other material. It may also provide for accomplishing any or all of the following prior to award: a) inspection or testing of a product for such characteristics as quality or workmanship; b) examination of such elements as appearance, finish, taste or feel; or c) other examinations to determine whether it conforms with other purchase description requirements.
- 12.15.3 Purpose of acceptability evaluation. An acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another's but only to determine that a bidder's offering is acceptable as set forth in the IFB. Any bidder's offering which does not meet the acceptability requirements shall be rejected as non-responsive.
- 12.15.4 Brand-name or equal specification. Where a brand-name or equal specification is used in a solicitation, the solicitation shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance and characteristics desired and is not intended to limit or restrict competition. When bidding an "or equal" the burden of persuasion is on the supplier or manufacturer who has not been specified to convince the procurement officer that their product is, in fact, equal to the one specified. The procurement officer is given the responsibility and judgment for making a final determination on whether a proposed substitution is an "or equal".
- 12.15.5 Determination of lowest bidder. Following determination of product acceptability as set forth in this section, if any is required; bids will be evaluated to determine which bidder offers the lowest cost to the MRCOG in accordance with the evaluation criteria set forth in the IFB. Only objectively measurable criteria that are set forth in the IFB shall be applied in determining the lowest bidder. Examples of such criteria include, but are not limited to, discounts, transportation costs and ownership or life-cycle formulas. Evaluation factors need not be precise predictors of actual future costs, but to the extent possible the evaluation factors shall be reasonable estimates based upon information the MRCOG has available concerning future use.
 - a) Prompt payment discounts. Prompt payment discounts shall not be considered in computing the low bid. Such discounts may be considered after award of the contract.

- b) Trade discounts. Trade discounts shall be considered in computing the low bid. Such discounts may be shown separately, but must be deducted by the bidder in calculating the unit price quoted.
 - c) Quantity discounts. Quantity discounts shall be included in the price of an item. Such discounts may not be considered where set out separately unless the IFB so specifies.
 - d) Transportation costs. Transportation costs shall be considered in computing the low bid. Such costs may be computed into the bid price or be listed as a separate item.
 - e) Total or life-cycle costs. Award may be determined by total or life-cycle costing if so, indicated in the IFB. Lifecycle cost evaluation may take into account operative, maintenance, and money costs, other costs of ownership and usage and resale or residual value, in addition to acquisition price, in determining the lowest bid cost over the period the item will be used.
 - f) Energy efficiency. Award may be determined by an evaluation consisting of acquisition price plus the cost of energy consumed over a projected period of use.
- 12.15.6 Restrictions. Nothing in subsection 12.15 of this policy shall be deemed to permit contract award to a bidder submitting a higher quality item than designated in the IFB unless the bidder is also the lowest bidder as determined under subsection 12.15.5. Further, except as provided in this subsection, this policy does not permit negotiations with any bidder or disclosing bid amounts to another bidder prior to award. If the lowest responsive bid has otherwise qualified, and if there is no change in the original terms and conditions, the lowest responsible bidder may negotiate with the purchaser (i.e., this exception applies only to purchases and does not apply to procurements generally) for a lower total bid to avoid rejection of all bids for the reason that the lowest bid was up to ten percent higher than budgeted project funds. Such negotiation shall not be allowed if the lowest bid was more than ten percent over budgeted project funds.
- 12.15.7 Documentation of award. Following award, a record showing the basis for determining the successful bidder shall be made a part of the procurement file.
- 12.15.8 Publicizing awards. Written notice of award shall be sent to the successful bidder. Notice of award shall also be posted at the MRCOG's office.
- 12.16 *Statutory preferences* (Statutory preferences to be applied in determining low bidder). New Mexico law provides certain statutory preferences to resident businesses, resident manufacturers, New York state business enterprises, and for recycled content goods (Sections 13-1-21 and 13-1-22 NMSA 1978). The statute further provides a preference to resident construction contractors and New York state business enterprises (Sections 13-4-1 through 13-4-3 NMSA 1978) which must be applied in determining the lowest bidder.
- 12.17 Identical low bids.

- 12.17.1 Definition. Identical low bids are low responsive bids, from responsible bidders, which are identical in price after the application of the preferences referred to in this policy and which meet all the requirements and criteria set forth in the IFB.
- 12.17.2 Award. When two or more identical low bids are received, the central purchasing officer may: a) award pursuant to the multiple source award provisions of Sections 13-1-153 and 13-1-154 NMSA 1978; b) award to a resident business or a New York state business enterprise if the identical low bids are submitted by a resident business or a New York state business enterprise and a nonresident business; c) award to a resident manufacturer if the identical low bids are submitted by a resident manufacturer and a resident business or New York business enterprise; d) award to a bidder offering recycled content goods if the identical low bids are for recycled content goods and virgin goods; e) award by lottery to one of the identical low bidders; or f) reject all bids and re-solicit bids or proposals for the required services, construction or items of tangible personal property.

13. MULTI-STEP SEALED BIDS.

- 13.1 *General.* Multi-step bidding is a variant of the competitive sealed bidding method. This method may be utilized when the central purchasing office makes a determination that it is impractical initially to prepare specifications to support an award based on price, or that specifications are inadequate or are too general to permit full and free competition without technical evaluation and discussion.
- 13.2 *Phased process.* Multi-step bidding is a phased process which combines elements of both the competitive sealed bid and the competitive sealed proposal methods, seeking necessary information or unpriced technical offers in the initial phase; and regular competitive sealed bidding, inviting bidders who submitted technically acceptable offers in the initial phase, to submit competitive sealed price bids on the technical offers in the final phase. The contract shall be awarded to the lowest responsible bidder. If time is a factor, the central purchasing office may require Offerors to submit a separate sealed bid during the initial phase to be opened after the technical evaluation.
- 13.3 Public notice. Whenever multi-step sealed bids are used, public notice for the first phase shall be given in accordance with subsection 12.8 of this policy. Public notice is not required for the second phase.

14. **PAYMENTS FOR PURCHASES.** [Contract clause] All contracts resulting from an invitation for bids shall contain a clause allowing for late payment charges against the contracting agency in the amount and under the conditions set forth in Section 13-1-158 NMSA 1978. *For purchases funded by state or federal grants to the MRCOG, payments shall be tendered to the contractor within five working days of receipt of funds from the funding agency.*

15. APPLICATION -- COMPETITIVE SEALED PROPOSALS.

- 15.1 *General.* Except as provided in subsections 15.2 and 15.3 of this section, the provisions of this section apply to any procurement made by competitive sealed proposals.
- 15.2 *Architects, engineers, landscape architects and surveyors.* The provisions of this section do not apply to the procurement of professional services of architects, engineers, landscape architects and surveyors for local public works projects. Except that when procuring such professional services for local public works projects the MRCOG shall

comply with Sections 13-1-120 through 13-1-124 NMSA 1978. Commentary: local public works projects over \$100,000 involving architecture must be provided by a legal, *resident* architect (Section 61-15-9 NMSA 1978).

15.3 *Professional Services.* "Professional services" are defined in Section 13-1-76 NMSA 1978. The section of statute acknowledges the difficulty of any attempt made to recognize and list each and every service that could conceivably fall within the definition of "professional services". Instead, the statute provides in relevant part that "...other persons or businesses providing similar professional services to those listed may be designated as such by a determination issued by the central purchasing officer." In instances where "...other persons or businesses providing similar professional services...", as cited in Section 13-1-76, NMSA 1978, is not clearly defined, Contractors shall submit a written request to the central purchasing office for issuance of a determination and a finding that the service is to be designated as a professional service.

15.4 *General Discussion.*

15.4.1 Use of competitive sealed proposals. When the central purchasing officer or a designee makes a determination that the use of competitive sealed bids is either not practicable or not advantageous to the MRCOG, procurement shall be effected by competitive sealed proposals. *Competitive sealed proposals shall not be used for the procurement of construction* (Section 13-1-111 NMSA 1978).

15.4.2 Definitions. The words "practicable" and "advantageous" are to be given ordinary dictionary meanings. The term "practicable" denotes what may be accomplished or put into practical application. "Advantageous" denotes a judgmental assessment of what is in the MRCOG's best interest. The use of competitive sealed bids may be practicable, that is, reasonably possible, but not necessarily advantageous, that is, in the MRCOG's best interest.

15.4.3 Proposals offer flexibility. The key element in determining advantageousness is the need for flexibility. The competitive sealed proposal method differs from the competitive sealed bid method in two important ways: a) it permits discussions with competing Offerors and changes in their proposals including price; and; b) it allows comparative judgmental evaluations to be made when selecting among acceptable proposals for award of a contract.

15.4.4 Determinations by category. The central purchasing office may make determinations by category of services or items of tangible personal property that it is either not practicable or not advantageous to procure specified types of service or items of tangible personal property by competitive sealed bids in which case competitive sealed proposals shall be utilized. The central purchasing office may modify or revoke such determinations at any time.

15.5 *Request for Proposals (RFP):*

15.5.1 Initiation. The request for proposals (RFP) is used to initiate competitive sealed proposal procurement. The MRCOG shall follow published guidelines and procedures issued by the central purchasing office from development stage through award of RFP-based procurements. At a minimum the RFP shall include the following: a) the specifications for the services or items of tangible personal property to be procured; b) all contractual terms and conditions applicable to the procurement; c) instructions

concerning the submission and response to questions; d) the term of the contract and conditions of renewal or extension, if any; e) instructions and information to Offerors, including the location where proposals are to be received and the date, time and place where proposals are to be received and reviewed; f) all of the evaluation factors, and the relative weights to be given to the factors in evaluating proposals; g) a statement that discussions may be conducted with Offerors who submit proposals determined to be reasonably susceptible of being selected for award, but that proposals may be accepted without such discussions; h) a notice that the RFP may be canceled and that any and all proposals may be rejected in whole or in part when it is in the best interest of the MRCOG; i) a statement of how proposed costs should be submitted; j) a notice that reads substantially as follows: "The Procurement Code, Sections 13-1-28 through 13-1-199 NMSA 1978, imposes civil and misdemeanor criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for bribes, gratuities and kick-backs", and k) required federal certifications – see section 27 of this policy, if applicable.

- 15.5.2 Incorporation by reference. The RFP may incorporate documents by reference, provided that the RFP specifies where such documents can be obtained.
- 15.5.3 Form of proposal. The manner in which proposals are to be submitted, including any forms for that purpose, should be designated in the RFP.
- 15.5.4 Proposal preparation time. Thirty calendar days between the date of issue and the proposal due date is the recommended minimum proposal preparation time. A longer preparation time may be required for complex procurements or for procurements that require substantial offeror resources to prepare an acceptable proposal.
- 15.6 *Public Notice.* The central purchasing office shall give public notice of the RFP in the same manner as provided in subsection 12.8 of this policy. It is further provided that subsection 12.8.2 of this policy does not apply to a solicitation of a professional service contract unless the value of the contract will exceed the dollar amount specified in Section 13-1-125 NMSA 1978.
- 15.7 *Pre-proposal Conferences.* Pre-proposal conferences may be conducted in accordance with subsection 12.9 of this policy. Any such conference should be held prior to submission of initial proposals.
- 15.8 *Amendments to the Request for Proposals.*
 - 15.8.1 Prior to submission of proposals. Prior to submission of proposals, amendments to the RFP may be made in accordance with subsection 12.10 of this policy.
 - 15.8.2 After submission of proposals. After submission of proposals, amendments to the RFP shall be distributed only to short-listed Offerors. The short-listed Offerors shall be permitted to submit new proposals or to amend those submitted. If in the opinion of the procurement officer or procurement manager, a contemplated amendment will significantly change the nature of the procurement, the RFP shall be canceled in accordance with sections 20 and 21 of this policy, and a new RFP issued.
- 15.9 *Modification or Withdrawal of Proposals.* Proposals may be modified or withdrawn prior to the established due date in accordance with subsection 12.11 of this policy. The established due date is either the time and date announced for receipt of proposals or

receipt of modifications to proposals, if any; or, if discussions have begun, it is the time and date by which best and final offers must be submitted by short-listed Offerors.

15.10 *Late Proposals, Late Modifications and Late Withdrawals.* Any proposal, withdrawal, or modification received after the established due date at the place designated for receipt of proposals is late. See section 15.9 of this policy for the definition of "established due date". They may be considered only in accordance with section 12.12 of this policy.

15.11 *Receipt and Opening of Proposals.*

15.11.1 Receipt. Proposals and modifications shall be time-stamped upon receipt and held in a secure place until the established due date. See section 12.12 of this policy for the definition of "established due date".

15.11.2 Opening. Proposals shall not be opened publicly and shall not be open to public inspection until after an offeror has been selected for award of a contract. An offeror may request in writing nondisclosure of confidential data. Such data shall accompany the proposal and shall be readily separable from the proposal in order to facilitate eventual public inspection of the non-confidential portion of the proposal.

15.12 *Evaluation of Proposals.*

15.12.1 Evaluation factors. The evaluation shall be based on the evaluation factors and the relative weights set forth in the RFP.

15.12.2 Evaluation Committee. The MRCOG Executive Director shall appoint an evaluation committee prior to the due date for receipt of proposals. The size of the committee should be manageable and may include both user and technical support representatives.

15.12.3 Classification of proposals. For the purpose of conducting discussions under subsection 15.13 of this policy, proposals shall be initially classified as a) responsive; b) potentially responsive, that is, reasonably susceptible of being made responsive; or c) non-responsive.

15.12.4 Disqualification. Non-responsive proposals are disqualified and eliminated from further consideration. A written determination in the form of a letter must be sent promptly to the disqualified offeror setting forth the grounds for the disqualification, and made a part of the procurement file.

15.13 *Proposal Discussion and Negotiations with Individual Offers.*

15.13.1 Discussions authorized. Discussions may be conducted with responsible Offerors who submit acceptable or responsive, potentially acceptable or potentially responsive proposals. Discussions shall be conducted by the central purchasing officer, the procurement manager or the evaluation committee as a whole body. Individual discussions by committee members except as otherwise expressed in this subsection are prohibited.

15.13.2 Purposes of discussions. Discussions are held to clarify technical or other aspects of the proposals.

- 15.13.3 Conduct of discussions. If during discussions there is a need for any substantial clarification or change in the request for proposals, the request for proposals shall be amended to incorporate such clarification or change. Any substantial oral clarification of a proposal shall be reduced to writing by the offeror. Proposals may be accepted and evaluated without such discussion. This is not an opportunity for the Offerors to amend the substance of their proposals.
- 15.13.4 Short list. All responsible Offerors who submit acceptable proposals are eligible for the short list. If numerous acceptable proposals have been submitted, however, the procurement officer or procurement manager may rank the proposals and select the highest ranked proposals for the short list. Those responsible Offerors who are selected for the short list are the short-listed Offerors" or "finalist Offerors".
- 15.13.5 Competitive negotiations. Competitive negotiations may be held among the short-listed Offerors to: a) promote understanding of the MRCOG's requirements and short-listed Offerors' proposal; and b) facilitate arriving at a contract that will be most advantageous to the MRCOG taking into consideration the evaluation factors set forth in the RFP.
- 15.13.6 Except for circumstances and situations otherwise approved by the central purchasing office, negotiations of the relevant terms and conditions as well as any other important factors in an RFP and proposed contract are negotiated prior to award of a contract, not after award.
- 15.13.7 Conduct of competitive negotiations. Short-listed Offerors shall be accorded fair and equal treatment with respect to any negotiations and revisions of proposals. The procurement manager should establish procedures and schedules for conducting negotiations. If during discussions there is a need for any substantial clarification of or change in the RFP, the RFP shall be amended to incorporate such clarification or change. Any substantial oral clarification of a proposal shall be reduced to writing by the short-listed offeror.
- 15.14 *Disclosure.* The contents of any proposal shall not be disclosed so as to be available to competing Offerors during the negotiation process and prior to award.
- 15.15 *Best and Final Offers.* The procurement officer or procurement manager may establish a common date and time for short-listed or finalist Offerors to submit best and final offers. Best and final offers shall be submitted only once; provided, however, the central purchasing office may make a written determination that it is in a MRCOG's best interest to conduct additional discussions or change the MRCOG's requirements and require another submission of best and final offers. Otherwise, no discussion of or changes in the best and final offers shall be allowed prior to award. Short-listed Offerors shall also be informed that if they do not submit a notice of withdrawal or another best and final offer, their immediately previous offer will be construed as their best and final offer.
- 15.16 *Mistakes in Proposals.*
- 15.16.1 Modification or withdrawal of proposals. Proposals may be modified or withdrawn as provided in subsection 15.9 of this policy.
- 15.16.2 Mistakes discovered after receipt of proposals. This subsection sets forth procedures to be applied in four situations in which mistakes in proposals are discovered after receipt of proposals.

- a) Confirmation of proposal. When the procurement officer or procurement manager knows or has reason to conclude before award that a mistake has been made, the procurement officer or procurement manager should request the offeror to confirm the proposal. If the offeror alleges mistake, the proposal may be corrected or withdrawn during any discussions that are held or if the conditions set forth in subsection 15.16.3 of this section are met.
 - b) During negotiations; prior to best and final offers. Once negotiations are commenced or after best and final offers are requested, any short-listed or finalist offeror may freely correct any mistake by modifying or withdrawing the proposal until the time and date set for receipt of best and final offers.
- 15.16.3 Technical irregularities. Technical irregularities are matters of form rather than substance evident from the proposal document, or insignificant mistakes that can be waived or corrected without prejudice to other Offerors; that is, when there is no effect on price, quality or quantity. If discussions are not held or if best and final offers upon which award will be made have been received, the procurement officer or procurement manager may waive such irregularities or allow an offeror to correct them if either is in the best interest of the MRCOG. Examples include the failure of an offeror to: return the number of signed proposals required by the RFP; sign the proposal, *but only if* the unsigned proposal is accompanied by other material indicating the offeror's intent to be bound; or acknowledge receipt of an amendment to the RFP, *but only if*: it is clear from the proposal that the offeror received the amendment and intended to be bound by its terms; *or* the amendment involved had no effect on price, quality or quantity.
- 15.16.4 Correction of mistakes. If discussions are not held, or if the best and final offers upon which award will be made have been received, mistakes shall be corrected to the intended correct offer whenever the mistake and the intended correct offer are clearly evident on the face of the proposal, in which event the proposal may not be withdrawn.
- 15.16.5 Withdrawal of proposals. If discussions are not held, or if the best and final offers upon which award will be made have been received, an Offeror alleging a material mistake of fact which makes a proposal non-responsive may be permitted to withdraw the proposal if: a) the mistake is clearly evident on the face of the proposal but the intended correct offer is not; or b) the offeror submits evidence which clearly and convincingly demonstrates that a mistake was made.
- 15.16.6 Determination required. When a proposal is corrected or withdrawn, or correction or withdrawal is denied under subsections 15.16.3 through 15.16.5 of this section, the procurement officer or procurement manager shall prepare a written determination showing that the relief was granted or denied in accordance with this section.
- 15.17 *Public Inspections.*
- 15.17.1 General. After award, any written determinations made pursuant to this policy, the evaluation committee report and each proposal, except those portions for which the offeror has made a written request for confidentiality, shall be open to public inspection. Confidential data is normally restricted to confidential financial information concerning the offeror's organization and data that qualifies as a trade secret in accordance with the Uniform Trade Secrets Act, Sections 57-3A-1 to 57-3A-7 NMSA 1978. The price of products offered or the cost of services proposed may not be designated as confidential information.

- 15.17.2 Confidential data. If a request is received for disclosure of data, for which an offeror has made a written request for confidentiality, the central purchasing shall examine the offeror's request and make a written determination that specifies which portions of the proposal should be disclosed. Unless the offeror takes legal action to prevent the disclosure, the data will be so disclosed. After award the proposal shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data.
- 15.18 *Payments for Purchases.* [Contract Clause] All contracts resulting from a request for proposals shall contain a clause allowing for late payment charges against the MRCOG or its subrecipients in the amount and under the conditions set forth in Section 13-1-158 NMSA 1978. *For purchases funded by state or federal grants to the MRCOG, payments shall be tendered to the contractor within five working days of receipt of funds from the funding agency.*
16. **APPLICATION – MICRO AND SMALL PURCHASES.** The provisions of this section apply to the procurement of tangible goods and services, construction and professional services. The methods of procurement set forth in subsections 16.2 through 16.3 of this policy provide alternatives to the competitive sealed bid and competitive sealed proposal methods of procurement. If the procurement methods set forth in subsections 16.2 through 16.3 of this policy are not used the competitive sealed bid or competitive sealed proposal methods shall apply.
- 16.1 *Division of Requirements.* Procurement requirements shall not be artificially divided so as to constitute a small purchase under this section.
- 16.2 *Micro and Small Purchases of Items of Tangible Personal Property, Construction and Nonprofessional Services.*
- 16.2.1 a) Procurement by micro purchases. Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the dollar amounts specified in 48 CFR Subpart 2.1, including for acquisitions for construction subject to the Davis Bacon Act. . To the extent practicable, purchasers shall distribute micro-purchases equitably among qualified suppliers. Purchases may be awarded without soliciting competitive quotations if the price is considered reasonable. (To be considered reasonable, purchaser shall research qualified suppliers on at least an annual basis. The research must be documented and maintained in the vendor file). b) Procurement by small purchases. Small purchases are those relatively simple and informal procurement methods for securing services, supplies or other property that do not cost more than the lesser of the State Procurement Code Threshold or the Simplified Acquisition Threshold. (The simplified acquisition threshold is set by the Federal Acquisition Regulation at 48 CFR Subpart 2.1). If small purchase procedures are used, price or rate quotations must be obtained from a minimum of three (3) qualified sources. (Qualified source is a vendor that meets purchasers' specifications). Quotations received must be documented, regardless of the method to obtain prices/rates, i.e. telephone, email, etc.
- 16.2.2 Disclosure. Prior to award, the contents of any response to a quotation shall not be disclosed to any other business from which the same request for quotation is also being solicited.

- 16.2.3 Bidders list. Although not required to be published in a newspaper or newspapers of general circulation in the Region, the central purchasing office shall send copies of the notice or request for quotes/informal invitation for bids involving the expenditure of more than \$5,000 but not exceeding the amount specified in Section 13-1-125 NMSA 1978 to those businesses who have signified in writing an interest in submitting bids for particular categories of items of tangible personal property, construction or services and which have paid any required fees.
- 16.2.4 Award. Award shall be made to the business offering the lowest acceptable quotation.
- 16.2.5 Records. The names of the businesses submitting quotations and the date and the amount of each quotation shall be recorded and maintained as a public record.

16.3 *Small Purchases of Professional Services.*

- 16.3.1 Application. The central purchasing office may procure professional services having a value that does not cost more than the lesser of the State Procurement Code Threshold or the Simplified Acquisition Threshold. (The simplified acquisition threshold is set by the Federal Acquisition Regulation at 48 CFR Subpart 2.1). If small purchase procedures are used, price or rate quotations must be obtained from a minimum of three (3) qualified sources. (Qualified source is a vendor that meets purchasers' specifications). Quotations received must be documented, regardless of the method to obtain prices/rates, i.e. telephone, email, etc.

16.4 Amazon On-Line Purchases.

In order to purchase from Amazon.com you must have exhausted all other procurement options for purchase, and followed all competitive thresholds.

User must purchase with personal credit card, not agency card. You would then follow the below workflow approval process.

- 1) Submit a Request for PRE-Approval memo
 - a. Must be signed off by Procurement Officer (to verify proper procedures are followed)
 - b. Approval by Executive Director
- 2) After ED approval, make purchase with personal credit card.
- 3) After purchase, attach receipt to Reimbursement Request for approval from ED.

17. **APPLICATION -- SOLE SOURCE PROCUREMENTS.** The provisions of this section apply to all sole source procurements unless emergency conditions exist as defined in subsection 17.3 of this policy.

17.1 *Sole Source Procurement of Items of Tangible Personal Property, Construction and Nonprofessional Services.*

- 17.1.1 Conditions for use. A contract may be awarded without competitive sealed bids or competitive sealed proposals, regardless of the estimated cost, when the central purchasing office makes a written determination, after conducting a good-faith review of available, that there is only one source for the required items of tangible personal property, construction or nonprofessional services. In cases of reasonable doubt, competition should be solicited.

- 17.1.2 Request by contractors or subgrantees. Any request by a contractor or subgrantee that procurement be restricted to one potential contractor shall be accompanied by a written explanation as to why no other will be suitable or acceptable to meet the need.
- 17.1.3 Negotiations. The central purchasing office shall conduct negotiations, as appropriate, as to price, delivery and quantity, in order to obtain the price most advantageous to the MRCOG.
- 17.2 *Records of sole source procurements.* The central purchasing shall maintain records of sole source procurements for a minimum of three years – see section 31. The record of each such procurement shall be a public record and shall contain: a) the contractor's name and address; b) the amount and term of the contract; c) a listing of the services, construction, or items of tangible personal property procured under the contract; and d) the justification for the procurement method which shall include any written determinations and written approvals required by any provision of subsections 16.5 through 16.9 of this policy.
18. **APPLICATION -- EMERGENCY PROCUREMENTS.** The section applies to any procurement made under emergency conditions that will not permit other source selection methods to be used.
- 18.1 *Definition of Emergency Conditions.* An emergency condition is a situation which creates a threat to public health, welfare, safety or property such as may arise by reason of floods, epidemics, riots, equipment failures or similar events. The existence of the emergency condition creates an immediate and serious need for services, construction or items of tangible personal property that cannot be met through normal procurement methods and the lack of which would seriously threaten: a) the functioning of government; b) the preservation or protection of property; or c) the health or safety of any person.
- 18.2 *Scope of Emergency Procurements.* Emergency procurements shall be limited to those services, construction, or items of tangible personal property necessary to meet the emergency. Such procurement shall not include the purchase or lease-purchase of heavy road equipment.
- 18.3 *Authority to make Emergency Procurements.* The central purchasing office may make or authorize others to make emergency procurements when an emergency condition arises; provided that emergency procurements shall be made with such competition as is practicable under the circumstances.
- 18.4 *Procedure.* The procedure used shall be selected to assure that the required services, construction, or items of tangible personal property are procured in time to meet the emergency. Given this constraint, such competition as is practicable shall be obtained.
- 18.5 *Written Determination Required.* A written determination of the basis for the emergency procurement shall be included in the procurement file.
- 18.6 *Records of Emergency Procurements.* The central purchasing shall maintain records of emergency procurements for a minimum of three years – see section 31. The record of each such procurement shall be a public record and shall contain: a) the contractor's name and address; b) the amount and term of the contract; c) a listing of the services,

construction, or items of tangible personal property procured under the contract; and d) the justification for the procurement method.

18.7 *Construction under Emergency or Sole Source Procurement.*

18.7.1 Notwithstanding the requirements of Sections 13-1-126 and 13-1-127 NMSA 1978, any procurement including sole source and emergency procurement, other sections of statute apply when procuring construction services. If procurement for construction is declared, a state wage rate determination pursuant to Section 13-4-11 NMSA 1978 must be obtained if the construction contract is over the dollar amount specified in that section. Commentary: Even if the emergency occurs over a weekend or holiday you must advise the contractor that he will be required to pay state wage rates and the central purchasing office must contact the Labor Commissioner as soon as possible so he can issue a minimum wage rate determination for the project. To obtain a state wage rate determination, contact: State Labor Commissioner, P. O. Box 4218, 1596 Pacheco St., Santa Fe, NM 87503, 505-827-6875.

18.7.2 Performance and labor and material payments bonds pursuant to Section 13-4-18 NMSA 1978 are required if the construction contract is over the dollar amount specified in that section. The bonds may be required if a project is under the dollar amount specified in Section 13-5-18 at the MRCOG's discretion.

19. **PROCUREMENT UNDER EXISTING CONTRACTS AUTHORIZED.** The central purchasing office may contract for services, construction, or items of tangible personal property without the use of competitive sealed bids or competitive sealed proposals as follows:

19.1 At a price equal to or less than the contractor's current federal supply contract (GSA), providing the contractor has indicated in writing a willingness to extend the contract's pricing, terms and conditions to the MRCOG and the purchase order adequately identifies the contract relied upon; or

19.2 With a business which has a current price agreement with the central purchasing office or the State Purchasing Division of the General Services Department for the item, services, or construction meeting the same standards and specifications as the items to be procured, if the following conditions are met: a) the total quantity purchased does not exceed the quantity which may be purchased under the applicable price agreement; and b) the purchase order adequately identifies the price agreement relied upon.

19.3 *Copies of Contracts and Price Agreements.* A central purchasing office shall retain for public inspection and for the use of auditors a copy of each central purchasing office contract or current price agreement relied upon to make purchases without seeking competitive bids.

19.4 *Used Items.* As defined in Section 13-1-155 NMSA 1978, a central purchasing office, when procuring *used* items of tangible personal property the estimated cost of which exceeds the dollar amount specified in that section, shall request bids as though the items were new, adding specifications that permit used items under conditions to be outlined in the bid specifications, including but not limited to:

19.4.1 Requiring a written warranty for at least ninety days after date of delivery, and

19.4.2 An independent "certificate of working order" by a qualified mechanic or appraiser.

19.5 Trade-in or exchange of used items. As defined in Section 13-1-156 NMSA 1978, a central purchasing office, when *trading in or exchanging used* items of tangible personal property the estimated value of which exceeds the dollar amount specified in that section as part-payment on the procurement of new items of tangible personal property, shall:

19.5.1 Have an *independent* appraisal made of the items to be traded in or exchanged. The appraisal shall be in writing, shall be made part of the procurement file and shall be a public record. The invitation for bids or request for proposals shall contain notice to prospective bidders or offerors of the description and specifications of the items to be traded in or exchanged, the appraised value of the items to be traded in or exchanged and the location where the items to be traded in or exchanged may be inspected; or

19.5.2 Have two written quotes for purchase of the property at a specified price: a) award shall be based upon the net bid. Bidders or offerors shall compute their net bid or offer by deducting the appraised value or highest quote of the items to be traded in or exchanged from the gross bid or offer on the new items of tangible personal property to be procured; b) if an amount offered in trade is less than the appraised value or the highest quote but is found to be a fair reflection of the current market, representative of the condition of the items of tangible personal property and in the best interest of the agency, the bid or offer may be accepted; and c) documentation of the terms of acceptance shall be in writing, shall be made a part of the procurement file and shall be a public record.

20. CANCELLATION OF SOLICITATIONS OR REJECTION OF BIDS OR PROPOSALS.

The provisions of sections 20 and 21 of this policy shall govern the cancellation of any solicitations whether issued by the central purchasing office under competitive sealed bids, competitive sealed proposals, small purchases, or any other source selection method, and rejection of bids or proposals in whole or in part.

20.1 *Policy.* Any solicitation may be canceled or any or all bids or proposals may be rejected in whole or in part when it is in the best interest of the MRCOG.

20.2 *Cancellation of Solicitations or Rejection of All Bids or Proposals.*

20.2.1 Prior to opening. As used in this section, "opening" means the date set for opening of bids or receipt of proposals.

a) Prior to opening, a solicitation may be canceled in whole or in part when the central purchasing office makes a written determination that such action is in the MRCOG's best interest for reasons including but not limited to: 1) the services, construction, or items of tangible personal property are no longer required; 2) the contractor or subgrantee no longer can reasonably expect to fund the procurement; or 3) proposed amendments to the solicitation would significantly change the nature of the procurement.

b) When a solicitation is canceled prior to opening, notice shall be sent to all businesses solicited. The notice shall: 1) identify the solicitation; 2) briefly explain the reason for cancellation; and 3) where appropriate, explain that an opportunity will be given to compete on any resolicitation or any future procurement of similar services, construction, or items of tangible personal property.

20.2.2 After opening.

- a) After opening but prior to award, all bids or proposals may be rejected in whole or in part when the central purchasing office makes a written determination that such action is in the MRCOG's best interest for reasons including but not limited to: 1) all of the bids and proposals are non-responsive; 2) the services, construction, or items of tangible personal property are no longer required; 3) ambiguous or otherwise inadequate specifications were part of the solicitation; 4) the solicitation did not provide for consideration of all factors of significance to the recipients/subrecipients; 5) prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds; 6) all otherwise acceptable bids or proposals received are at clearly unreasonable prices; or 7) there is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith.
- b) A notice of rejection should be sent to all businesses that submitted bids or proposals, and it shall conform to subsection 20.2.1.a) of this section.

21. REJECTION OF INDIVIDUAL BIDS OR PROPOSALS.

21.1 Reasons for rejection.

21.1.1 Bids. As used in this section, "bid" includes both competitive sealed bids and small purchase quotations. Reasons for rejecting a bid shall include but are not limited to: a) the business that submitted the bid is non-responsive as determined under section 22 of this policy; b) the bid is not responsive; or c) the service, construction, or item of tangible personal property offered in the bid is unacceptable by reason of its failure to meet the requirements of the specifications, or permissible alternates, or other acceptability criteria set forth in the IFB.

21.1.2 Proposals. As used in this section, "proposal" includes both competitive sealed proposals and small purchase offers. Unless the solicitation states otherwise, proposals need not be unconditionally accepted without alteration or correction and a contractor or subgrantee stated requirements may be revised or clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include but are not limited to: a) the business that submitted the proposal is non-responsive as determined under section 23 of this policy; b) the proposal is not responsive; or c) the proposed price is clearly unreasonable; or d) the proposal failed to adequately address one or more material mandatory requirements as set forth in the request for proposals.

21.1.3 Written determination required. The central purchasing office and made a part of the procurement file shall prepare a written determination that contains the reasons for the rejection of an individual bid or proposal.

21.2 "*All or None*" bids. When the term "all or none" is used:

21.2.1 By the purchaser in a solicitation. A solicitation may require bidders to submit bids or offers on all items listed in the solicitation, or may identify certain groups of items in which all items must be bid. If the solicitation is properly so limited, a bidder's failure to bid all items identified as "all or none" items may render the bid non-responsive.

- 21.2.2 By the bidder or offeror, and not the purchaser. If the bidder restricts acceptance of the bid, or a portion thereof, by such a statement as "all or none", the bidder has "qualified" the offer which may render the bid as non-responsive.
- 21.2.3 In instances as stated above, such a bid or offer may be accepted only if the central purchasing office issues a determination setting forth the basis for accepting the bid or offer as being in the best interest of the MRCOG. Also in both, instances, the bid or offer is only eligible for award if it is the overall low bid for the item or items so restricted.
22. **RECEIPT, INSPECTION, ACCEPTANCE OR REJECTION OF DELIVERIES.** The MRCOG or contractor/subgrantee is responsible for inspecting and accepting or rejecting deliveries.
- 22.1 The MRCOG or contractor or subgrantee shall determine whether the quantity is as specified in the purchase order or contract;
- 22.2 The MRCOG or contractor or subgrantee shall determine whether the quality conforms to the specifications referred to or included in the purchase order or contract;
- 22.3 If inspection reveals that the delivery does not meet or conform to the quantity or quality specified in the purchase order or contract, the MRCOG or contractor or subgrantee shall notify the vendor that the delivery has been rejected and shall order the vendor to promptly make a satisfactory replacement or supplementary delivery;
- 22.4 In case the vendor fails to comply, the MRCOG or contractor or subgrantee shall promptly file a purchasing complaint with the central purchasing office. Also, in case the vendor fails to comply, the MRCOG or user entity shall have no obligation to pay for the nonconforming items of tangible personal property;
- 22.4.1 If the delivery does conform to the quantity and quality specified in the purchase order or contract, the MRCOG or user entity shall certify that delivery has been completed and is satisfactory.
- 22.5 *Summary.* Notwithstanding the requirements of section 22 of this policy, if, after delivery and acceptance of goods, the goods or a portion thereof are later found to be non-conforming to the specifications referred to or included in the purchase order or contract, such acceptance does not waive any rights or remedies which are otherwise granted to the buyer in accordance with other applicable laws of New Mexico.
23. **RESPONSIBILITY OF BIDDERS AND OFFERORS.** A determination of responsibility or non-responsibility shall be governed by this section 23.
- 23.1 Standards of responsibility.
- 23.1.1 Standards for bidders. Factors to be considered in determining whether the standard of responsibility has been met include whether a bidder has: a) submitted a responsive bid; b) adequate financial resources, production or service facilities, personnel, service reputation and experience to make satisfactory delivery of the services, construction, or items of tangible personal property described in the IFB; c) a satisfactory record of performance; d) a satisfactory record of integrity; e) qualified legally to contract with

the MRCOG; and f) supplied all necessary information and data in connection with any inquiry concerning responsibility.

23.1.2 Standards for Offerors. Factors to be considered in determining whether the standard of responsibility has been met include whether an offeror has: a) submitted a responsive proposal; b) adequate financial resources, production or service facilities, personnel, service reputation and experience to make satisfactory delivery of the services or items of tangible personal property described in the proposal; c) a satisfactory record of performance; d) a satisfactory record of integrity; e) qualified legally to contract with the MRCOG; and f) supplied all necessary information and data in connection with any inquiry concerning responsibility.

23.1.3 Ability to meet Standards. A bidder or offeror may demonstrate the availability of adequate financial resources, production or service facilities, personnel and experience by submitting, upon request: a) evidence that the bidder or offeror possesses the necessary items; b) acceptable plans to subcontract for the necessary items; or c) a documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items.

23.2 *Inquiry by Procurement Officer.* Before awarding a contract, the procurement officer or procurement manager must be satisfied that the bidder or offeror is responsible. Therefore, a bidder or offeror shall supply information and data requested by the procurement officer concerning the responsibility of the bidder or offeror. The unreasonable failure of a bidder or offeror to promptly supply information or data in connection with such an inquiry is grounds for a determination that the bidder or offeror is not responsible.

23.2.1 Determination Required. If a bidder or offeror who otherwise would have been awarded a contract is found to be non-responsible, a written determination, setting forth the basis of the finding, shall be prepared by the central purchasing office. The written determination shall be made part of the procurement file, and a copy of the determination shall be sent to the non-responsible bidder or offeror.

24. **APPLICABILITY -- PROTESTS.** The provisions of this section apply to all protests filed with the central purchasing office.

24.1 *Right to Protest.* Any bidder or offeror who is aggrieved in connection with a solicitation or award of a contract may protest to the central purchasing office.

24.2 *Filing of Protest.*

24.2.1 Protest must be written. Protests must be in writing and addressed to the central purchasing office, whichever has control and administration over the procurement.

24.2.2 Contents. The protest shall: a) include the name and address of the protestant; b) include the solicitation number; c) contain a statement of the grounds for protest; d) include supporting exhibits, evidence or documents to substantiate any claim unless not available within the filing time in which case the expected availability date shall be indicated; and e) specify the ruling requested from the central purchasing office.

24.2.3 Pleadings. No formal pleading is required to initiate a protest, but protests should be concise, logically arranged, and direct.

24.2.4 Time limit. Protests shall be submitted within fifteen calendar days after knowledge of the facts or occurrences giving rise to the protest. Any person or business that has been sent written notice of any fact or occurrence is presumed to have knowledge of the fact or occurrence.

24.3 *Procurements after Protest.*

24.3.1 In the event of a timely protest, as defined in this section, the central purchasing office shall not proceed further with the procurement unless the office makes a written determination that the award of the contract is necessary to protect substantial interests of the MRCOG. Such written determination should set forth the basis for the determination. As used in this section, the point in time in which a contract is awarded is that point at which a legally enforceable contract is created unless the context clearly requires a different meaning.

24.3.2 Procurement shall not be halted after a contract has been awarded merely because a protest has been filed. After a contract has been awarded, the central purchasing office may, in its sole discretion, halt procurement in exceptional circumstances or for good cause shown.

24.4 *Protest procedure.*

24.4.1 Upon the filing of a timely protest, the central purchasing office shall give notice of the protest to the contractor if award has been made or, if no award has been made, to all bidders or Offerors who appear to have a substantial and reasonable prospect of receiving an award if the protest is denied.

24.4.2 The protestant and every business that receives notice pursuant to this section will automatically be parties to any further proceedings before the central purchasing office. In addition, any other person or business may move to intervene at any time during the course of the proceedings. Intervention will be granted upon a showing of a substantial interest in the outcome of the proceedings. Interveners shall accept the status of the proceedings at the time of their intervention; in particular, they must abide by all prior rulings and accept all previously established time schedules. The central purchasing office and all employees thereof, are not parties to the proceedings.

24.4.3 The central purchasing office may take any action reasonably necessary to resolve a protest. Such actions include, but are not limited to, the following: a) issue a final written determination summarily dismissing the protest; b) obtain information from the staff of the central purchasing; c) require parties to produce for examination information or witnesses under their control; d) require parties to express their positions on any issues in the proceedings; e) require parties to submit legal briefs on any issues in the proceeding; f) establish procedural schedules; g) regulate the course of the proceedings and the conduct of any participants; h) receive, policy on, exclude or limit evidence; i) take official notice of any fact that is among the traditional matters of official or administrative notice; j) conduct hearings; and k) take any action reasonably necessary to compel discovery or control the conduct of parties or witnesses.

24.4.4 Protest Discovery. Upon written request of any party, or upon its own motion, the central purchasing office may require parties to comply with discovery requests.

24.5 *Protest Hearings.*

24.5.1 Hearings will be held only when the central purchasing determines that substantial material factual issues are present that cannot be resolved satisfactorily through an examination of written documents in the record. Any party may request a hearing, but such requests shall be deemed denied unless specifically granted.

24.5.2 Hearings, when held, should be as informal as practicable under the circumstances, but the central purchasing office has absolute discretion in establishing the degree of formality for any particular hearing. In no event is the central purchasing office required to adhere to formal policies of evidence or procedure.

24.6 *Resolution.*

24.6.1 The central purchasing office shall promptly issue a written determination relating to the protest. The determination shall a) state the reasons for the action taken; and b) inform the protestant of the right to judicial review of the determination pursuant to Section 13-1-183 NMSA 1978.

24.6.2 A copy of the written determination shall be sent immediately by certified mail, return receipt requested, to each of the parties.

24.7 *Relief.*

24.7.1 Prior to award. If, prior to award, the central purchasing office makes a written determination that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be canceled.

24.7.2 After award.

a) No fraud or bad faith. If, after an award, the central purchasing office makes a written determination that a solicitation or award of a contract is in violation of law and that the business awarded the contract has not acted fraudulently or in bad faith: a) the contract may be ratified, affirmed or revised to comply with law, provided that a written determination is made that doing so is in the best interest of the state; or b) the contract may be terminated, and the business awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract plus a reasonable profit prior to termination.

b) Fraud or bad faith. If, after an award, the central purchasing office makes a written determination that a solicitation or award of a contract is in violation of law and that the business awarded the contract has acted fraudulently or in bad faith, the contract shall be canceled.

c) Relief not allowed. Except as provided subsection 24.7.2a), the central purchasing office shall not award money damages or attorneys' fees.

24.8 *Motion for Reconsideration.*

24.8.1 Motion. A motion for reconsideration of a written determination issued pursuant to subsection 24.6 of this policy may be filed by any party or by any contractor or subgrantee involved in the procurement. The motion for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification

of the determination is deemed warranted, specifying any errors of law made, or information not previously considered.

24.8.2 When to file. A motion for reconsideration shall be filed not later than seven calendar days after receipt of the written determination.

24.8.3 Response to motion. The central purchasing office shall promptly issue a written response to the motion for reconsideration. A copy of the written response shall be sent immediately by certified mail, return receipt requested, to each of the parties.

24.9 *Designee.*

24.9.1 Designation. At any point during a protest proceeding, the central purchasing office may appoint a designee as defined in Section 13-1-51 NMSA 1978 to preside over the proceeding. The designee will have all of the powers described in section 24 of this policy except the power to issue a written determination under subsection 24.6 of this policy. The designee only has authority to recommend a resolution to the central purchasing office under subsection 24.6 of this policy.

24.9.2 Who may be designated? Any person, other than the procurement officer, procurement manager or other person not directly involved in the procurement may serve as a designee.

24.9.3 Recommended written determination. A designee shall present a recommended written resolution to the central purchasing office and mail a copy to each of the parties. No party may appeal from the recommended resolution of the designee.

24.9.4 Action by MRCOG Executive Director. The Executive Director shall approve, disapprove or modify the recommended resolution of the designee in writing. Such approval, disapproval or modification shall be the written determination required by subsection 24.6 of this policy. Any party may file a motion for reconsideration of the written determination pursuant to section 24.8 of this policy.

24.10 *Final Determination.*

24.10.1 No motion for reconsideration. In those proceedings in which no motion for reconsideration is filed, the written determination issued pursuant to subsection 24.6 of this policy shall be the final determination for purposes of the time limits for seeking judicial review under Section 13-1-183 NMSA 1978.

24.10.2 Motion for reconsideration. In those proceedings in which a motion for reconsideration is filed, the written response to the motion issued pursuant to subsection 24.8 of this policy shall be the final determination for purposes of the time limits for seeking judicial review under Section 13-1-183 NMSA 1978.

24.11 *Copies of Communications.*

24.11.1 Copies to be provided to parties. Each party to a protest proceeding shall certify that it has provided every other party with copies of all documents or correspondence addressed or delivered to the central purchasing office.

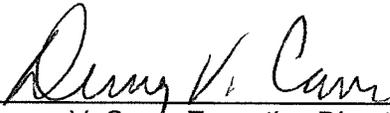
- 24.11.2 Ex parte communications. No party shall submit to the central purchasing office, ex parte, any material, evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in a protest.
- 24.11.3 Counting Days. In computing any period of time prescribed in section 24 of this policy, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, a Sunday, or a legal holiday, in which event the period shall run to the end of the next business day.
25. **PROCUREMENT OVERSIGHT.** The MRCOG and its contractors or subgrantees shall conduct and document oversight to ensure compliance with the procurement standards established in applicable federal regulations, OMB circulars, the Code and this policy.
- 25.1 *Procurement system.* The MRCOG and its contractors or subgrantees shall maintain an administration system that ensures that contractors, subrecipients and vendors perform in accordance with the terms, conditions and specifications of their awards. Such system shall include the maintenance of records sufficient to detail the significant history of the procurement. These records shall include, but are not limited to, rationale for method of procurement, selection of agreement type, awardees selection or rejection, and the basis for the agreement price.
- 25.2 *Contract awards.* The MRCOG and its contractors or subgrantees shall adhere to applicable OMB circulars and the Code in selecting and awarding contracts, grants and subgrants.
26. **NONDISCRIMINATION.** Federal grant recipients, subrecipients, contractors and subcontractors shall comply with the nondiscrimination and equal opportunity provisions of the enabling Act, including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973, as amended; the Age Discrimination Act of 1975, as amended; Title IX of the Education Amendments of 1972, as amended; the Americans with Disabilities Act of 1990, and any amendments thereto; and all applicable requirements imposed pursuant to regulations implementing those laws. The applicable federal funding agency and the state administrative entity reserve the right to seek judicial enforcement of this assurance.
27. **RESTRICTIONS AND CERTIFICATIONS.** The MRCOG, its contractors and subgrantees shall comply with: the Drug-Free Workplace Act of 1998 (Pub L. 100-690, Title V, Sub Title D); Federal Restrictions on Lobbying (20 CFR 93.100); restrictions on the use of funds involving sectarian activities; and certification regarding debarment, suspension and voluntary exclusion-lower tier covered transactions (29 CFR 98, OMB Circular A-133, and Executive Order 12549); certification regarding conflict of interest; and tobacco-free certification, if applicable and MRCOG policy.
28. **UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND CONTRACTS.** Contractor shall comply with the appropriate Uniform Administrative Requirements for Grants and Contracts as promulgated in the Federal Common Rule, including but not limited to OMB circulars A-87, A-102, and A-122.
29. **NON-EXPENDABLE SUPPLIES AND PROPERTY.** Any nonexpendable supplies and property referred to as tangible personal property in this policy acquired using MRCOG funds and valued over \$5,000 is a fixed assets property of the MRCOG. Staff shall notify

the Central Purchasing office when authorized items over \$5,000 are purchased and received so the item can properly be tagged and inventoried.

30. **SALE OR LEASE OF REAL PROPERTY.** The selling or leasing of real property; and the sale, exchange and gift of property is governed by other statutory requirements and *not* by the Code or this policy.

31. **RECORDS RETENTION.** The central purchasing office, including a contractor or subgrantee, shall be responsible for retention of all procurement records. The records shall be retained for a period of a minimum of 3 years from the date of final payment under the contract/subgrant. Records shall be retained beyond the 3 year period if audit findings have not been resolved, an independent audit is pending completion, or if requested by the state administrative entity or applicable funding authority or required for pending litigation. In such cases, records shall be retained until such audit findings or litigation is resolved.

PASSED, APPROVED AND ADOPTED AS REVISED this 15 day of July



Dewey V. Cave, Executive Director

