

DEPARTMENT OF PERSONNEL AND ADMINISTRATION

Division of Finance and Procurement

PROCUREMENT RULES

1 CCR 101-9

[Editor's Notes follow the text of the rules at the end of this CCR Document.]

ARTICLE 101 GENERAL PROVISIONS

PART 1 PURPOSES, CONSTRUCTION AND APPLICATION

R-24-101-101 Short title

(See Statute)

R-24-101-102 Purposes - Rules of Construction

(See Statute)

R-24-101-102-01 General

These rules implement the provisions of the Colorado Procurement Code (§24-101-101 et seq. CRS), the Construction Bidding for Public Projects Act (§24-92-101 CRS et seq.), Construction Contracts with Public Entities (§24-91-101 CRS et seq.) and the Integrated Delivery Method for Public Projects Act (§24-93-101 CRS et seq.).

R-24-101-102-02 Expenditure of Funds

These rules shall apply to every expenditure of public funds by the executive branch of this state, including federal assistance money, under any contract except supplies, services or construction as defined in Rule R-24-101-105-01.

R-24-101-103 Supplemental General Principles of Law Applicable

(See Statute)

R-24-101-104 Requirement of Good Faith

(See Statute)

R-24-101-105 Application of This Code

(See Statute)

R-24-101-105-01 Applicability

The Colorado Procurement Code and these rules do not apply to the following procurements:

- (a) No state funds are expended or the contract is revenue-producing. Agencies shall maximize the return to the State when revenue-producing contracts are involved. Competitive bidding is encouraged to ensure fair and open competition.
- (b) The procurement is made by the legislative or judicial branch of state government.
- (c) The procurement is for highway and/or bridge construction.
- (d) The contract is between state agencies, between the State and a political sub-division, another state, or the federal government, or any combination as described in R-24-110-101 through R-24-110-301.
- (e) The procurement is for public printing which meets the requirements of Article 109, CRS, as amended.
- (f) The procurement is for services provided by architects, engineers, landscape architects, industrial hygienists, and land surveyors (Ref. 24-30-1401 through 24-30-1407).
- (g) After approval of a written determination, a supplier's item is to be procured for resale; or
- (h) Where the procurement of services from a specific vendor(s) is necessary to comply with the specific terms and conditions of a grant award.
- (i) The awarding of grants, as the term is defined in §24-101-301 (10.5)(A), (B) CRS.

PART 2 WRITTEN DETERMINATIONS

R-24-101-201-01 Preparation and Execution

Where the Colorado Procurement Code or these rules require a written determination, the person required to prepare the determination may delegate its preparation.

R-24-101-201-02 Content

Each written determination shall set out sufficient facts, circumstances, and reasoning to substantiate the specific determination which is made.

R-24-101-201-03 Supporting Information

The person responsible for the execution of a written determination may require other state personnel, including technical personnel and appropriate personnel in the using agency, to furnish, in an accurate and adequate fashion, any information pertinent to the determination.

R-24-101-201-04 Retention

Each written determination shall be filed in the solicitation or contract file to which it applies, and shall be retained as part of such file for so long as the file is required to be maintained, as provided in Section 24-80-101 through 24-80-112.

PART 3 DEFINITIONS

R-24-101-301 Terms Defined in Colorado Procurement Code

- (a) As used throughout these rules, words and terms defined in the Colorado Procurement Code shall have the same meaning as in the Code.

- (b) "Commodity" as used in these Rules shall have the same meaning as "product".
- (c) "Product" means anything that is produced or manufactured and that may be obtained, or needs to be obtained, by the State, either in and of itself, or in conjunction with services. As used in these Rules, "Product," "Supplies," and "Commodity" shall have essentially the same meaning.

PART 4 PROCUREMENT RECORDS AND INFORMATION

(See Statute)

ARTICLE 102 PROCUREMENT ORGANIZATION

PART 1 EXECUTIVE DIRECTOR, DEPARTMENT OF ADMINISTRATION

(See Statute)

PART 2 DIVISION OF PURCHASING

R-24-102-201 Creation of the Division of Purchasing

(See Statute)

R-24-102-201 State Purchasing Director

The State Purchasing Director referred to in these rules shall be appointed by the Executive Director of the Department of Personnel and shall have these powers and duties through delegation from the Executive Director. Any powers and duties not so delegated remain with the Executive Director.

R-24-102-201 State Purchasing Director

(See Statute)

R-24-102-202-01 Mandatory and Permissive Price Agreements

- (a) The State Purchasing Director may issue mandatory or permissive price agreements for supplies or services for use by all state agencies and institutions.
- (b) Mandatory price agreements shall be used by all agencies and institutions if and when the supplies or services are needed. Any agency or institution desiring to purchase supplies or services of a similar nature other than those on a mandatory price agreement must request and receive written authorization to do so by the Division of Purchasing.
- (c) Permissive price agreements may be used by all agencies and institutions if and when the supplies or services are needed. If supplies or services contained on permissive price agreements are not used by agencies or institutions, the needs must be submitted for competition as provided by these rules.

R-24-102-202.5-01 Electronic Procurement Systems.

Definitions

- (a) "Construction Project," for purposes of Rule R-24-102-202.5-04, means any procurement that meets the definition of a "public project," as defined in §24-92-102(8) CRS, or any procurement that meets the definition of "construction" as defined in §24-101-301 CRS.

- (b) “Electronic Procurement Systems” means database and notification systems” created pursuant to §24-102-202.5 CRS.

R-24-102-202.5-02 Use of Electronic Procurement Systems - Goods and Services

An Electronic Procurement System shall be the notification method for competitive solicitations for goods and services made through Invitations for Bids (IFB), Requests for Proposals (RFP), and Documented Quotes (DQ).

R-24-102-202.5-03 Electronic Procurement Systems Fees

The fee structure for use of Electronic Procurement Systems shall be set by the State Purchasing Director.

R-24-102-202.5-04 Use of Electronic Procurement Systems - Notice of Construction Projects and Professional Services

For all construction projects and for all procurements for professional service (as defined in §24-30-1402(6) CRS) for which competitive notification or solicitation procedures are required, a notification must be placed on an Electronic Procurement System, and the award must be posted on an Electronic Procurement System.

- (a) Detailed specifications shall not be included in the notice, and all information must be open to public view, without password protection.
- (b) Contractors/bidders need not be registered for an Electronic Procurement System in order to be deemed responsive.
- (c) This requirement is in addition to, and does not supersede, any advertisement, notification, or solicitation procedures required by statute or rule.

R-24-102-204 Delegation of Authority by State Purchasing Director

(See Statute)

R-24-102-204-01 Purchasing Delegation Limits

Purchasing delegations will have limits as described in Rule R-24-103-204 and all associated subparagraphs. An agency that receives limited purchasing authority shall be referred to as a “Group I Agency”, and an agency that receives an unrestricted purchasing delegation shall be referred to as a “Group II Agency”.

R-24-102-204-02 Delegation Criteria

Recognizing the importance of local control to meet local needs, delegation of purchasing authority is encouraged where efficient.

- (a) Minimum criteria to receive a Group I purchasing delegation shall include:
 - (i) a signed delegation agreement between the Department and the delegated agency or the governing board of a college or university, and
 - (ii) successful completion by staff of training by the Division of Purchasing, and
 - (iii) use of an Electronic Procurement System.

- (b) Minimum criteria to receive a Group II purchasing delegation shall include:
- (i) a signed delegation agreement between the Department and the delegated agency or the governing board of a college or university, and
 - (ii) demonstrated need, and
 - (iii) demonstrated existing staff competency in state purchasing, and
 - (iv) an automated purchasing system, and
 - (v) use of an Electronic Procurement System.

R-24-102-206 Contract Performance Outside the United States or Colorado – Notice - Penalty

R 24-102-206-01 Department –Services Contracts

The Department will collect the data required by this section for all services contracts, including contracts for construction services.

R24-102-206-02 Written Notice and Post of Notice Timeline

Pursuant to §24-102-206(3) CRS, a governmental body will provide written notice to the Department of Personnel within 30 calendar days from the vendor's notice to the governmental body. Pursuant to §24-102-206(5) CRS, the Executive Director will post on the official web site of the Department any notice that a vendor provides to a governmental body within 30 calendar days of notice from the governmental body.

PART 3 ORGANIZATION OF PUBLIC PROCUREMENT

(See Statute)

PART 4 STATE PROCUREMENT RULES

(See Statute)

PART 5 COORDINATION

(See Statute)

ARTICLE 103 SOURCE SELECTION AND CONTRACT FORMATION

PART 1 DEFINITIONS

(See Statute)

R24-103-101-01 Terms Defined in This Article.

As used in this Article, unless the context otherwise requires:

- (a) "Acceptable Bid" means an offer submitted by any person in response to an Invitation for Bid issued by the State that is in compliance with the solicitation terms and conditions and within the requirements of the plans and specifications described and required therein.

- (b) “Adequate Competition” exists if a competitive sealed bid or competitive sealed proposal has been conducted and at least two responsible and responsive offerors have independently competed to provide the State’s needed product or services. If the foregoing conditions are met, price competition shall be presumed to be “adequate” unless the procurement officer determines, in writing that such competition is not adequate.
- (c) “Alternate Bid” means an offer submitted by any person in response to an Invitation for Bid issued by the State that is in essential compliance with the solicitation terms and conditions but which may offer an alternate that does not significantly deviate from the required specifications contained in the solicitation. The soliciting agency would be responsible for determining whether an alternate bid is acceptable.
- (d) “Colorado Labor” shall have the same definition as used in §8-17-101(2)(a), CRS.
- (e) “Competitive Negotiation” means the process of discussion and issue resolution between a procurement official and a prospective vendor in order to arrange for the providing of a product or service needed by the State. If more than one vendor is available for such negotiation, the needs of the State must be clearly defined in advance of any negotiations, via a specification that details fully the State’s intended procurement.
- (f) “Cost of Ownership Life Cycle Analysis” means an accounting of the estimated total cost of ownership, including but not limited to: initial costs, operational costs, longevity, stranded utility costs, and service and disposal costs, along with an assessment of life-cycle environmental, health and energy impacts resulting from new material extraction, transportation, manufacturing, use, and disposal.
- (g) “Documented Quotation” or “Request for Quotation (RFQ)” is a process of soliciting informally for fulfilling the State’s need for a specific product(s) or service(s) and receiving and evaluating vendor responses. The dollar limits for use of documented quotations shall be as stated in the Section on Small Purchases and shall be conducted only by a procurement officer or designee.
- (h) “Environmentally Preferable Products” -means products or services that have a lesser or reduced adverse effect on human health and the environment when compared with competing products or services that serve the same purpose. The product or service comparison may consider such factors as the availability of any raw materials used in the product or service being purchased and the availability, use, production, safe operation, maintenance, packaging, distribution, disposal, or recyclability of the product or service being purchased.
- (i) “Nationally Recognized Third-party Certification Entity” means a voluntary, multiple criteria-based program that awards a certification after independently reviewing the product or service on its cost of ownership and life cycle and meets criteria for overall environmental preferability and product function characteristics. The Colorado Energy Office or any successor office maintains a listing of eligible entities.
- (j) “Non-Resident bidder” shall have the same meaning as in §8-19-102(1), CRS.
- (k) “Public Works Project” shall have the same definition as “Public Project” as defined in §8-19-102(2), CRS.
- (l) “Request for Proposals (RFP)” is the commonly used name for competitive sealed proposals. Formal RFPs shall be used in all cases where the total expected cost of the procurement is in excess of the small purchase threshold and the provisions of §24-101-203 CRS apply. Procurements for which the resulting contract is expected to be for more than one fiscal period must take into account the costs for the full life of any resulting contract to determine total expected cost.

- (m) "Resident bidder" shall have the same definition as in §8-19-102(3), CRS.
- (n) "Responsible Vendor" 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.
- (o) "Sealed" means that the Bid, Proposal, or Best Value Bid must be submitted in a manner that:
 - (i) Ensures that the contents of the bid, proposal, or best value bid cannot be opened or viewed before the formal bid opening without leaving evidence that the document has been opened or viewed; and
 - (ii) Ensures that the document cannot be changed, once received by the State, without leaving evidence that the document has been changed: and
 - (iii) Bears a physical or electronic signature evincing an intent by the bidder or offeror to be bound. An electronic signature must comply with the definitions and requirements set forth in the Government Electronic Transactions Act, §24-71.1-101 et seq. C.R.S. and its implementing rules; and
 - (iv) Records, manually or electronically, the date and time the bid, proposal, or best value bid is received by the state and that cannot be altered without leaving evidence of the alteration.
- (p) "Substitute Bid" means an offer submitted by any person in response to an Invitation for Bid that is not in substantive compliance with the terms and conditions and specifications of the solicitation as issued. A substitute bid, by this definition, would generally be considered non-responsive to the requirements of the solicitation and would serve the sole purpose of advising the soliciting agency that a different specification could be used to provide the desired or similar product or service. The soliciting agency would be responsible for determining whether the substitute language would be justification for canceling the bid and re-soliciting.

PART 2 METHODS OF SOURCE SELECTION

R-24-103-201 Methods of Source Selection

(See Statute)

R-24-103-202a Competitive Sealed Bidding (other than construction)

R-24-103-202a-01 Invitation for Bids

- (a) Bidding Policy. It shall be the policy of the State of Colorado to purchase products, commodities, services, and construction in a manner that affords businesses a fair and equal opportunity to compete.
- (b) Specifications. Purchasing agencies shall issue product, supply, service, or construction specifications which are not unduly restrictive. Brand name specifications, brand name or equal specifications, or qualified products lists shall only be used in accordance with the provisions of Rules R-24-104-202, -01, -02.

Purchasing agencies may utilize life cycle costing and/or value analysis in determining the lowest responsible bidder. In bids where life cycle costing or value analysis is to be used, the specifications shall indicate the procedure and valuation factors to be considered.

When appropriate, specifications issued and/or used by the federal government, other public procurement units or professional organizations may be referenced by the State. Bidders may be required to certify that these standardized specifications have been met.

- (c) Solicitation Time. Except as provided under emergency procedures, the minimum time for the bid opening date shall be not less than 14 calendar days after posting the solicitation on an Electronic Procurement System. When special requirements or conditions exist, the head of a purchasing agency may lengthen or shorten the bid time, but in no case shall the time cycle be shortened to reduce competition. Solicitation periods of less than 14 calendar days shall be documented by the head of the purchasing agency as to why a reduced bid period was required.

R-24-103-202a-02 Pre-Bid Conferences

Pre-bid conferences may be conducted to explain the procurement requirements if they are provided for in the Invitation for Bid. The conference should be held long enough after the Invitation for Bid has been issued, to allow bidders to become familiar with it, but with adequate time before bid opening to allow bidders consideration of the conference results in preparing their bids. Nothing stated at the pre-bid conference shall change the Invitation for Bids unless a change is made by written amendment, posted on an Electronic Procurement System.

R-24-103-202a-03 Amendments to Invitations for Bids

Amendments to Invitations for Bids shall be identified as such and may require that the bidder acknowledge receipt of all amendments issued. The amendment shall reference the portions of the Invitation for Bids it amends. Amendments shall be posted on an Electronic Procurement System with sufficient time to allow prospective bidders to consider them in preparing their bids. If the time set for bid opening will not permit such preparation prior to bid opening, such time shall be increased in the amendment.

R-24-103-202a-04 Withdrawal of Bids

- (a) Withdrawal of Bids Prior to Bid Opening. Any bid may be withdrawn from the appropriate purchasing agency prior to the specified bid opening date and time.
- (b) Withdrawal of Bids after Bid Opening but Prior to Award. The Director or head of a purchasing agency may allow a bid to be withdrawn after bid opening but prior to award provided:
 - (i) the bidder provides evidentiary proof that clearly and convincingly demonstrates that a mistake was made in the costs or other material matter provided; or the mistake is clearly evident on the face of the bid; and
 - (ii) it is found to be (by the Director or head of the purchasing agency) unconscionable not to allow the bid to be withdrawn.
- (c) Procedure. Bids may be withdrawn by written notice received in the office designated in the Invitation for Bids prior to the time set for bid opening.

R-24-103-202a-05 Telephone Bids

Telephone bids from vendors will not be accepted, except as allowed in Rule R-24-103-204-03 and unless the Director or head of a purchasing agency makes a written determination that market conditions are of such nature that it is in the best interest of the State to solicit telephone bids.

Comment: An example of when the Director or head of a purchasing agency may approve telephone bids is in the procurement of petroleum fuels where the market price may change on a daily basis.

R-24-103-202a-06 Electronic Bids

Bids may be submitted electronically when: The terms of the solicitation expressly permit electronic submission and the requirements of one of the following statutes or rules are met: Rule R-24-103-101-01(h), §24-103-204 CRS, or §24-103-206 CRS.

R-24-103-202a-07 Timeliness of Bids

Bids received after the bid opening time shall not be opened, but shall be rejected as a late bid. The following exceptions are permitted by the director or head of a purchasing agency:

- (a) If prior to a specified opening time and date, the mail, either directly by the post office or by internal distribution system, has not been delivered, any bid received by the next same-day delivery may be accepted if it is reasonable to believe the bid response was in the delivery process which was not completed prior to the opening time and date. All Invitations for Bids utilizing this exception must so state in the terms and conditions of the Invitation for Bids.
- (b) In the event of a labor unrest (strike, work slowdown, etc.) which may affect mail delivery, the Director is authorized to develop and issue emergency procedures.
- (c) In any other situation that is beyond the control of the State or the vendor, the director or the head of a purchasing agency shall rule on the acceptability of the bid. However, under no circumstances shall a late bid be accepted if the bid was still within the control of the vendor at the time the bid opening actually occurred.

In those situations where the late bid was not in the control of the vendor at the time of the bid opening, the director or head of a purchasing agency shall not accept the late bid unless he/she further finds that extraordinary circumstances exist. The responsibility for ensuring that the bid is received on time rests with the vendor, and the reasonably foreseeable problems inherent in the delivery of bids (e.g. slow messengers, slow mail service, weather, bad directions, mechanical failures, traffic, etc.) are not extraordinary circumstances permitting acceptance of late bids.

R-24-103-202a-08 Bid Receipt, Opening, and Recording

- (a) Receipt. Upon receipt, each bid and modification shall be time-stamped by machine or by hand and shall be stored in a secure place until bid opening time. Bids and modifications shall not be opened upon receipt, except that unidentified bids and modifications may be opened for identification purposes. The purchasing employee will immediately reseal the bid or modification and attest in writing that the employee has not revealed the contents of the envelope.
- (b) Opening and Recording. All bid openings shall be open to the public and/or interested parties. Bids and modifications shall be opened, in the presence of one or more witnesses, as soon as possible after the time, and at the place, designated in the Invitation for Bids. The name of each bidder, the bid price(s) (unless otherwise provided in the Invitation for Bids), and other information deemed appropriate by the Procurement Officer shall be read aloud at the time of bid opening.

Reading of all bid item prices may not be reasonable or desired (e.g., in the case of lengthy or complex bids). The decision not to read all bid prices shall be made by the Procurement Officer and shall be stated in the Invitation for Bids.

The name of each bidder, amount of bid, delivery, names(s) of witness(es) and other relevant information shall be entered into the record and the record shall be available for public inspection.

Prior to award, copies of pricing information not read aloud at the bid opening shall be made reasonably available for inspection, if requested. Other information related to a bid, or a bidder's responsiveness, may be withheld from inspection until such determinations have been made.

After award, all bid documents, and a complete bid analysis, shall be open to public inspection except to the extent the State has approved a bidder's request that trade secrets or other proprietary data be held confidential as set forth below. Material so designated shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid.

- (c) Confidential Data. The Procurement Officer shall determine the validity of any written requests for nondisclosure of trade secrets and other proprietary data. If the parties do not agree as to the disclosure of data, the Procurement Officer shall inform the bidder(s) in writing what portions of the bids will be disclosed, and that unless the bidder protests under Article 109, Part 1, of the Colorado Procurement Code, the bids will be so disclosed.

After award, the bids shall be open to public inspection subject to any continued prohibition on the disclosure of confidential data.

R-24-103-202a-09 Mistakes in Bids

- (a) Confirmation of Bid. When it appears from a review of the bid that a mistake has been made, the bidder should be requested to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. If the bidder alleges mistake, the bid may be withdrawn if the conditions set forth in this section are met.
- (b) Minor Informalities. Minor informalities 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, the effect on price, quantity, quality, delivery, or contractual conditions is negligible. The Procurement Officer may waive such informalities or allow the bidder to correct them depending on which is in the best interest of the state. Examples include the failure of a bidder to:
- (i) return the number of signed bids required by the Invitation for Bids;
 - (ii) sign the bid, but only if the unsigned bid is accompanied by other material indicating the bidder's intent to be bound;
 - (iii) acknowledge receipt of an amendment to the Invitation for Bids, but only if:
 - (A) It is clear from the bid that the bidder received the amendment and intended to be bound by its terms; or
 - (B) the amendment involved had a negligible effect on price, quantity, quality, or delivery.
 - (C) Mistakes Where Intended Correct Bid Is Evident. If the mistake and the intended correct bid are clearly evident on the face of the 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 the bid document are typographical errors, errors in extending unit prices and transposition errors.

- (D) Mistakes Where Intended Correct Bid Is Not Evident. A bidder may be permitted to withdraw a low bid if the bidder submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made.
- (E) Determinations Required. Any decision to permit or deny correction or withdrawal of a bid under this section shall be supported by a written determination prepared by the director or head of a purchasing agency or their designee.

R-24-103-202a-10 Bid Evaluation and Award

All products and services shall be evaluated against the specifications and/or brand names used as a reference and other evaluation criteria in the Invitation for Bid.

For example, the following factors may be considered in evaluating any bid response: delivery date after receipt of order; cash discounts; warranties (type and length); future availability; results of product testing; local service; cost of maintenance agreements; future trade-in value or availability of repurchase agreement; availability of training courses; financial terms if not a cash purchase; space limitations; esthetics; adaptability to environment; cost of operation (if any); safety and health features relating to codes, regulations, or policies.

- (a) Product Acceptability. The Invitation for Bids may require the submission of bid samples, descriptive literature, technical data, or other material necessary to determine product acceptability. If bid responses are received that do not contain the required submission data, they may be rejected as nonresponsive. The Invitation for Bids may also provide for accomplishing any of the following prior to award:
 - (i) inspection or testing of a product prior to award for such characteristics as function, quality or workmanship;
 - (ii) examination of such elements as appearance, finish, taste, or feel; or
 - (iii) other examinations to determine whether it conforms with other specifications.

The acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another but only to determine whether a bidder's offering will meet the State's needs as set forth in the Invitation for Bids. Any bidder's offering which does not meet the acceptability requirements shall be rejected as nonresponsive.

- (b) Determination of Lowest Bidder. Following determination of product acceptability, bids shall be evaluated to determine which bidder offers the lowest cost to the State in accordance with specifications. They may be evaluated in accordance with value analysis or life cycle cost formulas. If such formulas are to be used, they shall be objectively measurable and shall be set forth in the Invitation for Bids. Such evaluation factors need not be precise predictors of actual future costs, but to the extent possible they shall:
 - (i) be reasonable estimates based upon information the State has available concerning future use; and
 - (ii) treat all bids equitably.
- (c) Restrictions. A contract may not be awarded to a bidder submitting a higher quality item than that designated in the Invitation for Bids unless such bidder is also the lowest bidder as determined by value analysis or life cycle cost formulas as permitted in this section.

- (d) Environmentally Preferable Products. The provisions of §24-103-207.5 CRS which require a preference for environmentally preferable products apply to the award of contracts under this section. The purchasing preference applies to products and services that have a lesser or reduced adverse effect on human health and the environment than comparable competing products. When the conditions of §24-103-207.5 CRS subsections (3)(a) through (f) have been met, agencies shall award bids for environmentally preferable products or services that cost no more than five percent more than the lowest bid. However, agencies may award the contract to a bidder who offers environmentally preferable products and services which exceed the lowest bid by more than five percent if a cost of ownership life-cycle analysis establishes that long term savings to the State will result. In addition, each purchasing agency must ensure that the purchase can be accommodated within an agency's existing budget.

R-24-103-202a-11 Disposition of Bid Surety

If a bid is withdrawn in accordance with this section, any bid surety shall be returned to the bidder in a timely manner.

R-24-103-202a-12 Multi-Step Sealed Bidding

- (a) Definition. Multi-step sealed bidding is a two-phase process consisting of a technical first phase composed of one or more steps in which bidders submit un-priced technical offers to be evaluated by the State. The second phase will consider only those bidders whose technical offers were determined to be acceptable during the first phase and, therefore, their price bids will be opened and considered. It is designed to obtain the benefits of competitive sealed bidding by award of a contract to the lowest responsive, responsible bidder, and at the same time obtain the benefits of the competitive sealed proposals procedure through the solicitation of technical offers and the conduct of discussions to evaluate and determine the acceptability of technical offers.
- (b) Conditions for Use. The multi-step sealed bidding method may be used when it is not practical to prepare, initially, a definitive purchase description which would be suitable to permit an award based on price.

R-24-103-202a-13 Records

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

R-24-103-202b Competitive Sealed Bidding - Construction

R-24-103-202b-01 General Provisions

- (a) Extension of Time for Bid or Proposal Acceptance. After opening bids, the Procurement Officer may request low bidders to extend the time during which the State may accept their bids, provided that no other change is permitted. The reasons for requesting such extension shall be documented.
- (b) One Bid Received. If only one responsive bid is received in response to an Invitation for Bid (including multi-step bidding), an award may be made to the single bidder if the Procurement Officer finds that the price submitted is fair and reasonable and that either other prospective bidders had reasonable opportunity to respond, or there is not adequate time for re-solicitation. Otherwise the bid may be rejected pursuant to the provisions of Rule R-24-103-301, (Cancellation of Solicitations; Rejection of Bids or Proposals) and
 - (i) new bids may be solicited;

- (ii) the proposed procurement may be cancelled; or
 - (iii) If the Director or head of a purchasing agency determines in writing that the need for the construction continues but that the price of the one bid is not fair and reasonable and there is no time for re-solicitation or re-solicitation would likely be futile, the procurement may then be conducted under Rule R-24-103-205 (Sole Source Procurement) or Rule R-24-103-206 (Emergency Procurements), as appropriate.
- (c) **Multiple or Alternate Bids.** The solicitation shall prohibit multiple or alternate bids unless such bids are specifically provided. When prohibited the multiple or alternate bids shall be rejected although a clearly indicated base bid will be considered for award as though it were the only bid or offer submitted by the bidder. The provisions of this Section shall be set forth in the solicitation, and if multiple or alternate bids are allowed, it shall specify their treatment.
- (d) **Combining Bids or Offers Not Acceptable.** Any bid or offer which is conditioned upon receiving award of both the particular contract being solicited and another State contract shall be deemed nonresponsive and not acceptable.
- (e) **Affiliates are prohibited from submitting bids for the same contract.** Affiliates are defined as any individuals, partnerships, corporations, joint ventures, companies, firms, contractors or other legal entities, if directly or indirectly, either (i) one controls or can control the other, or (ii) a third controls or can control both.
- (f) **Purchase of Items Separately from Construction Contract.** The Director or head of a purchasing agency is authorized to determine whether a supply item or group of supply items shall be included as a part of, or procured separately from, any contract for construction.
- (g) **Standard Forms.** All construction bidding and contracting procedures shall utilize standard state forms which are available on-line from the website of the Office of the State Architect.

Any changes or modifications of the state forms, including General Conditions of the Contract, shall not be deemed valid unless issued in the form of Supplementary General Conditions and approved by the Principal Representative, as defined in the state contract, and the Office of the State Architect.
- (h) **Competitive Sealed bidding** may be used on projects that have no federal funding involved, pursuant to §24-92-103, CRS.

R-24-103-202b-02 Invitation for Bids

- (a) **Content.** The Invitation for Bids shall include the following:
 - (i) instructions and information to bidders concerning the bid submission requirements, including the time and closing date for submission of bids, the address of the office to which bids are to be delivered, the maximum time for bid acceptance by the State, and any other special information.
 - (ii) the purchase description, evaluation factors, delivery or performance schedule, and inspection and acceptance requirements not included in the purchase description; and
 - (iii) the contract terms and conditions, including warranty and bonding or other security requirements, as applicable.
- (b) **Incorporation by Reference.** The Invitation for Bids may incorporate documents by reference provided that the Invitation for Bids specifies where such documents can be obtained.

- (c) Acknowledgment of Addenda. The Invitation for Bids shall require the acknowledgment of the receipt of all addenda issued.
- (d) Bidding Time. Bidding time is the period of time between the date of the Advertisement for Bids and the date set for opening of bids. In each case bidding time will be set up to provide bidders a reasonable time to prepare their bids, but in no event shall this time be less than fourteen days as provided in Section §24-103-202(3)CRS.

R-24-103-202b-03 Bidder Submissions

- (a) Bid Form. The Invitation for Bids 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.

Bidders must execute and submit bids on the form as prescribed by the Office of the State Architect, and as specified by the Invitation for Bids. A bid received on any other form will be cause for that bid being deemed unresponsive.

- (b) Telegraphic Bids. Telegraphic Bids and mailgrams will not be accepted or considered, but will be rejected.

R-24-103-202b-04 Public Notice

- (a) Distribution. Notice of the Invitation for Bids will be advertised according to the provisions of Section §§24-70-101 through 107 CRS and these Rules.

The Notice will be advertised in a newspaper of general circulation which is printed and/or published electronically in the municipality nearest the location of the construction site as described in the Invitation for Bids or in an electronic medium approved by the Executive Director of the Department pursuant to §24-92-103(3)CRS. Publication of the Notice shall occur twice, one week apart. Additionally, a copy of the Advertisement for Bids shall be sent to the Colorado Minority Business Development Agency, with a set of Bid Documents attached thereto. Nothing in these rules shall prevent the Procurement Officer from advertising or otherwise giving public notice in additional media and locations; and/or more than twice as described above.

The Notice of the Invitation for Bids shall include the following information and statements:

- (i) date, time and location of the bid opening
- (ii) project number, name and location
- (iii) project time of completion
- (iv) location where Bidding Documents may; be obtained
- (v) deposit required, if any, for a complete set of Contract Documents
- (vi) "Preference shall be given to Colorado resident bidders and for Colorado labor as provided by law."
- (vii) "The rate of wages to be paid for all laborers and mechanics shall be in accordance with the applicable Davis-Bacon rates of wages for the project. Such rates will be specified in the General Documents."

- (viii) any other appropriate information. A copy of the Invitation for Bid shall be made available for public inspection at the Office of the State Architect.
- (b) 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 an Invitation for Bids. The conference should be held long enough after the Invitation for Bids has been issued to allow bidders to become familiar with it, but sufficiently before bid opening to allow consideration of the conference results in preparing their bids. Nothing stated at the pre-bid conference shall change the Invitation for Bids unless a change is made by written addendum as provided in Rule R-24-103-202b-05 (Addenda to Invitations for Bids) and the Invitation for Bids and the notice of the pre-bid conference shall so provide.

R-24-103-202b-05 Addenda to Invitation for Bids

- (a) Form. Addenda to Invitations for Bids shall be identified as such and shall require that the bidder acknowledge receipt of all amendments issued. The addenda shall reference the portions of the Invitation for Bids it amends.
- (b) Distribution. Addenda shall be sent to all prospective bidders known to have received an Invitation for Bids.
- (c) Timeliness. Addenda shall be distributed within a reasonable time to allow prospective bidders to consider them in preparing their bids.

R-24-103-202b-06 Pre-Opening Modification or Withdrawal of Bids

- (a) Procedure. Bids may be modified or withdrawn by written notice received in the office designated in the Invitation for Bids prior to the time set for bid opening.
- (b) Disposition of Bid Security. Bid security, if any, shall be returned to the bidder when withdrawal of the bid is permitted.
- (c) Records. All documents relating to the modification or withdrawal of bids shall be made a part of the appropriate procurement file.

R-24-103-202b-07 Timeliness of Bids

Bids received after the bid opening time shall not be opened, but shall be rejected as a late bid. The following exceptions are permitted by the director or head of a purchasing agency:

- (a) If prior to a specified opening time and date, the mail, either directly by the post office or by internal distribution system, has not been delivered, any bid received by the next same-day delivery may be accepted if it is reasonable to believe the bid response was in the delivery process which was not completed prior to the opening time and date. All invitations for bids utilizing this exception must so state in the terms and conditions of the invitation for bids.
- (b) In the event of a labor unrest (strike, work slow down, etc.) which may affect mail delivery, the director is authorized to develop and issue emergency procedures.
- (c) In any other situation that is beyond the control of the state or the vendor, the director or the head of a purchasing agency shall rule on the acceptability of the bid. However, under no circumstances shall a late bid be accepted if the bid was still within the control of the vendor at the time the bid opening actually occurred.

In those situations where the late bid was not in the control of the vendor at the time of the bid opening, the director or head of a purchasing agency shall not accept the late bid unless he/she further finds that extraordinary circumstances exist. The responsibility for ensuring that the bid is received on time rests with the vendor, and the reasonably foreseeable problems inherent in the delivery of bids (e.g. slow messengers, slow mail service, weather, bad directions, mechanical failures, traffic, etc.) are not extraordinary circumstances permitting acceptance of late bids.

R-24-103-202b-08 Receipt, Opening, and Recording of Bids

- (a) Receipt. Upon receipt, all bids and modifications will be date and time-stamped but not opened.
- (b) 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 Invitation for Bids. The names of the bidders, the bid price, attendees received, alternatives, bid security, time of completion, and such other information as is deemed appropriate by the Procurement Officer, shall be read aloud or otherwise made available. Such information also shall be recorded at the time of bid opening; that is, the bids shall be tabulated or a bid abstract made. The names and addresses of required witnesses shall also be recorded at the opening. The opened bids shall be recorded at the opening. The opened bids shall be available for public inspection except to the extent the bidder designates trade secrets or other proprietary data to be confidential as set forth in subsection R-24-103-202b-08(c) of this Rule. Material so designated shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid.
- (c) Confidential Data. The Procurement Officer shall examine the bids to determine the validity of any requests for nondisclosure of trade secrets and other proprietary data identified in writing. Such requests shall be submitted by the bidder prior to the bid opening under separate cover. If the parties do not agree as to the disclosure of data, the Procurement Officer shall inform the bidders in writing what portions of the bids will be disclosed and that, unless the bidder protests under Article 109 (Remedies) of the Colorado Procurement Code, the bids will be so disclosed. The bids shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data.

R-24-103-202b-09 Mistakes in Bids

- (a) General. Correction or withdrawal of a bid because of an inadvertent, non-judgmental 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 non-judgmental mistake is permissible but only to the extent it is not contrary to the interest of the State or the fair treatment of other bidders.
- (b) Mistakes Discovered Before Opening. A bidder may correct mistakes discovered before bid opening by withdrawing or correcting the bid as provided in Rule R-24-103-202b-06 (Pre-Opening Modification or Withdrawal of Bids).
- (c) Confirmation of Bid. When it appears from a review of the bid that a mistake has been made, the bidder should be requested to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid reasonably lower than the other bids submitted. If the bidder alleges mistake, the bid may be corrected or withdrawn if the conditions set forth in subsection R-24-103-202b-09(d)(i) through R-24-103-202b-09(d)(iii) of this Rule are met.
- (d) Mistakes Discovered After Opening But Before Award. This subsection sets forth procedures to be applied in three situations described in subsection R-24-103-202b-09(d)(i) through R-24-103-202b-09(d)(iii) below in which mistakes in bids are discovered after opening but before award.

- (i) Minor Informalities. Minor informalities are matters of form rather than substance evident from the bid document, or insignificant mistakes that can be waived or corrected without prejudice or other bidders. The Procurement officer shall waive such informalities or allow the bidder to correct them depending on which is in the best interest of the State.
- (ii) Mistakes Where Intended Correct Bid Is Evident. If the mistake and the intended correct bid are clearly evident on the face of the 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 the bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors.
- (iii) Mistakes Where Intended Correct Bid Is Not Evident. A bidder may be permitted to withdraw a low bid if:
 - (A) a mistake is clearly evident on the face of the bid document but the intended correct bid is not similarly evident, or
 - (B) the bidder submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made.
- (e) Mistakes Discovered After Award. Mistakes shall not be corrected after award of the contract except where the Director or the head of a purchasing agency makes a written determination that it would be unconscionable not to allow the mistake to be corrected or the bid withdrawn.
- (f) Determination Required. When a bid is corrected or withdrawn, or correction or withdrawal is denied under subsections R-24-103-202b-09(d) or R-24-103-202b-09(e) of this Rule, the Director or the head of a purchasing agency shall prepare a written determination showing that the relief was granted or denied in accordance with these regulations, except that the Procurement Officer shall prepare the determination required under subsection R-24-103-202b-09(i) of this Rule.

R-24-103-202b-10 Bid Evaluation and Award

- (a) General. The contract is to be awarded "to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids." (§§24-103-202 (5) and (7) CRS). The Invitation for Bids shall set forth the requirements and criteria which will be used to determine the lowest requirements or criteria that are not disclosed in the Invitation for Bid.
- (b) Product Acceptability. The Invitation for Bids shall set forth the 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:
 - (i) inspection or testing of a product prior to award for such characteristics as quality or workmanship;
 - (ii) examination of such elements as appearance, finish, taste, or feel; or
 - (iii) other examinations to determine whether it conforms with any other purchase description requirements.

The acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another, but only to determine that a bidder's offering is acceptable as set forth in the Invitation for Bids. Any bidder's offering which does not meet the acceptability requirements shall be rejected.

- (c) Determination of Lowest Bidder. Following determination of product acceptability, if any is required, bids will be evaluated to determine which bidder offers the lowest cost to the State in accordance with the evaluation criteria set forth in the Invitation for Bids. Only objectively measurable criteria which are set forth in the Invitation for Bids shall be applied in determining the lowest bidder.

Examples of such criteria include, but are not limited to, transportation cost, and ownership or life-cycle cost formulae. Evaluation factors need not be precise predictors of actual future cost, but to the extent possible such evaluation factors shall:

- (i) be reasonable estimates based upon information the State has available concerning future use; and
 - (ii) treat all bids equitably.
- (d) Restrictions. A contract may not be awarded to a bidder submitting a higher quality item than that designated in the Invitation for Bids, unless such bidder is also the lowest bidder as determined by value analysis or life-cycle cost formulas as permitted in this Section.
- (e) Low Tie Bids. Tie bids are low responsive bids from responsible bidders that are identical in price and which meet all the requirements and criteria set forth in the Invitation for Bids. In the discretion of the Director or the head of a purchasing agency, award shall be made in any permissible manner that will discourage tie bids. The office of the Attorney General shall be notified of any tie bids in an amount greater than \$1,000.

R-24-103-202b-11 Multi-Step Sealed Bidding.

- (a) Definition. Multi-step sealed bidding is a two-phase process consisting of a technical first phase composed of one or more steps in which bidders submit un-priced technical offers to be evaluated by the State, and a second phase in which those bidders whose technical offers are determined to be acceptable during the first phase have their price bids considered. It is designed to obtain the benefits of competitive sealed bidding by award of a contract to the lowest responsive, responsible bidder, and at the same time obtain the benefits of the competitive sealed proposals procedure through the solicitation of technical offers and the conduct of discussions to evaluate and determine the acceptability of technical offers.
- (b) Conditions for Use. The multi-step sealed bidding method will be used when it is not practical to prepare initially a definitive purchase description which will be suitable to permit an award based on price.
- (c) Procedure for Phase One of Multi-Step Sealed Bidding.
- (i) Form. Multi-step sealed bidding shall be initiated by the issuance of an Invitation for Bids in the form required by Rule R-24-103-202b-02 (Invitation for Bids), except as hereinafter provided. In addition to the requirements set forth in Rule R-24-103-202b-02, the multi-step Invitation for Bids shall state:
 - (A) that un-priced technical offers are requested;
 - (B) whether price bids are to be submitted at the same time as un-priced technical offers; if they are, such price bids shall be submitted in a separate sealed envelope;

- (C) that it is a multi-step sealed bid procurement, and priced bids will be considered only in the second phase and only from those bidders whose un-priced technical offers are found acceptable in the first phase;
 - (D) the criteria to be used in the evaluation of un-priced technical offers;
 - (E) that the State, to the extent the Procurement Officer finds necessary, may conduct oral or written discussions of the un-priced technical offers;
 - (F) that bidders may designate those portions of the un-priced technical offers which contain trade secrets or other proprietary data which are to remain confidential; and
 - (G) that the item being procured shall be furnished generally in accordance with the bidder's technical offer as found to be finally acceptable and shall meet the requirements of the Invitation for Bids.
- (ii) Addenda to the Invitation for Bids. After receipt of un-priced technical offers, addenda to the Invitation for Bids shall be distributed only to bidders who submitted un-priced technical offers or to amend those submitted. If, in the opinion of the Procurement Officer, a contemplated addendum will significantly change the nature of the procurement, the Invitation for Bids shall be canceled in accordance with Rule R-24-103-301 (Cancellation of Solicitations; Rejections of Bids or Proposals) of this Article and a new Invitation for Bids issued.
- (iii) Receipt of Handling of Un-priced Technical Offers. Un-priced technical offers shall not be opened publicly but shall be opened in front of two or more procurement officials. Such offers shall not be disclosed to unauthorized persons. Bidders may request non-disclosure of trade secrets and other proprietary data identified in writing.
- (iv) Evaluation of Un-Priced Technical Offers. The un-priced technical offers submitted by bidders shall be evaluated solely in accordance with the criteria set forth in the Invitation for Bids. The un-priced technical offers shall be categorized as:
- (A) acceptable;
 - (B) potentially acceptable; that is, reasonably susceptible of being made acceptable; or
 - (C) unacceptable. The Procurement Officer shall record in writing the basis for finding an offer unacceptable and make it part of the procurement file.

The Procurement Officer may initiate Phase Two of the procedure if, in the Procurement Officer's opinion, there are sufficient acceptable un-priced technical offers to assure effective price competition in the second phase without technical discussions. If the Procurement Officer finds that such is not the case, the Procurement Officer shall issue an amendment to the Invitation for Bids or engage in technical discussions as set forth in subsection R-24-103-202b-11(c)(v) of this Rule.

- (v) Discussion of Un-priced Technical Offers.

Discussion of its technical offer may be conducted by the Procurement Officer with any bidder who submits an acceptable, or potentially acceptable technical offer. During the course of such discussions, the Procurement Officer shall not disclose any information derived from one un-priced technical offer to any other bidder. Once discussions are begun, any bidder who has not been notified that its offer has been finally found unacceptable, may submit supplemental information amending its technical offer at any time until the closing date established by the Procurement Officer. Such submission may be made at the request of the Procurement Officer or upon the bidder's own initiative.

- (vi) Notice of Unacceptable Un-priced Technical Offer. When the Procurement Officer determines a bidder's un-priced technical offer to be unacceptable, such bidder shall not be afforded an additional opportunity to supplement technical offers.
- (vii) Mistakes During Multi-Step Sealed Bidding. Mistakes may be corrected or bids may be withdrawn during Phase One:
 - (A) before un-priced technical offers are considered;
 - (B) after any discussions have commenced under Rule R-24-103-202b-11(c)(v) (Procedure for Phase One of Multi-Step Sealed Bidding, Discussion of Un-priced Technical Offers); or
 - (C) when responding to any amendment of the Invitation for Bids. Otherwise mistakes may be corrected or withdrawal permitted in accordance with Rule R-24-103-202b-09 (Mistakes in Bids).
- (d) Procedure for Phase Two.
 - (i) Initiation. Upon the completion of Phase One, the Procurement Officer shall either:
 - (A) open price bids submitted in Phase One (if price bids were required to be submitted) from bidders whose un-priced technical offers were found to be acceptable; or
 - (B) if price bids have not been submitted, technical discussions have been held, or amendments to the Invitation for Bids have been issued, invite each acceptable bidder to submit a price bid.
 - (ii) Conduct. Phase Two shall be conducted as any other competitive sealed bid procurement except:
 - (A) as specifically set forth in Rule R-24-103-202b-11 (Multi-Step Sealed Bidding) through this Rule;
 - (B) no public notice need be given of this invitation to submit price bids because such notice was previously given;
 - (C) after award the un-priced technical offer of the successful bidder shall be disclosed as follows:

The Procurement Officer shall examine written requests of confidentiality for trade secrets and proprietary data in the technical offer of said bidder to determine the validity of any such requests. If the parties do not agree as to the disclosure of data, the Procurement Officer shall inform the bidder in writing what portion of the un-priced technical offer will be disclosed and that, unless the bidder protests under Article 109 (Remedies) of the Colorado Procurement Code, the offer will be so disclosed. Such technical offer shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data; and

- (D) un-priced technical offers of bidder who are not awarded the contract shall not be open to public inspection unless the Director or head of a purchasing agency determines in writing that public inspection of such offers is necessary to assure confidence in the integrity of the procurement process; provided, however, that the provisions of paragraph (C) above shall apply with respect to the possible disclosure of trade secrets and proprietary data.

R-24-103-202.3 COMPETITIVE SEALED BEST VALUE BIDDING

R-24-103-202.3a COMPETITIVE SEALED BEST VALUE BIDDING (other than construction)

R-24-103-202.3a -01 Definitions

- (a) Base bid means the minimum functional requirements set forth in the bid, as issued by the state.
- (b) Enhancements means components, services, or products that exceed the minimum functional requirements and would improve the quality of the goods or services being procured by the state.
- (c) Options means choices of additional components, services, or products that would serve to provide increased value to the state beyond the base bid.
- (d) Alternatives means a choice of a different commodity or service that meets or exceeds the functional requirements of the base bid.
- (e) Best value means the lowest overall cost to the state after taking into consideration costs, benefits, and savings.

R-24-103-202.3a-02 Written Determination

When best value bidding selection process is to be used, the State Purchasing Director or head of a purchasing agency shall make a written determination that the use of best value bidding is appropriate for the commodity or service being solicited.

R-24-103-202.3a- 03 Award

When the best value bidding process is used, award shall be made to the responsible offeror whose bid results in the best value to the state. The bid, as awarded, must meet the minimum functional requirements in the base bid.

R-24-103-202.3a-04 Evaluation

Bids shall be evaluated against the minimum functional requirements in the base bid. All bids meeting these specifications shall be determined to be responsive. When a written determination has been made that best value bidding is appropriate for the commodity or service being solicited, the invitation for bids shall expressly allow for enhancements, options, and/or alternatives and shall set forth the objective criteria or formula to be used for evaluation, and the invitation for bid shall require that prices be stated for all options, enhancements, and/or alternatives. The criteria or formula for evaluation must include objective consideration of the costs and savings and/or benefits associated with the enhancements, options, or alternatives. Based on the evaluation of the cost of the base bid, the dollar value of enhancements, options, or alternatives, and the determination of which enhancements, options, or alternatives best meet the needs of the state, an award shall be made to the bidder providing the best value to the state.

R-24-103-202.3b COMPETITIVE SEALED BEST VALUE BIDDING – CONSTRUCTION

R-24-103-202.3b-01 Construction Projects

The use of Competitive Sealed Best Value Bidding shall follow the requirements as used in §24-92-103.5, CRS in construction projects.

R-24-103-202.3b-02 Disclosure

An agency choosing between competitive sealed bidding methods shall disclose the rationale behind its decision in accordance with §24-92-103.7, CRS.

R-24-103-202.3b-03 Evaluation

The criteria for construction projects shall be those in §24-92-103.5(3), CRS.

R 24-103-202.5 Low Tie Bids – Award Procedure and Determination – Bid Preference

- (a) The requirements of §24-103-202.5 CRS regarding low tie bids shall be stated in all Invitations for Bids for commodities.
 - (i) The IFB shall state that any bidder who wishes to be considered a “resident bidder” for purposes of the preference provided in §24-103-202.5 CRS shall include with his/her bid, proof that he/she meets the definition of resident bidder as set forth in either §24-103-101(6)(a) CRS or §24-103-101(6)(b) CRS.
- (b) When low tie bids are received in response to an Invitation for Bids for commodities and tie bidders are either both/all resident bidders or both/all non-resident bidders, the State Purchasing Director or the head of a purchasing agency shall follow the procedures set forth in §24-103-202.5 and shall flip a coin or draw straws to determine which bidder receives the award, except when a valid environmentally preferable product preference exists pursuant to §24-103-207.5 CRS. The purchasing preference applies to products and services that have a lesser or reduced adverse effect on human health and the environment than comparable competing products. When the conditions of §24-103-207.5 CRS subsections (3)(a) through (f) have been met, agencies shall award bids for environmentally preferable products or services that cost no more than five percent more than the lowest bid. However, agencies may award the contract to a bidder who offers environmentally preferable products and services which exceed the lowest bid by more than five percent if a cost of ownership life-cycle analysis establishes that long term savings to the state will result. In addition, each purchasing agency must ensure that the purchase can be accommodated within an agency's existing budget.

- (c) Any tie bid for personal services procured through a competitive sealed bid shall be broken by awarding the contract to the bidder utilizing the greatest quantitative (numerical) preference for veterans in hiring offeror's employees.

R-24-103-203 Competitive Sealed Proposals

Except as noted below, the competitive sealed proposal process shall be the same as the competitive sealed bid process.

R-24-103-203-01 Definitions

- (a) "Acceptable Proposal" means an offer submitted by any person in response to a Request for Proposals, issued by the State, that is in compliance with the solicitation terms and conditions, and within the requirements of the plans and specifications described and required therein.
- (b) "Advantageous" means a judgmental assessment of what is in the State's best interests.
- (c) "Practicable" means what may be accomplished or put into practical application; reasonably possible.
- (d) "Proposal" means a response, from a vendor, to a Request for Proposals (RFP), also called a response or offer.
- (e) "Request for Information (RFI)" is similar to an RFP, but is NOT a source selection method. An RFI is used to obtain preliminary information about a market, type of available service or a product when there is not enough information readily available to write an adequate specification or work statement. An RFI may ask for vendor input to assist the State in preparing a specification or work statement for a subsequent solicitation and may ask for pricing information only with the provision that such information would be submitted voluntarily. The RFI must clearly state that no award will result.

R-24-103-203-02 Written Determinations

- (a) The written determinations required by this Rule shall be made by the Director or head of a purchasing agency, or a designee of either.
- (b) The Director or head of a purchasing agency may make determinations by category of supply, service, or construction item that it is either not practicable or not advantageous to the State to procure specified types of supplies, services, or construction by competitive sealed bidding. Procurements of the specified types of supplies, services or construction may then be made by competitive sealed proposals based upon such determination. The person who made such determination may modify or revoke it at any time, and such determination should be reviewed for current applicability from time to time.

R-24-103-203-03 When Competitive Sealed Bidding Is "Not Practicable"

Competitive sealed bidding is not practicable unless the nature of the procurement permits award to a low bidder who agrees by his or her bid to perform without condition or reservation in accordance with the purchase description, delivery or performance schedule, and all other terms and conditions of the Invitation for Bids. Factors to be considered in determining whether competitive sealed bidding is not practicable include, but are not limited to:

- (a) whether the contract needs to be other than a fixed-price type;

- (b) whether it may be necessary to conduct oral or written discussions with offerors concerning technical and price aspects of their proposals;
- (c) whether it may be necessary to afford offerors the opportunity to revise their proposals;
- (d) whether it may be necessary to base an award on a comparative evaluation, as stated in the Request for Proposals, of differing price, quality, and contractual factors in order to determine the most advantageous offering to the State. Quality factors include technical and performance capability and the content of the technical proposal; and
- (e) whether the primary considerations in determining award may be factors other than price alone.

R-24-103-203-04 When Competitive Sealed Bidding Is “Not Advantageous”

A determination may be made to use competitive sealed proposals if it is determined that it is not advantageous to the State, even though practicable, to use competitive sealed bidding. Competitive sealed bidding may be practicable, that is reasonably possible, but not necessarily advantageous, that is, in the State's best interest. Factors to be considered in determining whether competitive sealed bidding is not advantageous include:

- (a) if prior procurements indicate that competitive sealed proposals may result in more beneficial contracts for the State; and
- (b) whether the elements listed in the specifications are desirable rather than necessary in conducting a procurement.

R-24-103-203-05 Dollar Thresholds for, and Content of, Requests for Proposals (RFP's)

- (a) Requests for Proposals shall be issued (promulgated) by the Division of Purchasing, or agencies with delegated purchasing authority, for requirements that are estimated to exceed the small purchase threshold, utilizing guidelines established by the Division of Purchasing
- (b) Form of Proposal. The manner and format in which proposals are to be submitted, including any forms for that purpose, shall be as set forth in the Request for Proposals.

R-24-103-203-06 Vendor Inquiries

In cases where an RFP raises questions or concerns from vendors, or may require interpretation, all known participating vendors must be given an opportunity to ask questions and to receive answers or clarifications. This may be accomplished by use of a pre-proposal conference, via a formal inquiry period, or a combination of options. If any of these options is anticipated, the RFP shall so state and shall list appropriate dates, times and locations.

Pre-proposal conferences may be mandatory or optional. However, if such meetings result in any material changes to the scope of work or otherwise affect the manner or form of response, all known potential offerors must be notified in writing of any such change.

Similarly, if responses to inquiries result in any material changes to the scope of work or otherwise affect the manner or form of response, all known potential offerors must be notified in writing of any such change.

When such written notice is given, offerors must be afforded a reasonable amount of time to review these materials, to contemplate any consequences and to consider the content for inclusion in their offers.

R-24-103-203-07 Proposal Preparation Time

Proposal preparation time for formal RFPs shall be set to provide offerors a minimum of 30 calendar days to prepare and submit their proposals. However, when special requirements or conditions exist, the State Purchasing Director or head of a purchasing agency may shorten this time, but in no case shall the time be shortened in order to reduce competition. The State Purchasing Director or head of a purchasing agency shall document why the reduced time period was necessary.

R-24-103-203-08 Opening and Recording of Proposals

Proposals shall be opened publicly and a register of proposals shall be prepared which shall include the name of each offeror.

R-24-103-203-09 Evaluation of Proposals

Evaluation Factors in the Request for Proposals. The Request for Proposals shall state all of the evaluation factors, including price. The evaluation shall be based on the evaluation factors set forth in the Request for Proposals. Numerical rating systems may be used. Factors not specified in the Request for Proposals shall not be considered.

- (a) Veterans' Preference. The relative weight assigned to a criterion, as to the extent and quality of any preference for veterans of military service given by offeror in the hiring of offeror's employees, shall not exceed 5%.
- (b) Minority Business Enterprises
 - (i) When a competitive sealed proposal process is conducted for commodities or services, and past discrimination against minority businesses can be shown, the RFP shall contain an evaluation criterion, in addition to price and other appropriate criteria, evaluating the extent of MBE participation offered in the proposal. Disparity or predicate studies accepted by other public entities may be used as evidence establishing past discrimination in the geographical area of the study for the goods or services involved.
 - (ii) The goal established in each procurement for MBE participation, against which the extent of participation shall be measured, and the weight assigned to the criterion which considers the extent of offeror's MBE participation, shall be determined on a case-by-case basis, but in no event shall the weight assigned to such criterion exceed the lesser of a goal established as a result of the disparity study relied upon as evidence of past discrimination, or the 17% goal established by the Governor's Executive Order D005587.
 - (iii) In establishing the goal, and the weight of the criterion which considers such goal, consideration shall be given to:
 - (A) the extent to which subcontracting, or the use of suppliers, is permitted by the RFP or is possible in the response to the RFP; and
 - (B) the extent to which Minority Business enterprises exist in the particular marketplace and industry to provide the specific goods or services sought by the State in the RFP; and
 - (C) the extent to which the procuring agency is exceeding, on an annual aggregate basis, the goals of the Executive Order at the time the RFP is prepared.
- (c) Women's Business Enterprises.

- (i) When a competitive sealed proposal process is conducted for commodities or services, and past discrimination against women's businesses can be shown, the RFP shall contain an evaluation criterion, in addition to price and other appropriate criteria, evaluating the extent of WBE participation offered in the proposal. Disparity or predicate studies accepted by other public entities may be used as evidence establishing past discrimination in the geographical area of the study for the goods or services involved.
- (ii) The goal for WBE participation established in each procurement against which the extent of participation shall be measured, and the weight assigned to the criterion that considers the extent of offeror's WBE participation, shall be determined on a case by case basis, but in no event shall such criterion exceed the goal established as a result of the disparity findings relied upon as directed by the Governor's Executive Order D0005-94.
- (iii) In establishing the goal, and the weight of the criterion that considers such goal, consideration shall be given to:
 - (A) the extent to which subcontracting, or the use of suppliers, is permitted by the RFP or is possible in the response to the RFP; and
 - (B) the extent to which Women's Business Enterprises exist in the particular marketplace and industry to provide the specific goods or services sought by the State in the RFP; and
 - (C) the extent to which actual WBE participation in the agency's contracts, resulting from RFPs, issued during the current year have exceeded the goals set in those same RFPs, on an aggregate basis.
- (d) Tie bids. In all solicitations for personal services, by competitive sealed proposal, any tie between offerors shall be broken by awarding the contract to the offeror utilizing the greatest quantitative (numerical) preference for veterans in hiring offeror's employees.
- (e) Classifying Proposals. for the purpose of conducting discussion with offerors, proposals shall be initially classified as:
 - (i) acceptable;
 - (ii) potentially acceptable, that is, reasonable susceptible of being made acceptable; or
 - (iii) unacceptable.

R-24-103-203-10 Proposal Discussion with Individual Offerors after Opening

Purpose of Discussion. Discussions may be held to:

- (a) promote understanding of the State's requirements and the offeror's proposals; and
- (b) facilitate arriving at a contract that will be most advantageous to the State taking into consideration price and the other evaluation factors set forth in the Request for Proposals.

- (c) **Conduct and Purpose of Discussion.** Offerors shall be accorded fair and equal treatment in discussion and revision of their proposals. After RFP's have been opened, discussions may be held with those offerors determined to be most responsive. Discussions may be held to clarify requirements and to make adjustments in services to be performed and in costs and/or prices. Auction techniques and/or disclosure of any information derived from competing proposals are prohibited. Any changes to the proposal, technical or costs, shall be submitted/confirmed in writing by the contractor(s).

R-24-103-203-11 Award

Awards shall be made to the responsible offeror whose proposal is determined to be most advantageous to the State based on the evaluation factors set forth in the Request for Proposals. The evaluation committee established to evaluate offers shall make such determination subject to final approval by the head of a purchasing agency or delegate.

R-24-103-204 Small Purchases

Small purchases are goods and services purchases costing less than \$150,000 and construction projects costing less than \$150,000. Small purchases may be procured in accordance with the dollar limits established by this rule. Procurements shall not be artificially divided so as to constitute small purchases under this Rule. Small purchases are subject to the requirement that prices paid be fair and reasonable. (§24-30-202(2) CRS)

R-24-103-204-01 Purchase Orders

The use of Purchase Orders is governed by the State Fiscal Rules.

R-24-103-204-02 Competition Not Required

- (a) **Non-delegated Agencies.** Agencies that have not been delegated purchasing authority may purchase supplies or services up to a limit of \$5,000 without benefit of competition. Items on a mandatory price agreement issued by the Division of Purchasing must be secured from the appropriate vendor.
- (b) **Group I and Group II Agencies.** Group I and Group II agencies may secure supplies up to a limit of \$10,000 and services up to \$25,000 without benefit of competition. Items on a mandatory price agreement issued by the Division of Purchasing must be secured from the appropriate vendor.
- (c) All agencies shall maximize the opportunity for minority-owned and women-owned business enterprises to receive orders that are issued when bids are not required.
- (d) The person doing the acquisition shall use professional judgment to ensure that the State is receiving maximum value. This rule does not preclude the option to place the solicitation on an Electronic Procurement System.
- (e) All agencies may procure construction up to \$25,000 without benefit of competition.

If abuses to this rule are discovered, the Director or head of a purchasing agency may revoke the purchasing authority.

R 24-103-204-03 Documented Quotes

- (a) Goods costing between \$10,000 and \$150,000, services not defined in §24-30-1402 CRS costing between \$25,000 and \$150,000 and construction projects between \$25,000 and \$150,000 may be purchased using a documented quote process.

- (b) For goods and services procurements, neither the solicitation nor the vendor's response constitutes an offer; therefore, responsiveness at the time of receipt is not an absolute criterion. The purchasing authority may determine whether or not a response is acceptable and may compare the relative value of competing responses, not solely the price. "Acceptable," for purposes of this paragraph and paragraphs (d) and (f) below, means that the product or service will meet the state's needs and that the price is fair and reasonable. The purchase order/commitment voucher constitutes an offer. The vendor may accept by performance, unless the purchase order/commitment voucher expressly requires acceptance by written acknowledgment.
- (c) For construction projects, the contractor's response constitutes an offer and is binding if accepted by the state.
- (d) The choice of vendor for goods and services must be based on which acceptable response is most advantageous to the state, price/cost being the primary consideration. The basis for the selection must be documented and will be final and conclusive unless determined to be arbitrary, capricious, or contrary to law. For construction projects, the award must be made to the low acceptable quote, except when the award is for products only that are for inclusion in construction projects and the products are specifically identified and a valid environmentally preferable product preference exists pursuant to §24-103-207.5 CRS. The provisions of §24-103-207.5 CRS which require a preference for environmentally preferable products apply to the award of contracts under this section. The purchasing preference applies to products and services that have a lesser or reduced adverse effect on human health and the environment than comparable competing products. When the conditions of §24-103-207.5 CRS subsections (3)(a) through (f) have been met, agencies shall award bids for environmentally preferable products or services that cost no more than five percent more than the lowest bid. However, agencies may award the contract to a bidder who offers environmentally preferable products and services which exceed the lowest bid by more than five percent if a cost of ownership life-cycle analysis establishes that long term savings to the state will result. In addition, each purchasing agency must ensure that the purchase can be accommodated within an agency's existing budget.
- (e) Requests for documented quotes must be placed on an Electronic Procurement System in accordance with Rules R24-102-202.5-02 and -04. Solicitations must remain posted for at least three working days unless the director or head of a purchasing agency determines in writing that a lesser time is required in order to meet an immediate state need.
- (f) The purchasing official may negotiate with any vendor or contractor to clarify its quote or to effect modifications that will: make the quote acceptable (including curing a defective bid bond) or make the quote more advantageous to the state. However, in the negotiation process, the terms of one vendor's quote shall not be revealed to a competing vendor, and quotes may be kept confidential until a commitment voucher is issued.
- (g) Procurement of services greater than \$10,000 must be reviewed by the delegated purchasing official for a determination that prices or rates are fair and reasonable.
- (h) Agencies, with the approval of the Office of the State Architect, may utilize a Standing Order Process for projects less than \$150,000. An approved process must include open public solicitation (including advertising on an Electronic Procurement System) for eligible contractors at least once per year, a process for obtaining at least three quotes before awarding a contract to an eligible contractor, and an equitable process for determining which contractors will be given an opportunity to provide quotes.

- (i) Bonding and retainage requirements set forth in §38-26-106 CRS, §24-105-201 et seq. CRS, and §24-91-103(1) CRS and rules promulgated thereunder are not affected by this Rule. Failure to provide a bid bond if required but not cured makes the quote unacceptable. Agencies should seek legal advice when bid bonds have been required and the terms of the quote are modified after receipt.

R-24-103-205-01 Sole Source Procurements

- (a) Conditions for Use. A sole source procurement is justified when there is only one good or service that can reasonably meet the need and there is only one vendor who can provide the good or service. A requirement for a particular proprietary item (i.e., a brand name specification) does not justify a sole source procurement if there is more than one potential bidder or offeror for that item. The following are examples of circumstances which could justify a sole source procurement:
 - (i) where the compatibility of equipment, accessories, or replacement parts is the paramount consideration;
 - (ii) where a sole supplier's item is needed for trial use or testing;
 - (iii) where public utility services are to be procured.

The Director, the head of a purchasing agency, or the designee of such person, shall make a written determination that a procurement is sole source, setting forth the reasons. In cases of reasonable doubt, competition should be solicited. Any request by a using agency that a procurement be restricted to one potential contractor shall be accompanied by an explanation as to why no other will be suitable or acceptable to meet the need.

- (b) Exemptions. Sole source determinations are not required under circumstances outlined in §24-101-105, CRS, as amended, and related rules.

R-24-103-205-02 Negotiation

When a sole source procurement is authorized, the Procurement Officer shall conduct negotiations, as appropriate, as to price, delivery, and terms.

R-24-103-206 Emergency Procurements

R-24-103-206-01 Definition of Emergency Conditions

An emergency condition is a situation which creates a threat to public health, welfare, or safety such as may arise by reason of floods, epidemics, riots, equipment failures, or such other reason as may be proclaimed by the using agency and approved by the director, head of a purchasing agency, or designee. In the event that emergency controlled maintenance funding is to be requested, the Office of the State Architect shall also be notified by the next working day. The existence of such condition creates an immediate and serious need for supplies, services, or construction that cannot be met through normal procurement methods and the lack of which would seriously threaten:

- (a) the functioning of state government, or its programs;
- (b) the preservation or protection of property; or
- (c) the health or safety of any person or persons.

R-24-103-206-02 Scope of Emergency Procurements.

Emergency procurements shall be limited only to a quantity of those supplies, services, or construction items necessary to meet the emergency.

R-24-103-206-03 Authority to Make Emergency Procurements.

Any state agency may make emergency procurements when an emergency condition arises and the need cannot be met through normal procurement methods, provided that whenever practical, approval by the Director, or head of a purchasing agency, shall be obtained prior to the procurement. In the event an emergency arises after normal working hours, the state agency shall notify the Director, or head of a purchasing agency, on the next working day. In the event that emergency controlled maintenance funding is to be requested, the Office of the State Architect shall also be notified by the next working day.

R-24-103-206-04 Source Selection Methods

- (a) General. The procedure used shall be selected to assure that the required supplies, services, or construction items are procured in time to meet the emergency. Given this constraint, such competition as is practicable shall be obtained.
- (b) Determination Required. The Procurement Officer or the agency official responsible for procurement shall make a written determination stating the basis for an emergency procurement and for the selection of the particular contractor. Such determination shall be sent promptly to the director.

R-24-103-208-01 Competitive Reverse Auctions

Contracts for goods and services may be awarded by competitive reverse auctions if the director or head of a purchasing agency determines that adequate competition can be achieved and that the process is likely to result in better pricing.

Competitive reverse auction means a bidding process through which a pre-established group of vendors may post bids for a defined period of time and may change their bids as desired during the bidding period.

- (a) The intent to conduct a competitive reverse auction shall be published on an Electronic Procurement System for a period of not less than 14 days. An Electronic Procurement System notice shall include all terms, conditions, and specifications and shall tell interested vendors how to participate in the process. If the director or head of a purchasing agency believes that an Electronic Procurement System is not likely to yield adequate competition, the agency may notify potential vendors through additional methods.
- (b) All responsible vendors willing to accept the terms and conditions of the procurement and to meet the specifications of the bid shall be eligible to participate. The purchasing agency may conduct a preliminary process to determine vendor responsibility and to ensure the vendor's responsiveness to terms and specifications.
- (c) During the bidding process, the participating vendors shall be identified only by a letter, number, or other symbol to protect their identities; each bid price and the letter, number, or symbol designation of the vendor shall be made available for all bidding vendors immediately upon receipt.
- (d) The contract shall be awarded to the low responsible bidder whose bid meets the requirements and specifications.

R-24-103-208-02 Competitive Negotiation

Contracts may be awarded by competitive negotiation.

- (a) If the director or head of a purchasing agency determines that time does not permit resolicitation, a contract may be awarded by competitive negotiation after an unsuccessful competitive sealed bid or competitive sealed proposal process.
- (b) A competitive sealed bid or competitive sealed proposal process is unsuccessful if (1) all offers received are unreasonable or uncompetitive, (2) the low bid exceeds available funds, as certified in writing by the appropriate fiscal officer, (3) the solicitation has been properly cancelled in accordance with the provisions of §24-103-301 CRS or §24-109-401 and –402 CRS, or (4) the number of responsive offers is not adequate to ensure adequate price competition.
- (c) The competitive negotiation process shall include all vendors who responded to the solicitation or any rebid and may include other vendors capable of fulfilling the state's needs.
- (d) The purchasing agency may set reasonable times and locations for participation in the competitive negotiation, reflecting the fact that time constraints are the basis for the competitive negotiation process.
- (e) Each vendor with whom the purchasing agency negotiates shall be given a fair and equal chance to compete. Negotiations shall be conducted separately and independently with each vendor, and in no case shall the terms of any vendor's offer be communicated to any other vendor until an intent to award notice has been issued. Any change in requirements shall be communicated to all vendors.
- (f) A vendor may be eliminated from the process upon a determination that its offer is not reasonably susceptible of being selected for award.
- (g) The award shall be made to the vendor whose offer is most advantageous to the state. The director or head of a purchasing agency shall make a written determination that identifies the nature of the discussions with each vendor and that states why the selected offer is the most advantageous to the state.

PART 3 CANCELLATION OF SOLICITATIONS: REJECTION OF BIDS OR PROPOSALS

R-24-103-301 Cancellation of Invitations for Bids or Requests for Proposals

R-24-103-301-01 Scope of This Rule

The provisions of this rule shall govern the cancellation of any solicitations whether issued by the state under competitive sealed bidding, competitive sealed proposals, small purchases, or any other source selection method, and rejection of bids or proposals in whole or in part, whether rejected for being non-responsive or non-responsible.

R-24-103-301-02 Policy

Solicitations should only be issued when there is a valid procurement need. Solicitations should not be issued to obtain estimates or to "test the water." A solicitation is to be cancelled only when there are cogent and compelling reasons to believe that the cancellation of the solicitation is in the state's best interest.

R-24-103-301-03 Cancellation of Solicitation; Notice

Each solicitation issued by the State shall contain language stating that the solicitations may be cancelled as provided in this rule.

R-24-103-301-04 Cancellation of Solicitation: Rejection of all Bids or Proposals

- (a) Prior to Opening. Prior to opening of bids, a solicitation may be cancelled in whole or in part when the Director, or the head of a purchasing agency, determines in writing that such action is in the state's best interest for reasons including but not limited to:
 - (i) the state no longer requires the supplies, services, or construction.
 - (ii) the state no longer can reasonably expect to fund the procurement; or
 - (iii) proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable.
- (b) Notice. When a solicitation is cancelled prior to opening, notice of cancellation shall be sent to all businesses solicited. The notice of cancellation shall:
 - (i) identify the solicitation;
 - (ii) explain the reason for cancellation; and
 - (iii) where appropriate, explain that an opportunity will be given to compete on any re-solicitation or any future procurements of similar supplies, services, or construction.
- (c) After Opening. After opening but prior to award, any or all bids or proposals may be rejected in whole or in part when the Director or the head of a purchasing agency, determines in writing that such action is in the state's best interest for reasons including but not limited to:
 - (i) the supplies, services, or construction being procured are no longer required;
 - (ii) ambiguous or otherwise inadequate specifications were part of the solicitation;
 - (iii) the solicitation did not provide for consideration of all factors of significance to the state;
 - (iv) prices exceed available funds and it would not be appropriate to adjust quantities or qualities to come within available funds;
 - (v) all otherwise acceptable bids or proposals received are at clearly unreasonable prices; or
 - (vi) 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.

A notice of rejection should be sent to all businesses that submitted bids or proposals.

- (d) Documentation. The reasons for cancellation or rejection shall be made a part of the procurement file and shall be available for public inspection.

- (e) Disposition of Bids or Proposals. When bids or proposals are rejected, or a solicitation cancelled after bids or proposals are received, the bids or proposals which have been opened shall be retained in the procurement file, or if unopened, returned to the bidders or offerors upon request, or otherwise disposed of.

PART 4 QUALIFICATIONS AND DUTIES

R-24-103-401 Responsibility of Bidders and Offerors

R-24-103-401-01 Application

A determination of responsibility or non-responsibility shall be governed by this Rule.

R-24-103-401-02 Standards of Responsibility

- (a) Standards. Factors to be considered in determining whether the standard of responsibility has been met include whether a prospective contractor or vendor has:
 - (i) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them necessary to indicate the capability to meet all contractual requirements;
 - (ii) a satisfactory record of performance;
 - (iii) a satisfactory record of integrity;
 - (iv) qualified legally to contract with the State; and
 - (v) supplied all necessary information in connection with the inquiry concerning responsibility.
- (b) Information Pertaining to Responsibility. The prospective contractor shall supply information requested by the Procurement Officer concerning the responsibility of such contractor. If such contractor fails to supply the requested information, the Procurement Officer shall base the determination of responsibility upon any available information or may find the prospective contractor non-responsible if such failure is unreasonable.

R-24-103-401-03 Ability to Meet Standards

The prospective contractor or vendor may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request:

- (a) evidence that such contractor possesses such necessary items;
- (b) acceptable plans to subcontract for such necessary items; or
- (c) a documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items.

R-24-103-401-04 Written Determination of Non-responsibility Required

If a bidder or offeror who otherwise would have been awarded a contract is found non-responsible, a written determination of non-responsibility setting forth the basis of the finding shall be prepared by the Director or head of a purchasing agency. A copy of the determination shall be sent promptly to the non-responsible bidder or offeror. The final determination shall be made part of the procurement file.

R-24-103-402 Prequalification of Suppliers

R-24-103-402-01 Requirements

- (a) The Director, or head of a purchasing agency, may develop pre-qualification procedures for specific solicitations.
- (b) Colorado Labor shall be employed on a Public Works Project unless a waiver is allowed pursuant to §8-17-101, CRS.

R-24-103-403 Cost or Pricing Data

R-24-103-403-01 Definitions

- (a) Cost Data is factual information concerning the cost of labor, material, overhead, and other cost elements which are expected to be incurred or which have been actually incurred by the contractor in performing the contract.
- (b) Price Data is factual information concerning prices for supplies, services, or construction substantially identical to those being procured. Prices in this definition refer to offered or proposed selling prices, historical selling prices, and current selling prices of such items. The definition refers to data relevant to both prime and subcontract prices.

R-24-103-403-02 Requirement for Cost or Pricing Data

Cost or pricing data is required to be submitted in support of a proposal when:

- (a) adjusting the price of any contract, including a contract awarded by competitive sealed bidding, whether or not cost or pricing data were required in connection with the initial pricing of the contract, if the adjustment involves aggregate increases and/or decreases in costs plus applicable profits expected to exceed \$500. However, this requirement shall not apply when unrelated and separately priced adjustments for which cost or pricing data would not be required if considered separately are consolidated for administrative convenience;
- (b) an emergency procurement is made in excess of \$25,000, but such data may be submitted after contract award; or
- (c) the procurement officer makes a written determination that the circumstances warrant requiring submission of cost or pricing data provided, however, cost or pricing data shall not be required where the contract award is made pursuant to competitive sealed bidding.

R-24-103-403-03 Submission of Cost or Pricing Data and Certification

- (a) Time and Manner. When cost or pricing data are required, they shall be submitted to the procurement officer prior to beginning price negotiations at any reasonable time and in any reasonable manner prescribed by the procurement officer. When the procurement officer requires the offeror or contractor to submit cost or pricing data in support of any proposal, such data shall be either actually submitted or specifically identified in writing.
- (b) Obligation to Keep Data Current. The offeror or contractor is required to keep such submission current until the negotiations are concluded.
- (c) Time for Certification. The offeror or contractor shall certify as soon as practicable after agreement is reached on price that the cost or pricing data submitted are accurate, complete, and current as of a mutually determined date prior to reaching agreement.

- (d) Refusal to Submit Data. A refusal by the offeror to supply the required data shall be referred to the Director or the head of a purchasing agency, whose duty shall be to determine, in writing, whether to disqualify the non-complying offeror, to defer award pending further investigation, or to enter into the contract. A refusal by a contractor to submit the required data to support a price adjustment shall be referred to the Director or the head of a purchasing agency who shall determine, in writing, whether to further investigate the price adjustment, not to allow any price adjustment, or to set the amount of the adjustment, subject to the contractor's rights under Article 109 (Remedies) of the Colorado Procurement Code.
- (e) Exceptions. Cost and pricing data need not be submitted and certified:
 - (i) where the contract price is based on:
 - (A) adequate price competition;
 - (B) established catalogue prices or market prices;
 - (ii) when the Director or the head of a purchasing agency determines in writing to waive the applicable requirement for submission of cost or pricing data under the Sub-section R-24-103-403-02(a) or (b) of this Rule in a particular pricing action and the reasons for such waiver are stated in the determination. A copy of such determination shall be kept in the contract file and made available to the public upon request.

If, after cost or pricing data were initially requested and received, it is determined that adequate price competition does exist, the data need not be certified.

R-24-103-403-04 Meaning of Terms “Adequate Price Competition,” “Established Catalogue Prices or Market Prices,” and “Prices Set by Law or Regulation”

- (a) Application. As used in the exceptions set forth in Rule R-24-103-403-03(e) (Cost or Price Data, Exceptions) the terms “adequate price competition,” “established catalogue prices or market prices,” and “prices set by law or regulations” shall be construed in accordance with the following definitions.
- (b) Adequate Price Competition. Price competition exists if competitive sealed proposals are solicited and at least two responsible offerors independently compete for a contract to be awarded to the responsible offeror submitting the lowest evaluated price by submitting priced offers (or best and final offers) meeting the requirements of the solicitation. If the foregoing conditions are met, price competition shall be presumed to be “adequate” unless the procurement officer determines in writing that such competition is not adequate.
- (c) Established Catalogue Prices or Market Prices.
 - (i) See Article 103, Part 1 (Definitions, Established Catalogue Price) of the Colorado Procurement Code for the definition of established catalogue price.
 - (ii) “Established Market Price” means a current price, established in the usual and ordinary course of trade between buyers and sellers, which can be substantiated from sources which are independent of the manufacturer or supplier and may be an indication of the reasonableness of price.

- (iii) If, despite the existence of an established catalogue price or market price, and after consultation with the prospective contractors, the procurement officer considers that such price is not reasonable, cost or pricing data may be requested. Where the reasonableness of the price can be assured by a request for cost or pricing data limited to data pertaining to the differences in the item or services being procured and those in the catalogue or market, requests should be so limited.
- (d) Prices Set by Law or Regulation. The price of a supply or service is set by law or regulation if some governmental body establishes the price that the offeror or contractor may charge the State and other customers.

R-24-103-403-05 Defective Cost or Pricing Data

- (a) Overstated Cost or Pricing Data. If certified cost or pricing data are subsequently found to have been inaccurate, incomplete, or non-current as of the date stated in the certificate, the State is entitled to an adjustment of the contract price, including profit or fee, to exclude any significant sum by which the price, including profit or fee was increased because of the defective data. Judgmental errors made in good faith concerning the estimated portions of future costs or projections do not constitute defective data. It is presumed that overstated cost or pricing data increased the contract price in the amount of the defect plus related overhead and profit or fee. Therefore, unless there is a clear indication that the defective data were not used or relied upon, the price should be reduced in such amount. In establishing that the defective data caused an increase in the contract price, the procurement officer is not expected to reconstruct the negotiation by speculating as to what would have been the mental attitudes of the negotiating parties if the correct data had been submitted at the time of agreement on price.
- (b) Offsetting Understated Cost or Pricing Data. In determining the amount of a downward adjustment, the contractor shall be entitled to an offsetting adjustment for any understated cost or pricing data submitted in support of price negotiations for the same pricing action up to the amount of the State's claim for overstated cost or pricing data arising out of the same pricing action.
- (c) Dispute as to Amount. If the contractor and the procurement officer cannot agree as to the amount of adjustment due to defective cost or pricing data, the procurement officer shall set an amount in accordance with Sub-sections (a) and (b) of this Section and the contractor may appeal this decision under Article 109 (Remedies) of the State of Colorado Procurement Code.

PART 5 TYPES OF CONTRACTS

R-24-103-501 Types of Contracts

(See Statute)

The minimum requirements for contract formation and content are contained in Chapter 3 of the Colorado Fiscal Rules.

R-24-103-502 Approval of Accounting System

(See Statute)

R-24-103-503 Multi-Year Contracts

The Division of Purchasing or agencies with delegated purchasing authority may enter into multi-year contracts for supplies or services subject to funding availability. Contracts for periods in excess of five years shall not be executed without written permission of the State Purchasing Director.

Specifications for multi-year contracts shall contain conditions of renewal or extension, if any. Methods used to determine any price escalation/de-escalation shall be part of the original specifications and made a part of the contract. Contracts shall only be renewed or extended if funds are available for the new contract period.

PART 6 AUDIT OF RECORDS

(See Statute)

PART 7 DETERMINATIONS AND REPORTS

(See Statutes)

ARTICLE 104 SPECIFICATIONS

PART 1 DEFINITIONS

R-24-104-101 Definitions

R-24-104-101-01 Terms Defined in this Article

- (a) Brand Name Specification: Means a specification limited to one or more items by manufacturer's names or catalogue numbers.
- (b) Brand Name or Equal Specification: Means a specification which uses one or more manufacturer's names or catalogue numbers to describe the standard of quality, performance, and other characteristics needed to meet state requirements, and which provides for the submission of equivalent products.
- (c) Qualified Products List: Means an approved list of supplies, services or construction items described by model or catalogue numbers, which prior to competitive solicitation, the state has determined will meet the applicable specification requirements.
- (d) Specifications: See Statute; includes performance characteristics.

PART 2 SPECIFICATIONS

R-24-104-201 Duties of the Executive Director

R-24-104-201-01 General Purpose and Policies

- (a) Purpose. The purpose of a specification is to serve as a basis for obtaining a supply, service, or construction item adequate and suitable for the State's needs in a cost effective manner, taking into account, to the extent practicable, the costs of ownership and operation as well as initial acquisition costs, i.e., value analysis. It is the policy of the State that specifications permit maximum practicable competition consistent with this purpose. Specifications shall be drafted with the objective of clearly describing the State's requirements.

- (b) Use of Functional or Performance Descriptions. Specifications shall, to the extent practicable, emphasize functional or performance criteria while limiting design or other detailed physical descriptions to those necessary to meet the needs of the State. To facilitate the use of such criteria, using agencies shall endeavor to include as part of their purchase requisitions the principal functional or performance needs to be met. It is recognized, however, that the preference for use of functional or performance specifications is primarily applicable to the procurement of supplies and services. Such preference is often not practicable in construction, apart from the procurement of supply type items for a construction project.
- (c) Preference for Commercially Available Products. It is the general policy of this State to procure standard commercial products whenever practicable. In developing specifications, accepted commercial standards shall be used and unique requirements shall be avoided, to the extent practicable.

R-24-104-202 Brand Name or Equal Specification: Conditions for Use

Brand name or equal specifications may be used when it is in the best interest of the State and when the item to be procured is best described by use of such a specification. Brand name or equal specifications shall seek to designate three or as many different brands as are practicable as "or equal" references and shall further state that substantially equivalent products to those designated will be considered for award.

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 to limit or restrict competition.

R-24-104-202-01 Brand Name Specifications: Conditions for Use

Since use of a brand name specification is restrictive, it may be used when only the brand name or items will satisfy the State's needs. The procurement officer shall seek to identify sources from which the designated brand name or item can be obtained and shall solicit such sources to achieve whatever degree of competition is practicable. If only one source can supply the requirement, the procurement shall be made under Rule R-24-103-205 (Sole Source Procurement).

R-24-104-202-02 Qualified Products List: Conditions for Use

A qualified products list may be developed with the approval of the Director or the head of a purchasing agency when testing or examination of the supplies or construction items prior to issuance of the solicitation is desirable or necessary in order to best satisfy the State's requirements. When developing a qualified products list, a representative group of potential suppliers may be solicited in writing to submit products for testing and examination to determine acceptability for inclusion on a qualified products list. Any potential supplier, even though not solicited, may offer its products for consideration on subsequent solicitations.

R-24-104-203 Exempted Items

(See Statute)

R-24-104-204 Relationship With Using Agencies

(See Statute)

R-24-104-205 Maximum Practicable Competition

(See Statute)

R-24-104-206 Ownership Considerations

(See Statute)

ARTICLE 105 CONSTRUCTION CONTRACTS

PART 1 MANAGEMENT OF CONSTRUCTION CONTRACTING

R-24-105-101 Responsibility for Selection of Methods of Construction Contracting Management

R-24-105-101-01 Definitions

- (a) Prime Contractor, as used in this article means a person who has a contract with the state to build, alter, repair, improve, or demolish any public structure or building, or other public improvements of any kind to any public real property.

R-24-105-101-02 General Definitions

- (a) Use of Definitions. The following definitions are to provide a common vocabulary for use in the context of this Rule and for general discussion concerning the construction contracting activities of the state. The methods described are not all mutually exclusive and often may be combined on one project. These definitions are not intended to be fixed in respect to all construction projects of the state. In each project these definitions may be adapted to fit the circumstances of that project. However, the procurement officer should endeavor to ensure that these terms are defined adequately in the appropriate contracts, are not used in a misleading manner, and are understood by all relevant parties. Significant deviations from the definitions provided in this Rule should be explicitly noted.
- (b) Single Prime Contractor. The single prime contractor method of contracting is typified by one business (general contractor) contracting with the state to timely complete an entire construction project in accordance with plans and specifications provided by the state. Often these plans and specifications are prepared by a private architectural firm under contract to the state. Further, while the general contractor may take responsibility for successful completion of the project, much of the work may be performed by specialty contractors with whom the prime contractor has entered into subcontracts.
- (c) Design-Build or Turnkey. In design-build or turnkey project, a business contracts directly with the state to meet the state's requirements as described in a set of performance specifications by constructing a facility to its own plans and specifications. Design responsibility and construction responsibility both rest with the design-build contractor. This method can include instances where the design-build contractor supplies the site as part of the package.
- (d) Construction Manager/General Contractor. Construction management is a team approach to construction. A construction manager/general contractor is a firm or individual experienced in construction that has the ability to evaluate and to implement plans and specifications as they affect time, cost, and quality of construction and the ability to coordinate the design (consisting of architect/engineers and other consultants as may be required as team members) and contracts directly with sub-contractors for performance of the construction of the project, including the administration of change orders.
- (e) Phased Design and Construction. Phased design and construction denotes a method in which construction is begun when appropriate portions have been designed, but before substantial design of the entire structure has been completed. This method is also known as fast-track construction.

The above defined methods of construction contracting are not to be construed as an exclusive list. In selecting the appropriate construction contracting method, consideration will be given to all appropriate and effective methods and their comparative advantages and disadvantages and how they might be adapted or combined to fulfill state requirements.

PART 2 BONDS

R-24-105-201 Bid Security

R-24-105-201-01 General

(See Statute)

R-24-105-201-02 Acceptable Bid Security.

Acceptable bid security shall be limited to:

- (a) a one-time bid bond underwritten by a company licensed to issue bid bonds in the State of Colorado, and in the form prescribed in Section 24-105-203 CRS and Rule R-24-105-203; or
- (b) a bank cashier's check made payable to the Treasurer of the State of Colorado; or
- (c) a bank certified check made payable to the Treasurer of the State of Colorado.

The bid security is submitted as a guarantee that the bid will be maintained in full force and effect for a period of thirty (30) days after the opening of the bids or as specified in the Invitation for Bids.

R-24-105-202 Contract Performance and Payment Bonds

R-24-105-202-01 Performance Bonds

(See Statute)

R-24-105-202-02 Payment Bonds

(See Statute)

R-24-105-202-03 Exceptions

If it is deemed to be in the State's best interest, the procurement officer may require, as provided in §24-105-202(2) CRS, a performance bond or other security in addition to those bonds or in circumstances other than those specified in §24-105-202(a), (b) CRS, as amended.

R-24-105-203 Bond Forms and Copies

R-24-105-203-01 Forms

All construction contracts and procedural documents shall be executed on standard State of Colorado forms available on-line on the Office of the State Architect website.

PART 3 CONSTRUCTION CONTRACT CLAUSES AND FISCAL RESPONSIBILITY

R-24-105-301 Contract Clauses and Their Administration

(See Statute)

R-24-105-302 Fiscal Responsibility

(See Statute)

ARTICLE 106 MODIFICATION AND TERMINATION OF CONTRACTS (FOR OTHER THAN CONSTRUCTION)

R-24-106-101 Contract Clauses - Price Adjustments - Additional Clauses - Modification

(See Statute)

R-24-106-101-01 Revisions to Contract Clauses

These clauses may be varied for use in a particular contract at the discretion of the procurement officer.

R-24-106-102-02 Changes Clause

- (a) Changes Clause in Fixed-Price Contracts. In fixed-price contracts, the following clause may be inserted:
 - (i) Change Order. By a written order, at any time, and without notice to any surety, the procurement officer may, subject to all appropriate adjustments, make changes within the general scope of this contract in any one or more of the following:
 - (A) drawings, designs, or specifications, if the supplies to be furnished are to be specially manufactured for the purchasing agency in accordance therewith;
 - (B) method of shipment or packing; or
 - (C) place of delivery.
 - (ii) Adjustments of Price or Time or Performance. If any such change order increases or decreases, the contractor's cost of, or the time required for, performance of any part of the work under this contract, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this Contract.

Failure of the parties to agree to an adjustment shall not excuse the contractor from proceeding with the contract as changed, provided that the purchasing agency promptly and duly makes such provisional adjustments in payment or time for performance as may be reasonable. By proceeding with the work, the contractor shall not be deemed to have prejudiced any claim for additional compensation, or an extension of the time for completion.
 - (iii) Time Period for Claim. Within 30 days after receipt of a written change order under the Change Order paragraph of this clause, unless such period is extended by the procurement officer in writing, the contractor shall file notice of intent to assert a claim for an adjustment.
 - (iv) Claim Barred After Final Payment. No claim by the contractor for an adjustment hereunder shall be allowed if asserted after final payment under this contract.

R-24-106-101-03 Stop Work Order Clause

- (a) Use of Clause. This clause is authorized for use in any fixed-price contract under which work stoppage may be required for reasons such as advancements in the state of the art, production modification, engineering changes or realignment of programs.
- (b) Use of Orders
 - (i) Because stop work orders may result in increased costs by reason of standby costs, such orders will be issued only with prior approval of the procurement officer.
 - (ii) Stop work orders shall include, as appropriate:
 - (A) a clear description of work to be suspended;
 - (B) instructions as to the issuance of further orders by the contractor for material or services.
 - (iii) If an extension of the stop work order is necessary, it must be evidenced by a supplemental agreement as soon as feasible after a stop work order is issued. Any cancellation of a stop work order shall be subject to the same approvals as were required for the issuance of the order.
- (c) Clause
 - (i) Order to Stop Work. The procurement officer may, by written order to the contractor, at any time, and without notice to any surety, require the contractor to stop all or any part of the work called for by this contract. This order shall be for a specified period after the order is delivered to the contractor. Any such order shall be identified specifically as a stop work order issued pursuant to this clause. Upon receipt of such an order, the contractor shall forthwith comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Before the stop work order expires, or as legally extended, the procurement officer shall either:
 - (A) cancel the stop work order; or
 - (B) terminate the work covered by such order; or
 - (C) terminate the contract.
 - (ii) Cancellation or Expiration of the Order. If a stop work order issued under this clause is properly cancelled, the contractor shall have the right to resume work. An appropriate adjustment shall be made in the delivery schedule or contract price, or both, and the contract shall be modified in writing accordingly, if:
 - (A) the stop work order results in an increase in the time required for, or in the contractor's cost properly allocable to, the performance of any part of this contract; and
 - (B) the contractor asserts claim for such an adjustment within 30 days after the end of the period of work stoppage.

- (iii) Termination of Stopped Work. If the work covered by such order is terminated for default or convenience, the reasonable costs resulting from the stop work order shall be allowed by adjustment or otherwise and such adjustment shall be in accordance with the Price Adjustment Clause of this contract.

R-24-106-101-04 Variations in Estimated Quantities Clause

- (a) Define Quantity Contracts. The following clause may be used in definite quantity supply or service contracts:

“Upon the agreement of the parties, the quantity of supplies or services, or both, specified in this contract may be increased provided:
 - (i) the unit prices for the increased quantity increment will remain the same; and
 - (ii) such an increase will either be more economical than awarding another contract or that it would not be practical to award another contract.”
- (b) Indefinite Quantity Contracts. No clause is provided here. However, the solicitation and contract should include:
 - (i) the minimum quantity, if any, the purchasing agency is obligated to order and the contractor to provide;
 - (ii) whether there is an approximate quantity the purchasing agency expects to order and how this quantity relates to the minimum and maximum quantities that may be ordered under the contract;
 - (iii) whether there is a maximum quantity the purchasing agency may order and the contractor must provide; and
 - (iv) whether the purchasing agency is obligated to order its actual requirements under the contract, with exception for a stated quantity, which if exceeded, separate bids may be solicited.

R-24-106-101-05 Price Adjustment Clause

The following clause may be used when price adjustments are anticipated:

- (a) Price Adjustment Method. Any adjustment in contract price pursuant to the application of a clause in this contract shall be made in one or more of the following ways:
 - (i) by agreement on a fixed-price adjustment;
 - (ii) by unit prices specified in the contract;
 - (iii) in such other manner as the parties may mutually agree; or
 - (iv) in the absence of agreement between the parties, by a unilateral determination by the procurement officer of the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee.
- (b) Submission of Cost or Pricing Data. The contractor shall provide cost or pricing data for any price adjustment subject to the provisions of the Cost or Pricing Data section of the Colorado State Procurement Rules.

R-24-106-101-06 Termination for Default Clause

- (a) **Default.** If the contractor refuses or fails to timely perform any of the provisions of this contract, with such diligence as will ensure its completion within the time specified in this contract, the procurement officer may notify the contractor in writing of the non-performance, and if not promptly corrected, such officer may terminate the contractor's right to proceed with the contract or such part of the contract as to which there has been delay or a failure to properly perform. The contractor shall continue performance of the contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services elsewhere.
- (b) **Contractor's Duties.** Notwithstanding termination of the contract and subject to any directions from the procurement officer, the contractor shall take timely, reasonable, and necessary action to protect and preserve property in the possession of the contractor in which the purchasing agency has an interest.
- (c) **Compensation.** Payment for completed supplies delivered and accepted by the purchasing agency shall be at the contract price. The purchasing agency may withhold amounts due to the contractor as the procurement officer deems to be necessary to protect the purchasing agency against loss because of outstanding liens or claims of former lien holders and to reimburse the purchasing agency for the excess costs incurred in procuring similar goods and services.
- (d) **Excuse for Nonperformance or Delayed Performance.** The contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms if such failure arises out of acts of God; acts of the public enemy; acts of the state and any governmental entity in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather.

Upon request of the contractor, the procurement officer shall ascertain the facts and extent of such failure, and, if such officer determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, the contractor's progress and performance would have met the terms of the contract, the delivery schedule shall be revised accordingly, subject to the rights of the purchasing agency.

- (e) **Erroneous Termination for Default.** If after notice of termination of the contractor's right to proceed under the provisions of this clause, it is determined for any reason that the contractor was not in default under the provisions of this clause, or that the delay was excusable, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to the termination for convenience clause.

R-24-106-101-07 Liquidated Damages Clause

The State may insert the following clause in construction contracts:

"When the contractor is given notice of delay or nonperformance and fails to cure in the time specified, in addition to any other damages that are applicable, the contractor shall be liable for a \$_____ (amount to be filled in for each contract) per calendar day from date set for cure until either the purchasing agency reasonably obtains similar supplies or services if the contractor is terminated for default, or until the contractor provides the supplies or services if the contractor is not terminated for default. To the extent that the contractor's delay or nonperformance is excused under the Excuse for Nonperformance or Delayed Performance paragraph of the Termination for Default Clause of this contract, liquidated damages shall not be due the purchasing agency."

R-24-106-101-08 Termination for Convenience Clause

- (a) Termination. The procurement officer may, when the interests of the purchasing agency so require, terminate this contract in whole or in part, for the convenience of the agency. The procurement officer shall give written notice of the termination to the contractor specifying the part of the contract terminated and when termination becomes effective. This in no way implies that the purchasing agency has breached the contract by exercise of the Termination for Convenience Clause.
- (b) Contractor's Obligations. The contractor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination the contractor will stop work to the extent specified. The contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The procurement officer may direct the contractor to assign the contractor's right, title, and interest under terminated orders or subcontracts to the purchasing agency. The contractor must still complete and deliver to the purchasing agency the work not terminated by the Notice of Termination and may incur obligations as are necessary to do so.
- (c) Compensation.
 - (i) The contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data bearing on such claim. If the contractor fails to file a termination claim within 90 days from the effective date of termination, the procurement officer may pay the contractor, if at all, an amount set in accordance with subparagraph (c) (iii) in this paragraph.
 - (ii) The procurement officer and the contractor may agree to a settlement provided the contractor has filed a termination claim supported by cost or pricing data and that the settlement does not exceed the total contract price plus settlement costs, reduced by payments previously made by the purchasing agency, the proceeds of any sales of supplies and manufactured materials made under agreement, and the contract price of the work not terminated.
 - (iii) Absent complete agreement under subparagraph (b) of this paragraph, the procurement officer shall pay the contractor the following amounts, provided payments agreed to under subparagraph (b) shall not duplicate payments under this subparagraph:
 - (A) contract prices for supplies or services accepted under the contract;
 - (B) costs incurred in preparing to perform the terminated portion of the work plus a fair and reasonable profit on such portion of the work (such profit shall not include anticipatory profit or consequential damages) less amounts paid to or to be paid for accepted supplies or services; provided, however, that if it appears that the contractor would have been sustained a loss if the entire contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;
 - (C) costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to the Contractor's Obligations paragraph of this clause. These costs must not include costs paid in accordance with subparagraph (c)(ii) of this paragraph;

- (D) the reasonable settlement costs of the contractor including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection terminated portion of this contract. The total sum to be paid the contractor under this subparagraph shall not exceed the total contract price reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under subparagraph (b) of this paragraph, and the contract price of work not terminated.
- (iv) Costs claimed or agreed to under this section shall be in accordance with applicable sections of the Colorado Procurement Code.

R-24-106-101-09 Novation, Assignment or Change of Name

- (a) Assignment. No contract is transferable, or otherwise assignable, without the written consent of the procurement officer, provided, however, that a contractor may assign monies receivable under a contract after due notice to the purchasing agency.
- (b) Recognition of a Successor in Interest Novation. When in the best interest of the purchasing agency, a successor in interest may be recognized in a novation agreement in which the transferor and the transferee shall agree that:
 - (i) the transferee assumes all of the transferor's obligations;
 - (ii) the transferor waives all rights under the contract as against the agency; and
 - (iii) unless the transferor guarantees performance of the contract by the transferee, the transferee shall, if required, furnish a satisfactory performance bond.
- (c) Change of Name. When a contractor requests to change the name in which it holds a contract with a purchasing agency, the procurement officer responsible for the contract shall, upon receipt of a document indicating such change of name (for example, an amendment to the articles of incorporation of the corporation), enter into an agreement with the requesting contractor to effect such a change of name. The agreement changing the name should specifically indicate that no other terms and conditions of the contract are thereby changed.

ARTICLE 107 COST PRINCIPLES

R-24-107-101 Administrative Rules - Cost Reimbursement

R-24-107-101-01 Applicability of Cost Principles

- (a) Application. This subpart contains cost principles and procedures to be used as guidance in:
 - (i) establishment of contract cost estimates and prices under contracts made by competitive sealed proposals where the award may not be based on adequate price competition, sole source procurement, contracts for certain services;
 - (ii) establishment of price adjustments for contract changes;
 - (iii) pricing of termination for convenience settlements; and
 - (iv) any other situation in which cost analysis is required.

- (b) Limitation. Cost principles in this subpart are not applicable to:
 - (i) the establishment of prices under contracts made by competitive sealed bidding or otherwise based on adequate competition rather than the analysis of individual, specific cost elements, except that this subpart does apply to the establishment of adjustments of price for changes made to such contracts;
 - (ii) prices which are fixed by law or regulation;
 - (iii) prices which are based on established catalogue prices as defined in §24-103-101(2) CRS, or established market price; and
 - (iv) stipulated unit prices.

R-24-107-101-02 Allowable Costs

- (a) General. Any contract cost proposed for estimating purposes or invoiced for cost-reimbursement purposes shall be allowable as provided in the contract. The contract shall provide that the total allowable cost of a contract is the sum of the allowable direct costs actually incurred (or, in the case of forward pricing, the amount estimated to be incurred) in the performance of the contract in accordance with its terms, plus the properly allocable portion of the allowable indirect costs, less any applicable credits (such as discounts, rebates, refunds, and property disposal income).
- (b) Accounting Consistency. All costs shall be accounted for in accordance with generally accepted accounting principles and in a manner that is consistent with the contractor's usual accounting practices in charging costs to other activities. In pricing a proposal, a contractor shall estimate costs consistently with cost accounting practices used in accumulating and reporting costs.
- (c) When Allowable. The contract shall provide that costs shall be allowed to the extent they are:
 - (i) reasonable, as defined in Rule R-24-107-101-03 (Reasonable Costs);
 - (ii) allocable, as defined in Rule R-24-107-101-04 (Allocable Costs);
 - (iii) not made unlawful under any applicable law;
 - (iv) not allowable under Rule R-24-107-101-05 (Treatment of Specific Costs) or Rule R-24-107-101-06 (Costs Requiring Prior Approval to be Allowable); and
 - (v) actually incurred or accrued and accounted for in accordance with generally accepted accounting principles in the case of costs invoiced for reimbursement.

R-24-107-101-03 Reasonable Costs

Any cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by an ordinarily prudent person in the conduct of competitive business. In determining the reasonableness of a given cost, consideration shall be given to:

- (a) whether the cost is of a type generally recognized as ordinary and necessary for the conduct of the contractor's business or the performance of the contract;
- (b) the restraints inherent in and the requirements imposed by such factors as generally accepted sound business practices, arm's length bargaining, federal and state laws and regulations, and contract terms and specifications;

- (c) the action that a prudent businessman would take under the circumstances, considering responsibilities to the owners of the business, employees, customers, the purchasing agency, and the general public;
- (d) significant deviations from the contractor's established practices which may unjustifiably increase the contract costs; and
- (e) any other relevant circumstances.

R-24-107-101-04 Allocable Costs

- (a) General. A cost is allocable if it is assignable or chargeable to one or more cost objectives in accordance with relative benefits received and if it:
 - (i) is incurred specifically for the contract;
 - (ii) benefits both the contract and other work, and can be distributed to both in reasonable proportion to the benefits received; or
 - (iii) is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.
- (b) Allocation Consistency. Costs are allocable as direct or indirect costs. Similar costs (those incurred for the same purpose, in like circumstances) shall be treated consistently either as direct costs or indirect costs except as provided by these regulations. When a cost is treated as a direct cost in respect to one cost objective, it and all similar costs shall be treated as a direct cost for all cost objectives.

Further, all costs similar to those included in any indirect cost pool shall be treated as indirect costs. All distributions to cost objectives from a cost pool shall be on the same basis.

- (c) Direct Cost. A direct cost is any cost which can be identified specifically with a particular cost objective. A direct cost shall be allocated only to its specific cost objective. To be allowable, a direct cost must be incurred in accordance with the terms of the contract.
- (d) Indirect Costs
 - (i) An indirect cost is one identified with more than one cost objective. Indirect costs are those remaining to be allocated to the several cost objectives after direct cost have been determined and charged directly to the contract or other work as appropriate. Any direct costs of minor dollar amounts may be treated as indirect costs, provided that such treatment produces substantially the same results as treating the cost as a direct cost.
 - (ii) Indirect costs shall be accumulated into logical cost groups with consideration of the reasons for incurring the costs. Each group should be distributed to cost objectives benefiting from the costs in the group. Each indirect cost group shall be distributed to the cost objectives substantially in proportion to the benefits received by the cost objectives. The number and composition of the groups and the method of distribution should not unduly complicate indirect cost allocation where substantially the same results could be achieved through less precise methods.
 - (iii) The contractor's method of distribution may require examination when:
 - (A) any substantial difference exists between the cost patterns of the work performed under the contract and the contractor's other work;

- (B) any significant change occurs in the nature of the business, the extent of subcontracting, fixed asset improvement programs, inventories, the volume of sales and production, manufacturing processes, the contractor's products, or other relevant circumstances; or
- (C) indirect cost groups developed for a contractor's primary location are applied to off-site locations. Separate cost groups for costs allocable to off-site locations may be necessary to distribute the contractor's costs on the basis of the benefits accruing to the appropriate cost objectives.
- (iv) The base period for indirect cost allocation is the one in which such costs are incurred and accumulated for distribution to work performed in that period. Normally, the base period is the contractor's fiscal year. A different base period may be appropriate under unusual circumstances. In such cases, an appropriate period should be agreed to in advance.

R-24-107-101-05 Treatment of Specific Costs

- (a) Advertising. The only allowable advertising costs are those for:
 - (i) the recruitment of personnel;
 - (ii) the procurement of scarce items;
 - (iii) the disposal of scrap or surplus materials;
 - (iv) the listing of a business' name and location in a classified directory; and
 - (v) other forms of advertising as approved by the purchasing agency when in the best interest of the agency.
- (b) Bad Debts. Bad debts include losses arising from uncollectible accounts and other claims, such as dishonored checks, employee advances, and related collection and legal costs. All bad debt costs are unallowable.
- (c) Contingencies
 - (i) Contingency costs are contributions to a reserve account for unforeseen costs. Such contingency costs are unallowable except as provided in subsection (c)(ii) of this section.
 - (ii) For the purpose of establishing a contract cost estimate or price in advance of performance of the contract, recognition of uncertainties within a reasonably anticipated range of costs may be required and is not prohibited by this subsection. However, where contract clauses are present which serve to remove risks from the contractor, there shall not be included in the contract price a contingency factor for such risks. Further, contributions to a reserve for self-insurance in lieu of, and not in excess of, commercially available liability insurance premiums, are allowable as an indirect charge.
- (d) Depreciation and Use Allowances

- (i) Depreciation and use allowances are allowable to compensate contractors for the use of buildings, capital improvements and equipment. Depreciation is a method of allocating the acquisition cost of an asset to periods of its useful life. Useful life refers to the asset's period of economic usefulness in the particular contractor's operation as distinguished from its physical life. Use allowances provide compensation in lieu of depreciation or other equivalent costs. Consequently, these two methods may not be combined to compensate contractors for the use of any one type of property.
 - (ii) The computation of depreciation or use allowances shall be based on acquisition costs. When the acquisition costs are unknown, reasonable estimates may be used.
 - (iii) Depreciation shall be computed using any generally accepted method, provided that the method is consistently applied and results in equitable charges considering the use of the property. The straight-line method of depreciation is preferred unless the circumstances warrant some other method. However, the purchasing agency will accept any method which is accepted by the Internal Revenue Service.
 - (iv) In order to compensate the contractor for use of depreciated, contractor-owned property which has been fully depreciated on the contractor's books and records and is being used in the performance of a contract, use allowances are allowable, provided that they are computed in accordance with an established industry or government schedule or other method mutually agreed upon by the parties. If a schedule is not used, factors to consider in establishing the allowance are the original cost, remaining estimated useful life, the reasonable fair market value, the effect of any increased maintenance or decreased efficiency.
- (e) Entertainment
- (i) Entertainment costs include costs of amusements, social activities and incidental costs relating thereto, such as meals, beverages, lodging, transportation and gratuities. Entertainment costs are unallowable.
 - (ii) Nothing herein shall make unallowable a legitimate expense for employee morale, health, welfare, food service, or lodging cost; except that, where a net profit is generated by such employer related services, it shall be treated as a credit as provided in Section R-24-107-101-07 (Applicable Credits). This section shall not make unallowable costs incurred for meetings or conferences, including, but not limited to, costs of food, rental facilities, and transportation where the primary purpose of incurring such cost is the dissemination of technical information or the stimulation of production.
- (f) Fines and Penalties. Fines and penalties include all costs incurred as the result of violations of or failure to comply with federal, state and local laws and regulations. Fines and penalties are unallowable costs unless incurred as a direct result of compliance with specific provisions of the contract or written instructions of the procurement officer. To the extent that workmen's compensation is considered by state law to constitute a fine or penalty, it shall not be an allowable cost under this subsection.
- (g) Gifts, Contributions and Donations. A gift is property transferred to another person without the other person providing return consideration of equivalent value. Reasonable costs for employee morale, health, welfare, food services, or lodging are not gifts and are allowable. Contributions and donations are property transferred to a nonprofit institution which are transferred in exchange for supplies or services of equivalent fair market value rendered by a nonprofit institution. Gifts, contributions and donations are unallowable.

- (h) Interest Costs
 - (i) Interest is a cost of borrowing. Interest is not allowable except as provided in subsection (h)(ii) of this section.
 - (ii) Interest costs on contractor claims for payments due under purchasing agency contracts shall be allowable as provided in §24-209-301 CRS.
 - (iii) Losses Incurred Under Other Contracts. A loss is the excess of costs over income earned under a particular contract. Losses may include both direct and indirect costs. A loss incurred under one contract may not be charged to any other contract.
- (i) Material Costs
 - (i) Material costs are the costs of all supplies, including raw material, parts and components (whether acquired by purchase from an outside source or acquired by transfer from any division, subsidiary, or affiliate under the common control of the contractor), which are acquired in order to perform the contract. Material costs are allowable, subject to subsection (j)(ii) and subsection (j)(iii) of this section. In determining material costs, consideration shall be given to reasonable spoilage, reasonable inventory losses and reasonable overages.
 - (ii) Material costs shall include adjustments for all available discounts, refunds, rebates and allowances which the contractor reasonably should take under the circumstances, and for credits for proceeds the contractor received or reasonably should receive from salvage and material returned to suppliers.
 - (iii) Allowance for all materials transferred from any division (including the division performing the contract), subsidiary, or affiliate under the common control of the contractor shall be made on the basis of costs incurred by the transferor (determined in accordance with these costs principles regulations, except that double charging of indirect costs is unallowable), except the transfer may be made at the established price provided that the price of materials is not determined to be unreasonable by the procurement officer and the price is not higher than the transferor's current sales price to its most favored customer for a like quantity under similar payment and delivery conditions and:
 - (A) the price is established either by the established catalogue price, as defined in §24-103-101(2) CRS; or
 - (B) by the lowest price offer obtained as a result of competitive sealed bidding or competitive sealed proposals conducted with other businesses that normally produce the item in similar quantities.
- (j) Taxes
 - (i) Except as limited in subsection (k)(ii) of this section all taxes which the contractor is required to pay and which are paid and accrued in accordance with generally accepted accounting principles are allowable.
 - (ii) The following costs are unallowable:
 - (A) federal income taxes and federal excess profit taxes;

- (B) all taxes from which the contractor could have obtained an exemption, but failed to do so, except where the administrative cost of obtaining the exemption would have exceeded the tax savings realized from the exemption;
 - (C) any interest, fines, or penalties paid on delinquent taxes unless incurred at the written direction of the procurement officer; and
 - (D) income tax accruals designed to account for the tax effects of differences between taxable income and pre-tax income as reflected by the contractor's books of account and financial statements.
- (iii) Any refund of taxes which were allowed as a direct cost under the contract shall be credited to the contract. Any refund of taxes which were allowed as an indirect cost under a contract shall be credited to the indirect cost group applicable to contracts being priced or costs being reimbursed during the period in which the refund is made.
- (iv) Direct government charges for services such as water, or capital improvements such as sidewalks, are not considered taxes and are allowable costs.

R-24-107-101-06 Cost Requiring Prior Approval to be Allowable

- (a) General. The costs described in subsections (b), (c), (d), and (e) of this section are allowable as direct costs to cost-reimbursement type contracts to the extent that they have been approved in advance by the procurement officer. In other situations those costs are negotiable in accordance with general standards set out herein.
- (b) Pre-Contract Costs. Pre-contract costs are those incurred prior to the effective date of the contract directly pursuant to, and in anticipation of, the award of the contract. Such costs are allowable to the extent that they would have been allowable if incurred after the date of the contract; provided that, in the case of a cost-reimbursement type contract, a special provision must be inserted in the contract setting forth the period of time and maximum amount of cost which will be covered as allowable pre-contract costs.
- (c) Bid and Proposal Costs. Bid and proposal costs are the costs incurred in preparing, submitting and supporting bids and proposals. Reasonable ordinary bid and proposal costs are allowable as direct costs only to the extent that they are specifically permitted by a provision of the contract or solicitation document. Where bid and proposal costs are allowable as direct costs, to avoid double accounting, the same bid and proposal costs shall not be charged as indirect costs.
- (d) Insurance
- (i) Insurance costs are the costs of obtaining insurance in connection with performance of the contract or contributions to a reserve account for the purpose of self-insurance. Ordinary and necessary insurance costs are allowable in accordance with these cost principles. Self-insurance contributions are allowable only to the extent of the cost to the contractor to obtain similar insurance.
 - (ii) Insurance costs may be approved as a direct cost only if the insurance is specifically required for the performance of the contract.
 - (iii) Actual losses which should reasonably have been covered by permissible insurance or were expressly covered by self-insurance are unallowable unless the parties expressly agree otherwise in the terms of the contract.

- (e) **Litigation Costs.** Litigation costs include all filing fees, legal fees, expert witness fees, and all other costs involved in litigating claims in court or before an administrative board. Litigation costs are allowable as indirect costs in accordance with these regulations, except that costs incurred in litigation against the purchasing agency are unallowable.

R-24-107-101-07 Applicable Credits

- (a) **Definitions and Examples.** Applicable credits are receipts or price reductions which offset or reduce expenditures allocable to contracts as direct or indirect costs. Examples include purchase discounts, rebates, allowance, recoveries or indemnification for losses, sale of scraps and surplus equipment and materials, adjustments for overpayments or erroneous charges, and income from employee recreational, incidental, or services and food sales.
- (b) **Reducing Costs.** Credits shall be applied to reduce related direct or indirect costs.
- (c) **Refund.** The purchasing agency shall be entitled to a cash refund if the related expenditures have been paid to the contractor under a cost-reimbursement type contract.

R-24-107-101-08 Advance Agreements

- (a) **Purpose.** Both the purchasing agency and the contractor should seek to avoid disputes and litigation arising from potential problems by providing in the terms of the contract the treatment to be accorded special or unusual costs.
- (b) **Procedure Required.** Advance agreements may be negotiated either before or after contract award, but shall be negotiated before a significant portion of the cost covered by the agreement has been incurred. Advance agreements shall be in writing, executed by both contracting parties and incorporated in the contract.
- (c) **Limitation on Costs Covered.** An advance agreement shall not provide for any treatment of costs inconsistent with these regulations unless a determination has been made pursuant to Rule R-24-107-101-10 (Authority to Deviate from Cost Principles).

R-24-107-101-09 Use of Federal Cost Principles

- (a) **Cost Negotiations.** In dealing with contractors operating according to federal cost principles, such as Defense Acquisition Regulation, Section 15, or Federal Procurement Regulations, Part 1-15, the procurement officer, after notifying the contractor, may use the federal cost principles as guidance in contract negotiations, subject to subsection (b) of this section.
- (b) **Incorporation of Federal Cost Principles: Conflicts Between Federal Principles and This Part**
 - (i) In contracts not awarded under a program which is funded by federal assistance funds, the procurement officer may explicitly incorporate federal cost principles into a solicitation and thus into any contract awarded pursuant to that solicitation. The procurement officer and the contractor by mutual agreement may incorporate federal cost principles into a contract during negotiation or after award. In either instance, the language incorporating the federal cost principles shall clearly state that to the extent federal cost principles conflict with the regulations issued pursuant to §25-107-101 CRS, the state rules shall control.

- (ii) In contracts awarded under a program which is financed in whole or in part by federal assistance funds, all requirements set forth in the assistance document including specified federal cost principles, must be satisfied. Therefore, to the extent that the cost principles specified in the grant document conflict with the cost principles issued pursuant to §24-107-101 CRS, the cost principles specified in the grant shall control.

R-24-107-101-10 Authority to Deviate from Cost Principles

If a procurement officer desires to deviate from the cost principles set forth in these regulations, a written determination shall be made by such officer specifying the reasons for the deviation.

ARTICLE 108 SUPPLY MANAGEMENT

(Repealed. See Statute)

ARTICLE 109 REMEDIES

PART 1 PRELITIGATION RESOLUTION OF CONTROVERSIES

R-24-109-101 Resolution of Controversies

(See Statute)

R-24-109-102-01 Filing of Protest

- (a) Subject of Protest. Protestors may file a protest on any phase of solicitation or award, including but not limited to specifications, award, or disclosure of information marked confidential in the bid offer.
- (b) Form. The written protest shall include, as a minimum, the following:
 - (i) the name and address of the protestor;
 - (ii) appropriate identification of the procurement by bid or award number;
 - (iii) a statement of the reasons for the protest; and
 - (iv) any available exhibits, evidence, or documents substantiating the protest.

R-24-109-102-02 Requested Information

Any additional information regarding the protest should be submitted within the time period requested in order to expedite resolution of the protest. If any party fails to comply expeditiously with any request for information by the Director or head of a purchasing agency, the protest may be resolved without such information.

R-24-109-102-03 Decision

If an action concerning the protest has been commenced in court, the Director or head of a purchasing agency shall not act on the protest but shall refer it to the Attorney General. The decision shall inform the protester of his or her right to appeal administratively or judicially in accordance with Article 109 (Remedies) of the Colorado Procurement Code.

R-24-109-103 Stay of Procurements During Protest

(Repealed. See Statute)

Section 24-109-103 CRS was repealed by the General Assembly effective June 6, 1985. This only affects competitive sealed bids or awards of any type other than Competitive Sealed Proposals. A stay of a contract for Competitive Sealed Proposals is in effect until any protest is resolved pursuant to §24-109-102 CRS. (See §24-103-203(7) CRS, effective April 8, 1996).

R-24-109-104 Entitlement to Costs

(See Statute)

R-24-109-105 Debarment And Suspension

R-24-109-105-01 Suspension

- (a) Initiation. After consultation with the affected using agency, the Attorney General, and where practicable, the contractor or potential contractor who is to be suspended, the director may issue a written determination to suspend a person from consideration of contracts pending an investigation to determine whether cause exists for debarment. A notice of suspension, including a copy of the determination, shall be sent to the suspended contractor or prospective contractor. Such notice shall:
 - (i) state that the suspension will be for the period necessary to complete an investigation into possible debarment, as limited in §24-109-105 CRS;
 - (ii) inform the suspended person that bids or proposals will not be solicited from him or her and, if received, will not be considered during the period of suspension; and
 - (iii) inform the contractor or prospective contractor of his or her right to appeal administratively or judicially in accordance with Article 109 (Remedies) of the Colorado Procurement Code.
- (b) Effect of Decision. A contractor or prospective contractor is suspended upon issuance of the notice of suspension; the suspension shall remain in effect during any appeals.

R-24-109-105-02 Debarment

- (a) Initiation. Following completion of the investigation to determine whether a contractor or prospective contractor has engaged in activities which are a cause for debarment, and after consultation with the affected using agencies and Attorney General, the Director may debar a contractor or prospective contractor. A written notice of debarment shall be sent by certified mail, return receipt requested. The notice shall inform the debarred person of his or her right to appeal the decision administratively or judicially in accordance with Article 109 (Remedies) of the Colorado Procurement Code.
- (b) Effect of Debarment Decision. A debarment decision will take effect 30 days after the contractor or prospective contractor receives notice of the decision unless an appeal is filed during that time. After the debarment decision takes effect, the person shall remain debarred unless a court, the Executive Director, or the person who issued the debarment decision orders otherwise or until the debarment period specified in the decision expires. A debarment may be for a specific purchasing agency or may apply to all agencies.

- (c) Lists of Debarred and Suspended Persons. The Director shall maintain a current list of all debarred and suspended persons and shall send such lists and updates of it to heads of all purchasing agencies.

R-24-109-106 Resolution of Contract and Breach of Contract Controversies - Applicability - Authority

R-24-109-106-01 Statement of Policy

The Colorado Procurement Code establishes procedures and remedies to resolve contract and breach of contract controversies between the state and a contractor. It is the state's policy to try to resolve all controversies by mutual agreement through informal discussions without litigation. As used in these rules, the word "controversy" is meant to be broad and all-encompassing, including the full spectrum of disagreements from pricing of routine contract changes to claims of breach of contract.

R-24-109-106-02 Decision

- (a) Procurement Prior to Issuing Decisions. When a controversy cannot be resolved by mutual agreement, the Director or head of a purchasing agency shall, within 20 working days after receiving a written request by the contractor for a final decision, issue a written decision. Before issuing a final decision, the Director or head of a purchasing agency shall review the facts pertinent to the controversy and secure any necessary assistance from legal, fiscal, and other advisers.
- (b) Final Decision. The Director or head of a purchasing agency shall immediately furnish a copy of the decision to the contractor by certified mail, return receipt requested. The decision shall include:
 - (i) a description of the controversy;
 - (ii) a reference to the pertinent contract provision;
 - (iii) a statement of the factual areas of agreement and disagreement;
 - (iv) the supporting rationale for the decision; and
 - (v) notice of the contractor's right to appeal the decision administratively or judicially in accordance with the provisions of Article 109 (Remedies) of the Colorado Procurement Code.
- (c) Payments of Amounts Found Due. The amount and interest on the amount determined payable pursuant to the decision, less any portion already paid, normally should be paid without awaiting contractor action concerning appeal. Such payment shall be without prejudice to the rights of either party. If, on appeal, such payments are required to be returned, interest shall be paid from the date of payment.

PART 2 APPEALS

R-24-109-201 Appeal to the Executive Director

(See Statute)

R-24-109-202 Rules of Procedure

(See Statute)

R-24-109-202-01 Filing of Appeals

- (a) When to file. Appeals of decisions of the Director or head of a purchasing agency shall be submitted in writing to the Executive Director within ten (10) working days of the date a decision is mailed or within twenty (20) working days of a decision regarding a suspension, debarment, or contract controversy. Appeals received after the prescribed time periods shall not be considered. (See §24-109-203 CRS.)
- (b) Form. The written appeal shall include copies of all documents and evidence previously submitted to the Director or head of a purchasing agency, any additional relevant information, and the decision rendered by the Director or head of a purchasing agency.
- (c) Content. The appeal shall be limited to the issues raised in the original protest. However, the appeal may include new evidence or additional information related to those issues or issues related to the conduct of the protest process.

R-24-109-202-02 Additional Information

The Executive Director may request that the parties submit any additional information necessary to make a decision on the appeal. If any party fails to submit requested information within the time period set by the Executive Director, the appeal may be considered without such information.

R-24-109-202-03 Hearing by the Executive Director

- (a) Request for Hearing. A contractor or prospective contractor bringing an appeal may request in writing that the Executive Director conduct a hearing on the appeal.
- (b) Notice of Hearing. If a hearing is requested, the Executive Director, or his designee, shall send a written notice of the time and place of the hearing to all parties and the Attorney General. Such notice shall be sent by certified mail, return receipt requested.
- (c) Hearing Procedures. Hearings shall be as informal as possible under the circumstances. The weight to be attached to any evidence presented shall be within the discretion of the Executive Director or his designee. Stipulations of fact agreed upon by the parties may be used as evidence at the hearing. The Executive Director, or his designee, may request evidence in addition to that presented by the parties. A hearing may be recorded but need not be transcribed except at the request and expense of the contractor or prospective contractor. A record of those present, identification of any written evidence presented, copies of all written statements, and a summary of the hearing shall be sufficient record. The Executive Director or his designee may:
 - (i) hold informal conferences to settle, simplify, or fix the issue or to consider other matters that may aid in an expeditious disposition of the appeal;
 - (ii) require parties to state their position with respect to the various issues;
 - (iii) require parties to produce for examination those relevant witnesses and documents under their control;
 - (iv) regulate the course of the hearing and conduct of participants;
 - (v) receive, rule on, exclude, or limit evidence and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;
 - (vi) request and set time limitation for submission of briefs; and

- (vii) administer oaths or formulations.

R-24-109-203 Time Limitation for Appeals

(See Statute)

R-24-109-204 Decision of the Executive Director

The Executive Director, or his designee, shall issue a final decision on the issue. Copies of the decision shall inform the contractor or prospective contractor of his or her rights to judicial appeals under Article 109 (Remedies) of the Colorado Procurement Code. However, if an action concerning the protest, suspension, debarment, or contract controversy has been commenced in court, the Executive Director shall not act on the matter, but shall refer it to the Attorney General.

R-24-109-205 Appeals to District Court

(See Statute)

R-24-109-206 Time Limitations on Appeals to the District Court

(See Statute)

PART 3 INTEREST

(See Statute)

PART 4 SOLICITATIONS AND AWARDS IN VIOLATION OF THE LAW

R-24-109-401 Applicability

This Rule addresses only requirements of procurement law. Any other violations of law or rule are not considered in this review process.

R-24-109-401-01 Definitions

- (a) An “unauthorized purchase” is any situation where a purchase has occurred or a purchase commitment has been made to a vendor to obtain goods or services, and:
 - (i) the requesting agency has not followed established applicable purchasing statutes and rules, or
 - (ii) a purchase or commitment to purchase is made by a person(s) who is not so authorized.
- (b) “Ratification” is the act of the using agency's purchasing director, after review of all facts involved in an unauthorized purchase, sanctioning the unauthorized purchase.
- (c) “Responsible individual(s)” is the person(s) who has made an unauthorized purchase.

R-24-109-402 Remedies Prior to an Award

(See Statute)

R-24-109-403 Remedies After an Award

(See Statute)

R-24-109-404 Liability of Public Employees

R-24-109-404-01 Authority of the Director or Head of a Purchasing Agency.

The director or head of a purchasing agency is authorized, after review and consideration of all facts involved in an unauthorized purchase, to decide whether to ratify an unauthorized purchase.

R-24-109-404-02 Factors to be Considered in Ratification of an Unauthorized Purchase.

- (a) The director or head of a purchasing agency, or their designee, shall consider all factors related to the procurement including, but not limited to, the following in making a decision whether or not to ratify an unauthorized purchase:
 - (i) the facts and circumstances giving rise to the need for the good or service, including the responsible individual's explanation as to why established procedures were not followed, and any lack of information or training on the part of the responsible individual;
 - (ii) indications of intent to deliberately evade established purchasing procedures;
 - (iii) whether the purchase, if it had been made according to established procedures, would have been reasonable (prudent) and appropriate;
 - (iv) the extent to which any competition was obtained;
 - (v) whether this is the first occurrence, or a repeat instance, by the responsible individual;
 - (vi) whether appropriate written assurances and safeguards have been established to preclude a subsequent unauthorized procurement; and
 - (vii) indications as to whether either the agency or vendor has acted fraudulently or in bad faith.
- (b) A decision to ratify an unauthorized purchase shall weigh the above noted factors as they apply to the express goals of the Colorado Procurement Code, §24-101-102 CRS, and in particular fairness to any vendor who has acted fairly and in good faith.

R-24-109-404-03 Purchasing Agency Actions - Authorized Ratification

- (a) After consideration of the above factors, the state purchasing director or head of a purchasing agency may take one of the following actions:
 - (i) ratify the responsible individual's action and authorize issuance of a payment voucher, voucher request or purchase order if the procurement meets the substantive requirements of law and is only a procedural violation; or
 - (ii) refuse to ratify the responsible individual's action, but ratify the commitment and authorize issuance of a payment voucher, voucher request or purchase order if the procurement fails to meet the substantive requirements of law, the vendor has not acted fraudulently or in bad faith, and ratification of the commitment is in the best interests of the State; or

- (iii) refuse to ratify the responsible individual's action and authorize issuance of a payment voucher, voucher request or purchase order for only the amount of actual expenses and reasonable profit, if the procurement fails to meet the substantive requirements of law, the vendor has not acted fraudulently or in bad faith, and ratification of the commitment is not in the best interests of the state.
- (b) When ratification is denied pursuant to (a)(ii) or (a)(iii) of this subsection 04 above, a purchase order shall not be issued except in cases where it is necessary to effect payment and the purchase order shall so indicate.
- (c) If during the review process, it is determined that:
 - (i) the vendor has acted fraudulently or in bad faith, the ratification shall be denied and there shall be no authorization of a payment voucher, voucher request or purchase order; or
 - (ii) the responsible person has acted fraudulently or in bad faith, there shall be no ratification, but authorization to issue a payment voucher, voucher request or purchase order may be given.

R-24-109-404-04 Purchasing Agency Actions - In the Event of Denial

- (a) In the event the director or head of a purchasing agency refuses to ratify the unauthorized procurement, the following actions shall occur:
 - (i) notification shall be sent to the responsible individual, the state controller, their agency controller and their agency head, that ratification is denied, and that the responsible individual(s) can be held personally liable for payment;
 - (ii) notification shall be sent to the affected vendor(s) that the State has denied responsibility for the purchase in whole or in part as determined in the ratification review process; and notification shall be sent to the director.
- (b) In the event a court action is started involving a procurement that is undergoing a ratification review, the ratification process shall cease and be referred to the Attorney General.

R-24-109-404-05 Written Determination

A written determination setting forth the basis for the decision shall be made and included in the procurement record.

ARTICLE 110 INTERGOVERNMENTAL RELATIONS

PART 1 DEFINITIONS

(See Statute)

PART 2 COOPERATIVE PURCHASING

R-24-110-201-01 Cooperative Purchasing

The Executive Director or designee may approve the purchase of goods or services in accordance with §24-110-201(2) CRS if such purchase is in the best interests of the State, after considering: (1) The interests of Colorado vendors; (2) the competitiveness of pricing under the cooperative procurement; (3) the efficiencies and cost savings of using the cooperative procurement, beyond the savings and administrative convenience achieved from not having to comply with Article 103 of the Colorado Procurement Code; and (4) the purposes of the Colorado Procurement Code, as set forth in §24-101-102 CRS.

- (a) The head of a purchasing agency shall make the request through the State Purchasing Director, addressing the considerations set forth above.
- (b) The Executive Director or his designee may approve a single purchase, make a conditional approval, or approve participation in an on-going program with the external procurement activity or the local public procurement unit. Participation in an on-going program must be for a specific period of time, not to exceed two years.

PART 3 CONTRACT CONTROVERSIES

(See Statute)

ARTICLE 111 PREFERENCES IN AWARDING CONTRACTS - FEDERAL ASSISTANCE REQUIREMENTS

R-24-111-101 Exemptions for Prescribed Methods of Source Selection

(See Statute)

R-24-111-102 Priorities Among Preferences

(See Statute)

R-24-111-102-01 Minority-owned and Women-owned Business Enterprises

It is the policy of this State that all procurement offices shall make a special effort to solicit and encourage minority-owned and women-owned business participation for state contracts and awards. All state procurement offices are mandated to implement the spirit and direction offered by present or future executive orders relating to this subject. Agencies and institutions are encouraged, to the greatest extent possible without sacrificing adequate competition, to ensure active participation by minority-owned and women-owned business enterprises.

R-24-111-102-02 Preferences

- (a) No provision is made in this Code for preferences or set asides for minority-owned or women-owned businesses.
- (b) In the event tie low bids are received in response to solicitations for bids for commodities, pursuant to §24-103-202 CRS, preference is given to the Resident bidder, pursuant to §§24-103-202.5 and 8-18-101, CRS.
- (c) A Non-Resident bidder shall be subject to the same percentage disadvantage as a Colorado bidder would have in their home state as required in §§8-19-104(2) and 8-19-104(3), CRS.

ARTICLE 112 EFFECTIVE DATE - APPLICABILITY

R-24-112-101-01 Effective Date - Applicability

Rules implementing the Colorado Procurement Law, SB-130, Title 24, shall become effective January 1, 1982. All contracts solicited or entered into after January 1, 1982, shall be in accordance to Title 24, and enacted rules implementing that Title.

COLORADO PROCUREMENT RULES

Editor's Notes

History

Rules R-24-103-01, R-24-103-202a-10, R-12-103-202.5, R-24-103-204-03 eff. 11/01/2007.

Rule R-24-103-204-03(a) emer. rule eff. 08/13/2010; expired eff. 12/11/2010.

Rules R-24-102-206, R-24-103-101-01, R-24-103-202b-01, R-103-202.3, R-24-103-402-01, R-24-111-102-02 eff. 01/01/2014.

Entire rule eff. 08/31/2015.