



# **Procurement Policy & Guidelines**

**TRANSPARENCY & ACCOUNTABILITY**



## **Austin Transit Partnership Local Government Corporation (“ATP”)**

In November 2020, Austin voters approved a ballot initiative (Proposition A) dedicating on- going property tax revenue to a new independent entity – the Austin Transit Partnership (ATP) – to implement Project, Connect, a transformative investment in new transit services, including MetroRapid Bus, Commuter Rail and two new Light Rail lines. ATP was officially formed in December 2020 by the City of Austin and the Capital Metro Transportation Authority (“CMTA”) and is a local government entity created under the Texas Transportation Corporation Act, Chapter 431 of the Texas Transportation Code, and Chapter 394 of the Texas Local Government Code to aid and act on behalf of the City of Austin and CapMetro.

ATP has the authority to finance, design, engineer, construct, implement, and to contract with CMTA to operate and maintain the new Project Connect assets. ATP as an independent organization, will guide the Project Connect investment with transparency and accountability throughout the program.

The ATP Board of Directors is comprised of five voting members, including one member of the Austin City Council, one member of CapMetro’s Board of Directors, and three members of the Austin community, which will carry out the following responsibilities:

- Maintaining oversight of the finance, design, construction, and implementation of Project Connect and its program of projects.
- Implementing Project Connect in accordance with the Project Connect map and sequencing plan approved by the City of Austin and CapMetro.
- Approving Project Connect finance, design, engineering, and construction contracts, as well as real estate and vehicle acquisition contracts.
- Approving interlocal agreements and the joint powers agreement with the City of Austin and CapMetro.
- Providing regular updates to the Austin City Council and CapMetro Board of Directors.

Learn more about the ATP Board of Directors at:

<https://atptx.org/austin-transit-partnership/atp-leadership/atp-board>

ATP has been – and will continue to - bring on staff and consultant resources to ensure proper and timely implementation of the Project Connect program.

Learn more about the ATP Leadership Team at:

<https://capmetro.org/plans-development/atp/atp-leadership>



## **Project Connect**

Project Connect is the result of a 20-year expansion of the region's public transit system. On November 3, 2020, City of Austin voters approved an increase in the City's property tax rate combined with dedicated Cap Metro funding to fund a portion of the initial investment. Federal funding is anticipated to provide approximately 45% of the capital cost. The initial investment will include:

- A new and expanded rail system: Two new light rail lines, including a subway, one new commuter line, and expanded service on the existing commuter rail.
- Expanded bus service: 9 new Park & Rides, 4 new MetroRapid routes, 3 new MetroExpress routes and 15 new neighborhood circulator zones.
- Anti-displacement Investments: \$300 million to help prevent residents from being displaced from their neighborhoods as transit expands.

Learn more about Project Connect at: [www.projectconnect.com](http://www.projectconnect.com).

## **The ATP Procurement Policy and Guidelines Summary**

The necessity of adopting the Procurement Policy and Guidelines is to comply with FTA's expectations and basic requirement of having written Procurement Policies and Guidelines that include local, state, and federal provisions. The ATP Policy and Guidelines explain how ATP will ensure compliance with General Procurement Standards and Contract Provisions of the FTA Procurement System Review (additional information on the FTA Procurement System Review can be found at: [Procurement System Review Contractor's Manual Fiscal Year 2020 | FTA \(dot.gov\)](http://Procurement System Review Contractor's Manual Fiscal Year 2020 | FTA (dot.gov))). The Policy and Guidelines has been reviewed internally and externally to ensure compliance, specifically on the 63 elements of the FTA Procurement System Review. The Policy and Guidelines have received a cursory review from FTA Region VI and have been reviewed by outside legal counsel to ensure local, state, and federal compliance.

The ATP Procurement Policy and Guidelines follow procurement best practices and is compliant with local, state, and federal rules and regulations. The Policy is contained in Sections 1-4 and the Guidelines in Sections 5-9. The Policy and Guidelines are separated out to allow flexibility in the procurement process; any changes to the Policy will require ATP Board approval while the Guidelines allow changes at the staff level.

The Policy and Guidelines are compliant with the applicable requirements and standards of Chapter 451 of the Texas Transportation Code, Chapters 2254 and 2269 of the Texas Government Code, as well as, when using federal assistance to finance a Procurement, in accordance with 2 C.F.R. Part 200 (as adopted by the U.S. Department of Transportation in 2 C.F.R. Part 1201), the terms of the Federal Transit Administration ("FTA") Master Agreement and any underlying FTA funding agreement, FTA Circular 4220.1 and other applicable federal statutory and regulatory requirements, in each case as in effect on the applicable date ("Federal Requirements")



The Procurement Policy and Guidelines establishes procedures and guidelines relating to the procurement, management, control, and disposal of property, services, and construction to define the terms in and implement the provisions of Chapter 451 of the Texas Transportation Code and other State law requirements and Federal Requirements as mentioned above. In addition, the Procurement Policy and Guidelines:

- Provides for public confidence in the integrity, fairness, and accountability of ATP's procurement system.
- Ensures fair and equitable treatment of all persons who deal with ATP's procurement system.
- Promotes contracting opportunities for all Disadvantaged Business Enterprises (DBEs), Minority-Owned Business Enterprises (MBEs), and Women-Owned Business Enterprises (WBEs), both as prime contractors and subcontractors.
- Fosters full and open competition.
- Meets the customer's needs in terms of cost, quality and timeliness of the delivered product or service.
- Promotes positive relationships through courtesy and impartiality in all phases of the procurement process.
- Handles confidential information or proprietary information with proper consideration of the ethical and legal ramifications of disclosure.
- Maintains the integrity of ATP's procurement system.
- Provides for the timely, impartial resolution of all procurement issues.
- Provides increased efficiency and effectiveness in ATP's procurement activities, thereby exercising good stewardship of public funds and maximizing, to the fullest extent possible, the purchasing value of those public funds.

The ATP Procurement Policy and Guidelines are modeled after the Federal Acquisition Regulation (FAR) with a focus on the Best Practices Procurement Manual (BPPM). The BBPM outlines the following content derived from various local, state, and federal laws and regulations:

- Purpose and Scope
- Planning
- Contracting Method and Types of Contracts
- Evaluation of Proposals and Contract Award
- Contract Administration

The Policy and Guidelines are designed to allow and encourage the following:

- Innovative Ideas
- Sourcing Flexibility including Sole Source and Unsolicited Proposals
- Performance and Cost Incentives
- Source Evaluation Criteria Flexibility
- Abide by the Diversity, Equity, and Inclusion Policy



	ATP Procurement	Board Adoption Date:	ATP Board Resolution No.
	Policy & Guidelines	Wednesday, September 15, 2021	ATP-2021-027

**Revision History**

Version No.	Implemented by Title	Approved by Title	Revision Date	Description of Revision
001				

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# **PROCUREMENT POLICY**



## CHAPTER 1 GENERAL PROVISIONS

### SECTION 1-100 Purpose and Scope

#### Section 1-101 Authority and Purpose

- (1) Austin Transit Partnership (“**ATP**”) is a Local Government corporation (LGC) created under the Texas Transportation Corporation Act, Chapter 431, and Chapter 394 of the Texas Local Government Code to aid and act on behalf of the City of Austin (the “**City**”) and Capital Metropolitan Transportation Authority (“**CapMetro**”). ATP has the authority to finance, design, engineer, construct, implement, and contract to operate and maintain Project Connect.

ATP is responsible for complying with the applicable requirements and standards of Chapter 451 of the Texas Transportation Code, Chapters 2254 and 2269 of the Texas Government Code, as well as, when using federal assistance to finance a Procurement, 2 C.F.R. Part 200 (as adopted by the U.S. Department of Transportation in 2 C.F.R. Part 1201), the terms of the Federal Transit Administration (“**FTA**”) Master Agreement and any underlying FTA funding agreement, FTA Circular 4220.1 and other applicable federal statutory and regulatory requirements, in each case as in effect on the applicable date (“**Federal Requirements**”).

- (2) This Procurement Policy (“**Policy**”) establishes minimum standards, procedures and guidelines relating to the Procurement, management, control, and disposal of property, services, and construction in order to define the terms in and implement the provisions of Chapter 451 of the Texas Transportation Code and other State law requirements and Federal Requirements applicable to Project Connect, and to:
- (a) Provide for public confidence in the integrity, fairness, and accountability of ATP’s Procurement system.
  - (b) Ensure the fair and equitable treatment of all persons who deal with the Procurement system of ATP.
  - (c) Promote contracting opportunities for all Disadvantaged Business Enterprises (DBEs), Minority-Owned Business Enterprises (MBEs), and Women-Owned Business Enterprises (WBEs), and other small businesses both as prime contractors and subcontractors.
  - (d) Foster full and open competition.
  - (e) Meet the customer’s needs in terms of cost, quality and timeliness of the delivered product or service.

- (f) Promote positive relationships through courtesy and impartiality in all phases of the Procurement process.
  - (g) Handle confidential information or proprietary information with proper consideration of the ethical and legal ramifications of disclosure.
  - (h) Maintain the integrity of ATP's Procurement system.
  - (i) Provide for the timely, impartial resolution of all Procurement issues.
  - (j) Provide increased efficiency and effectiveness in ATP's Procurement activities, thereby exercising good stewardship of public funds and maximizing, to the fullest extent possible, the purchasing value of those public funds.
- (3) This Policy also constitutes delegations of authority to Employees of ATP to assist the Board in discharging its management responsibilities to aid and act on behalf of CapMetro under Chapter 451 of the Texas Transportation Code.

These Policies and Guidelines have been approved by ATP's Board of Directors. The Procurement Director is responsible for updating and clarifying these Policies and Guidelines on an as-needed basis. The Procurement Director shall present any substantive changes to the Procurement Policies and Guidelines set out in Chapters 1-4 (the "**Procurement Policies** ") to the Board of Directors for review and approval in accordance with Section 2-301 of this document. The Procurement Director may present any proposed deviation or waiver to the Procurement Policies for an individual Procurement to the [Executive Director] for review and approval, which approval may be given at the discretion of the [Executive Director] in accordance with Chapter 2 of these Policies and Guidelines, subject to compliance with applicable law and any applicable Federal Requirements.

Chapters 5-9 to this document contain guidelines (the "**Procurement Guidelines**") that and are included to indicate best practices or recommended approaches (rather than strict requirements) for the purpose of providing assistance to ATP, including the Procurement Department and the General Counsel. In accordance with Section 2-301 of these Policies and Guidelines, the Procurement Director and General Counsel may as necessary, use discretion in applying and modifying the Procurement Guidelines to a Procurement, subject to compliance with applicable law and any applicable Federal Requirements.

- (4) This Policy and Guidelines is for the benefit of ATP only and do not confer any rights on actual or potential bidders, offerors, contractors, or any other person, except as provided in Chapter 4, Section 4-300 - Administrative Remedies of these policies and guidelines.



- (5) The Procurement Policy and Guidelines cover the Procurement of real property only to the extent provided in Section 1-501 (Acquisition of Real Property). Contracts outside the scope of this Policy include, but are not limited to, employment contracts, real-estate contracts, and intergovernmental agreements.
- (6) This Policy is intended to apply to both locally funded and federally funded Procurements, except to the extent indicated.

### **Section 1-101A Procurement Ethical Principles**

Austin Transit Partnership (ATP) believes and conducts ALL Procurements based on the following ethical principles governing the conduct of every Procurement staff member:

- (1) Practice integrity, avoid conflicts of interest and personal enrichment, treat vendors equally and fairly, transparency, accountability, and comply with legal and other obligations.
- (2) Believes in the dignity and worth of the services rendered by the organization, and the societal responsibilities assumed as a trusted public servant.
- (3) Is governed by the highest ideals of honor and integrity in all public and personal relationships to merit the respect and inspire the confidence of the organization and the public being served.
- (4) Believes that personal aggrandizement or personal profit obtained through misuse of public or personal relationships is dishonest and not tolerable.
- (5) Identifies and eliminates participation of any individual in operational situations where a conflict of interest may be involved.
- (6) Believes that members of ATP and its staff at no time, or under any circumstances, accept directly or indirectly, gifts, gratuities, or other things of value from Suppliers, which might influence or appear to influence purchasing decisions.
- (7) Keeps ATP informed through appropriate channels, on problems and progress of applicable operations by emphasizing the importance of the facts.

### **Section 1-101B Standards of Conduct and ATP Conflicts of Interest**

In regard to Procurements, all ATP employees, officers and board members (each an "**ATP Person**") and all committee members, representatives, consultants, vendors, contractors, volunteers, outside agencies doing business with employees of ATP, and/or any other parties with a business relationship with ATP that are engaged in or otherwise involved in the



Procurement, award or administration of Third Party Contracts must abide by the obligations in this manual in addition to ATP's Ethics, Conflicts and Nondisclosure Policy. In the event of a conflict between documents, the Policy that is more restrictive on the employee, officer, agent or board member shall govern.

**(1) Participation in Selection, Award, or Administration of a Contract**

No ATP Person shall participate in the deliberation, evaluation, selection, award, or administration of any contract if they have a real or apparent conflict of interest as described in the ATP Ethics, Conflicts and Disclosure Policy.

If any ATP Person recuses himself or herself from a Procurement action or administration of a contract on the basis of a real or apparent conflict of interest, ATP shall maintain a record of the recusal in the Procurement File.

**(2) Contact with Vendors and Contractors**

The importance of demonstrating constant and attentive sensitivity to and compliance with ethics policies under these policies and procedures and ATP's Ethics, Conflicts and Disclosure Policy cannot be overemphasized. All ATP Persons shall avoid any conduct that may give the impression that a person can improperly influence official acts or actions by ATP. ATP Persons shall avoid compromising or culpable acts, including any action that gives the appearance of improper influence or personal conflict of interest. In addition to complying with the ATP Ethics, Conflicts and Nondisclosure Policy, ATP Personnel must also comply with the requirements below to ensure that Procurement actions are and appear to be proper.

**(3) Contacts Prior to Issuance of a Solicitation**

Informational and market-research contacts with prospective vendors or contractors prior to the issuance of a Solicitation are a valuable source of data and information to ATP. These contacts must be guided by the exercise of good judgment. ATP Persons must avoid:

- (a) Making promises or implications of a future contract;
- (b) Making requests for substantial complimentary goods or services, which may create the impression of an obligation on the part of ATP; and
- (c) Testing, viewing, sampling, etc. the product or services of a single vendor or contractor.

If any ATP Person determines it is necessary to test, view, sample, etc., a product or service, he or she must coordinate the contact with the Procurement Department. The ATP Person may be required to obtain a form or agreement that will protect ATP and the vendor.



**(4) Contacts After Issuance of a Solicitation and Before Contract Award**

ATP shall require all contacts with vendors or contractors that relate to a Procurement that is in the solicitation, evaluation, negotiation, or pre-award phase to be conducted only through the Procurement Department (or such other persons designated by the Procurement Department in the relevant solicitation documents). The Procurement Department may direct technical questions (e.g., whether an item is considered an “approved equivalent”) to the Project Manager for evaluation, Disadvantaged Business Enterprise (DBE) and other small and minority business questions to the DEI Office and other questions to the relevant departments, consultants or advisors. All oral and written communications with ATP regarding the Procurement action shall be exclusively with, or on the subjects and with the persons approved by, the persons identified by the Procurement Department. Discussions with any other person not specified could result in disclosure of proprietary or other competitive sensitive information or otherwise create the appearance of impropriety or unfair competition and thereby compromise the integrity of ATP’s Procurement system.

ATP will include in all Solicitations information to caution prospective Offerors that until solicitation is either awarded or cancelled, they may have contact only with the contact person identified in the Solicitation, Offer and Award Form. Discussions or communications regarding the solicitation with any other personnel associated in any capacity with ATP, its consultants, contractors or members of its Board of Directors, are strictly prohibited, unless otherwise approved in writing by the Contracting Officer. Any violation of this restriction may result in the disqualification of the offeror from further participation in this Procurement, and from award of any contract or subcontract under this solicitation.

**(5) Prohibitions Regarding Gratuities, Favors, or Anything of Monetary Value**

All ATP Persons shall comply at all times with the ATP Ethics, Conflicts and Disclosure Policy with respect to gifts, gratuities and favors.

**(6) Discipline for Violations**

In accordance with ATP's Ethics, Conflicts and Nondisclosure Policy, ATP may take disciplinary actions against any ATP Person or any contractors, subcontractors, or their agents for a violation of the standards of conduct in this Section 1-101A (Standards of Conduct and ATP Conflicts of Interest) or ATP's Ethics, Conflicts and Nondisclosure Policy. Any actions taken by a third party (including the Federal Government) against the applicable ATP Person or other person shall not impact ATP’s right to take such action.

**Section 1-102            General Principles of Law and Interpretation**

- (1) Unless modified by the particular provisions of the Procurement Policy and Guidelines, the principles of law and equity, including the Texas Business and Commerce Code, the law merchant, and applicable law relative to capacity to contract, agency, fraud,



misrepresentation, duress, coercion, mistake, or bankruptcy shall supplement the provisions of the Procurement Policy and Guidelines.

- (2) Unless the context of the Procurement Policy and Guidelines requires otherwise:
  - (a) words in the singular number include the plural, and those in the plural include the singular; and
  - (b) words of a particular gender include any gender and the neuter, and, when the sense so indicates, words of the neuter gender may refer to both genders.
- (3) The titles of chapters, sections, and subsections, or other titles contained in the Procurement Policy and Guidelines are for convenience and reference only and in no way define, describe, extend, or limit the scope or intent of the substantive provision to which the title applies unless the context so requires.
- (4) Unless otherwise stated, a listing of factors, criteria, or subjects in the Procurement Policy and Guidelines does not constitute an order of preference.

#### **Section 1-103 Requirement of Good Faith**

All parties involved in the negotiation, performance, or administration of contracts with ATP shall act in good faith.

#### **Section 1-104 Application of Policy and Guidelines**

- (1) This Policy only applies to contracts solicited or entered into after the effective date of this Policy unless the parties agree to their application to a contract solicited or entered into prior to the effective date.
- (2) Unless the context otherwise requires, this Policy shall apply to every expenditure of public funds irrespective of their source, including federal assistance monies, by ATP under any contract, except that the Procurement Policy and Guidelines shall not apply to:
  - (a) grants;
  - (b) contracts between ATP and other public agencies under Chapter 791 (Interlocal Cooperation Contracts) of the Government Code, as amended; or
  - (c) any transaction for, or related to, the borrowing of money by ATP permitted under the laws of the State of Texas.

The Procurement Policy and Guidelines also shall apply to the disposal of ATP's supplies. Nothing in the Procurement Policy and Guidelines shall prevent ATP from complying with the terms and





conditions of any grant, gift, bequest, or cooperative agreement.

**Section 1-105 Severability**

If any provision of the Procurement Policy and Guidelines, or any application thereof to any person or circumstance, is held invalid, such in- validity shall not affect any other provision or application of the Procurement Policy and Guidelines which can be given effect without the invalid provision or application, and to this extent the provisions of the Procurement Policy and Guidelines are declared to be severable.

**Section 1-106 Specific Repealer**

All prior policies and resolutions of ATP which are inconsistent with the Procurement Policy and Guidelines are superseded by the Procurement Policy and Guidelines.

**Section 1-107 Construction Against Implicit Repealer**

No part of this Policy shall be deemed to be impliedly repealed or modified by subsequent action of ATP if such construction reasonably can be avoided.

**Section 1-108 Effective Date**

The Procurement Policy and Guidelines shall become effective at 12:01 A.M. September 16, 2021.

**Section 1-109 Dissemination of the Policy and Guidelines**

Private firms, individuals, and others may obtain copies of this Policy from the Procurement department or on the ATP website at [www.atptx.org](http://www.atptx.org). [All operational procedures implementing this Policy shall be similarly available.]

**Section 1-201 Written Determinations**

- (1) Where this Policy requires a written determination, the person responsible for making the determination may delegate its preparation, but the responsibility for and the execution of the determination itself shall not be delegated unless expressly permitted. [The failure to make any written determination required by these Policies and Guidelines shall not affect the validity of any action taken with or relating to any other party.]
- (2) Written determinations shall set out sufficient facts, circumstances, and reasoning as will substantiate the specific determinations made.
- (3) While a designated person is responsible for the execution of a written determination, other ATP Persons or external advisors or other persons with appropriate and applicable

knowledge may be requested to provide to the designated person, in an accurate and adequate fashion, information, advice, recommendations and guidance pertinent to the determination. When requested, such information shall be furnished in writing to the cognizant designated person [who shall have authority to decide the final form and content of the determination and to resolve any questions or conflicts arising with respect thereto].

- (4) The Executive Director, or his/her Designee, is authorized to prescribe methods and operational procedures to be used in preparing written determinations.
- (5) Written determinations shall be filed in the appropriate Procurement File, shall be retained as part of such file for so long as the file is required to be maintained, and (except as otherwise provided by law or regulation) shall be open to public inspection.

**Section 1-301 Definitions**

The words defined in this section shall have the meanings set forth below whenever they appear in the Procurement Policy and Guidelines unless the context in which they are used clearly requires a different meaning or a different definition is prescribed for a particular section or provision or under applicable law or Federal Requirements. [Additional definitions may be added as appropriate and applicable to the Contract, as determined by the [Procurement Director and General Counsel].

- (1) "Actual Costs" is defined in Section 7-101(1).
- (2) "ATP" is defined in Section 1-101.
- (3) "ATP Person" is defined in Section 1-101B
- (4) "Approval, Authorization, Concurrence, Waiver" means a deliberate written statement (transmitted in typewritten hard copy or in an electronic format or medium) of a Federal Government official authorized to permit the Recipient to take or omit an action required by the Grant Agreement or Cooperative Agreement for the Project, Master Agreement, or Circular 4220.1F, which action may not be taken or omitted without that permission. Except to the extent that FTA determines otherwise in writing, that approval, authorization, concurrence, or waiver permitting the performance or omission of a specific action does not constitute permission to perform or omit other similar actions. An oral permission or interpretation has no legal force, authority, or effect.
- (5) "Best Value" describes a competitive Procurement process in which ATP reserves the right to select the most advantageous offer by evaluating and comparing factors in addition to cost or price such that ATP may acquire technical superiority even if it must pay a premium price. A "premium" is the difference between the price of the lowest priced proposal and the one that ATP believes offers the Best Value. The term "Best

Value” also means the expected outcome of an acquisition that, in ATP’s estimation, provides the greatest overall benefit in response to its material requirements. To achieve Best Value in the context of acquisitions for Public Transportation purposes, the evaluation factors for a specific Procurement should reflect the subject matter and the elements that are most important to ATP. While FTA does not mandate any specific evaluation factors, ATP must disclose those factors in its solicitation. Evaluation factors may include, but are not limited to, technical design, technical approach, length of delivery schedules, quality of proposed personnel, past performance, and management plan. This definition is intended neither to limit nor to dictate qualitative measures ATP may employ, except that those qualitative measures must support the purposes of the Federal Public Transportation program.

- (6) "Board" means the Board of Directors (Executive Committee) of the Austin Transit Partnership (ATP).
- (7) “Brand Name” is defined in Section 4-101(1)
- (8) "Brand Name or Equal Specification" is defined in Section 4-101(3).
- (9) "Brand Name Specification" is defined in Section 4-101(2).
- (10) "Business" means any corporation, partnership, firm, sole proprietorship, joint stock company, joint venture, or any other private legal entity.
- (11) "CapMetro" is defined in Section 1-101.
- (12) “Cardinal Change” means a major deviation from the original purpose of the work or the intended method of achievement, or a revision of contract work so extensive, significant, or cumulative that, in effect, the contractor is required to perform very different work from that described in the original contract.
- (13) “Changes Clause” means a clause that permits ATP’s Contracting Officer to make unilateral changes, in designated areas, *within the general scope of the contract*, to be followed by such equitable adjustments in the price and delivery schedule as the change makes necessary. Although ATP has a unilateral right, two general principles are important: (1) the right exists only because it is specifically conferred by the terms of the contract; and (2) when such unilateral rights are exercised, ATP has an obligation to adjust the price and/or other provisions to compensate for the alteration in the contractor’s obligations.
- (14) "Change Order" means a written, unilateral order signed by the Contracting Officer directing the applicable Contractor to make changes, as authorized under the terms of the applicable Contract.

- (15) "City" is defined in Section 1-101.
- (16) "Clarification" means a communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in a proposal.
- (17) "Commercial Products" are items and/or services regularly used, for other than Federal Government purposes, in the course of normal business operations.
  - (a) "Items," including computer software, are those that:
    - (i) have been sold or traded to the general public;
    - (ii) have been offered for sale to the general public at established prices but not yet sold;
    - (iii) although intended for sale or trade to the general public, have not yet been offered for sale but will be available for commercial delivery in a reasonable period of time; or
    - (iv) are described in Sections (i), or (ii), or (iii) and would require only minor modification in order to meet the requirements of ATP.
  - (b) "Services" include:
    - (i) installation, maintenance, repair, training, and other services if such services are procured for support of an item referred to in Sections (a)(i), (ii), (iii), or (iv) above, and the source of such services offers them to the general public under similar terms and conditions; or
    - (ii) services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices.
- (18) "Construction" is defined in Section 6-401.
- (19) "Constructive Contract Change" means a change to a contract resulting from the conduct of ATP's officials that has the effect of requiring the Contractor to perform additional work. A Constructive Contract Change results from the acts, written or oral, or from the omissions of ATP's officials that have the same effect as if the Contracting Officer had issued a formal, written Change Order. Such changes represent actions which usually exceed the authority of the individual responsible for them. Contractors need to be advised as part of the terms of their contracts to bring any such actions to the immediate attention of the Contracting Officer so that an official determination can be made by the appropriate officials and proper directions given in writing under the Changes Clause.
- (20) "Contract" means a mutually binding legal relationship obligating the seller to furnish the

supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate ATP to expenditure and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq.*

- (21) "Contract Administration" means the post-award administration of the contract to ensure compliance with the terms of the contract by both the contractor and the procuring entity.
- (22) "Contract Administration Files" means documentation contained in the contract file maintained by, or on behalf of the contracting officer. It reflects the actions taken by the contracting parties in accordance with the requirements of the contract, and documents the decisions made and the rationale behind matters which may result (or have resulted) in controversy or dispute.
- (23) "Contracting Officer" means any person (or a duly appointed successor) authorized to enter into and administer contracts and amendments on behalf of ATP and make written determinations with respect thereto.
- (24) "Contracting Officer's Representative (COR)" means a representative of the procuring agency who has more limited authority than the contracting officer but is generally authorized to provide technical direction to the contractor.
- (25) "Contract Modification" means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any Contract, whether under a Change Order or a bilateral agreement, as authorized under the terms of the applicable Contract and as further described in Section 8-303.
- (26) "Contractor" means any person having a Contract with ATP.
- (27) "Cost Analysis" is defined in Section 3-101(1).
- (28) "Cost Data" is defined in Section 3-101(2).
- (29) "Cost Objective" is defined in Section 7-101(2).
- (30) "Data" means recorded information, regardless of form or characteristic.
- (31) "Days" means calendar days. In computing any period of time prescribed by the Procurement Policy and Guidelines, the day of the event from which the designated period of time begins to run shall not be included, but the last day shall be included unless

it is a Saturday, Sunday, or Federal or Texas holiday, in which event the period shall run to the end of the next business day.

- (32) "Deductive Change" means a change resulting in a reduction in the contract price because of a net reduction in the Contractor's work
- (33) "Designee" means a duly authorized representative of a person having specific authority or holding a superior position.
- (34) "Discussions" is defined in Section 3-101(4).
- (35) "Employee" means an individual drawing a salary or wages directly from ATP.
- (36) "Equitable Adjustment" is an adjustment to Contract provisions pursuant to a Contract clause specifically providing for an "equitable adjustment" and as defined in applicable court and administrative decisions construing the same clause or similar clauses. See also Section 8-305.
- (37) "Ethics, Conflicts and Nondisclosure Policy" means ATP's Ethics, Conflicts and Nondisclosure Policy , as may be updated from time to time.
- (38) "Executive Director" is the person appointed by the Board to be the chief operating officer of ATP.
- (39) "Federal Requirements" is defined in Section 1-101.
- (40) Federal Cost Principles as used in the Policy means reference to the Federal Acquisition Regulation (FAR), 48 C.F.R. part 31. As Third-Party Contractors are mainly for-profit organizations, under the Uniform Guidance the FAR cost principles apply to those entities. Grant funds may only be used by ATP to pay for allowable costs when the contract is a cost-plus-fixed-fee contract or when a fixed price contract is being negotiated on the basis of cost estimates submitted by the contractor. The term allowable cost is defined in 48 C.F.R. § 31.201-2
- (41) Force Account means ATP's own labor forces and equipment to accomplish a capital project. Force Account does not include project administration, preventive maintenance, mobility management or other types of nontraditional capital projects.
- (42) "FTA" is defined in Section 1-101.
- (43) "Full and Open Competition" means that all responsible sources are permitted to compete.
- (44) "Gratuity" means a payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received.

- (45) "Joint Venture" shall be defined as a partnership, teaming arrangement or association of two or more persons or business entities to carry on a business limited to one particular enterprise for ATP. No Joint Venture shall be comprised of two or more companies whose owners are related within the second degree of affinity (marriage) or within the third degree of consanguinity (blood).
- (46) "Local Government" means a county, municipality, City, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a Local Government. This term does not include a local public institution of higher education.
- (47) "Master Agreement" means the FTA document incorporated by reference and made part of FTA's standard grant agreements and cooperative agreements, that contains the standard terms and conditions governing the administration of a project supported with Federal assistance awarded by FTA.
- (48) "May" or "may" denotes the permissive. However, the words "no person may" mean that no person is required, authorized, or permitted to do the act prescribed.
- (49) "Negotiation" means a procedure that includes the receipt of proposals from offerors, permits bargaining and usually affords offerors an opportunity to revise their offers before award of a contract.
- (50) "Offer" means a response to a solicitation that, if accepted, would bind the offeror to perform according to the terms specified in either an Invitation for Bid (IFB) or a Request for Proposal (RFP). For purposes of Policy, bid and offer, and, bidder and offeror, are used interchangeably.
- (51) "Performance Specification" means specifications based on the function and performance of a product or service under specified conditions, preferably conditions that can be reproduced for testing purposes. Performance Specifications may include useful life, reliability in terms of average intervals between failure, and capacity.
- (52) "Person" or "person" means any individual, firm, corporation, LLC, LLP, joint venture, voluntary association, partnership, trust or public or private organization, other legal entity, or a combination thereof.
- (53) "Policy" is defined in Section 1-101.
- (54) "Price Analysis" is defined in Section 3-101(7).

- (55) "Price Data" is defined in Section 3-101(8).
- (56) "Prime Contractor" is defined in Section 5-101(2).
- (57) "Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring any property (except real property), services, or construction. It also includes all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.
- (58) "Procurement Department" means the office responsible for the acquisition of supplies, services, and construction in support of ATP's business.
- (59) "Procurement Director" means the primary ATP Employee designated by the Executive Director to implement this Policy.
- (60) "Procurement File" means the documentation contained in a Procurement file that details the history of the Procurement through award of the contract. It includes, at a minimum, the rationale for the method of Procurement, the selection of the contract type, the reasons for selection or rejection of the contractor, and the basis for the contract price.
- (61) "Procurement Guidelines" is defined in Section 1-101.
- (62) "Procurement Policies and Procedures" is defined in Section 1-101.
- (63) "Project Labor Agreement (PLA)" means an agreement between the contractor, subcontractors, and the union(s) representing workers. Under a PLA, the contractor, subcontractors, and union(s) working on a project agree on terms and conditions of employment for the project, establishing a framework for labor-management cooperation to advance the buyer's Procurement interest in cost, efficiency, and quality.
- (64) "Property" means real property consisting of land and buildings, structures, or appurtenances on land, equipment, supplies, other expendable property, intellectual property, and intangible property.
- (65) "Protest" means a written statement concerning any unresolved disagreement or controversy arising out of the solicitation or award of a contract filed in accordance with Section 10-201.
- (66) "Protester" is defined in Section 4-301(b)(3).
- (67) "Public Transportation" means regular, continuing shared-ride surface transportation services that are open to the general public or open to a segment of the general public defined by age, disability, or low income; and does not include: (i) intercity passenger rail



transportation provided by the entity described in 49 U.S.C. Chapter 243 (or a successor to such entity); (ii) intercity bus service; (iii) charter bus service; (iv) school bus service; (v) sightseeing service; (vi) courtesy shuttle service for patrons of one or more specific establishments; or (vii) intra- terminal or intra- facility shuttle services.

- (68) "Purchase Request" or "Purchase Requisition" means that document whereby a person requests that a Contract be entered into by ATP for a specific need, and may include, but is not limited to, the description of the requested item, delivery schedule, transportation data, criteria for evaluation, suggested sources of supply, and information supplied for the making of any written determination required by the Procurement Policy and Guidelines.
- (69) "Public Transportation" is defined in Section 4-101(3).
- (70) "Recipient" means the public or private entity to which FTA awards Federal assistance through a grant, cooperative agreement, or other agreement. The Recipient is the entire legal entity even if only a particular component of the entity is designated in the document through which FTA has awarded the Federal assistance. The term "Recipient" is synonymous with "grantee." The term "Recipient" includes each member of a consortium, joint venture, team, or partnership awarded FTA assistance through a grant, cooperative agreement, or other agreement. For purposes of this Manual, "Recipient" also includes a sub-Recipient or sub grantee of the Recipient. A Recipient is responsible for assuring each of its subrecipients complies with the applicable FTA requirements and that each of its sub-Recipients is aware of the Federal statutory and regulatory requirements that apply to its actions as a sub-Recipient. Neither a Third-Party Contractor nor a third-party subcontractor is a "Recipient" for purposes of this ATP Procurement Policy and Guidelines.
- (71) "Responsive Offer/Bid". means an offer/bid that conforms in all material aspects to the requirements of the solicitation at the scheduled time of submission and does not require further discussion with the offeror/ bidder.
- (72) "Recipient". means those qualities of an item that are essential to ensure that the intended use of the item can be satisfactorily realized. The term is mainly used in connection with a brand-name-or-equal description, which should set forth those salient physical, functional, or other characteristics of the referenced product that an equal product must have in order to meet the Recipient's needs.
- (73) "Simplified Acquisition Threshold" means the dollar amount below which a non-Federal entity may purchase property or services using small purchase methods. Non- Federal entities adopt small purchase procedures in order to expedite the purchase of items costing less than the simplified acquisition threshold. The simplified acquisition threshold is set by the Federal Acquisition Regulation at 48 C.F.R. Subpart 2.1 (Definitions) and in accordance with 41 U.S.C. 1908. As of the publication of this part,

the simplified acquisition threshold is \$150,000, but this threshold is periodically adjusted for inflation.

- (74) "Single Bid" means only one bid has been received at the time and date set for bid opening.
- (75) "Single Responsive Bid" means only one responsive bid received at the time and date set for bid opening. This may result from having only one bidder or from all other bidder(s) being nonresponsive.
- (76) "Small Business" shall have the meaning set forth by the Small Business Administration Standards found in 13 C.F.R. Section 121 and in 49 C.F.R. Section 26.65.
- (77) "Solicitation" is defined in Section 3-101(13).
- (78) "Source Selection Plan" means a plan that describes how the source selection will be organized, how proposals will be evaluated and analyzed, and how source(s) will be selected.
- (79) "Specification" is defined in Section 4-101(4).
- (80) "State" means a State of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, Guam, American Samoa, and the Virgin Islands.
- (81) "State or Local Government Purchasing Schedule or Purchasing Contract" means an arrangement that a State or Local Government has established with multiple vendors in which those vendors agree to provide an option to the State or Local Government, and its subordinate government entities and others it might include in its programs, to acquire specific property or services in the future at established prices. These arrangements are somewhat similar to the GSA's Cooperative Purchasing Program available for Federal Government use. If, at a later date, the State or Local Government permits others to use its schedules, the State or Local Government might seek the agreement of the vendor to provide the listed property or services to others with access to the schedules. In the alternative the State or Local Government establishing the schedules might permit the vendor to determine whether or not it wishes to provide others the same contractual arrangement it affords the State or Local Government that has established the schedules. FTA recognizes that ATP will use the term "cooperative" in reference to these State and local programs, possibly because they are somewhat similar to GSA's "Cooperative Purchasing Program." These programs are distinct from "Joint Procurement" as defined this section.
- (82) "Subcontract" means any contract, subcontract, or other form of agreement to perform any part of the Work or provide any materials, equipment, or supplies for any part of the Work, or any such agreement, supplement or amendment at a lower tier, between a Subcontractor and its lower tier Subcontractor or a Supplier, and its lower tier Supplier,

at all tiers.

- (83) "Supplies" is defined, for the purposes of Chapter 9, in Section 9-101(4). As used elsewhere in the Policy and Guidelines, "supplies" means property of any type (except real property), including material, machinery, and equipment.
- (84) "Supplier" means any Person not performing work at or on a project site that Supplier machinery, equipment, materials, hardware, software, systems or any other appurtenance to the Project to the Contractor or to any Subcontractor in connection with the performance of the Work. Persons who merely transport, pick up, deliver or carry materials, personnel, parts or equipment or any other items or Persons to or from a project site will not be deemed to be performing Work at such project site.
- (85) "Third Party Contract" refers to ATP's contract with a vendor or contractor, including Procurement by purchase order or purchase by credit card, which is financed with Federal assistance awarded by FTA.
- (86) "Technical Proposal" means a solicited or unsolicited submission of information from a prospective contractor which states how that party intends to perform certain work; its technical and business qualifications; and its proposed delivery, warranty, and other terms and conditions as those might differ from or supplement ATP's solicitation requirements. It shall include such pricing information as may be required.
- (86) "Uniform Guidance (a/k/a Super Circular)" means U.S. DOT regulations, "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards," 2 C.F.R. part 1201, which incorporates by reference U.S. OMB regulatory guidance, "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards," 2 C.F.R. part 200. The Uniform Guidance applies to all Federal grants and cooperative agreements.
- (87) "Unsolicited Proposal" means a proposal that is: innovative and unique, independently originated and developed by the offeror, prepared without ATP's supervision, endorsement, direction, or direct involvement, sufficiently detailed that its benefits in support of ATP's mission and responsibilities are apparent, not an advance proposal for property or services that ATP could acquire through competitive methods, and not an offer responding to ATP's previously published expression of need or request for proposals.
- (88) "Work" means the design, constructions, operation, maintenance, and all other work, services and obligations required to be furnished, performed or provided by the Contractor under the Agreement.
- (89) "Value Engineering" means the systematic application of recognized techniques that identify the function of a product or service, establish a value for that function, and



provide the necessary function reliably at the lowest overall cost. In all instances, the required function should be achieved at the lowest possible life cycle cost consistent with requirements for performance, maintainability, safety, security, and aesthetics.

**Section 1-401          Public Access to Procurement Information**

- (1) Procurement information shall be a public record to the extent provided in Chapter 552 (Public Information Act) of the Government Code, as amended, and shall be available to the public as provided in such statute.
- (2) All Solicitations shall contain a provision requiring all bids and proposals to identify any information believed to be exempt from disclosure as trade secrets or commercial or financial information provided that blanket designations will not be acceptable and that any such identification of information will not be determinative of any issue relating to the application of, or treatment of such information or materials under law.

**Section 1-501          Acquisition of Real Property**

- (1) This section sets forth the Policy of ATP in connection with the Procurement of real property. For the purpose of the Procurement Policy and Guidelines, "real property" includes ownership in fee, leases of real property, easements, rights-of-way, and all other ownership interests in real property.
- (2) It is the Policy of ATP to make every reasonable effort to acquire real property by agreement with the owners.
- (3) Whenever practical, ATP shall establish an amount estimated to be fair compensation for real property prior to initiation of negotiations with the owner. If only part of the property is to be acquired or the interest to be acquired is less than the full interest of the owner, the estimated amount will include a statement explaining the basis for the determination of fair value. Any increase or decrease in the fair market value of the real property, prior to the date of valuation, caused by the public improvement or project for which the real property is to be acquired, or by the likelihood that the real property would be acquired for such improvement or project, should be disregarded in making the estimate.
- (4) In establishing the amount estimated to be fair compensation, two appraisals of each parcel or tract may be obtained, from appraisers working independently of each other, to the extent required under Section 451.054(d) of the Transportation Code.
- (5) The Executive Director shall establish procedures for the selection and Procurement of real property; provided, however, no acquisition of real property shall be made without the approval of the Board.

**CHAPTER 2                  PROCUREMENT AUTHORITY AND OFFICIALS**

**Section 2-100 Authority and Responsibility**

**Section 2-101 Procurement Authority**

- (1) The authorization to enter into contracts on behalf of ATP will be conferred only by resolution of the Board providing general authorizations to enter into contracts or authority for specific contracts or types of contracts. Any provision in this Policy describing the methods and procedure for Procurement and designating ATP representatives for Procurement actions shall be subject to authorization from the Board to award a contract.
- (2) No contract, modification, Change Order, or other commitment shall be made on behalf of ATP unless it is made in writing and executed by a representative of ATP acting within the scope of the representative's designated authority. Contracts, modifications, Change Orders, or other commitments made on behalf of ATP by ATP Person acting outside the scope of their designated authority may be ratified by the Executive Director provided the Executive Director determines in writing that such action is in ATP's best interest and all such ratification actions (together with a description of the circumstances and the justification therefor) shall be reported quarterly by the Executive Director in a written report to the Board.
- (3) No person shall be authorized or permitted to commence work for or on behalf of ATP in contemplation of a contract prior to the execution of a written contract.
- (4) No contract, modification, Change Order, or contract price adjustment shall be made unless sufficient funds are authorized and available for expenditure for such purpose in ATP's current budget; provided, however, that with respect to the validity, as to the contractor, of any contract, modification, Change Order, or adjustment in contract price which the contractor has reasonably relied upon, there shall be a rebuttable presumption that there has been compliance with this provision.

**Section 2-102 Procurement Responsibility**

- (1) The Executive Director or their designee shall be responsible for the Procurement of property, services, and construction in accordance with this Policy as well as the management and disposal of supplies.
- (2) In accordance with the Policy and Guidelines and subject to **Section 2-101**, the Executive Director shall:
  - (a) procure or supervise the Procurement of all property, services, and construction needed by ATP;



- (b) supervise and control all assets, equipment, and inventories of supplies belonging to ATP;
  - (c) sell, trade, or otherwise dispose of surplus assets, equipment, or supplies belonging to ATP; and
  - (d) establish and maintain programs for specification development, contract administration, and inspection and acceptance of supplies, services, and construction.
- (3) The Executive Director may adopt operational procedures consistent with the Policy and Guidelines pertaining to the execution of Procurement duties.

**Section 2-200 Board Authority and Delegations of Authority**

**Section 2-201 Board Authority and Authority to Delegate**

- (1) The Board is empowered under the laws of the State of Texas to exercise its powers by resolution, including to make contracts, incur liabilities, borrow money, issue notes, bonds and other obligations.
- (2) The Board may delegate authority to the Executive Director or other officers or agents of ATP to purchase certain property, services, or construction, and within budgeted amounts approved, by the Board.
- (3) In accordance with ATP Resolution 2021-008, the Executive Director or his/her Designee is authorized to execute agreements for amounts not to exceed \$250,000 per year per agreement, provided that the Executive Director or his/her Designee reports to the Board on a monthly basis regarding any contract agreement entered into during the previous month valued between \$150,000 and \$250,000.
- (4) The Executive Director shall seek the prior approval of the Board for any agreement that will exceed \$250,000. Any contract modification above the delegated Procurement authority or the originally approved contingency will require subsequent Board approval.
- (5) The Executive Director or his/her Designee has the authority and responsibility to:
  - (a) Approve and execute all purchase requisitions within his/her level of authority;
  - (b) Advertise and/or issue solicitation documents (*e.g.*, RFQs/IFBs/RFPs/SOQs) for Contracts expected to be within his/her level of authority;

- (c) Approve and enter into purchase orders and Contracts within his/her level of authority;
  - (d) Approve and enter into a Contract Modification (including the settlement of a contract claim) that did not originally require Board approval so long as the Contract Modification (either individually or in combination with other Contract Modifications) does not increase the Contract amount or yearly contract amount above the level of authority given to the Executive Director;
  - (e) Approve and enter into a Contract Modification (including the settlement of a contract claim) that originally required Board approval so long as the Contract Modification, as combined in amount with other non-Board-approved Contract Modifications does not exceed the level of authority given to the Executive Director;
  - (f) Approve the issuance of formal Change Orders that are expected to result in Contract Modifications that do not exceed the level of authority given to the Executive Director.
- (6) Authority conferred on the Executive Director in the Policy and Guidelines with respect to the following matters shall not be delegated:
- (a) appointment of contracting officers under Section 2-203;
  - (b) deviations from the Policy and Guidelines under Section 2-301;
  - (c) reduction of bond amounts under Section 5-302(3);
  - (d) stay of Procurements during protests under Section 10-204; and
  - (e) Authority to debar or suspend under Section 4-310(2).

**Section 2-202          Delegations and Revocations of Authority**

- (1) The Executive Director's delegations of authority shall be in writing and shall specify:
  - (a) the activity or function authorized;
  - (b) any limits or restrictions on the exercise of the delegated ATP; and
  - (c) the duration of the delegation.
- (2) Any authority delegated by the Executive Director may be revoked at any time and without prior approval of the Board.



**Section 2-203 Contracting Officers**

- (1) The selection, appointment, and terminations of appointments of contracting officers shall be made only by the Executive Director. In selecting contracting officers, the Executive Director shall consider public contract experience, training, education, judgment, character, and ethics.
- (2) Appointment of contracting officers shall be made in a Certificate of Appointment signed by the Executive Director in the following form:

*CERTIFICATE OF APPOINTMENT*

*Pursuant to Authority vested in the undersigned by the Austin Transit Partnership Procurement Policy and Guidelines,*

\_\_\_\_\_

*is hereby appointed Contracting Officer for Austin Transit Partnership subject to the limitations in ATP’s Procurement Policy and Guidelines and to the following:*

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*Unless sooner revoked, this appointment is effective as long as the appointee named herein is an employee of ATP.*

\_\_\_\_\_  
*Date Signature of Executive Director*

**Section 2-300 Deviations from Policy and Guidelines**

**Section 2-301 Deviations from Policy and Guidelines**

The Executive Director may approve deviations from the Policy and Guidelines with respect to an individual Procurement, subject to compliance with applicable law and any applicable Federal Requirements; provided, however, that any such deviation (together with a description of the circumstances and the justification therefor) shall be reported quarterly by the Executive Director in a written report to the Board.

**Section 2-400 Changes to Policy and Guidelines**

**Section 2-401 Changes to The Terms of this Policy**

The Executive Director is empowered to approve one-time deviations from the Policy and Guidelines in accordance with the provisions of Section 2-301. No permanent change shall be





made to this Policy without the express approval of the Board, except for minor, insignificant changes that are matters of form rather than substance, e.g., style changes, typographical, punctuation, and transposition errors.

**Section 2-500          Procurements Using Federal Funds**

**Section 2-501          Procedures**

Procurements involving the use of federal assistance grant funds will be conducted in accordance with the terms of the Procurement Policy and Guidelines and requirements of the grantor agency. In the instance of FTA grants, the Federal Requirements will be followed. In the event of any inconsistency with the Procurement Policy and Guidelines, the provisions of any Federal Requirements shall be controlling.

**Section 2-502          Procurement Clauses**

The Executive Director shall promulgate required clauses to be used when using federal assistance to finance a Procurement. ATP should ensure that only the applicable clauses for a Procurement are included; inapplicable clauses may restrict competition or result in a higher price.

## **CHAPTER 3                    SOURCE SELECTION AND CONTRACT FORMATION**

### **Section 3-100                General Provisions**

### **Section 3-101                Definition of Terms**

- (1) "Bid" means any bid submitted in competitive sealed bidding or in the second phase of multi-step competitive sealed bidding and includes submissions under Section 3-204 (Small Purchases) if no changes in offers are allowed after submission.
- (2) "Cost Analysis" is the evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.
- (3) "Cost Data" is information concerning the actual or estimated cost of labor, material, overhead, and other cost elements which actually have been incurred or which are expected to be incurred by the contractor in performing the contract.
- (4) "Cost-Reimbursement Contract" means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of the Procurement Policy and Guidelines and is paid a fee, if any.
- (4) "Discussions" as used in the source selection process, means an exchange of information (written or oral) or negotiation that involves information essential for determining the acceptability of a proposal or during which the offeror and ATP may alter or otherwise change the conditions, terms, and price of the proposed contract. Discussions may be conducted in connection with competitive sealed proposals, sole source, and emergency Procurement; discussions are not permissible in competitive sealed bidding (except to the extent permissible in the first phase of multi-step sealed bidding).
- (5) "Established Catalogue Price" means the price included in a catalogue, price list, schedule, or other form that:
  - (a) is regularly maintained by a manufacturer or contractor;
  - (b) is either published or otherwise available for inspection by customers; and
  - (c) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the property or services involved.

- (6) "Invitation for Bids" or "IFB" means all documents, whether attached or incorporated by reference, utilized for soliciting competitive sealed bids.
- (7) "Phase One" is defined in Section 3-202.17 (Multi-Step Competitive Sealed Bidding).
- (8) "Phase Two" is defined in Section 3-202.17 (Multi-Step Competitive Sealed Bidding).
- (9) "Price Analysis" is the evaluation of Price Data (without analysis of the separate cost components and profit as in cost analysis) which may assist in arriving at prices to be paid and costs to be reimbursed.
- (10) "Price Data" is factual information concerning prices, including profit, for property, services, or construction identical or substantially similar to those being procured. In this definition, "prices" refers to offered or proposed selling prices, historical selling prices, and current selling prices of such items. This definition refers to data relevant to both prime and subcontract prices.
- (11) "Proposal" means any offer submitted in response to any Solicitation, including an offer under Section 3-204 (Small Purchases), except a Bid.
- (12) "Purchase Description" means the words used in a solicitation to describe the property, services, or construction to be purchased, and includes Specifications attached to, or made a part of, the solicitation.
- (13) "Request for Proposals" or "RFP" means all documents, whether attached or incorporated by reference, utilized for soliciting Proposals.
- (14) "Responsible Bidder" or "Responsible Offeror" means a party that has the financial resources, personnel, facilities, integrity, past and current performance history, and overall capabilities to fulfill specific contractual requirements satisfactorily.
- (15) "Responsive" (1) Describes a bid/proposal that meets, without any material deviation, the expressed requirements of a solicitation (2) When a bidder fully complies with and does not materially deviate from the terms, conditions, and specifications set forth in an invitation for bids. (3) When an offeror materially complies with a solicitation and is capable of being made compliant through discussions.
- (16) "Solicitation" means an Invitation for Bids, a Request for Proposals, a request for quotations, or any other document issued by ATP for the purpose of soliciting bids or proposals to perform a contract.

### **Section 3-102            Extension of Time for Bid or Proposal Acceptance**

After opening bids or proposals, the Contracting Officer may request bidders or offerors to extend the time during which ATP may accept their bids or proposals; provided that with regard to bids, no other change is permitted. The reasons for requesting the extension shall be documented.

### **Section 3-103            Extension of Time on Indefinite Quantity Contracts**

The time of performance of an indefinite quantity contract may be extended upon agreement of the parties, provided the extension is for 90 days or less and the Contracting Officer determines in writing that it is not practical to award another contract at the time of such extension.

### **Section 3-104            Only One Bid or Proposal Received**

- (1) If only one responsive bid is received in response to an Invitation for Bids (including multi- step bidding), an award may be made to the single bidder if the Contracting Officer finds that the price submitted is fair and reasonable and that either (i) other prospective bidders had reasonable opportunity to respond or (ii) there is not adequate time for resolicitation. Otherwise, the bid may be rejected pursuant to the provisions of Section 3-300 (Cancellation of Solicitations; Rejection of Bids or Proposals) and:
  - (a) new bids or offers may be solicited;
  - (b) the proposed Procurement may be cancelled; or
  - (c) if a Contracting Officer above the level of the procuring Contracting Officer determines in writing that the need for the property, service, or 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 then may be conducted under Section 3-205 (Sole Source Procurement).
  
- (2) If only one proposal is received in response to a Request for Proposals, a determination must be made by a Contracting Officer above the level of the procuring Contracting Officer to:
  - (a) make an award in accordance with the procedures set forth in Section 3-203 (Competitive Sealed Proposals);
  - (b) conduct the Procurement under Section 3-205 (Sole Source Procurement);  
or



- (c) if time permits, resolicit proposals.

**Section 3-105 Multiple or Alternate Bids or Proposals**

Unless multiple or alternate bids or proposals are specifically provided for, the solicitation shall state that such bids or proposals shall not be accepted. When prohibited, multiple or alternate bids or proposals shall be rejected; provided, however, that if a bidder clearly indicates a responsive base bid, it shall be considered for award as though it were the only bid or proposal submitted by the bidder or offeror. The provisions of this section shall be set forth in the solicitation, and if multiple or alternate bids or proposals are allowed, it shall specify their treatment.

**Section 3-106 Bonds for Supply or Service Contracts**

Bid, performance and payment bonds or other security may be required for supply contracts or service contracts as the Contracting Officer deems advisable to protect the interest of ATP. Any such requirements must be set forth in the solicitation. Bid or performance bonds should not be used as a substitute for a determination of bidder or offeror responsibility. Sections 5-301 (Bid Bonds), 5-302 (Performance Bonds), and 5-303 (Payment Bonds) set forth bonding requirements applicable to construction contracts and may be considered when establishing any such requirements for supply contracts or service contracts.

**Section 3-107 Conditioning Bids or Proposals Upon Other Awards**

Any bid or proposal which is conditioned upon receiving award of both the particular contract being solicited and another contract from ATP shall be deemed nonresponsive and not acceptable.

**Section 3-108 Determination of Contractual Terms and Conditions**

The Contracting Officer is authorized to determine the contractual provisions, terms, and conditions of Solicitations and Contracts; provided, such provisions, terms, and conditions are aligned with this Policy to the extent applicable and are not contrary to the Federal Requirements (if applicable) or applicable law governing the Procurement.

**Section 3-109 Unsolicited Offers**

- (1) An unsolicited offer is any offer submitted to ATP by a third party other than one submitted in response to a Solicitation. The Executive Director shall consider the offer as provided in this section.

- (2) To be considered for evaluation, an unsolicited offer must not be for an item for which competitive sealed bids or competitive sealed proposals are required by the Federal Requirements (if applicable) or applicable law and:
  - (a) must be in writing;
  - (b) must be independently originated and developed by the offeror;
  - (c) must be prepared without ATP's supervision, endorsement, direction or direct involvement;
  - (d) must be sufficiently detailed to allow a judgment to be made concerning the potential utility of the offer to ATP;
  - (e) must be for unique and innovative supplies or services;
  - (f) must not be an advance proposal for property or services that ATP could acquire through competitive methods;
  - (g) must not be an offer responding to any previously published ATP expression of need or request for proposals.
- (3) An unsolicited offer meeting the requirements of (2), above, shall be evaluated to determine its utility to ATP and whether it would be to ATP's advantage to enter into a contract based on the unsolicited offer. Except where (4) applies, if ATP determines that it is interested in acquiring the property or services described in the unsolicited offer, ATP will issue a public notice which includes the following details: (a) a statement that the unsolicited offer was received by ATP; (b) an adequate description of the property or services offered, without improperly disclosing proprietary information or disclosing the originality of thought or innovativeness of the property or services offered; and (c) a statement that ATP is interested in acquiring the property or services offered. Following issuance of public notice, ATP will allow interested parties an adequate opportunity to comment or submit competing proposals. ATP will issue a public notice of its intention to award any contract based on the unsolicited offer or another proposal submitted in response to the public notice prior to award.
- (4) If it is impossible to describe the property or services offered in the unsolicited offer without revealing proprietary information or disclosing the originality of thought or innovativeness of such property or services, ATP make a sole source award to the offeror. A sole source award may not be based solely on the unique capability of the offeror to provide the specific property or services proposed.
- (5) If an award is to be made on the basis of the unsolicited offer under (3) or (4)

above, the sole source procedures in Section 3.205 (Sole Source Procurement) shall be followed.

- (6) Any written request for confidentiality of data contained in an unsolicited offer that is made in writing shall be honored if permitted by law, subject to Section 1-401 (Public Access to Procurement Information) and the other provisions of this policy, guidelines and applicable law. If an award is contemplated, confidentiality of data shall be agreed upon by the parties and governed by the provisions of law and the contract. If agreement cannot be reached on the confidentiality, ATP may reject the unsolicited offer.

### **Section 3-110      Novation or Change of Name**

- (1) No contract between ATP and a Contractor is transferable or otherwise assignable by the Contractor without the written consent of the Contracting Officer; provided, however, that a contractor may assign monies receivable under a contract after due notice to ATP.
- (2) When in the best interest of ATP, a successor in interest may be recognized in a novation agreement in which the transferor, transferee, and ATP shall agree that:
  - (a) the transferee assumes all of the transferor's obligations;
  - (b) the transferor waives all rights under the contract as against ATP; and
  - (c) unless the transferor guarantees performance of the contract by the transferee, the transferee shall, if required, furnish a satisfactory performance bond, or otherwise in accordance with the terms of the relevant Contract.
- (3) When a contractor requests to change the name in which it holds a contract with ATP, the Contracting Officer 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 the change of name. The agreement changing the name shall specifically indicate that no other terms and conditions of the contract are thereby changed and the Contract shall continue in full force and effect.

### **Section 3-111      Contracting for Installment Purchase Payments**

Supply contracts may provide for installment purchase payments, including interest charges, over a period of time. Installment payments, however, should be used judiciously in order to achieve economy and not to avoid budgetary restraints and shall be justified in writing by the Contracting Officer, who shall be responsible for ensuring that



statutory or other prohibitions are not violated by use of installment provisions and that all budgetary, funding, or other required prior approvals are obtained. No such agreement shall be used unless provision for installment payments is included in the solicitation document.

**Section 3-112 Purchase of Items Separately from Construction Contract**

The Executive Director 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.

**Section 3-113 Purchase of Standard Commercial Products**

If the Contracting Officer makes a determination that the items or services to be purchased qualify as Commercial Products in accordance with the definition at Section 1-301 (39), the Procurement shall be fully and openly competed, whenever practicable.

**Section 3-114 Maximizing Participation of Small Business Private Enterprises**

**Section 3-114.01 Purpose and General Requirements**

ATP adopts this program to require and encourage, to the maximum extent feasible, the participation of small business private enterprises in ATP procurements. This program is reasonably designed to increase the participation of disadvantaged, minority, and women owned business enterprises in ATP procurements through race-neutral means.

This section sets out parameters and guidelines regarding Joint Venture formation and participation in ATP Procurements. The determination whether to incorporate solicitation considerations for such entities shall be made by the Contracting Officer.

**Section 3-114.02 Utilization of Joint Ventures**

- (1) Where appropriate, the Contracting Officer shall encourage the participation of Joint Ventures in Procurements.
- (2) When the Contracting Officer determines, in writing, that appropriate business circumstances warrant, the Contracting Officer may require that Bids or Proposals in response to the solicitation be submitted by Joint Ventures. By inserting such language in the solicitation, any bid or offer submitted in response to the solicitation that does not comply with this requirement shall be determined nonresponsive and rejected.

- (a) The Executive Director or his/her Designee may promulgate ATP



detailed guidelines for determining the types of Procurements for which the Contracting Officer may require responses by Joint Ventures. As a general guideline, such Procurements shall involve one or more of the following:

- (i) Large, complex, and/or multi-disciplinary statements of work;
  - (ii) Work to be performed at more than one ATP site;
  - (iii) Long-term repetitive task performance for a variety of tasks;
  - (iv) Efficiency-enhancing activities; or
  - (v) Requirements related to the quality or competence of the work.
- (b) In adopting guidelines for determining the types of Procurements for which the Contracting Officer shall require responses by Joint Ventures, the Executive Director shall be guided by the Antitrust Guidelines for Collaboration Among Competitors published by the Federal Trade Commission and the Department of Justice or any equivalent document.
- (3) The requiring activity (“customer”) shall make an initial determination whether a Procurement is appropriate for Joint Ventures at the time the requirement is identified for inclusion in ATP Procurement Plan. This determination shall be provided to the Board and notated for that Procurement in ATP Procurement Plan.
- (4) When the customer provides the appropriate funding and Procurement requisition to the Contracting Officer to commence the solicitation process, the Contracting Officer shall initially review the requirement to ascertain if the customer made a determination concerning the utilization of Joint Ventures for the solicitation and work performance.
- (a) If the customer identified the Procurement as appropriate for the use of Joint Ventures, the Contracting Officer shall review that determination and either concur or non-concur. If the Contracting Officer concurs with the customer's determination, Subsection (c) shall apply. If the Contracting Officer non-concurs, then the reasons shall be written and placed in the Procurement File.
  - (b) If the customer did not identify the Procurement as appropriate for the use of Joint Ventures, the Contracting Officer shall make the determination. If the Contracting Officer determines that the use of Joint Ventures is appropriate to the specific Procurement, the Contracting



Officer shall prepare a written determination for the Procurement File.

- (5) The Contracting Officer's determination must be documented in writing in the Procurement File and comply with applicable statutory and regulatory criteria for conducting ATP Procurements.

**Section 3-115      Ensuring Necessary and Non-Duplicative Purchases**

- (1) ATP shall endeavor to acquire only property and services that are necessary and non- duplicative. To determine its reasonably expected Procurement needs, ATP shall:
  - (a) determine the Procurement requirements necessary to sustain ATP operations through the upcoming fiscal year during the annual budget process; and
  - (b) carry out long range Procurement planning to identify the Procurement requirements of ATP.
- (2) Any additional Procurement requirements identified outside of the processes described in (1) above should be submitted to the Procurement Department.
- (3) The Procurement Department will review the Procurement requirements identified in accordance with (1) and (2) above and take the following further steps as appropriate:
  - (a) Consider consolidating or breaking out Procurements to obtain a more economical purchase and avoiding purchase of unnecessary or duplicative items.
  - (b) Where appropriate, analyze lease versus purchase alternatives.
  - (c) Conduct any other appropriate analysis to determine the most economical approach.
  - (d) Consider FTA guidance on spare ratios.
  - (e) Prohibit adding quantities or options solely to permit assignment to another party at a later date.
  - (f) Consider various Procurement sources, including those available under interlocal agreements, where appropriate to foster greater economy and efficiency.

These considerations do not prohibit ATP from splitting Procurements to foster



greater opportunities for DBEs, small and minority firms, and women business enterprises.

- (4) Where appropriate in construction contracts of sufficient size to offer reasonable opportunities for cost reductions, ATP shall consider inclusion of value engineering clauses.

### **Section 3-200      Methods of Source Selection**

ATP may use and consider various Procurement sources, including, but not limited to:

- (a) State contracts awarded competitively for the benefit of all State agencies (such as DIR, HGACBuy, Texas Multiple Award Schedule Program, The Cooperative Purchasing Network, and Buy Board);
- (b) Another state's cooperative Procurement contract, including purchases made pursuant to Section 3019 of the FAST Act;
- (c) Cooperative Procurement contracts that are purchasing schedules between a state or eligible nonprofit with one or more vendors for rolling stock;
- (d) Specified purchasing programs under the General Services Administration ("GSA") Federal Supply Schedule to the extent authorized by federal law (which may include the Cooperative Purchasing Program for information technology, law enforcement, and security solutions; disaster purchases; and public-health-emergency purchases);
- (e) Federal excess and surplus property;
- (f) Assignment of another entity's contract rights

#### **Cooperative Contract Requirements**

If buying a product that is other than the lowest offered price for that product under all cooperative contracts, the Procurement Department must document why the higher-priced product must be purchased. Prior to purchase, the Procurement Department must also determine that the State contracts were awarded with full and open competition and were not subject to geographical preferences (e.g., giving in-state vendors a bidding preference) because some states have such practices that are prohibited by FTA.

#### **GSA Schedule Requirements**

The GSA schedule does not require vendors to comply with FTA's Buy America regulations, and it may include manufactured products that are not eligible for



reimbursement of FTA funds. In these cases, ATP must ensure that all Buy America certifications or waivers are received before awarding a contract or purchase order.

When using the GSA schedule to acquire property or services, ATP can fulfill the requirement for full and open competition by seeking offers from at least three vendors. ATP must still determine that any purchase from the GSA schedule is a fair and reasonable price.

### **Acquisition Through Assigned Contract Rights (Piggybacking)**

ATP may acquire contract rights through assignment by another entity. If ATP does so, it must ensure:

- (a) The underlying contract complies with FTA requirements prohibiting excessive options;
- (b) The underlying contract includes an assignment clause with a clear right to assign the quantities and that those quantities are still permitted to be purchased under the original contract terms;
- (c) ATP documents that the price of the contract rights being assigned is fair and reasonable at the time of the assignment (no price analysis is required if ATP can confirm that a price analysis was properly prepared for the original contract);
- (d) No Cardinal Changes are made;
- (e) Domestic content meets the applicable requirements.
- (f) All other Federal Requirements are complied with; and
- (g) It obtains a complete Procurement File for the underlying Procurement from the assigning agency.

ATP must also consider, prior to using another entity's contract rights, if other approaches would better allow it to meet its particular needs. Where the assigned contract includes options, ATP shall only exercise the option right if it has determined that: (i) the terms and conditions of the option to be exercised are substantially similar to the terms and conditions as stated in the original contract at the time of award; and(ii) the option price is better than prices available in the market or that when it intends to exercise the option, the option is more advantageous.

### **Section 3-201      General Requirements**

- (1) Chapter 451 of the Texas Transportation Code provides:

- (a) The Board of Directors shall have authority and responsibility to advertise, enter into, and amend contracts for the purchase, or lease of materials or services. Chapter 451 also authorizes the Board of Directors to adopt rules governing Procurement policy including defining the terms in and implementing ATP's Procurement Policy & Guidelines.
  - (b) the procedures, guidelines, or rules adopted under this section confer no rights on an actual or potential bidder, offeror, contractor, or other person except as expressly stated in the procedures, policy, guidelines, or rules.
- (2) Section 451 of the Texas Transportation Code provides as follows:
- (a) Except as provided by subsection (f), ATP may not award a contract for construction, services, or property, other than real property, except through the solicitation of competitive sealed bids or proposals ensuring full and open competition.
  - (b) ATP shall describe in a solicitation each factor to be used to evaluate a bid or proposal and give the factor's relative importance.
  - (c) The Board may authorize the negotiation of a contract without competitive sealed bids or proposals if:
    - (1) the aggregate amount involved in the contract is \$50,000 or less;
    - (2) the contract is for construction for which no more than one bid or proposal is received;
    - (3) the contract is for services or property for which there is only one source or for which it is otherwise impracticable to obtain competition;
    - (4) the contract is to respond to an emergency for which the public exigency does not permit the delay incident to the competitive process;
    - (5) the contract is for personal or professional services or services for which competitive bidding is precluded by law; or
    - (6) the contract, without regard to form and which may include bonds, notes, loan agreements, or other obligations, is for the purpose of borrowing money or is a part of a transaction relating to the borrowing of money, including:

- (A) a credit support agreement, such as a line or letter of credit or other debt guaranty;
  - (B) a bond, note, debt sale or purchase, trustee, paying agent, remarketing agent, indexing agent, or similar agreement;
  - (C) an agreement with a securities dealer, broker, or underwriter; and
  - (D) any other contract or agreement considered by the executive committee to be appropriate or necessary in support of ATP's financing activities.
- (3) All contracts of ATP shall be awarded by competitive sealed bidding pursuant to Section 3-202 (Competitive Sealed Bidding), except as provided in:
- (a) section 2-101(5) (contracts for legal services);
  - (b) section 3-203 (Competitive Sealed Proposals);
  - (c) section 3-204 (Small Purchase);
  - (d) section 3-205 (Sole Source Procurement);
  - (e) section 3-206 (Emergency Procurements);
  - (f) section 3-207 (Statutory Professional Services); or
  - (g) section 5-500 (Architect-Engineer and Land Surveying Services).

**Section 3-202 Competitive Sealed Bidding**

**Section 3-202.01 General Requirements**

The competitive sealed bidding method is the preference for the Procurement of property, services, or construction. The Contracting Officer will make a determination whether competitive sealed bidding is appropriate on a Procurement-by-Procurement basis taking into the relevant circumstances including, but not limited to, whether: (i) a precise specification is available, (ii) two or more responsible bidders are willing to compete, (iii) the Procurement generally lends itself to a firm fixed price contract, (iv) selection can be made on the basis of price, and (v) Discussions are not expected to be necessary. The provisions of this Section 3-202 apply to every Procurement made by competitive sealed bidding, including multi-step sealed bidding, unless otherwise determined by the Contracting Officer, subject to compliance with applicable law and



any applicable Federal Requirements.

### **Section 3-202.02 The Invitation for Bids**

- (1) An Invitation for Bids shall be used to initiate a competitive sealed bid Procurement.
- (2) The Invitation for Bids shall include the following:
  - (a) instructions and information to bidders concerning the bid submission requirements, including the time and date set for receipt of bids, the address of the office to which bids are to be delivered, the maximum time for bid acceptance by ATP, and any other special information;
  - (b) the Purchase Description, all evaluation factors and their relative importance, delivery or performance schedule and such inspection and acceptance requirements as are not included in the purchase description; and
  - (c) the contract terms and conditions, including warranty and bonding or other security requirements, as applicable.
- (3) Bid receipt times for construction contracts should be no earlier than 2:00 p.m. on Tuesday through Friday, and the day for receipt of bids shall not be the day after a legal holiday in order to facilitate receipt and evaluation of subcontractor bids by prospective general contractors.
- (4) The Invitation for Bids may incorporate documents by reference provided that the Invitation for Bids specifies where such documents can be obtained.
- (5) The Invitation for Bids shall require bidders to acknowledge the receipt of all amendments issued.

### **Section 3-202.03 Bidding Time**

Bidding time is the period of time between the date of distribution of the Invitation for Bids and the time and date set for receipt of bids. In each case, bidding time will be set to provide bidders sufficient time to prepare their bids. A minimum of 21 days shall be provided, unless a shorter time is deemed necessary for a particular Procurement as determined in writing by the Contracting Officer.

### **Section 3-202.04 Bidder Submissions**



- (1) 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.
- (2) The Invitation for Bids will state whether electronic bids will be accepted. Electronic bids will be received, opened, and recorded in a manner consistent with Section 3-202.11 (Receipt, Opening, and Recording of Bids).
- (3) Bid samples or descriptive literature may be required when it is necessary to evaluate whether the items offered meet the Purchase Description of the Invitation for Bids and/or to establish with more precision what the bidder proposes to furnish. The Invitation for Bids shall state that bid samples or descriptive literature should not be submitted unless expressly requested and that, regardless of any attempt by a bidder to condition the bid, unsolicited bid samples or descriptive literature which are submitted at the bidder's risk will not be examined or tested and will not be deemed to vary any of the provisions of the Invitation for Bids.

**Section 3-202.05 Public Notice**

- (1) Invitations for Bids or notices of the availability of Invitations for Bids shall be publicly advertised and furnished to a sufficient number of bidders for the purpose of securing competition. Notices of availability shall indicate where, when, and for how long Invitations for Bids may be obtained; generally, describe the property, service, or construction desired; and may contain other appropriate information.
- (2) Any Procurement exceeding the small purchases threshold for which competitive sealed bids or proposals are required by law, as described in Section 3-201(1), shall require notice published at least once each week for two consecutive weeks. Notice shall be advertised in a local newspaper, on the internet, in trade journals, etc. as is deemed appropriate by the Contracting Officer. If practicable, the notice will be published in a newspaper of general circulation at least once each week for two consecutive weeks before the date set for the bid opening and the first notice must be published at least 15 days before the date set for the bid opening.
- (3) A copy of the Invitation for Bids shall be made available for public inspection at the office of ATP.

**Section 3-202.06 Bidders Lists**

ATP does not maintain a bidders list.

**Section 3-202.07 Pre-Bid Conferences**



Pre-bid conferences may be conducted to explain the Procurement requirements. If the Contracting Officer determines to hold a pre-bid conference, it 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 amendment as provided in Section 3-202.08 (Amendments to Invitations for Bids), and the Invitation for Bids or the notice of pre-bid conference shall so provide. A summary of the conference or the presentation given by ATP shall be supplied to all those prospective bidders known to have received an Invitation for Bids. If a transcript is made, it shall be a public record.

### **Section 3-202.08 Amendments to Invitations for Bids**

Amendments to Invitations for Bids shall be identified as such and shall require that the bidder acknowledge receipt of all amendments issued. The amendment shall reference the portions of the Invitation for Bids it amends. Amendments should be used to:

- (1) make any changes in the Invitation for Bids such as changes in quantity, Purchase Descriptions, delivery schedules, and opening dates;
- (2) correct defects or ambiguities; or
- (3) furnish to other bidders information given to one bidder if such information will assist the other bidders in submitting bids or if the lack of such information would prejudice the other bidders.

### **Section 3-202.09 Pre-Opening Modification or Withdrawal of Bids**

- (1) Bids may be modified or withdrawn by written notice received in the office designated in the Invitation for Bids prior to the time and date set for bid opening. A bid modification or withdrawal received by ATP prior to the time and date set for bid opening will be effective if there is evidence demonstrating that the modification or withdrawal was received by ATP prior to the time and date set for bid opening.
- (2) If a bid is withdrawn in accordance with this section, the bid security, if any, shall be returned to the bidder.
- (3) All documents relating to the modification or withdrawal of bids shall be made a part of the Procurement File.

### **Section 3-202.10 Late Bids, Withdrawals, and Modifications**

- (1) Any bid received at the location designated in the Invitation for Bids after the time and date set for receipt of bids is late. Any withdrawal or modification of a bid received at the location designated in the Invitation for Bids after the time and date set for opening of bids at the place designated for opening is late.
- (2) No late bid, late modification, or late withdrawal will be considered unless received before contract award and the bid, modification, or withdrawal would have been timely but for the action or inaction of ATP personnel.
- (3) Bidders submitting late bids that will not be considered for award shall be so notified as soon as practicable.
- (4) Records shall be made and kept in the Procurement File for each late bid, late modification, or late withdrawal.

### **Section 3-202.11 Receipt, Opening, and Recording of Bids**

- (1) Upon receipt, each bid and modification shall be time-stamped but not opened and shall be stored in a secure place until the time and date set for bid opening.
- (2) Bids and modifications shall be opened publicly, in the presence of one or more witnesses, at the time, date, and place designated in the Invitation for Bids. The name of each bidder, the bid price, and such other information as is deemed appropriate by the Contracting 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 also 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 this section and Section 1-401 (Public Access to Procurement Information). 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. Prices and makes and model or catalogue numbers of the items offered, deliveries, and terms of payment shall be publicly available at the time of bid opening regardless of any designation to the contrary.
- (3) The Contracting Officer shall examine the bids to determine the validity of any requests for nondisclosure of trade secrets and other proprietary data identified in writing in accordance with Section 1-401 (Public Access to Procurement Information) and the other requirements of this Policy, guideline and applicable law. If the Contracting Officer and the relevant bidder do not agree as to the disclosure of data, the Contracting Officer shall inform the bidder in writing what portions of the bids will be disclosed and that, unless the bidder

protests under Chapter 4, 4-300 (Administrative Remedies) of this Policy, 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.

### **Section 3-202.12 Mistakes in Bids**

- (1) Correction or withdrawal of a bid because of an inadvertent mistake in the bid requires careful consideration to protect the integrity of the competitive bidding system and to ensure fairness. If the mistake is attributable to an error in judgment, the bid may not be corrected. Bid correction or withdrawal by reason of a nonjudgmental mistake is permissible but only to the extent it is not contrary to the interest of ATP and would not be prejudicial to other bidders.
- (2) A bidder may correct mistakes discovered before the time and date set for bid opening by withdrawing or correcting the bid as provided in Section 3-202.09 (Pre-Opening Modification or Withdrawal of Bids).
- (3) When the Contracting Officer knows or has reason to conclude that a mistake has been made, such officer should advise the bidder why a mistake is suspected and request the bidder to confirm the bid. Situations in which confirmation of bids should be requested include obvious errors apparent on the face of the bid or a bid unreasonably lower than the other bids submitted or ATP's estimate. If the bidder alleges mistake, the bid may be corrected or withdrawn if the conditions set forth in this section are met.
- (4) This subsection sets forth procedures to be applied in three situations described in this subsection in which mistakes in bids are discovered after the time and date set for bid opening but before award.
  - (a) 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 Contracting Officer shall waive such informalities or allow the bidder to correct them depending on which is in the best interest of ATP. Examples of minor informalities 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 clearly indicating the bidder's intent to be bound; or

- (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.
- (b) 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.
- (c) Mistakes Where Intended Correct Bid is Not Evident. A bidder may be permitted to withdraw a low bid if:
  - (i) a mistake is clearly evident on the face of the bid document, but the intended correct bid is not similarly evident; or
  - (ii) the bidder submits proof which clearly and convincingly demonstrates that a mistake was made.
- (5) Mistakes discovered after award shall not be corrected except where the Procurement Director makes a written determination that it would be unconscionable not to allow the mistake to be corrected.
- (6) When a bid is corrected or withdrawn, or correction or withdrawal is denied, the Contracting Officer shall prepare a written determination to be kept on the Procurement File showing that the relief was granted or denied in accordance with this Policy.

### **Section 3-202.13 Bid Evaluation**

- (1) Evaluation Criteria. Bids shall be unconditionally accepted without alteration or correction, except as authorized by the Policy and Guidelines. Bids shall be evaluated based on the requirements set forth in the Invitation for Bids, which may include criteria to determine acceptability (such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose) and the bid price (such as discounts, transportation costs, and total or life-cycle costs). All criteria that will be considered in evaluation for award shall be objectively measurable. The Invitation for Bids shall set forth

all evaluation factors for source selection and the relative importance of each factor. No factor may be used in bid evaluation that is not set forth in the Invitation for Bids.

- (2) Responsiveness. To be considered for award, a bid must be "responsive"; i.e., comply in all material respects with the Invitation for Bids (see Section 3-101(12) defining "responsive bidder"). Bids must be responsive so that all bidders may stand on an equal footing and the integrity of the competitive Procurement system may be maintained. Only minor informalities in bids described in Section 3-202.12(4)(a) can be contained in bids to be considered for award. Except as otherwise authorized by this Policy, examples of issues that may result in a nonresponsive bid include:
  - (a) failure to sign the bid;
  - (b) failure to acknowledge receipt of a material amendment to the Invitation for Bids;
  - (c) bids containing any exception to, or any qualification of, any material requirement of the Invitation for Bids;
  - (d) bids imposing any condition or altering the rights of ATP (e.g., conditioned on the occurrence of any event, the receipt of material or parts, "negotiation" of the warranty, or nondisclosure of information);
  - (e) failure to furnish items or information required to be submitted with the bid;
  - (f) bids which are indefinite, uncertain, or ambiguous (the consideration of which would give the bidder an unfair competitive advantage); and
  - (g) bids containing unsolicited descriptive literature if the bid creates any uncertainty as to whether the bidder is offering to conform to the specifications.
- (3) Responsibility. Responsibility of prospective contractors is covered by Section 3-400 (Responsibility) of the Procurement Policy and Guidelines.
- (4) Acceptability. The Invitation for Bids shall set forth any evaluation criterion to be used in determining product acceptability. It may require the submission of bid samples, descriptive literature, technical data, or other material. It may also provide for accomplishing any of the following prior to award:
  - (a) inspection or testing of a product prior to award for such characteristics

as quality or workmanship;

- (b) examination of such elements as appearance, finish, taste, or feel; or
- (c) other examinations to determine whether it conforms with 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 as non-responsive.

- (5) Lowest bid. Following determination of product acceptability as set forth in this section (if any is required), bids will be evaluated to determine which bidder offers the lowest cost to ATP in accordance with the evaluation criteria set forth in the Invitation for Bids.
- (6) Nothing in this section shall be deemed to permit contract award to a bidder submitting a higher quality item than that designated in the Invitation for Bids if such bidder is not also the lowest bidder as determined under this section. Further, this section does not permit negotiations with any bidder.
- (7) Nonresident bidders. Pursuant to Chapter 2252, Subchapter A, of the Government Code, as amended, ATP may not award a contract for general construction, improvements, services, or public works projects or purchases of supplies, materials, or equipment to a nonresident bidder unless the nonresident's bid is lower than the lowest bid submitted by a responsible Texas resident bidder by the same amount that a Texas resident bidder would be required to underbid a nonresident bidder to obtain a comparable contract in the state in which the nonresident's principal place of business is located.
  - (a) "Nonresident bidder", for purposes of this section, means a bidder whose principal place of business is not in Texas but excludes a contractor whose ultimate parent company or majority owner has its principal place of business in Texas.
  - (b) "Texas resident bidder", for purposes of this section, means a bidder whose principal place of business is in Texas and includes a contractor whose ultimate parent company or majority owner has its principal place of business in Texas.
  - (b) This subsection (7) does not apply to a contract involving federal funds.

**Section 3-202.14     Low Tie Bids**

- (1) Low 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.
- (2) In accordance with Texas Local Government Code Section 271.901, as amended, award upon receipt of low tie bids will be made by the casting of lots, except as set forth below, and all other bids will be rejected. The process for casting lots shall be administered in a manner proscribed by the Chair of the ATP Board. The casting of lots shall be conducted at an ATP Board meeting open to the public.
- (3) If only one of the businesses submitting low tie bids is a resident of the city of Austin or Project Connect service area, ATP will select that bidder in lieu of casting lots. If two or more businesses submitting low tie bids are residents of the city of Austin or Project Connect service area, ATP will select one of those bidders by the casting of lots.
- (4) Records shall be made of all Invitation for Bids on which tie bids are received showing at least the following information:
  - (a) the identification number of the Invitation for Bids;
  - (b) the property, service, or construction item; and
  - (c) a listing of all the bidders and the prices submitted.

A copy of each such record shall be provided to legal counsel and filed in the Procurement File.

**Section 3-202.15     Award**

- (1) The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids. In the event all bids for a construction project exceed available funds as certified by the appropriate fiscal officer and the low responsive and responsible bid does not exceed such funds by more than five percent, the Executive Director is authorized in situations where time or economic considerations preclude re-solicitation of work of a reduced scope to negotiate an adjustment of the bid price (including changes in the bid requirements) with the low responsive and responsible bidder in order to bring the bid within the amount

of available funds.

- (2) Following award, a record showing the basis for determining the successful bidder shall be made a part of the Procurement File.
- (3) All new contract awards made under this section shall be reported monthly by the Executive Director in a written report to the Board.

### **Section 3-202.16 Publicizing Awards**

Written notice of award shall be sent to the successful bidder. In Procurements over \$50,000, each unsuccessful bidder shall be notified of the award. Notice of the award shall be made available to the public.

### **Section 3-202.17 Multi-Step Competitive Sealed Bidding**

- (1) Multi-step competitive sealed bidding is a two-phase process consisting of a technical first phase composed of one or more steps in which bidders submit unpriced technical offers to be evaluated by ATP ("Phase One") 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 ("Phase Two"). The process 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.
- (2) The multi-step competitive sealed bidding method may 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. Multi-step competitive sealed bidding may be used when it is considered desirable:
  - (a) to invite and evaluate technical offers to determine their acceptability to fulfill the purchase description requirements;
  - (b) to conduct discussions for the purposes of facilitating understanding of the technical offer and purchase description requirements and, where appropriate, obtain supplemental information, permit amendments of technical offers, or amend the purchase description;
  - (c) to accomplish the purposes in subsections (a) and (b), above, prior to soliciting priced bids; and



- (d) to award the contract to the lowest responsive and responsible bidder in accordance with the competitive sealed bidding procedures set out in this Section 3-202 (Competitive Sealed Bidding).

**Section 3-202.18 Pre-Bid Conferences in Multi-Step Competitive Sealed Bidding**

Prior to the submission of unpriced technical offers, a pre-bid conference as contemplated by Section 3-202.07 (Pre-Bid Conferences) may be conducted by the Contracting Officer. The Contracting Officer may also hold a conference of all potential bidders in accordance with Section 3-202.07 at any time during the evaluation of the unpriced technical offers.

**Section 3-202.19 Phase One of Multi-Step Competitive Sealed Bidding**

- (1) Multi-step competitive sealed bidding shall be initiated by the issuance of an Invitation for Bids in the form required by Section 3-202.02 (The Invitation for Bids), except as hereinafter provided. In addition to the requirements set forth in Section 3-202.02, the multi-step Invitation for Bids shall state:
  - (a) that unpriced technical offers are requested;
  - (b) whether priced bids are to be submitted at the same time as technical offers (if they are, such priced bids shall be submitted in a separate sealed envelope);
  - (c) that it is a multi-step competitive sealed bid Procurement and priced bids will be considered only in Phase Two and only from those bidders whose technical offers are found acceptable in Phase One;
  - (d) the criteria to be used in the evaluation of the technical offers;
  - (e) that ATP, to the extent the Contracting Officer finds necessary, may conduct oral or written discussions regarding the technical offers;
  - (f) that bidders may designate those portions of the technical offers which contain trade secrets or other proprietary data which are to remain confidential, subject to the Section 1-401 Public Access to Procurement information), Section 3-202.11 (Receipt, Opening, and Recording of Bids) and the other requirements of this Policy and applicable law; 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.

- (2) After receipt of technical offers, amendments to the Invitation for Bids shall be distributed only to bidders who submitted technical offers, and they shall be permitted to submit new technical offers or to amend those submitted. If, in the opinion of the Contracting Officer, a contemplated amendment will significantly change the nature of the Procurement, the Invitation for Bids shall be cancelled in accordance with Section 3-300 (Cancellation of Solicitations; Rejection of Bids or Proposals) of this Policy and a new Invitation for Bids issued.
- (3) Technical offers shall not be opened publicly but shall be opened in front of two or more ATP employees. Such offers shall not be disclosed to unauthorized persons.
- (4) The technical offers submitted by bidders shall be evaluated solely in accordance with the criteria set forth in the Invitation for Bids. The unpriced technical offers shall be categorized as:
  - (a) acceptable;
  - (b) potentially acceptable (that is, reasonably susceptible of being made acceptable); or
  - (c) unacceptable (the Contracting Officer shall record in writing the basis for finding an offer unacceptable and make it part of the Procurement File).
- (5) The Contracting Officer may conduct discussions with any bidder who submits an acceptable or potentially acceptable technical offer. Discussions shall be conducted in accordance with the provisions of Section 3-203.15(3). 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 (and any price proposal previously submitted) at any time until the closing date established by the Contracting Officer. Such submission may be made at the request of the Contracting Officer or upon the bidder's own initiative.
- (6) The Contracting Officer may initiate "Phase Two" of the multi-step competitive sealed bidding process without technical discussions if, in the Contracting Officer's opinion, there are sufficient acceptable technical offers to ensure effective price competition in Phase Two. If the Contracting Officer finds that such is not the case, the Contracting Officer shall issue an amendment to the Invitation for Bids or engage in technical discussions as set forth below.
- (7) When the Contracting Officer determines a bidder's technical offer to be



unacceptable, such offeror shall be notified and shall not be afforded an additional opportunity to supplement its technical offer.

**Section 3-202.20 Mistakes During Multi-Step Competitive Sealed Bidding**

Mistakes may be corrected or bids may be withdrawn during Phase One at any time. During Phase Two, mistakes may be corrected or withdrawal permitted in accordance with Section 3-202.12 (Mistakes in Bids).

**Section 3-202.21 Phase Two of Multi-Step Competitive Sealed Bidding**

- (1) Upon the completion of Phase One, the Contracting Officer shall either:
  - (a) open the priced bids submitted in Phase One (if priced bids were required to be submitted) from bidders whose unpriced technical offers were found to be acceptable; or
  - (b) if priced 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 priced bid.
- (2) Phase Two shall be conducted as any other competitive sealed bid Procurement except:
  - (a) as specifically set forth in Section 3-202.17 (Multi-Step Competitive Sealed Bidding) through this Section 3-202.21; and
  - (b) no public notice need be given of this invitation to submit priced bids because such notice previously was given.

**Section 3-203 Competitive Sealed Proposals**

**Section 3-203.01 Authority for Use**

When the Contracting Officer determines in writing that the use of competitive sealed bidding is either not practical or not advantageous to ATP, a contract may be entered into by competitive sealed proposals. The provisions of this Section 3-203 apply to every Procurement made by competitive sealed proposals unless otherwise determined by the Contracting Officer, subject to compliance with applicable law and any applicable Federal Requirements.

**Section 3-203.02 Conditions for Use**

- (1) As used in this section, the words "practicable" and "advantageous" are to be

given ordinary dictionary meanings. The term "practicable" denotes what may be accomplished or put into practical application. "Advantageous" connotes a judgmental assessment of what is in ATP's best interest. Competitive sealed bidding may be practicable (that is, reasonably possible) but not necessarily advantageous (that is, in ATP's best interest).

- (2) Competitive sealed bidding is the preferred method of Procurement; however, if it is not practicable, competitive sealed proposals may be used. If competitive sealed bidding is practicable, it may then be considered whether competitive sealed bidding is advantageous. If competitive sealed bidding is determined not to be advantageous, competitive sealed proposals may be used when authorized as provided in this section. The key element in determining advantageousness is the need for flexibility. The competitive sealed proposals method differs from competitive sealed bidding in three important ways:
  - (a) it provides considerably more flexibility in utilizing evaluation factors other than price in source selection;
  - (b) it permits discussions with competing offerors and changes in their proposals, including price; and
  - (c) it allows comparative judgmental evaluations to be made based upon predetermined evaluation criteria when selecting among acceptable proposals for award of the contract.
  
- (3) An important difference between competitive sealed proposals and competitive sealed bidding is the finality of initial offers. Under competitive sealed proposals, alterations in the nature of a proposal, and in prices, may be made after proposals are opened. Such changes are not allowed, however, under competitive sealed bidding (except to the extent allowed in the first phase of multi-step competitive sealed bidding). Therefore, unless it is anticipated that a contract can be awarded solely on the basis of information submitted by bidders at the time of opening, competitive sealed bidding is not practicable or advantageous. Another consideration concerns the type of evaluations needed after offers are received. Where evaluation factors involve the relative abilities of offerors to perform, including degrees of technical or professional experience or expertise, use of competitive sealed proposals is the appropriate Procurement method. Similarly, such method is appropriate where the need to be satisfied involves weighing design and aesthetic values to the extent that price is a secondary consideration. Further, where the types of property, services, or construction may require the use of comparative, judgmental evaluations to evaluate them adequately, use of competitive sealed proposals is the appropriate method.

- (4) Competitive sealed bidding is not practicable unless the nature of the Procurement permits award to a low bidder who agrees by its 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:
  - (a) whether the contract needs to be other than a fixed-price type;
  - (b) whether oral or written discussions may need to be conducted with offerors concerning the technical and price aspects of their proposals;
  - (c) whether offerors may need to be afforded the opportunity to revise their proposals, including price;
  - (d) whether award may need to be based upon 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 ATP. Quality factors include technical and performance capability and the content of the technical proposal; and
  - (e) whether the primary consideration in determining award may not be price.
- (5) A determination may be made to use competitive sealed proposals if it is determined that it is not advantageous to ATP (even though practicable) to use competitive sealed bidding. 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 ATP; and
  - (b) whether the factors listed in subsections 4(b) through (e), above, are desirable in conducting a Procurement rather than necessary; if they are, then such factors may be used to support a determination that competitive sealed bidding is not advantageous.
- (6) When the Procurement Director has determined in writing, in accordance with Section 3- 305(3), that the use of negotiation after cancellation of an Invitation for Bids is appropriate, the Contracting Officer may negotiate and make award without initiating a new Procurement, provided the negotiated price is the lowest price offered by any responsible offeror. If the negotiation is unsuccessful, the Contracting Officer shall reestablish the Procurement as a Request for Proposals, and ensure that each bidder that submitted a bid in response to the Invitation for Bids is given the opportunity to participate.

### **Section 3-203.03 Determination of Categories**

The determinations required by this section for the use of competitive sealed proposals may be made by category of property, service, or construction item that it is either not practicable or not advantageous to ATP to procure specified types of property, services, or construction by competitive sealed bidding. Procurements of the specified types of property, services, or construction then may be made by competitive sealed proposals based upon such determination. The officer 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.

### **Section 3-203.04 Content of the Request for Proposals**

The Request for Proposals shall be prepared in accordance with Section 3-202.02 (The Invitation for Bids) provided that it shall also include:

- (1) a statement that discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award but that proposals may be accepted without such discussions; and
- (2) a statement of when and how price proposals should be submitted.

### **Section 3-203.05 Proposal Preparation Time**

Proposal preparation time is the period of time between the date of distribution of the Request for Proposals and the time and date set for receipt of Proposals. Proposal preparation time shall be set to provide offerors sufficient time to prepare their proposals. A minimum of 21 days shall be provided unless a shorter time is deemed necessary for a particular Procurement as determined in writing by the Contracting Officer.

### **Section 3-203.06 Form of Proposal**

The manner in which proposals are to be submitted, including any forms for that purpose, shall be designated as a part of the Request for Proposals.

### **Section 3-203.07 Public Notice**

Public notice shall be given by advertising and by distributing the Request for Proposals in the same manner as provided for Invitation for Bids under Section 3-202.05 (Public Notice).

### **Section 3-203.08 Use of Bidders List**



ATP does not maintain a bidders list.

### **Section 3-203.09 Pre-Proposal Conferences**

Pre-proposal conferences may be conducted in accordance with Section 3-202.07 (Pre-Bid Conferences). Any such conference should be held prior to submission of initial proposals.

### **Section 3-203.10 Amendments to Requests for Proposals**

Amendments to Requests for Proposals may be made in accordance with Section 3-202.08 (Amendments to Invitations for Bids) prior to submission of proposals. After submission of proposals, amendments may be made in accordance with Section 3-202.19 (Phase One of Multi- Step Competitive Sealed Bidding).

### **Section 3-203.11 Modification or Withdrawal of Proposals**

Proposals may be modified or withdrawn prior to the established due date in accordance with Section 3-202.09 (Pre-Opening Modification or Withdrawal of Bids). For the purposes of this section and Section 3-203.12 (Late Proposals, Withdrawals, and Modifications), the established due date is either the time and date announced for receipt of proposals or receipt of modifications to proposals, if any; or if discussions have begun, it is the time and date by which best and final offers must be submitted; provided, that only offerors who submitted proposals by the time announced for receipt of proposals may submit best and final offers.

### **Section 3-203.12 Late Proposals, Withdrawals, and Modifications**

Any proposal, withdrawal, or modification received after the established due date at the place designated for receipt of proposals is late. See Section 3-203.11 (Modification or Withdrawal of Proposals) for the definition of "established due date." They may be considered only in accordance with Section 3-202.10 (Late Bids, Withdrawals, and Modifications).

### **Section 3-203.13 Receipt and Registration of Proposals**

Proposals and modifications shall be time-stamped upon receipt and held in a secure place until the established due date. After the date established for receipt of proposals, a Register of Proposals shall be prepared which shall include for all proposals the name of each offeror, the number of modifications received, if any, and a description sufficient to identify the property, service, or construction item offered. The Register of Proposals shall be open to public inspection only after award of the contract. Proposals shall not be opened publicly but shall be opened in the presence of two or more ATP representatives. Proposals and modifications shall be shown only to ATP



personnel, consultants, advisors, or other persons having a legitimate interest in them.

**Section 3-203.14 Evaluation of Proposals**

- (1) The Request for Proposals shall state all of the evaluation factors, including price, and their relative importance.
- (2) The evaluation shall be based on the evaluation factors set forth in the Request for Proposals. Numerical rating systems are encouraged but are not required. If a numerical rating system is used, however, it shall be set forth in the Request for Proposals. Factors not specified in the Request for Proposals shall not be considered.
- (3) Offerors whose proposals are unacceptable shall be so notified promptly.

**Section 3-203.15 Proposal Discussions with Individual Offerors**

- (1) For the purposes of this section, the term "offerors" includes only those businesses submitting proposals that are acceptable or potentially acceptable. The term shall not include businesses who submitted unacceptable proposals.
- (2) Discussions are held with offerors in order to:
  - (a) promote understanding of ATP's requirements and the offerors' proposals; and
  - (b) facilitate arriving at a contract that will be most advantageous to ATP taking into consideration price and the other evaluation factors set forth in the Request for Proposals.
- (3) Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. The Contracting Officer should establish procedures and schedules for conducting discussions. Those aspects of proposals which are unclear, improperly substantiated, or fail to meet the requirements of the solicitation must be discussed with offerors. If during discussions there is a need for any substantial clarification of or change in the Request for Proposals, the Request shall be amended to incorporate such clarification or change. Any substantial oral clarification of a proposal shall be reduced to writing by the offeror. In conducting discussions, the Contracting Officer and other ATP representatives involved shall not engage in :
  - (a) technical leveling (i.e., helping offerors to improve their proposals through successive rounds of discussions that point out those weaknesses that are the offeror's sole responsibility or conducting discussions which eliminate the technical discrimination necessary for source selection so



that price, however weighted, assumes disproportionate importance);

- (b) technical transfusion (i.e., ATP's disclosure of technical information pertaining to a proposal that results in improvement of a competing proposal); or
  - (c) auction techniques, such as :
    - (i) indicating to an offeror a cost or price that it must meet in order to obtain further consideration;
    - (ii) advising an offeror of its price standing relative to another offeror (however, it is permissible to inform an offeror that its cost or price is considered by ATP to be too high or unrealistic); and
    - (iii) otherwise furnishing information about other offerors' Proposals, including prices.
- (4) The Contracting Officer shall establish a common date and time for the submission of best and final offers. To the extent practicable, best and final offers shall be submitted only once. However, the Executive Director may make a written determination that it is in ATP's best interest to conduct additional discussions or change ATP's requirements and require another submission of best and final offers. Otherwise, no discussion of or changes in the best and final offers shall be allowed prior to award. Offerors also shall be informed that, if they do not submit a notice of withdrawal or another best and final offer, their most recent offer will be construed as their best and final offer.

**Section 3-203.16 Mistakes in Proposals**

- (1) Proposals may be modified or withdrawn as provided in Section 3-203.11 (Modification or Withdrawal of Proposals).
- (2) When the Contracting Officer knows or has reason to conclude before award that a mistake has been made, the offeror should be requested to confirm the proposal. If the offeror alleges mistake, the proposal may be corrected or withdrawn during any discussions that are held or if the conditions set forth in subsections (3) through (5), below, are met.
- (3) This subsection sets forth procedures to be applied in four situations in which mistakes in proposals are discovered after receipt of proposals but before award.
  - (a) Once discussions are commenced with any offeror or after best and final offers are requested, any offeror may freely correct any mistake by

modifying or withdrawing the proposal until the time and date set for receipt of best and final offers.

- (b) Minor informalities, unless otherwise corrected by an offeror as provided in this section, shall be treated as they are under competitive sealed bidding. See Section 3-202.12 (Mistakes in Bids).
- (c) If discussions are not held, or if the best and final offers upon which award will be made have been received, mistakes may be corrected and the intended correct offer considered only if:
  - (i) the mistake and the intended correct offer are clearly evident on the face of the proposal; in which event the proposal may not be withdrawn; or
  - (ii) the mistake is not clearly evident on the face of the proposal, but the offeror submits proof which clearly and convincingly demonstrates both the existence of a mistake and the intended correct offer, and such correction would not displace another offeror or otherwise be contrary to the fair and equal treatment of other offerors.
- (d) If discussions are not held, or if the best and final offers upon which award will be made have been received, the offeror may be permitted to withdraw the proposal if:
  - (i) the mistake is clearly evident on the face of the proposal and the intended correct offer is not;
  - (ii) the offeror submits proof which clearly and convincingly demonstrates that a mistake was made but does not demonstrate the intended correct offer; or
  - (iii) the offeror submits proof which clearly and convincingly demonstrates the intended correct offer, but to allow correction would be contrary to the fair and equal treatment of the other offerors.
- (4) Mistakes shall not be corrected after award of the contract except where the Procurement Director finds it would be unconscionable not to allow the mistake to be corrected.
- (5) When a proposal is corrected or withdrawn, or correction or withdrawal is



denied under this subsection, the Contracting Officer shall prepare a written determination to be kept on the Procurement File showing that the relief was granted or denied in accordance with this Policy.

**Section 3-203.17 Award**

- (1) Award shall be made to the responsible offeror whose proposal is determined by the Contracting Officer in writing to be the most advantageous to ATP taking into consideration the price and evaluation factors set forth in the Request for Proposals.
  - (a) Debriefing of Unsuccessful Offerors. When requested by an unsuccessful offeror, ATP will provide a debriefing following contract award utilizing the evaluation matrix, documentation of scoring process, and the narrative appraisal describing the strengths and weaknesses as basis for the debriefing discussion. ATP may elect to conduct the debriefing in writing only or in person. When a DBE or other small or minority business firm requests a debriefing, the DEI Director may be invited to participate in the debriefing.
- (2) All new contract awards made under this section shall be reported monthly by the Executive Director in a written report to the Board.

**Section 3-203.18 Publicizing Awards**

After a contract is entered into, notice of award shall be made available to the public. When the award exceeds \$50,000, each unsuccessful offeror shall be notified of the award.

**Section 3-204 Micro and Small Purchases**

**Micro Purchases**

Micro purchases, including delivery charges, may be accomplished without securing competitive quotations if the prices are considered to be fair and reasonable. The Federal micro-purchase threshold is set by 41 U.S.C. § 1902. The relevant department is required to submit previous purchase information and the purchase order number for similar, previous purchases in order to document rotation. The Procurement Department is not obligated to purchase from the department's suggested source if the price is not considered fair and reasonable. Micro purchases made under the Purchasing Card (PCard) Program are not excluded from the need for rotation.



Dividing a purchase requirement with the intent of avoiding the Federal micro-purchase threshold, competition requirement, or other dollar thresholds is considered bid-splitting and is therefore prohibited.

**NOTE:** Micro-purchase procedures must not be used for construction contracts with a value of \$2,000.00 or more.

### **Section 3-204.01 Authority to Make Small Purchases**

- (1) Small purchase procedures may be used for the Procurement of property, services, or construction valued at more than the Federal micro-purchase threshold, but less than the Federal simplified acquisition threshold at 41 U.S.C Section 403(11). Property, services, or construction items valued at less than the Federal micro-purchase threshold which may be obtained under current ATP contracts shall be procured under such agreements in accordance with the terms of such contracts if the Contracting Officer determines that this is in the best interests of ATP. The Contracting Officer may prescribe solicitation provisions, contract clauses, and purchase order forms for small purchases made under authority of this section.
- (2) If the property, service, or construction item is available from only one business, Sole Source Procurement Section 3-205.02 and Section 3-205.03 of the Procurement Policy and Guidelines shall be used. A record of the sole source Procurement shall be maintained along with the small purchase file which sets forth in writing that the conditions for use have been satisfied.
- (3) Procurement requirements shall not be artificially divided to avoid using the other source selection methods set forth in the Procurement Policy and Guidelines.
- (4) Other sections of this Chapter 3 may be used if determined by the Contracting Officer to be in ATP's best interest.
- (5) Where in the Policy and Guidelines written determinations are required, if the small purchases method of Procurement is being utilized, these requirements shall be considered satisfied by execution of the purchasing instrument by the Contracting Officer. In all cases a record shall be maintained along with the small purchase Procurement File which sets forth in writing the rationale for the determination(s).

### **Section 3-204.02 Competition for Small Purchases**

- (1) Businesses shall be solicited to submit written quotations or oral quotations that are recorded and placed in the Procurement File. The names of the

businesses submitting quotations and the date and amount of each quotation shall be recorded and maintained as a public record.

- (2) Insofar as it is practical for small purchases, no less than three (3) businesses shall be solicited to submit quotations, if it is expected that the required property, services or construction cannot be procured for \$10,000 or less. Award shall be made to the business offering the lowest acceptable quotation.
- (3) Small purchases not exceeding \$10,000 may be accomplished without securing competitive quotations if the prices quoted are considered by the Contracting Officer to be fair and reasonable. Such purchases shall be distributed equitably among qualified businesses. When practical, a quotation shall be solicited from other than the previous supplier prior to placing a repeat order. The administrative cost of verifying the fairness and reasonableness of the price of a purchase not exceeding \$10,000 may more than offset potential savings from detecting instances of overpricing. Therefore, action to verify that prices submitted are fair and reasonable need to be taken only when:
  - (a) the Contracting Officer suspects or has information (i.e., comparison to previous prices paid or personal knowledge of the item involved) to indicate that the price may not be fair and reasonable; or
  - (b) purchasing an item for which no comparable pricing information is readily available (i.e., an item that is not the same as, or is not similar to, other items that have been recently purchased on a competitive basis).

### **Section 3-204.03 Small Purchases of Professional Services**

- (1) If it is expected that the services of accountants, architects, engineers, or land surveyors can be procured for \$50,000 or less, the methods specified in this subsection may be used in lieu of the procedure specified in Section 3-207 (Statutory Professional Services) and in Section 5-500 (Architect-Engineer and Land Surveying Services) of the Policy and Guidelines.
- (2) Before contacting any person to perform the required services, the Contracting Officer shall examine any current statements of qualifications on file with ATP. Based on this examination, the Contracting Officer shall contact the most competent and qualified firm and attempt to negotiate a contract for the required services at a fair and reasonable price. If no current statements of qualifications are on file or the statements on file are inadequate to determine the most competent and qualified firm, technical

proposals or statements of qualifications shall be solicited. A minimum of three firms shall be considered unless there are only one or two qualified firms; in the latter case, the Contracting Officer shall make a written determination justifying the consideration of only one or two firms. A price or fee shall not be solicited until the most competent and qualified firm is chosen, and only the most competent and qualified firm will be requested to submit a price. If, after negotiations, a fair and reasonable price cannot be agreed to, negotiations will be terminated with such firm and negotiations begun with the next most competent and qualified firm. The process shall continue until a contract can be negotiated at a fair and reasonable price to ATP.

### **Section 3-205 Sole Source Procurement**

#### **Section 3-205.01 General Authority**

A contract for property, services, or construction may be awarded without competition when a Contracting Officer above the level of the procuring Contracting Officer determines in writing that the conditions for use set forth in this section have been satisfied.

#### **Section 3-205.02 Conditions for Use**

Sole source Procurement is permissible only under the following conditions. In cases of reasonable doubt, competition should be solicited.

- (1) The contract is for construction and:
  - (a) no bid or proposal is received and there is no time for re-solicitation or re-solicitation likely would be futile, or
  - (b) only one bid or proposal is received and an appropriate determination has been made under Section 3-104 (Only One Bid or Proposal Received).
- (2) the contract is for services or supplies for which there is only one responsible source. Examples include but not limited to:
  - (a) the existence of patent rights, copyrights, secret processes, or similar circumstances which have precluded more than one supplier;
  - (b) where the compatibility of equipment, accessories, or replacement parts is the paramount consideration and there is no assurance that other supplies will perform the same function;

- (c) where a sole Supplier's item is needed for trial use or testing or is being procured for resale; or
  - (d) the Procurement of public utility services.
- (3) The contract is for services or property for which it is impracticable to obtain competition. Examples include:
- (a) bids or proposals have been solicited and no responsive bid or proposal has been received from a responsible bidder or offeror;
  - (b) only one bid or proposal is received and an appropriate determination has been made under Section 3-104 (Only One Bid or Proposal Received);
  - (c) the contract is for maintenance, repairs, or inspections where the exact nature or amount is not known;
  - (d) it is impossible to draft an adequate specification or statement of work;
  - (e) ATP will be reimbursed for the Procurement by a third party who requires the use of a particular source;

**Section 3-205.03 Negotiation**

The Contracting Officer shall conduct negotiations, as appropriate, as to price, delivery, and terms.

**Section 3-205.04 Record of Sole Source Procurement**

A record of sole source Procurements shall be maintained that lists:

- (1) each contractor's name;
- (2) the amount and type of each contract;
- (3) the property, services, or construction procured under each contract; and
- (4) the identification number of each contract file.

The record of sole source Procurements shall be submitted quarterly by the Executive Director in a written report to the Board.

## **Section 3-206      Emergency Procurements**

### **Section 3-206.01    General Authority**

Subject to Section 2-101 and notwithstanding any other provision of the Procurement Policy and Guidelines, the Procurement Director or his Designee may make or authorize others to make Procurements in emergency conditions for which the public exigency will not permit the delay incident to competition.

### **Section 3-206.02    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 accidents, fires, floods, riots, or equipment failures. The existence of such condition creates an immediate and serious need for property, services, or construction that cannot be met through normal Procurement methods and the lack of which would seriously threaten:

- (1) the functioning of ATP's operations;
- (2) the preservation or protection of property; or
- (3) the health or safety of any person.

### **Section 3-206.03    Scope of Emergency Procurements**

Emergency Procurements shall be limited to the property, services, or construction items necessary to meet the emergency.

### **Section 3-206.04    Source Selection Methods**

- (1) The procedure used shall be selected to ensure that the required property, services, or construction items are procured in time to meet the emergency. Given this constraint, such competition as is practicable shall be obtained.
- (2) Competitive Procurement is unsuccessful when bids or proposals received are unreasonable, noncompetitive, or exceed available funds as certified by the appropriate fiscal officer, and time or other circumstances will not permit the delay required to resolicit competitive sealed bids or proposals. If emergency conditions exist after an unsuccessful attempt to use competitive Procurement methods, an emergency Procurement may be made.

### **Section 3-206.05    Determination and Record of Emergency Procurements**



The Contracting Officer or ATP official responsible for Procurement shall make a written determination stating the basis for an emergency Procurement and for the selection of the particular contractor. A record of each emergency Procurement shall be made as soon as practicable and shall set forth:

- (1) the contractor's name;
- (2) the amount and type of the contract;
- (3) a listing of the property, services, or construction procured under the contract; and
- (4) the identification number of the contract file;
- (5) for federally funded Procurements, if a sole source selection procedure is selected, ATP's sole source justification adequately recording its decision in light of the standards in this Section 3-205 and the Federal Requirements; and
- (6) for federally funded Procurements, the Cost Analysis conducted verifying the proposed cost data, the projections of the data and the evaluation of the costs and profits.

The record of emergency Procurements shall be submitted monthly by the Executive Director in a written report to the Board.

**Section 3-206.06 Non-Procurement Purchases**

There are instances where goods or services are not processed through the Procurement Department; however, the Procurement Department may set up contract purchase agreements for these goods or services to track expenditures as required. Contract purchase agreements may be set up to track funding for any type of income or expense agreement.

Certain expenses are routinely incurred without the issuance of formal purchasing documents.

Expenses that may fall into the category of non-Procurement purchases may include:

- (a) Payroll account reimbursement, tax withholding payments, and all associated benefit payments.
- (b) Claim settlements.
- (c) Real property settlements and Escrow payments.

- (d) Periodic vendor payments under established leases.
- (e) Licenses and permits.
- (f) Subscriptions and publications.
- (g) Conference and seminar registration fees.
- (h) Training
- (i) Organizational and professional membership dues.
- (j) Refunds (return of bid deposits, overpayment of bus passes, etc.)
- (k) Reimbursement of petty cash.
- (l) Freight bills and/or courier service.
- (m) Official ATP newspaper advertisements by marketing.
- (n) Community Relations, Personnel Service Agreements.
- (o) Travel advances and employee reimbursements.
- (p) Replenishment of postage meters.
- (r) Interlocal Agreements
- (s) Utilities
- (t) Insurance Premiums

**Section 3-207 Statutory Professional Services**

**Section 3-207.01 Definitions**

- (1) The phrase "Statutory Professional Services" shall mean those professional services within the scope of the practice of accounting, architecture (excluding landscape architecture), optometry, medicine, or professional engineering as defined by the laws of the State of Texas or those performed by any licensed architect, optometrist, physician, surgeon, certified public accountant, or professional engineer in connection with his professional employment or practice.
- (2) The "Texas Professional Services Procurement Act" shall mean Chapter 2254, Subchapter A, of the Government Code, as amended.



### **Section 3-207.02 Application**

The provisions of this section apply to the Procurement of Statutory Professional Services which, under the Texas Professional Services Procurement Act, may not be obtained by ATP on the basis of competitive bids; provided, however, that architect-engineer services shall be obtained under Section 5-500 (Architect-Engineer and Land Surveying Services). Contracts for Statutory Professional Services must be awarded on the basis of demonstrated competence and qualifications for such services and at fair and reasonable prices as long as professional fees are consistent with and not higher than any published recommended practices and fees of the applicable professional association and do not exceed any maximum provided by Texas law.

### **Section 3-207.03 Requirement for Competitive Selection**

Except as authorized under Section 3-205 (Sole Source Procurement) or Section 3-206 (Emergency Procurements), the competitive selection procedures of this section shall be used for all Procurements of Statutory Professional Services in excess of \$50,000. Any Procurement of such services not in excess of this amount may be procured in accordance with Section 3-204 (Small Purchases).

### **Section 3-207.04 Statement of Qualifications**

When Statutory Professional Services are needed on a recurring basis, the Contracting Officer shall actively solicit persons engaged in providing such services to submit annual statements of qualifications in a prescribed format which shall include the following information:

- (1) technical education and training;
- (2) general or special experience, certifications, licenses, and memberships in professional associations, societies, or boards;
- (3) an expression of interest in providing a particular Statutory Professional Service; and
- (4) any other pertinent information requested by the Contracting Officer.

Persons may amend statements of qualifications at any time by filing a new statement.

### **Section 3-207.05 Public Notice**

Notice of the need for Statutory Professional Services shall be made by the Contracting Officer in the form of a Request for Proposals or Qualifications at least 21 days before the proposals are due. Adequate public notice shall be given as provided in Section



3-202.05 (Public Notice) and, additionally, shall consist of distributing Requests for Proposals to persons interested in performing the services required by the proposed Contract.

**Section 3-207.06 Request for Proposals or Qualifications**

The Request for Proposals or Qualifications shall be in the form specified by the Contracting Officer and contain at least the following information:

- (1) the type of services required;
- (2) a description of the work involved;
- (3) an estimate of when and for how long the services will be required;
- (4) the type of contract to be used;
- (5) a date by which proposals or responses for the performance of the services shall be submitted;
- (6) a statement that the proposals or responses shall be in writing;
- (7) a statement that offerors may designate those portions of the proposals or responses which contain trade secrets or other proprietary data which may remain confidential, subject to Section 1-401 (Public Access to Procurement Information) and the other provisions of this Policy and applicable law;
- (8) a statement of the minimum information that the proposals or response shall contain, including:
  - (a) the name of the proposer or respondent, the location of the proposer's or respondent's principal place of business and, if different, the place of performance of the proposed contract;
  - (b) if deemed relevant by the Contracting Officer, the age of the offeror's business and average number of employees over a previous period of time, as specified in the Request for Proposals or Qualifications;
  - (c) the abilities, qualifications, and experience of all persons who would be assigned to provide the required services;
  - (d) a listing of other contracts under which services similar in scope, size, or discipline to the required services were performed or undertaken within

a previous period of time, as specified in the Request for Proposals or Qualifications; and

- (e) a plan giving as much detail as is practical explaining how the services will be performed;
  - (f) the professional fees proposed for the services to be provided; and
- (9) the factors to be used in the evaluation and selection process and their relative importance.

**Section 3-207.07 Evaluation Factors**

Proposals shall be evaluated only on the basis of evaluation factors stated in the Request for Proposals or Qualifications. The relative importance of these and other factors will vary according to the type of services being procured. The following factors may be appropriate to use in conducting the evaluation:

- (1) the plan for performing the required services;
- (2) ability to perform the services as reflected by technical training and education, general experience, specific experience in providing the required services, and the qualifications and abilities of personnel proposed to be assigned to perform the services;
- (3) the personnel, equipment, and facilities to perform the services currently available or demonstrated to be made available at the time of contracting;
- (4) a record of past performance of similar work; and
- (5) the fairness and reasonableness of the proposed fees.

**Section 3-207.08 Pre-Proposal Conferences**

Pre-submittal conferences, as appropriate, may be conducted in accordance with Section 3-202.07 (Pre-Bid Conferences). Such a conferences may be held any time prior to the date established for submission of proposals or responses.

**Section 3-207.09 Receipt and Handling of Proposals or Responses**

- (1) Proposals or responses and modifications shall be time-stamped upon receipt and held in a secure place until the established due date. Proposals or responses shall not be opened publicly or disclosed to unauthorized persons but shall be opened in the presence of two or more ATP representatives. A Register of Proposals or

Responses shall be established which shall include for all proposals the name of each offeror, the number of modifications received, if any, and a description sufficient to identify the services offered. The Register of Proposals or Responses shall be open to public inspection only after award of the contract.

**Section 3-207.10 Discussions**

- (1) The Contracting Officer or their Designee shall evaluate all proposals or responses submitted and may conduct discussions with any proposer or respondent. The purposes of such discussions shall be to:
  - (a) determine in greater detail such offeror's competence and qualifications; and;
  - (b) explore with the offeror the scope and nature of the required services, the offeror's proposed method of performance, and the relative utility of alternative methods of approach.
- (2) Discussions shall not disclose any information derived from proposals or responses submitted by other proposals or respondents, and ATP shall not disclose any information contained in any proposals or responses until after award of the proposed contract has been made. The proposal of the offeror awarded the contract shall be open to public inspection except as otherwise provided in the contract.
- (3) Proposals or responses may be modified or withdrawn at any time prior to the conclusion of discussions.

**Section 3-207.11 Selection of the Best Qualified Offerors**

After conclusion of validation of qualifications, evaluation, and discussions, the Contracting Officer shall select, in the order of their respective ranking, no fewer than three acceptable offerors (or such lesser number if less than three acceptable proposals were received) whose proposals to provide the required services have received the highest evaluation scores.

**Section 3-207.12 Negotiation and Award of Contract**

- (1) The Contracting Officer shall negotiate a contract with the highest evaluated proposer or respondent for the required services at compensation determined in writing to be fair and reasonable.
- (2) Contract negotiations shall be directed toward:
  - (a) making certain that the proposer or respondent has a clear understanding

of the scope of the work, specifically the essential requirements involved in providing the required services;

- (b) determining that the proposer or respondent will make available the necessary personnel and facilities to perform the services within the required time; and
  - (c) agreeing upon compensation, which is fair and reasonable, taking into account the estimated value of the required services and the scope, complexity, and nature of such services.
- (3) If compensation, contract requirements, and contract documents can be agreed upon with the highest evaluated proposer or respondent, the contract shall be awarded to that proposer or respondent.
  - (4) If compensation, contract requirements, or contract documents cannot be agreed upon with the highest evaluated proposer or respondent, a written record stating the reasons therefor shall be placed in the Procurement File, and the Contracting Officer shall advise such proposer or respondent of the termination of negotiations, which shall be confirmed by written notice.
  - (5) Upon failure to negotiate a contract with the highest evaluated proposer or respondent, the Contracting Officer may enter into negotiations with the next highest evaluated proposer or respondent. If compensation, contract requirements, and contract documents can be agreed upon, then the contract shall be awarded to that proposer or respondent. If negotiations again fail, negotiations shall be terminated as provided in subsection (4), above, and commenced with the next highest evaluated proposer or respondent.
  - (6) Written notice of award shall be public information and made a part of the Procurement File.
  - (7) Should the Contracting Officer be unable to negotiate a contract with any of the proposers or respondents initially selected, offers may be resolicited or additional proposers or respondents may be selected based on original, acceptable submissions in the order of their respective evaluation ranking and negotiations may continue in accordance with subsections (4) and (5), above, until an agreement is reached and the contract awarded.

**Section 3-207.13 Memorandum of Evaluation and Negotiation**

At the conclusion of negotiations resulting in the award of the contract, the Contracting Officer shall prepare a memorandum setting forth the bases of award, including:

- (1) how the evaluation factors stated in the Request for Proposals or Qualifications were applied to determine the highest evaluated proposers or respondents; and
- (2) the principal elements of the negotiations, including the significant considerations relating to price and the other terms of the contract.

All memoranda shall be included in the Procurement File.

### **Section 3-208 Goods/Services Exempted from Procurement Department Process**

#### **Certain Recurring Payment Process**

Recurring payment forms for interlocal agreements (ILAs), memorandum of understanding, and other items/services on the below list are exempt from the Procurement process and as such do not require approval from the Procurement Department. However, the recurring payment forms for these Procurement-exempt items/services will require approval by either the Controller or Treasurer and the Chief Financial Officer. All other recurring payment forms for items/services not expressly address in this Policy will follow the regular payment set-up process and will need to go through the Procurement Department for approval.

#### **Employee/Benefits-Related**

1. Professional Licenses/Dues/Memberships/Association Fees.
2. Conference/seminar registrations.
3. Employee travel expense reimbursements.
4. Commercially available off-site training (training offered to the general public at published price lists). Where training exceeds \$25,000, pre-review by Procurement is required.
5. Unemployment fees to Texas Workforce Commission.
6. Employee deductions (Employee payroll taxes, EAC, union dues, etc.).
7. Pension disbursements.
8. Workers' Compensation, and Health Insurance claims payments made by Third Party Administrators (TPAs); TPA fees must be paid through a contract/Purchase Order (PO).





### **Agency-Related**

9. Books, periodicals, and subscription services.
10. US Postal Service fees/services only (UPS, FedEx, DHL, or other courier/delivery services must go through Procurement).
11. Owner Controlled Insurance Program (OCIP) made by Third Party Administrators (TPAs): TPA fees must be paid through a contract/PO.
12. City-owned Utilities
13. Board Member fees/reimbursements.
14. Federal, state, and local tax payments (real estate, city, payroll, sales etc.).
15. Patron refunds.
16. State of Texas decals, registrations, licensing, etc.
17. Claim settlements (excluding contract settlements on claims), Board Resolution number must be cited.
18. Host-Agency disbursements (TFLEEx, SWTA, WTX, etc.)
19. Agencywide Memberships (COMTO, WTS, etc., and APTA-related programs (i.e., bus and rail safety programs)

### **Finance Department**

20. Debt financing costs: rating agencies, commercial paper dealers, and liquidity banks.
21. Investments

### **Legal Department**

22. Legal Services
23. Outside Counsel Fees.

### **Real Estate Division**

24. Real estate acquisitions, leases, individual/business/utility relocations.

25. Business and individual relocation expense (due to real estate acquisitions).

26. Utilities: water and utilities associated with real estate acquisitions.

### **Section 3-209      Unauthorized Procurement Actions**

ATP will not be bound by unauthorized Procurement actions.

When is a Procurement Action is Unauthorized?

When persons without Procurement authority direct, instruct, order, or request a person to do something for, or on behalf of, ATP without a purchase order, contract, contract modification, or formal Change Order, they may be engaging in an unauthorized Procurement action. Additionally, when persons with Procurement authority act outside the established limits of their authority, they may be engaging in an unauthorized Procurement action.

### **Examples of Unauthorized Procurement Actions**

Unauthorized Procurement actions may include, but are not limited to, the following:

- (a) The outright purchase of an item by an Employee outside the Procurement Department;
- (b) Placing orders against expired contracts, blanket purchase agreements, or blanket purchase orders;
- (c) Placing orders in excess of the “not-to-exceed” value of a variable-quantity contract, blanket purchase agreement or blanket purchase order;
- (d) Directing changes to the scope of the contractor’s work under a contract without express, written, or delegated authority. These changes could be in the form of:
  - (1) requiring additional work.
  - (2) deleting work.
  - (3) requesting quantities in excess of or less than those specified.
  - (4) “trading-off” item A for item B.
  - (5) changes to the contractual terms and conditions.

- (6) requiring acceleration or deceleration of the work schedule;
  - (7) promising to pay sooner than called for in the contract;
  - (8) promising to pay more than the specified amounts.
- (e) Directing or permitting changes to the nature or quality of the goods, services or construction. These changes could be in the form of:
- (1) Directing the vendor to perform work outside of the original intent of the contract.
  - (2) Allowing substitutions of brand-named items other than those specified in the agreement.

### **Potential Outcomes for an Unauthorized Procurement Action**

An unauthorized Procurement action may result in:

- (a) Personal liability to ATP from the employee authorizing the action;
- (b) Personal liability to the vendor from the employee authorizing the action;
- (c) The vendor absorbing any losses; or
- (d) ATP ratification of the unauthorized Procurement action.
  - (1) The Executive Director or his/her Designee may approve or ratify unauthorized Procurement actions that are less than \$50,000.
  - (2) All other unauthorized Procurement actions may be approved or ratified only by the consent of the Board of Directors.

### **Addressing the Financial Impact of the Unauthorized Procurement Actions**

The Executive Director may take action to address the financial impact of the unauthorized action.

### **The Department**

The Executive Director may reduce the subject department's budget by the amount of the unauthorized Procurement action if the action involves an amount exceeding ATP's micro-purchase threshold.



## **The Employee**

The Executive Director may determine that an employee that made an unauthorized Procurement action should be required to pay ATP for the costs ATP has or will incur as a result of the unauthorized action.

## **Corrective or Disciplinary Action Against the Employee**

In the event of an unauthorized Procurement action, ATP may initiate corrective or disciplinary action against the Employee charged with undertaking the unauthorized Procurement action, up to and including termination. The severity of the disciplinary action shall be commensurate with the severity of the unauthorized Procurement action. Prior to taking an action against the Employee, the Employee's supervisor shall consult with the Procurement Director in assessing the severity of the unauthorized action and the Director of Human Resources for compliance with applicable disciplinary policies. Factors to be considered in determining the severity of the action taken and the appropriate disciplinary action include, but are not limited to:

- (a) The dollar value of the adverse effect of the action;
- (b) Whether this is the first unauthorized Procurement action of the Employee;
- (c) Whether the action was knowing or unintentional;
- (d) Whether the action subjected the ATP to operational or financial risk, and;
- (e) Reputational impact of the action or creation of an appearance of conflict of interest

### **Section 3-300 Cancellation of Solicitations; Rejection of Bids or Proposals**

#### **Section 3-301 Application**

The provisions of this section shall govern the cancellation of any solicitations whether issued by ATP 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.

#### **Section 3-302 Policy on Issuing Solicitations**

Solicitations should be issued only when there is a valid Procurement need, unless the solicitation states that it is for informational purposes only. Preparing and distributing a



solicitation requires the expenditure of ATP's time and funds. Businesses likewise incur expense in examining and responding to solicitations. Therefore, although issuance of a solicitation does not compel award of a contract, a solicitation is to be cancelled only when there are cogent and compelling reasons to believe that the cancellation of the solicitation is in ATP's best interest.

**Section 3-303 Cancellation of Solicitation - Notice**

Each solicitation issued by ATP shall state that ATP reserves its right to cancel the solicitation or reject all bids or offers as provided in this section.

**Section 3-304 Cancellation Prior to Opening**

- (1) As used in this section, "opening" means the date set for opening of bids, receipt of unpriced technical offers in multi-step sealed bidding, or receipt of proposals in competitive sealed proposals.
- (2) Prior to opening, a solicitation may be cancelled in whole or in part when the Contracting Officer determines in writing that such action is in ATP's best interest for reasons including, but not limited to, the fact that:
  - (a) ATP no longer requires the property, services, or construction;
  - (b) ATP no longer can reasonably expect to fund the Procurement; or
  - (c) proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable.
- (3) When a solicitation is cancelled prior to opening, notice of cancellation shall be sent to all businesses solicited. The notice of cancellation shall:
  - (a) identify the solicitation;
  - (b) briefly explain the reason for cancellation; and
  - (c) where appropriate, explain that an opportunity will be given to compete on any resolicitation or any future Procurements of similar supplies, services, or construction.

**Section 3-305 Cancellation After Opening**

- (1) After opening but prior to award, all bids or proposals may be rejected in whole or in part when the Contracting Officer determines in writing that such action is in ATP's best interest for reasons including, but not limited to, the following:

- (a) the construction, property, or services being procured are no longer required;
  - (b) ambiguous or otherwise inadequate specifications were part of the solicitation;
  - (c) the solicitation did not provide for consideration of all factors of significance to ATP;
  - (d) prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
  - (e) all otherwise acceptable bids or proposals received are at clearly unreasonable prices;
  - (f) 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; or
  - (g) no responsive bid has been received from a bidder.
- (2) A notice of rejection should be sent to all businesses that submitted bids or proposals, and it shall conform to Section 3-304(3), above.
- (3) If the Invitation for Bids has been cancelled for the reasons specified in subsections (1)(e), (1)(f), or (1)(g) above, the Procurement Director may authorize the Contracting Officer to complete the Procurement through negotiation, in accordance with Section 3-203.02(6).

**Section 3-306 Rejection of Individual Bids or Proposals**

- (1) This section applies to rejections of individual bids or proposals in whole or in part. Each solicitation issued by ATP shall reserve ATP's right to reject any bid or proposal in whole or in part if it is in the best interest of ATP as provided in this section.
- (2) As used in this subsection, "bid" means any bid submitted in competitive sealed bidding or in the second phase of multi-step competitive sealed bidding and includes submissions under Section 3-204 (Small Purchases) if no changes in offers are allowed after submission. Reasons for rejecting a bid include, but are not limited to, the following:
- (a) the business that submitted the bid is non-responsible as determined

under Section 3-400 (Responsibility);

- (b) the bid is not responsive (that is, it does not conform in all material respects to the Invitation for Bids or the property, service, or construction item offered in the bid is unacceptable by reason of its failure to meet the requirements of the Specifications or permissible alternates or other acceptability criteria set forth in the Invitation for Bids); or
  - (c) the bid is materially unbalanced so that there is a risk that evaluation under the stated criteria may not result in the lowest overall cost to ATP.
- (3) As used in this subsection, "proposal" means any offer submitted in response to any solicitation, including an offer under Section 3-204 (Small Purchases), except a bid as defined in sub-section (2), above. Unless the solicitation states otherwise, proposals need not be unconditionally accepted without alteration or correction, and ATP's stated requirements may be revised or clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include, but are not limited to, the following:
- (a) the business that submitted the proposal is non-responsible as determined under Section 3-400;
  - (b) the proposal ultimately (that is, after any opportunity has passed for altering or clarifying the proposal) fails to meet the announced requirements of ATP in some material respect;
  - (c) the proposed price is clearly unreasonable; or
  - (d) the offer is materially unbalanced so that there is a risk that evaluation under the stated criteria may not result in award of a contract that will be most advantageous to ATP.
- (4) Upon request, unsuccessful bidders or offerors shall be advised of the reasons for the rejection of their bids or proposals.

**Section 3-400      Responsibility**

**Section 3-401      Application**

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

**Section 3-402      Standards of Responsibility**

- (1) The award of a contract to a Supplier based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional Procurement or administrative costs. A prospective contractor must demonstrate affirmatively its responsibility, including (when necessary) that of its proposed sub-contractors. Recent unsatisfactory performance (in either quality or timeliness of delivery) is an example of a problem the Contracting Officer must consider and resolve as to its impact on the current Procurement.
- (2) Factors to be considered in determining whether the standard of responsibility has been met include whether a prospective contractor has:
  - (a) the appropriate financial, material, equipment, facility, technical, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
  - (b) a satisfactory record of past and current performance, including quality or timeliness of delivery;
  - (c) a satisfactory record of integrity;
  - (d) legal qualifications to contract with ATP, including applicable licensing;
  - (e) supplied all necessary information in connection with the inquiry concerning responsibility; and
  - (f) complied with all applicable federal, state, and local laws regarding nondiscrimination and equal opportunity.
- (3) The prospective contractor shall supply information requested by the Contracting Officer concerning responsibility. If the prospective contractor fails to supply the requested information, the Contracting Officer shall base the determination of responsibility upon any available information or may find the prospective contractor non-responsible if such failure is unreasonable.

### **Section 3-403 Ability to Meet Standards**

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

- (1) evidence that the prospective contractor possesses such necessary items;
- (2) acceptable plans to subcontract for such necessary items; or
- (3) a documented commitment from, or explicit arrangement (which will be in existence at the time of award) with, a satisfactory source to provide the





necessary items.

**Section 3-404 Pre-Award Surveys**

When the information available to the Contracting Officer is insufficient to make a determination regarding responsibility, a pre-award survey of the prospective contractor's business and facilities may be conducted. A pre-award survey may cover one or more areas, including technical ability, production capacity, facilities, equipment, quality control, accounting system, financial capability, and record of performance on other contracts.

**Section 3-405 Responsibility Determination**

Before awarding a contract, the Contracting Officer must be satisfied that the prospective contractor is responsible and document this determination in writing. 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 Contracting Officer. The Contracting Officer shall promptly cause to be sent a letter to the non-responsible bidder or offeror indicating that the Contracting Officer has determined it to be non-responsible and stating the reason(s) for the determination. The final determination shall be made part of the Procurement File. Any determination by a Contracting Officer regarding responsibility shall be sustained under the procedures in Chapter 10 (Administrative Remedies) if there is a rational basis for such determination.

**Section 3-500 Cost or Pricing Data**

**Section 3-501 Scope of Section**

This section sets forth the pricing policies which are applicable to contracts of any type and any price adjustments thereunder when cost or pricing data are required to be submitted to facilitate ATP's conduct of cost and/or price analysis as described in this Policy and the Federal Requirements for each Procurement action above the Federal micro-purchase threshold (if applicable). The provisions of this section requiring submission of cost or pricing data do not apply to a contract let by competitive sealed bidding (including multi-step bidding) or small purchases. However, cost or pricing data may be required under a contract let by competitive sealed bidding when price adjustments are subsequently made in such a contract.

**Section 3-502 Requirement for Cost or Pricing Data**

- (1) Except as provided in Section 3-502(2), cost or pricing data may be required to be submitted in support of a proposal when:

- (a) any contract for property, services (except professional services), or construction expected to exceed \$500,000 is to be awarded by competitive sealed proposals or by sole source Procurement; or
  - (b) adjusting the price of any contract for property, services (except professional services), or construction (including a contract awarded by competitive sealed bidding containing a Cost or Pricing Data Clause, 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 \$100,000. For example, the requirement applies to a \$30,000 net modification resulting from a reduction of \$70,000 and an increase of \$40,000 when the reduction and increase are related. 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.
- (2) Cost and pricing data shall not be required:
- (a) when the contract or adjusted price is based on:
    - (i) adequate price competition;
    - (ii) established catalogue prices or market prices; or
    - (iii) prices set by law or regulation; or
  - (b) when the Procurement Director determines in writing to waive the applicable requirement for submission of cost or pricing data 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 Procurement File and made available to the public upon request.
- (3) 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.
- (4) Any contractor required to submit and certify cost or pricing data shall be required to submit accurate, current, and complete cost or pricing data from prospective or actual subcontractors in support of each subcontract cost estimate included in the contractor's submission whenever the subcontract cost estimate is either:

- (i) more than \$100,000; or
- (ii) more than 10% of the contractor's price for the contract or contract modification, as the case may be. The exceptions stated in subsection (2), above, also shall be applicable to this requirement for subcontractor cost or pricing data. Contractors agree to include provisions in all subcontracts by which the contractor can require subcontractors to submit cost or pricing data in accordance with this subsection in support of subcontract modifications. While contractors shall be required to submit a subcontractor's certified cost or pricing data only from the prospective subcontractor most likely to be awarded the subcontract, other subcontractor quotations and information may be cost or pricing data of the contractor required to be submitted. Prospective subcontractor cost or pricing data shall be certified to be current, accurate, and complete as of the same date specified in contractors' certificates.

### **Section 3-503      Meaning of Terms**

As used in the exceptions to the requirement for cost or pricing data, the terms "adequate price competition," "established catalogue prices or market prices," and "prices set by law or regulation" shall be construed in accordance with the following definitions.

- (1) Adequate Price Competition. Price competition exists if competitive sealed proposals are solicited and at least two unaffiliated, responsible offerors independently compete for a contract to be awarded to the responsible offeror submitting the proposal that is most advantageous to ATP considering price and factors and meeting the requirements of the solicitation. If the foregoing conditions are met, price competition shall be presumed to be "adequate" unless the Contracting Officer determines in writing that such competition is not adequate. Competition may also be determined to be adequate after receipt of only one or no proposals:
  - (i) where ATP confirms that its Specification are not unduly restrictive, and no changes can be made to encourage submission of more proposals; and
  - (ii) where the reasons for few responses were caused by conditions beyond ATP's control.
- (2) Established Catalogue or Market Prices.
  - (a) "Established catalogue price" means the price included in a catalogue, price list, schedule, or other form that:

- (i) is regularly maintained by a manufacturer or contractor;
  - (ii) is either published or otherwise available for inspection by customers; and
  - (iii) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved.
- (b) "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.
- (3) 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 ATP and other customers.

**Section 3-504 Submission of Cost or Pricing Data and Certification**

- (1) When cost or pricing data are required, they shall be submitted to the Contracting Officer prior to beginning negotiations at any reasonable time and in any reasonable manner prescribed by the Contracting Officer. When the Contracting Officer requires the offeror or contractor to submit cost or pricing data in support of any proposal, such data shall either be actually submitted or specifically identified in writing.
- (2) The offeror or contractor is required to keep such submission current until the negotiations are concluded.
- (3) 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. Certification shall be made using the certificate set forth in Section 3-505.
- (4) A refusal by the offeror to supply the required data shall be referred to the Procurement Director, whose duty shall be to determine in writing whether to disqualify the noncomplying 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 of Procurement, who shall determine in writing to further investigate the price adjustment, not to allow any price adjustment, or to set the amount of



the price adjustment, subject to the contractor's rights under the Disputes Clause of the contract.

**Section 3-505 Certificate of Current Cost or Pricing Data**

- (1) When cost or pricing data must be certified, a certificate substantially as set forth below shall be included in the Procurement File along with any award documentation required under the Procurement Policy and Guidelines. The offeror or contractor shall be required to submit the certificate as soon as practicable after agreement is reached on the contract price or adjustment.

*CERTIFICATE OF CURRENT COST OR PRICING DATA*

*This is to certify that, to the best of my knowledge and belief, cost or pricing data as defined in the ATP Procurement Policy and Guidelines submitted, either actually or by specific identification, in writing, to the Contracting Officer in support of \_\_\_\_\_\*, are accurate, complete, and current as of (date) (month) (year)\_\_\_\_\_\*\*\**

*This certification includes the cost or pricing data supporting any advance agreement(s) between the offeror and ATP which are part of the proposal. Firm \_\_\_\_\_ Name \_\_\_\_\_ Title \_\_\_\_\_ Date of Execution\_\_\_\_\_\*\*\**

*(End of Certificate)*

\*Describe the proposal, quotation, request for price adjustment or other submission involved, giving appropriate identifying number (e.g., RFP No.)

\*\*The effective date shall be a mutually determined date prior to but as close to the date when price negotiations were concluded and the contract price was agreed to as possible. The responsibility of the offeror or contractor is not limited by the personal knowledge of the offeror's or contractor's negotiator if the offeror or contractor had information reasonably available, at the time of agreement, showing that the negotiated price is not based on accurate, complete, and current data.

\*\*\*This date should be as soon after the date when the price negotiations were concluded and the contract price was agreed to as practical.

- (2) Although the certificate pertains to "cost or pricing data," it is not to be construed as a representation as to the accuracy of the offeror's or contractor's judgment on the estimated portion of future costs or projections. It does, however, constitute a representation as to the accuracy of the data upon which the offeror's or contractor's judgment is based. A Certificate of Current Cost or Pricing Data shall not substitute for examination and analysis of

the offeror's or contractor's proposal.

- (3) Whenever it is anticipated that a Certificate of Current Cost or Pricing Data may be required, notice of this requirement shall be included in the solicitation. If such a certificate is required, the contract shall include a clause giving ATP a contract right to a reduction in the price as provided in Section 3-506.
- (4) The exercise of an option at the price established in the initial negotiation in which certified cost or pricing were used does not require recertification or further submission of data.

### **Section 3-506 Defective Cost or Pricing Data**

- (1) If certified cost or pricing data subsequently are found to have been inaccurate, incomplete, or noncurrent as of the date stated in the certificate, ATP 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 overstatement 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 Contracting 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.
- (2) 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 ATP's claim for overstated cost or pricing data arising out of the same pricing action.
- (3) If the contractor and the Contracting Officer cannot agree as to the existence of defective cost or pricing data or the amount of adjustment due to defective cost or pricing data, the Contracting Officer shall set an amount in accordance with this section, and the contractor may appeal this decision as a contract controversy under the Disputes Clause of the contract.

### **Section 3-507 Price Analysis Techniques**

Price analysis is used to determine if a Contract or Contract Modification price is reasonable and acceptable. It involves an evaluation of the prices for the same or

similar items or services. Examples of price analysis criteria include, but are not limited to:

- (1) price submission of prospective bidders or offerors in the current Procurement;
- (2) prior price quotations and contract prices charged by the bidder, offeror, or contractor for the same or similar items;
- (3) prices published in catalogues or price lists;
- (4) prices available on the open market; and
- (5) in-house estimates of cost.

In making such analysis, consideration must be given to any differing terms and conditions.

### **Section 3-508 Cost Analysis Techniques**

ATP must conduct a cost analysis for every Procurement action when a price analysis will not provide sufficient information to determine reasonableness of the contract cost or Contract Modification. Cost analysis includes the appropriate verification of cost or pricing data and the use of this data to evaluate:

- (1) specific elements of costs;
- (2) the necessity for certain costs;
- (3) the reasonableness of amounts estimated for the necessary costs;
- (4) the reasonableness of allowances for contingencies;
- (5) the basis used for allocation of indirect costs;
- (6) the appropriateness of allocations of particular indirect costs to the proposed contract; and
- (7) the reasonableness of the total cost or price.

### **Section 3-509 Evaluations of Cost or Pricing Data**

Evaluations of cost or pricing data should include comparisons of costs and prices of an offeror's cost estimates with those of other offerors and any independent price and cost

estimates by ATP. They also shall include consideration of whether such costs are reasonable and allocable under the pertinent provisions of Chapter 7 (Cost Principles) of the Procurement Policy and Guidelines.

### **Section 3-600      Types of Contracts**

#### **Section 3-601      Scope of Section**

This section contains descriptions of types of contracts and limitations as to when they should be utilized by ATP in its Procurements. The use of any type of contract not prohibited by this section is permissible.

#### **Section 3-602      Cost-Plus-a-Percentage-of-Cost Contracting**

The use of a cost-plus-a-percentage-of-cost contract is prohibited. A cost-plus-a-percentage-of-cost contract is one in which, prior to completion of the work, the parties agree that the fee will be a predetermined percentage of the total cost of the work. The more the contractor spends, therefore, the greater its fee. The contractor's incentive may be to incur cost at the expense of ATP and not to economize.

#### **Section 3-603      Policy Regarding Selection of Contract Types**

- (1) The selection of an appropriate contract type depends on factors such as the nature of the property, services, or construction to be procured, the uncertainties which may be involved in contract performance, and the extent to which ATP or the contractor is to assume the risk of the cost of performance of the contract. Contract types differ in the degree of responsibility assumed by the contractor. The objective when selecting a contract type is to obtain the best value in needed property, services, or construction in the time required and at the lowest cost or price to ATP. In order to achieve this objective, the Contracting Officer, before choosing a contract type, should review those elements of the Procurement which directly affect the cost, time, risk, and profit incentives bearing on the performance. Among the factors to be considered in selecting any type of contract are:
  - (a) the type and complexity of the property, service, or construction item being procured;
  - (b) the difficulty of estimating performance costs, such as the inability of ATP to develop definitive Specifications, to identify the risks to the contractor inherent in the nature of the work to be performed, or otherwise to establish clearly the requirements of the contract;
  - (c) the administrative costs to both parties;



- (d) the degree to which ATP must provide technical coordination during the performance of the contract;
  - (e) the effect of the choice of the type of contract on the amount of competition to be expected;
  - (f) the stability of material or commodity market prices or wage levels;
  - (g) the urgency of the requirement; and
  - (h) the length of contract performance.
- (2) The provisions of this section describe and define the contract types. Any other type of contract, except cost-plus-a-percentage-of-cost, may be used, provided the Procurement Director determines in writing that such use is in ATP's best interest.

**Section 3-604      Types of Fixed-Price Contracts**

- (1) A fixed-price contract places responsibility on the contractor for the delivery of the product or the complete performance of the services or construction in accordance with the contract terms at a price that may be firm or may be subject to contractually specified adjustments. The fixed-price contract is appropriate and preferred for use when the extent and type of work necessary to meet ATP requirements reasonably can be specified and the cost reasonably can be estimated, as is generally the case for construction or standard Commercial Products. A fixed-price type of contract is the only type of contract that can be used in competitive sealed bidding.
- (2) A firm fixed-price contract provides a price that is not subject to adjustment because of variations in the contractor's cost of performing the work specified in the contract. It should be used whenever prices which are fair and reasonable to ATP can be established at the outset. Bases upon which firm fixed prices may be established include:
- (a) adequate price competition for the contract;
  - (b) comparison of prices in similar prior Procurements in which prices were fair and reasonable;
  - (c) establishment of realistic costs of performance by utilizing available cost or pricing data and identifying uncertainties in contract performance; or

- (d) use of other adequate means to establish a firm price.
- (3) A fixed-price contract with price adjustment provides for variation in the contract price under certain conditions defined in the contract, other than customary provisions authorizing price adjustments due to modifications to the work. The formula or other basis by which the adjustment in contract price can be made shall be specified in the solicitation and the resulting contract. Adjustment allowed may be upward or downward only or both upward and downward. Examples of conditions under which adjustments may be provided in fixed-price contracts are:
- (a) changes in the contractor's labor agreement rates as applied to industry or area wide;
  - (b) changes due to rapid and substantial price fluctuation, which can be related to an accepted index (such as contracts for gasoline and oil); and
  - (c) in requirements contracts:
    - (i) when a general price change applicable to all customers occurs; or
    - (ii) when a general price change alters the base price (such as a change in a manufacturer's published price list or posted price to which a fixed discount is applied pursuant to the contract to determine the contract price).
- (4) A fixed-price contract with incentives provides for adjusting profit and establishing the final contract price by application of a formula based on the relationship of total final negotiated cost to total target final negotiated cost to total target cost. The final price is subject to a price ceiling, negotiated at the outset. There are two types of FPI contracts:
- (1) "Fixed-price-incentive (firm target) contract (FPIF): Specifies a target cost, target profit, price ceiling (but not a profit ceiling or floor), and a profit adjustment formula. These elements are all negotiated at the onset.
  - (2) "Fixed-price-incentive (successive target) contract" (FPIS): Specifies the following elements, all of which are negotiated at the onset: an initial target cost, initial target profit, and initial profit adjustments formula. These targets and formulas are used to establish:

- (a) The firm target profit, including a ceiling and floor for the firm target profit;
- (b) The production point at which the firm target cost and firm target profit will be negotiated (usually before delivery or shop completion of the first item); and
- (c) A ceiling price that is the maximum that may be paid to the contractor, except for any adjustment under the contract clauses providing for equitable adjustment or other revision of the contract price under stated circumstances.

If the contract permits unilateral action by the contractor to bring about the condition under which a price increase may occur, the contract shall reserve to ATP the right to reject the price increase and terminate without cost the future performance of the contract. The contract also shall require that notice of any such price increase shall be given within such time prior to its effective date as specified in the contract. These restrictions shall not apply to fixed-price cost incentive contracts and fixed-price performance incentive contracts.

### **Section 3-605      Types of Cost-Reimbursement Contracts**

- (1) The cost-reimbursement type contract provides for payment to the contractor of allowable costs incurred in the performance of the contract as determined in accordance with Chapter 7 (Cost Principles) of the Procurement Policy and Guidelines and as provided in the contract. This type of contract establishes at the outset an estimated cost for the performance of the contract and a dollar ceiling which the contractor may not exceed (except at its own expense) without prior approval or subsequent ratification by the Contracting Officer and, in addition, may provide for payment of a fee. The contractor agrees to perform as specified in the contract until the contract is completed or until the costs reach the specified ceiling, whichever first occurs. This type of contract is appropriate when the uncertainties involved in contract performance are of such magnitude that the cost of contract performance cannot be estimated with sufficient certainty to realize economy by use of any type of fixed-price contract. In addition, a cost-reimbursement contract necessitates appropriate monitoring by ATP personnel during performance so as to give reasonable assurance that the objectives of the contract are being met. It is particularly suitable for research, development, and study type contracts.
- (2) A cost-reimbursement type contract may be used only when the Procurement Director determines in writing that:

- (a) such a contract is likely to be less costly to ATP than any other type or that it is impracticable to obtain otherwise the property, services, or construction;
  - (b) the proposed contractor's accounting system will permit timely development of all necessary cost data in the form required by the specific contract type contemplated; and
  - (c) the proposed contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles.
- (3) A cost contract provides that the contractor will be reimbursed for allowable costs incurred in performing the contract but will not receive a fee.
- (4) A cost-plus-fixed-fee contract is a cost-reimbursement type contract which provides for payment to the contractor of an agreed fixed fee in addition to reimbursement of allowable incurred costs. The fee is established at the time of contract award and does not vary whether or not the actual cost of contract performance is greater or less than the initial estimated cost established for such work. Thus, the fee is fixed but not the contract amount because the final contract amount will depend on the allowable costs reimbursed. The fee is subject to adjustment only if the contract is modified to provide for an increase or decrease in the scope of work specified in the contract. The cost-plus- fixed-fee contract can be either a Completion Form or Term Form.
- (a) The Completion Form is one which describes the scope of work to be done as a clearly defined task or job with a definite goal or target expressed and with a specific end-product required. This form of contract normally requires the contractor to complete and deliver the specified end-product (in certain instances, final report of research accomplishing the goal or target) as a condition for payment of the entire fixed-fee established for the work and within the estimated cost if possible; however, in the event the work cannot be completed within the estimated cost, ATP can elect to require more work and effort from the contractor without increase in fee, provided it increases the estimated cost.
  - (b) The Term Form is one which describes the scope of work to be done in general terms and which obligates the contractor to devote a specified level of effort for a stated period of time. Under this form, the fixed fee is payable at the termination of the agreed period of time upon certification that the contractor has exerted the level of effort specified in the contract in performing the work called for, and that such

performance is considered satisfactory by ATP.

- (c) The Completion Form of contract, because of differences in obligation assumed by the contractor, is to be preferred over the Term Form whenever the work itself or specific milestones can be defined with sufficient precision to permit the development of estimates within which prospective contractors reasonably can be expected to complete the work. A milestone is a definable point in a program when certain objectives can be said to have been accomplished.
- (d) In no event should the Term Form of contract be used unless the contractor is obligated by the contract to provide a specific level-of-effort within a definite period of time.

**Section 3-606 Cost Incentive Contracts**

- (1) A cost incentive type of contract provides for the reimbursement to the contractor of allowable costs incurred up to the ceiling amount and establishes a formula whereby the contractor is rewarded for performing at less than target cost (that is, the parties' agreed best estimate of the cost of performing the contract) or is penalized if it exceeds target cost. The profit or fee under such a contract will vary inversely with the actual, allowable costs of performance and, consequently, is dependent on how effectively the contractor controls cost in the performance of the contract.
- (2) In a fixed-price cost incentive contract, the parties establish at the outset a target cost, a target profit (that is, the profit which will be paid if the actual cost of performance equals the target cost), a formula which provides a percentage increase or decrease of the target profit depending on whether the actual cost of performance is less than or exceeds the target cost, and a ceiling price. After performance of the contract, the actual cost of performance is arrived at based on the total incurred allowable costs as determined in accordance with Chapter 7 (Cost Principles) of the Procurement Policy and Guidelines and as provided in the contract. The final contract price then is established in accordance with the formula using the actual cost of performance. The final contract price may not exceed the ceiling price. The contractor is obligated to complete performance of the contract, and, if actual costs exceed the ceiling price, the contractor suffers a loss.
- (3) In a cost-reimbursement contract with cost incentive fee, the parties establish at the outset a target cost; a target fee; a formula for increase or decrease of fee depending on whether actual cost of performance is less than or exceeds the target cost; the maximum and minimum fee limitations; and a cost ceiling which represents the maximum amount which ATP is obligated to reimburse the contractor. The contractor continues performance until the work is complete or

costs reach the ceiling specified in the contract, including any modification thereof, whichever first occurs. After performance is complete or costs reach the ceiling, the total incurred, allowable costs reimbursed in accordance with Chapter 7 (Cost Principles) of the Procurement Policy and Guidelines and as provided in the contract are applied to the formula to establish the incentive fee payable to the contractor.

- (4) Prior to entering into any cost incentive contract, the Contracting Officer shall make the written determination required by Section 3-612 (Approval of Accounting Systems) regarding the proposed contractor's accounting system. Prior to entering any cost-reimbursement contract with cost incentive fee, the written determination required by Section 3-605(2) shall be made.

### **Section 3-607 Performance Incentive Contracts**

In a performance incentive contract, the parties establish at the outset a pricing basis for the contract (i.e., cost reimbursement or fixed price), performance goals, and a formula which varies the profit or the fee if the specified performance goals are exceeded or not met. For example, early completion may entitle the contractor to a bonus while late completion may entitle ATP to a price decrease.

### **Section 3-608 Time and Materials and Labor Hour Contracts**

- (1) Time and materials contracts provide an agreed basis for payment for materials supplied and labor performed. Such contracts shall, to the extent possible, contain a stated ceiling or an estimate that shall not be exceeded without prior approval by ATP and shall be entered into only after the Contracting Officer determines in writing that:
  - (a) ATP representatives have been assigned to closely monitor the performance of the work; and
  - (b) in the circumstances, it would not be practicable to use any other type of contract to obtain needed property, services, or construction in the time required and at the lowest cost or price to ATP.
- (2) A labor hour contract provides only for the payment of labor performed. It shall contain the same ceiling as provided in subsection (1), above. Prior to the award of such contract, the Contracting Officer shall make the determination as required in subsection (1), above.

### **Section 3-609 Definite and Indefinite Quantity Contracts**

- (1) A definite quantity contract is a fixed-price contract that provides for delivery

of a specified quantity of property or services either at specified times or when ordered.

- (2) An indefinite quantity contract is a contract for an indefinite amount of property or services to be furnished at specified times, or as ordered, that establishes unit prices of a fixed-price type. Generally, an approximate quantity or the best information available as to quantity is stated in the solicitation. The contract shall provide a minimum quantity ATP is obligated to order and may also provide for a maximum quantity provision that limits ATP's right to order.
- (3) A requirements contract is an indefinite quantity contract for property or services that obligates ATP to order all its actual requirements for such property or services during a specified period of time. For information, a realistic estimated total quantity shall be stated in the solicitation and the resulting contract; however, this estimate is not a representation to an offeror that the total quantity will be required or ordered. The obligation to order ATP's actual requirements is limited by the provisions of Texas Business & Commerce Code Section 2.306(a) (i.e., no quantity unreasonably disproportionate to any stated estimate or, in the absence of a stated estimate, to any normal or otherwise comparable prior output or requirements may be tendered or demanded). For the protection of ATP and the contractor, requirements contracts shall include the following:
  - (a) a provision which requires ATP to order its actual requirements of the property or services covered (however, ATP must reserve in the solicitation and in the resulting contract the right to take bids separately if a particular quantity requirement arises which exceeds ATP's normal requirements or an amount specified in the contract);
  - (b) two exemptions from ordering under the contract when:
    - (i) the Procurement Director approves a finding that the property or service available under the contract will not meet a nonrecurring, special need of ATP; or
    - (ii) property is produced or services are performed incidental to ATP's own programs.

**Section 3-610      Leases**

- (1) A lease is a contract for the use of equipment or other property under which title will not pass to ATP at any time. Section 3-611 (Option Provisions) applies to a lease with a purchase option where title may pass to ATP.

To obtain best value, ATP should review lease versus purchase alternatives. When conducting lease versus purchase analyses, cost used in the analysis must:

- (a) be reasonable;
  - (b) be based on realistic current market conditions; and
  - (c) be based on the expected useful service life of the asset.
- (2) A lease may be entered into provided:
- (a) it is in the best interest of ATP as determined by the Contracting Officer;
  - (b) all conditions for renewal and costs of termination are set forth in the lease; and
  - (c) the lease is not used to circumvent normal Procurement procedures.

### **Section 3-611      Option Provisions**

- (1) When a contract is to contain an option for renewal, extension, or purchase, notice of such provision shall be included in the solicitation. Exercise of the option is always at ATP's discretion only and not subject to agreement or acceptance by the contractor.
- (2) ATP may elect to include options in contracts, if options are needed for its Public Transportation or project purposes. ATP shall document in the Procurement File a justification for including any options, taking into account any applicable provisions of the Federal Requirements. If an option is included, the option quantities and periods included in the bid or proposal must generally be evaluated in order to determine contract award except that the option quantities need not be evaluated if ATP determines that evaluation would not be in its best interest. Any such determination must be documented in the Procurement File. The evaluation of options should be documented in writing and should be part of the cost or price analysis undertaken by ATP for the overall Procurement.
- (3) If an option is included for the Procurement of bus or rail rolling stock or replacement parts, the period of that option must comply with the Federal Requirements, to the extent applicable. Documentation awarding the contract should indicate that the award is for the base contract and the identified options.
- (4) Before exercising any option for renewal, extension, or purchase, the Contracting Officer should attempt to ascertain whether a competitive Procurement is practical (in terms of pertinent competitive and cost factors) and would be more



advantageous to ATP than renewal, extension or purchase of the existing contract.

- (5) A purchase option in a lease may be exercised only if the lease containing the purchase option was awarded under competitive sealed bidding or competitive sealed proposals. Before exercising such an option, the Contracting Officer shall:
  - (a) investigate alternative means of procuring comparable property or facilities; and
  - (d) compare estimated costs and benefits associated with the alternative means and the exercise of such option; for example, the benefit of buying new state-of-the-art equipment compared to the estimated, initial savings associated with exercise of a purchase option.

### **Section 3-612 Approval of Accounting Systems**

Except with respect to firm fixed-price contracts, no contract type shall be used unless the Procurement Director makes a determination in writing that the proposed contractor's accounting system is sufficient to comply with the provisions of Section 3-605(2)(b) and (c).

### **Section 3-613 Multi-Term Contracts - General**

- (1) A multi-term contract is appropriate when it is in the best interest of ATP to obtain uninterrupted services extending over more than one fiscal period, where the performance of such services involves high start-up costs, or where a changeover of service contractors involves high phase-in/phase-out costs during a transition period. The multi-term method of contracting also is appropriate when special production of definite quantities of supplies for more than one fiscal period is necessary to best meet ATP's needs but funds are available only for the initial fiscal period. Special production refers to production for contract performance, which requires alteration in the contractor's facilities or operations involving high start-up costs. The contractual obligation of both parties in each fiscal period succeeding the first is subject to the authorization and availability of funds therefor. The contract shall provide that, in the event that funds are not available for any succeeding fiscal period, the remainder of such contract shall be cancelled and the contractor shall be reimbursed the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies delivered or services performed under the contract to the extent that nonrecurring costs are identified in the contract.
- (2) The objective of the multi-term contract is to promote economy and efficiency in Procurement by obtaining the benefits of sustained volume production and

consequent low prices and by increasing competitive participation in Procurements which involve special production with consequent high start-up costs and in the Procurement of services which involve high start-up costs or high phase-in/phase-out costs during changeover of service contractors.

- (3) This Section 3-613 applies only to contracts for property or services described in 3-613(1) of this section and does not apply to any other contracts including, but not limited to, contracts for construction and leases (including leases of real property).

#### **Section 3-613.01 Conditions for Use**

A multi-term contract may be used when it is determined in writing by the Contracting Officer that:

- (1) special production of definite quantities or the furnishing of long-term services is required to meet ATP's needs; and
- (2) a multi-term contract will serve the best interests of ATP by encouraging effective competition or otherwise promoting economies in Procurement. The following factors are among those relevant to such a determination:
  - (a) Firms which are not willing or able to compete because of high start-up costs or capital investment in facility expansion will be encouraged to participate in the competition when they are assured of recouping such costs during the period of contract performance;
  - (b) lower production costs, because of larger quantity or service requirements and substantial continuity of production or performance over a longer period of time, can be expected to result in lower unit prices;
  - (c) stabilization of the contractor's work force over a longer period of time may promote economy and consistent quality; or
  - (d) the cost and burden of contract solicitation, award, and administration of the Procurement may be reduced.

#### **Section 3-613.02 Multi-Term Contract Procedure**

- (1) The solicitation for multi-term contracts shall state:
  - (a) the amount of property or services required for the proposed contract period;

- (b) that a unit price shall be given for each item of property or service and that such unit prices shall be the same throughout the contract (except to the extent price adjustments may be provided in the solicitation and resulting contract);
  - (c) that the multi-term contract will be cancelled only if funds are not authorized or otherwise made available to support continuation of performance in any fiscal period succeeding the first; however, this does not affect either ATP's rights or the contractor's rights under any termination clause in the contract;
  - (d) that the Contracting Officer must notify the contractor on a timely basis that the funds are, or are not, available for the continuation of the contract for each succeeding fiscal period;
  - (e) whether bidders or offerors may submit prices for:
    - (i) the first fiscal period only;
    - (ii) the entire time of performance only; or
    - (iii) both the first fiscal period and the entire time of performance;
  - (f) that a multi-term contract may be awarded and how award will be determined including, if prices for the first fiscal period and entire time of performance are submitted, how such prices will be compared; and
  - (g) that, in the event of cancellation for lack of funds, the contractor will be reimbursed the unamortized, reasonably incurred, nonrecurring costs.
- (2) Award shall be made as stated in the solicitation and permitted under the source selection method utilized. Care should be taken when evaluating multi-term prices against prices for the first fiscal period that award on the basis of prices for the first period does not permit the successful bidder or offeror to "buy in"; that is, give such bidder or offeror an undue competitive advantage in subsequent Procurements.
- (3) "Cancellation," as used in multi-term contracting, means the cancellation of the total requirements for the remaining portion of the contract because funds were not authorized or otherwise made available. The contract for the first fiscal period shall not be cancelled. Cancellation results when the Contracting Officer: (a) notifies the contractor of nonavailability of funds for contract performance for any fiscal period subsequent to the first; or (b) fails to notify the contractor by the date set forth in the contract (unless the parties agree to extend such

date) that funds are available for performance of the succeeding fiscal period and funds which may be used for the contract have not been authorized or otherwise made available. This provision on cancellation of multi-term contracts does not limit the rights of ATP or the contractor under any termination clause of the contract if the contract is terminated pursuant to that clause rather than cancelled as provided in this subsection.

**Section 3-614 Incremental Award**

- (1) An incremental award is an award of portions of a definite quantity requirement to more than one contractor. Each portion is for a definite quantity, and the sum of the portions is the total definite quantity required. An incremental award may be used only when awards to more than one bidder or offeror for different amounts of the same item are necessary to obtain the total quantity for the required delivery.
- (2) If an incremental award is anticipated prior to issuing a solicitation, ATP shall reserve the right to make such an award, and the criteria for award shall be stated in the solicitation.
- (3) The Contracting Officer shall make a written determination setting forth the reasons for the incremental award, and the determination shall be made a part of the Procurement File.

**Section 3-615 Multiple Award**

- (1) A multiple award is an award of an indefinite quantity contract for one or more similar supplies or services to more than one bidder or offeror when ATP is obligated to order all of its actual requirements for the specified supplies or services from those contractors. The obligation to order ATP's actual requirements is limited by the provisions of Texas Business & Commerce Code Section 2.306(a) (no quantity unreasonably disproportionate to any stated estimate or, in the absence of a stated estimate, to any normal or otherwise comparable prior output or requirements may be tendered or demanded).
- (2) A multiple award may be made when award to two or more bidders or offerors for similar products is necessary for adequate delivery, service, or product compatibility. Any multiple award shall be made in accordance with the provisions of Section 3-202 (Competitive Sealed Bidding), Section 3-203 (Competitive Sealed Proposals), Section 3-204 (Small Purchases), and Section 3-206 (Emergency Procurements), as applicable. Multiple awards shall not be made when a single award will meet ATP's needs without sacrifice of economy or service. Awards shall not be made for the purpose of dividing the business, making available product or Supplier selection to allow for user preference

unrelated to utility or economy, or avoiding the resolution of tie bids. Any such awards shall be limited to the least number of Suppliers necessary to meet ATP's valid requirements.

- (3) If a multiple award is anticipated prior to issuing a solicitation, ATP shall reserve the right to make such an award, and the criteria for award shall be stated in the solicitation.
- (4) The Contracting Officer shall make a written determination setting forth the reasons for a multiple award, and the determination shall be made a part of the Procurement File.

**Section 3-700 Audits**

**Section 3-701 Authority to Audit**

Audits by or on behalf of ATP of the books and records of a contractor, prospective contractor, subcontractor, or a prospective subcontractor may be performed when authorized by a solicitation, contract, or subcontract provision. Audits may be performed by representatives of ATP or for ATP by an independent contractor.

**Section 3-702 Cost or Pricing Data Audit**

- (1) The Executive Director or his Designee may require an audit of cost or pricing data that has been submitted under Section 3-500 (Cost or Pricing Data). An audit should be required when, with respect to the contractor, prospective contractor, subcontractor, or prospective subcontractor, there is:
  - (a) a question as to the adequacy of accounting policies or cost systems;
  - (b) a substantial change in the methods or levels of operation;
  - (c) previous unfavorable experience indicating doubtful reliability of estimating, accounting, or purchasing methods;
  - (d) a lack of cost experience due to the Procurement of a new supply or service; or
  - (e) other evidence that an audit is in ATP's best interests.

**Section 3-703 Cost or Pricing Data Audit Report**

When an audit is required under Section 3-702 (Cost or Pricing Data Audit), the auditor

shall submit a written report to the Contracting Officer by an agreed-upon date. The report should contain the following with respect to the contractor, prospective contractor, subcontractor, or prospective subcontractor:

- (1) a description of the original proposal and all submissions of cost or pricing data;
- (2) an explanation of the basis and the method used in preparing the proposal;
- (3) a statement identifying any cost or pricing data not physically submitted with the proposal but examined by the auditor which has a significant effect on the proposed cost or price;
- (4) a description of any deficiency in the cost or pricing data submitted and an explanation of its effect on the proposal;
- (5) a statement summarizing those major points where there is a disagreement as to the cost or pricing data submitted; and
- (6) a statement identifying any information obtained from other sources.

**Section 3-704 Contract Audit**

- (1) The type of contract under which books and records should be audited is that in which price is based on costs or is subject to adjustment based on costs, or that in which auditing would be appropriate to ensure satisfactory performance (such as a time and materials contract), or to ensure compliance with the requirements to submit current, accurate, and complete cost or pricing data.
- (2) A contract audit may be warranted when a question arises in connection with:
  - (a) the financial condition, integrity, and reliability of the contractor or subcontractor;
  - (b) any prior audit experience;
  - (c) the adequacy of the contractor's or subcontractor's accounting system;
  - (d) the number or nature of invoices or reimbursement vouchers submitted by the contractor or subcontractor for payment;
  - (e) the use of federal assistance funds;
  - (f) the fluctuation of market prices affecting the contract;

- (g) adequacy of cost or pricing data; or
- (h) any other circumstance when the Contracting Officer finds that such an audit is necessary for the protection of ATP's interest.

The scope of the audit may be limited as specified in the audit request.

**Section 3-705      Contract Audit Report**

Where a contract audit is required under Section 3-704 (Contract Audit), the auditor shall submit a written report to the Contracting Officer by an agreed upon date. The scope of the report will depend on the scope of the audit ordered. However, the report should contain specific reference to the terms of the contract to which the audited data relate and a statement of the degree to which the auditor believes the audited data evidence compliance with those terms.

**Section 3-706      Retention of Books and Records**

- (1) Any contractor who receives a contract, Change Order, or Contract Modification for which cost or pricing data are required under Section 3-500 (Cost or Pricing Data) shall be required to maintain such books and records that relate to such cost or pricing data for three years from the date of final payment under the contract, or such other time period specified in the contract or required by applicable law.
- (2) Contracts shall require that books and records relating to a contract with ATP, including subcontracts, other than a firm fixed-price contract, shall be maintained:
  - (a) by a contractor, for three years from the date of final payment under the prime contract; and
  - (e) by a subcontractor, for three years from the date of final payment under the subcontract, or such other time period specified as determined by the Contracting Officer or required by applicable law.

**Section 3-800      Solicitation Provisions**

**Section 3-801      General**



This section prescribes required provisions for incorporation in solicitations issued by ATP. The provisions set forth the rules under which the solicitation will be conducted. Nothing herein shall preclude ATP from incorporating additional, special solicitation instructions and conditions in individual Procurements.

### **Section 3-802 Solicitations for Competitive Sealed Bids**

The following solicitation instructions and conditions shall be included in all solicitations for competitive sealed bids.

#### **Section 3-802.01 Preparation of Bids**

##### PREPARATION OF BIDS

- (a) Bidders are expected to examine the Schedule, solicitation instructions, Special Provisions, General Provisions, all drawings, specifications, the statement of work, and all other provisions of, and exhibits to, the solicitation, whether incorporated by reference or otherwise, prior to the submission of bids. Failure to do so will be at the bidder's risk.
- (b) Each bidder shall furnish the information required by the solicitation. Bids shall be submitted on the bid form contained in the solicitation. Bidders shall sign and print or type their name on the bid form and each continuation sheet on which they make an entry. Erasures or other changes must be initialed by the person signing the bid. Bids signed by an agent of the bidder (other than an officer or a partner of the bidder) are to be accompanied by evidence of the agent's authority (unless such evidence has been previously furnished to ATP).
- (c) All blanks on the bid form shall be filled in electronically or printed in ink with a firm fixed unit price for items bid. Unit prices shall include packing unless otherwise specified. In case of any discrepancy between a unit price and any extended or total price required by the bid form, the unit price will be presumed to be correct, subject, however, to correction to the same extent and in the same manner as any other mistake.
- (d) Bids for property or services other than those specified in the Schedule will not be considered unless specifically authorized in the solicitation. Any condition, qualification, or limitation of the bid will be a basis for rejection of the bid as nonresponsive.
- (e) The bidder must state a definite time for delivery of property or for performance of services unless otherwise specified in the solicitation. All



measurements shall be in the system of weights and measures in common usage in the United States except where the contract is federally funded in which case, unless expressly authorized by ATP, the metric system shall be the primary unit of measure. Pricing shall be in U.S. dollars.

- (f) In computing any period of time for the solicitation or any resulting contract, "days" means calendar days, and the day of the event from which the designated period of time begins to run shall not be included, but the last day shall be included unless it is a Saturday, Sunday, or Federal or State of Texas holiday, in which event the period shall run to the end of the next business day.

### **Section 3-802.02 Explanation to Bidders**

Any explanation desired by a bidder regarding the meaning or interpretation of the solicitation, drawings, specifications, etc., must be requested in writing from ATP's Contracting Officer and with sufficient time allowed for a reply to reach bidders before the submission of bids. Oral explanations or instructions given before the award of any contract, at any pre-bid conferences or otherwise, will not be binding on ATP. Any information given to a bidder concerning an interpretation of the solicitation will be furnished to all bidders as an amendment to the solicitation, if such information is necessary to bidders in submitting bids on the solicitation or if the lack of such information would be prejudicial to uninformed bidders.

### **Section 3-802.03 Acknowledgment of Amendments to Invitation for Bids**

- (a) If this solicitation is amended, then all terms and conditions which are not modified remain unchanged.
- (b) Bidders shall acknowledge receipt of any amendment to this solicitation: (1) by signing and returning the amendment; or (2) by identifying the amendment number and date in the space provided for this purpose on the bid form; or (3) by letter or electronic message (if permitted). ATP must receive the acknowledgment by the time and at the place specified for receipt of bids.

### **Section 3-802.04 Submission of Bids**

- (a) Bids and modifications thereof shall be enclosed in sealed envelopes or sealed cartons and submitted to ATP's Contracting Officer at the address specified in the solicitation. The bidder shall show the hour and date specified in the solicitation for receipt of bids, the solicitation number, and the bidder's name, address, and telephone number on the face of the envelope or carton.

- (b) Electronic bids will not be considered unless authorized by the solicitation. Bids may be modified or withdrawn by written notice, provided such notice is received prior to the hour and date specified for receipt of bids.
- (c) Samples of items, when required, must be submitted within the time specified and, unless otherwise specified in the solicitation, at no expense to ATP. If not destroyed by testing, samples will be returned at the bidder's request and expense, unless otherwise specified in the solicitation.
- (d) Each copy of the bid shall include the legal name of the bidder and a statement whether the bidder is a sole proprietorship, a corporation, or any other legal entity. A bid for a corporation shall further give the state of incorporation.

**Section 3-802.05 Late Submissions, Modifications, and Withdrawals of Bids**

LATE SUBMISSIONS, MODIFICATIONS, AND WITHDRAWALS OF BIDS

- (a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made, and:
  - (1) it was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for receipt of bids (e.g., a bid submitted in response to a solicitation requiring receipt of bids by the 20th of the month must have been mailed by the 15th or earlier);
  - (2) it was sent by mail and it is determined by ATP that the late receipt was due solely to mishandling by ATP after receipt at ATP's offices; or
  - (3) it was sent by U. S. Postal Service Express Mail Next Day Service - Post Office to Addressee not later than 5:00 P.M. at the place of mailing two (2) working days prior to the date specified for receipt of bids. The term "working days" excludes weekends and U. S. Federal holidays.
- (b) Any modification or withdrawal of a bid is subject to the same conditions as in (a) of this provision.
- (c) The only acceptable evidence to establish:

- (1) the date of mailing of a late bid, modification or withdrawal sent either by registered or certified mail is the U.S. Postal Service postmark on both the envelope or wrapper and on the original receipt from the U.S. Postal Service. If neither postmark shows a legible date, the bid, modification or withdrawal shall be deemed to have been mailed late. The term "postmark" means a printed, stamped, or otherwise placed impression, exclusive of a postage meter machine impression, that is readily identifiable without further action as having been supplied and affixed on the date of mailing by an Employee of the U.S. Postal Service. Therefore, bidders should request the postal clerk to place a legible hand cancellation bull's-eye "postmark" on both the receipt and the envelope or wrapper; and
- (2) the time of receipt at ATP is the time-date stamp of ATP on the bid wrapper or other documentary evidence of receipt maintained by ATP.
- (3) the date of mailing of a late bid, modification, or withdrawal sent by U. S. Postal Service Express Mail Next Day Service - Post Office to Addressee is the date entered by the post office receiving clerk on the "Express Mail Next Day Service - Post Office to Addressee" label, and the postmark on the envelopes or wrapper and on the original receipt from the U. S. Postal Service. "Postmark" has the same meaning as defined in Section (c)(1) of this provision. Therefore, bidders should request the postal clerk to place a legible hand cancellation bull's-eye "postmark" on both the receipt and the envelope or wrapper.
- (d) Notwithstanding (a) of this provision, a late modification of an otherwise successful bid which makes its terms more favorable to ATP will be considered at any time it is received and may be accepted.
- (e) Bids may be withdrawn by written notice received at any time before the exact time set for receipt of bids. A bid may be withdrawn in person by a bidder or the bidder's authorized representative before the exact time set for receipt of bids, provided the identity of the person requesting withdrawal is established and the person signs a receipt for the bid.

### **Section 3-802.06 Discounts**

- (a) Prompt payment discounts will not be considered in evaluating bids for award. However, offered discounts will be taken if payment is made within the discount period, even though not considered in the evaluation of bids.

- (b) In connection with any discount offered for prompt payment, time shall be computed from (1) the date of completion of performance of the services or delivery of the supplies to the carrier if acceptance is at a point of origin, or date of delivery at destination or port of embarkation if delivery and acceptance are at either of these points, or (2) the date the correct invoice or voucher is received in the office specified by ATP, if the latter is later than the date of performance or delivery. For the purpose of computing the discount earned, payment shall be considered to have been made on the date of ATP's check or electronic funds transfer (as applicable).

### **Section 3-802.07 Award of Contract**

- (a) The contract will be awarded to the responsible bidder whose bid, conforming to the solicitation, will be most advantageous to ATP, price and other factors considered. A responsible bidder is one who affirmatively demonstrates to ATP that the bidder has adequate financial resources and the requisite capacity, capability, and facilities to perform the contract within the delivery period or period of performance, has a satisfactory record of performance on other comparable projects, has a satisfactory record of integrity and business ethics, and is otherwise qualified and eligible to receive award under the solicitation and laws or regulations applicable to the Procurement.
- (b) ATP reserves the right to reject any or all bids in part or in total for any reason, to accept any bid if considered best for its interest, and to waive informalities and minor irregularities in bids received.
- (c) ATP may accept any item or group of items of any bid, unless the bidder qualifies the bid by specific limitations. Unless otherwise provided in the solicitation, bids may be submitted for any quantities less than those specified, and ATP reserves the right to make an award on any item for a unit quantity less than the quantity offered at the unit prices bid unless the bidder specified otherwise in the bid.
- (d) A written award (or acceptance of bid) which is mailed or otherwise furnished to the successful bidder within the time for acceptance specified in the solicitation shall be deemed to result in a binding contract without further action by either party.
- (e) Any financial data submitted with any bid hereunder or any representation concerning facilities or financing will not form a part of any resulting contract; provided, however, that if the resulting contract



contains a clause providing for price reduction for defective cost or pricing data, the contract price will be subject to reduction if cost or pricing data furnished hereunder is incomplete, inaccurate, or not current.

**Section 3-802.08 ATP-Furnished Property**

No material, labor, or facilities will be furnished by ATP unless otherwise provided for in the solicitation.

**Section 3-802.09 Encouragement of Joint Ventures**

Consistent with the language in Section 3-114 (Maximizing Participation of Small Business Private Enterprises), the Contracting Officer shall insert the following provision in all ATP solicitations in excess of the small purchase threshold for which the Contracting Officer has determined, in writing, that award to a joint venture is appropriate for the work to be performed.

ATP encourages bids or offers, as appropriate, from duly constituted Joint Ventures in response to this solicitation. ATP intends to maximize opportunities for all vendors, including disadvantaged business enterprises (DBE), minority owned firms, women's business enterprises, and other small and minority businesses, to participate as prime contractors and actively seeks to do business with these entities. Any offeror that submits a bid or offer as a Joint Venture must identify itself as such an entity and provide a copy with its bid or offer of the Joint Venture Agreement.

**Section 3-802.091 Mandating Award to Joint Ventures**

Consistent with the language in Section 3-114 (Maximizing Participation of Small Business Private Enterprises), the Contracting Officer shall insert the following provision in all ATP solicitations in excess of the small purchase threshold for which the Contracting Officer has determined, in writing, that award to a joint venture shall be mandated for the work to be performed.

ATP shall accept bids and/or offers, as appropriate, only from duly constituted Joint Ventures in response to this solicitation. Any bid or offer that is not submitted by a Joint Venture in full compliance with the provisions shall be rejected as nonresponsive.

**Section 3-802.10 Order of Precedence**

In the event of any inconsistency between the provisions of the solicitation (including any resulting contract), the inconsistency shall be resolved by giving precedence in the following order: (a) the Schedule; (b) Special Solicitation Instructions and



Conditions; (c) Solicitation Instructions and Conditions; (d) Special Provisions; (e) General Provisions; (f) other provisions of the contract whether incorporated by reference or otherwise; and (g) the specifications or statement of work.

**Section 3-802.11 Confidential Data**

Each bidder may clearly mark each page of the bid that contains trade secrets or other confidential commercial or financial information which the bidder believes should not be disclosed outside ATP provided that blanket designations will not be acceptable and that any such identification of information will not be determinative of any issue relating to the application of, or treatment of such information or materials under law. Disclosure of requested information will be determined in accordance with the Texas Open Records Act.

**Section 3-802.12 Administrative Remedies**

Include the provision at Section 4-300.

**Section 3-802.13 Cancellation of Solicitation**

ATP reserves the right to cancel the solicitation before or after receipt of bids or proposals (as applicable) in accordance with the provisions of this Policy.

**Section 3-803 Solicitations for Construction**

Solicitations for construction shall include all applicable provisions set forth in Section 3-802 hereof (with such modifications as may be appropriate to substitute "construction" for references to property or services). In addition, such solicitations shall include the following provisions, as applicable and unless otherwise determined by the Contracting Officer in its reasonable discretion in accordance with Section 3-801.

**Section 3-803.01 Bonds**

- (a) A Bid Bond on the form accompanying this solicitation (or a certified check payable to ATP from a bank acceptable to ATP) in an amount equal to 5% of the total bid price must be submitted by each bidder prior to bid opening date and time under this solicitation. The Bid Bond must be executed strictly in accordance with the instructions printed thereon. Failure to comply with the requirements for a Bid Bond may render a bid ineligible for further consideration for award.



- (b) The successful bidder will be required to submit Performance and Payment Bonds on the forms accompanying this solicitation (each in an amount equal to the total contract price) within the time prescribed by ATP.

(c)

**Section 3-803.02 Site Investigation**

All bidders are cautioned to read the Site Investigation and Conditions Affecting the Work Clause of Contract terms and conditions accompanying the solicitation and (prior to bidding) to conduct a site investigation sufficient to apprise bidders of the nature of the work to be performed to the extent specified in that Clause.

**Section 3-803.03 Drug-Free Workplace Program Certification**

- (a) By submission of a bid, the bidder certifies and agrees that, with respect to the bidder and all Employees of the bidder to be utilized in the performance of any contract resulting from the solicitation, it will establish a drug-free workplace program that complies with the provisions of the Drug-Free Workplace Program Clause under the terms and conditions of the Contract.
- (b) Failure of the bidder to have the drug-free workplace program complying with this certification and the Drug-Free Workplace Program Clause of the General Provisions available for ATP's review and approval as part of ATP's pre-award responsibility survey will be deemed a lack of responsibility rendering the bidder unqualified and ineligible for award.

**Section 3-804 Solicitations for Competitive Sealed Proposals**

The following provisions shall be included in all solicitations for competitive sealed proposals, as applicable and unless otherwise determined by the Contracting Officer in its reasonable discretion in accordance with Section 3-801.

**Section 3-804.01 Preparation of Offers**

- (a) Offerors are expected to examine the Schedule, solicitation instructions, Contract terms and conditions, all drawings, specifications, the statement of work, and all other provisions of, and exhibits to, the solicitation, whether incorporated by reference or otherwise, prior to the submission of offers. Failure to do so will be at the offeror's risk.
- (b) Each offeror shall furnish the information required by the solicitation. Offerors shall sign and print or type their name on the form provided by ATP for submitting an offer and each continuation sheet on which they

make an entry. Erasures or other changes must be initialed by the person signing the offer. Offers signed by an agent of the offeror (other than an officer or a partner of the offeror) are to be accompanied by evidence of the agent's authority (unless such evidence has been previously furnished to ATP).

- (c) Pricing for the property or services offered shall be provided by offerors in the format required by ATP. Where property is being offered, the prices offered shall include packing unless otherwise specified. In case of any discrepancy between a unit price and any extended or total price, the unit price will be presumed to be correct, subject, however, to correction to the same extent and in the same manner as any other mistake.
- (d) Offers for property or services other than those specified in the Schedule will not be considered unless specifically authorized in the solicitation.
- (e) The offeror must state a definite time for delivery of property or for performance of services unless otherwise specified in the solicitation. All measurements shall be in the system of weights and measures in common usage in the United States except where the Contract is federally funded in which case, unless expressly authorized by ATP, the metric system shall be the primary unit of measure. Pricing shall be in U.S. dollars.
- (f) In computing any period of time for the solicitation or any resulting contract, "days" means calendar days, and the day of the event from which the designated period of time begins to run shall not be included, but the last day shall be included unless it is a Saturday, Sunday, or Federal or State of Texas holiday, in which event the period shall run to the end of the next business day.

### **Section 3-804.02 Explanation to Offerors**

Any explanation desired by an offeror regarding the meaning or interpretation of the solicitation, drawings, specifications, etc., must be requested in writing from ATP's Contracting Officer and with sufficient time allowed for a reply to reach offerors before the submission of offers. Oral explanations or instructions given before the award of any contract, at any pre-proposal conferences or otherwise, will not be binding on ATP. Any information given to an offeror concerning an interpretation of the solicitation will be furnished to all offerors as an amendment to the solicitation, if such information is necessary to offerors in submitting offers on the solicitation or if the lack of such information would be prejudicial to uninformed offerors.

### **Section 3-804.03 Acknowledgment of Amendments to Request for Proposals**





## ACKNOWLEDGMENT OF AMENDMENTS TO REQUEST FOR PROPOSALS

- (a) If this solicitation is amended, then all terms and conditions which are not modified remain unchanged.
- (b) Offerors shall acknowledge receipt of any amendment to this solicitation: (1) by signing and returning the amendment; or (2) by identifying the amendment number and date in the space provided for this purpose on the form for submitting an offer; or (3) by letter or electronic message (if permitted). ATP must receive the acknowledgment by the time and at the place specified for receipt of offers.

### **Section 3-804.04 Submission of Offers**

- (a) Offers and modifications thereof shall be enclosed in sealed envelopes or sealed cartons and submitted to ATP's Contracting Officer at the address specified in the solicitation. The offeror shall show the hour and date specified in the solicitation for receipt of offers, the solicitation number, and the offeror's name, address, and telephone number on the face of the envelope or carton.
- (b) Electronic offers will not be considered unless authorized by the solicitation. Offers may be modified or withdrawn by written notice, provided such notice is received prior to the hour and date specified for receipt of offers.
- (c) Samples of items, when required, must be submitted within the time specified and, unless otherwise specified in the solicitation, at no expense to ATP. If not destroyed by testing, samples will be returned at the offeror's request and expense, unless otherwise specified in the solicitation.
- (d) Each copy of the offer shall include the legal name of the offeror and a statement whether the offeror is a sole proprietorship, a corporation, or any other legal entity. An offer for a corporation shall further give the state of incorporation.

### **Section 3-804.05 Late Submissions, Modifications, and Withdrawals of Offers**

- (a) Any offer received at the location designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made, and:

- (1) it was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for receipt of offers (e.g., an offer submitted in response to a solicitation requiring receipt of offers by the 20th of the month must have been mailed by the 15th or earlier);
  - (2) it was sent by mail and it is determined by ATP that the late receipt was due solely to mishandling by ATP after receipt at ATP's offices; or
  - (3) it was sent by U. S. Postal Service Express Mail Next Day Service-Post Office to Addressee, not later than 5:00 P.M. at the place of mailing two (2) working days prior to the date specified for receipt of offers. The term "working days" excludes weekends and U. S. Federal holidays.
  - (4) it is the only offer received.
- (a) Any modification of an offer, except a modification resulting from the Contracting Officer's request for a "best and final" offer, is subject to the same conditions as in (a)(1) and (a)(2) of this provision.
- (b) A modification resulting from the Contracting Officer's request for a "best and final" offer received after the time and date specified in the request will not be considered unless received before award, and the late receipt is due solely to mishandling by ATP after receipt at ATP's offices.
- (c) The only acceptable evidence to establish:
- (1) the date of mailing of a late offer or modification sent either by registered or certified mail is the U.S. Postal Service postmark on both the envelope or wrapper and on the original receipt from the U.S. Postal Service. If neither postmark shows a legible date, the offer, modification or withdrawal shall be deemed to have been mailed late. The term "postmark" means a printed, stamped, or otherwise placed impression, exclusive of a postage meter machine impression, that is readily identifiable without further action as having been supplied and affixed on the date of mailing by an Employee of the U.S. Postal Service. Therefore, offerors should request the postal clerk to place a legible hand cancellation bull's-eye "postmark" on both the receipt and the envelope or wrapper; and

- (2) the time of receipt at ATP is the time-date stamp of ATP on the offer wrapper or other documentary evidence of receipt maintained by ATP.
- (3) the date of mailing of a late offer, modification, or withdrawal sent by U. S. Postal Service Express Mail Next Day Service - Post Office to Addressee is the date entered by the post office receiving clerk on the "Express Mail Next Day Service - Post Office to Addressee" label and the postmark on the envelope or wrapper and on the original receipt from the U. S. Postal Service. "Postmark" has the same meaning as defined in Section (d)(1) of this provision. Therefore, offerors should request the postal clerk to place a legible hand cancellation bull's-eye "postmark" on both the receipt and the envelope or wrapper.
- (d) Notwithstanding (a), (b), and (c) of this provision, a late modification of an otherwise successful offer which makes its terms more favorable to ATP will be considered at any time it is received and may be accepted.
- (e) Offers may be withdrawn by written notice received in accordance with Section 3-203.11 (Modification or Withdrawal of Proposals). An offer may be withdrawn in person by an offeror or the offeror's authorized representative, provided the identity of the person requesting withdrawal is established and the person signs a receipt for the offer prior to award.

#### **Section 3-804.06 Discounts**

- (a) Prompt payment discounts will not be considered in evaluating offers for award, unless otherwise specified in the solicitation. However, offered discounts will be taken if payment is made within the discount period, even though not considered in the evaluation of offers.
- (b) In connection with any discount offered for prompt payment, time shall be computed from (1) the date of completion of performance of the services or delivery of the supplies to the carrier if acceptance is at a point of origin, or date of delivery at destination or port of embarkation if delivery and acceptance are at either of these points, or (2) the date the correct invoice or voucher is received in the office specified by ATP, if the latter is later than the date of performance or delivery. For the purpose of computing the discount earned, payment shall be considered to have been made on the date of ATP's check or electronic funds transfer (if applicable).

### **Section 3-804.07 Award of Contract**

- (a) The contract will be awarded to the responsible offeror whose offer, conforming to the solicitation, will be most advantageous to ATP, price and other factors considered. A responsible offeror is one who affirmatively demonstrates to ATP that the offeror has adequate financial resources and the requisite capacity, capability, and facilities to perform the contract within the delivery period or period of performance, has a satisfactory record of performance on other comparable projects, has a satisfactory record of integrity and business ethics, and is otherwise qualified and eligible to receive award under the solicitation and laws or regulations applicable to the Procurement.
- (b) ATP reserves the right to accept other than the lowest offer, reject any or all offers in part or in total for any reason, to accept any offer if considered best for its interest, and to waive informalities and minor irregularities in offers received.
- (c) ATP may accept any item or group of items of any offer, unless the offeror qualifies the offer by specific limitations. Unless otherwise provided in the solicitation, offers may be submitted for any quantities less than those specified, and ATP reserves the right to make an award on any item for a unit quantity less than the quantity offered at the unit prices offered unless the offeror specifies otherwise in the offer.
- (d) A written award (or acceptance of offer) which is mailed, telegraphed, or otherwise furnished to the successful offeror within the time for acceptance specified in the solicitation shall be deemed to result in a binding contract without further action by either party.
- (e) ATP may, within the time specified therein, accept any offer or part thereof, as provided in (c) above, whether or not there are negotiations subsequent to its receipt, unless the offer is withdrawn by written notice received by ATP prior to award. If subsequent negotiations are conducted, they shall not constitute a rejection or counteroffer on the part of ATP.
- (f) ATP may award a contract, based on initial offers received, without discussion of such offers. Accordingly, each initial offer should be submitted on the most favorable terms from a price and technical standpoint which the offeror can submit to ATP.
- (g) Any financial data submitted with any offer hereunder or any



representation concerning facilities or financing will not form a part of any resulting contract; provided, however, that if the resulting contract contains a clause providing for price reduction for defective cost or pricing data, the contract price will be subject to reduction if cost or pricing data furnished hereunder is incomplete, inaccurate, or not current.

**Section 3-804.08 ATP-Furnished Property**

Include the provision at Section 3-802.08.

**Section 3-804.09 Order of Precedence**

Include the provision at Section 3-802.10.

**Section 3-804.10 Confidential Data**

Include the provision at Section 3-802.11, substituting the term "offeror" for the term "bidder" and the term "offer" for the term "bid" wherever they appear.

**Section 3-804.11 Administrative Remedies**

Include the provision at Section 4-300(A).

**Section 3-804.12 Cancellation of Solicitation**

Include the provision at Section 3-802.13.

**Section 3-804.13 Encouragement of Joint Ventures**

Include the provisions at Section 3-802.09 when the Contracting Officer has determined, in writing, that award to a Joint Venture is appropriate for the work to be performed.

**Section 3-804.131 Mandating Award to Joint Ventures**

Include the provisions at Section 3-802.091 when the Contracting Officer has determined, in writing, that it is appropriate to mandate award to Joint Ventures.

**Section 3-804.14 Wage Rates**

Include the provisions at Section 6-303.16 when dealing with Services Contracts.

Include the provisions at Section 6-402.28 when dealing with Construction



Contracts

## **CHAPTER 4 – SPECIFICATIONS, ADMINISTRATIVE REMEDIES, AND ORGANIZATIONAL CONFLICT OF INTEREST**

### **Section 4-100      General**

### **Section 4-101      Definitions**

- (1) "Brand Name" means a name of a product or service that is limited to the product or service produced or controlled by one private entity or by a closed group of private entities. Brand names may include trademarks, manufacturer names, or model names or numbers that are associated with only one manufacturer.
- (2) "Brand Name Specification" means a specification limited to one or more items by manufacturers' names or catalogue numbers.
- (3) "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 ATP's requirements and which provides for the submission of equivalent products.
- (4) "Public Transportation" means an approved list of property, services, or construction items described by model or catalogue numbers, which, prior to competitive solicitation, ATP has determined will meet the applicable specification requirements.
- (5) "Specification" means any statement of work or any description of the physical, functional, or performance characteristics, or of the nature of property, service, or construction. A specification includes, as appropriate, requirements for inspecting, testing, or preparing a property, service, or construction item for delivery. Unless the context requires otherwise, the terms "specification" and "purchase description" are used interchangeably throughout the Procurement Policy and Guidelines.

### **Section 4-200      Policies and Requirements**

### **Section 4-201      Purpose and Policies**

- (1) The purpose of a specification is to serve as a basis for obtaining a property, service, or construction item adequate and suitable for ATP'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. It is a requirement of

law and the Policy of ATP that specifications permit full and open competition consistent with this purpose. Specifications shall be drafted with the objective of clearly describing ATP's requirements.

- (2) 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 ATP. It is recognized, however, that the preference for use of functional or Performance Specifications is primarily applicable to the Procurement of property and services. Such preference often is not practicable in construction apart from the Procurement of supply-type items for a construction project.
- (3) It is the general Policy of ATP 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.
- (4) Internal Responsibilities for Solicitation Issuance

#### **User Department**

The user department is responsible for providing the in-house independent cost estimate, technical specifications/scope of work, evaluation criteria (if applicable) and corresponding weights, drawings for equipment and materials, and service contracts. The user department shall also prepare a draft of additional and special terms and conditions to cover such items as required or desired delivery schedule, progress reporting requirements, and technical evaluation criteria in order of merit. Requestors are responsible for providing this information, together with a purchase requisition and information on funding source, to the Procurement Department.

#### **Procurement Department**

The Procurement Department is responsible for creating every solicitation package and reviewing and revising information submitted by the user department to ensure compliance with these policies and federal requirements. A solicitation package includes instructions to bidders/offerors, technical specifications or scope of work, the special terms and conditions recommended by the Department Project Manager, the contractual provisions required by the Federal Government (if needed), the proposed contract terms and conditions, and, if applicable, the evaluation criteria that will be utilized to determine contractor selection and protest procedures.

## **All Departments**

All departments involved in the preparation of the solicitation shall review the portions for which they are responsible. When all reviews have been completed, and approvals obtained, the Procurement Department will advertise and issue the final solicitation.

### **Section 4-202 Authority to Prepare Specifications**

The Executive Director or his Designee shall be responsible for preparing, approving, revising, and maintaining all specifications used by ATP for Procurement. Such procedures shall ensure that specifications are completed a sufficient time in advance of ATP's requirements to permit selection and implementation of the appropriate Procurement method under these policies and guidelines. When there will be no conflict of interest as described in the Procurement Policy and Guidelines and the Ethics, Conflicts and Nondisclosure Policy and it is otherwise in the best interest of ATP, a contract may be entered into to prepare specifications for ATP's use in the Procurement of property, services, or construction. In an emergency under Section 3-206 (Emergency Procurements), any necessary specifications may be utilized without regard to provisions of this Chapter.

### **Section 4-203 Procedures for the Development of Specifications**

- (1) This section applies to all persons who may prepare a specification for ATP's use. A specification may provide alternate descriptions of property, services, or construction items where two or more design, functional, or performance criteria will satisfactorily meet ATP's requirements. Specifications should not include any solicitation or contract term or condition such as a requirement for time or place of bid opening, time of delivery, payment, liquidated damages, or qualification of bidders.
- (2) This subsection covers or equal specifications and shall apply whenever Brand Names are used in specifications, except as provided in Section 4-203(3), below.
  - (a) Brand Name or equal specifications may be prepared to be used when the Contracting Officer determines in writing that:
    - (i) no specification for a common or general use item or Public Transportation is available;
    - (ii) time does not permit the preparation of another form of specification, not including a Brand Name specification;



- (iii) the nature of the product or the nature of ATP's requirements makes use of a Brand Name or equal specification suitable for the Procurement;
  - (iv) it is impractical or uneconomical to write a clear and accurate description of the technical requirements of the property or services to be acquired; or
  - (v) use of a Brand Name or equal specification is in ATP's best interest.
- (b) 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. Brand Name or equal specifications shall include a description of the particular design, functional, or performance characteristics which are required to meet the needs of ATP.

Where a Brand Name or equal specification is used in a solicitation, the solicitation shall contain explanatory language that the use of a Brand Name is for the purpose of describing the standard of quality, performance, and characteristics desired and is not intended to limit or restrict competition.

- (3) A Brand Name specification is restrictive and may be used only when the Contracting Officer makes a written determination that only the identified Brand Name item or items will satisfy ATP's needs. The Contracting Officer shall seek to identify sources from which the designated Brand Name item or items can be obtained and shall solicit such sources to achieve whatever degree of competition is practicable.

#### **Section 4-204 Public Transportation**

A Public Transportation may be developed when testing or examination of the property or construction items prior to issuance of the solicitation is desirable or necessary in order to best satisfy ATP's requirements. When developing a Public Transportation, a representative group of potential Suppliers shall be solicited in writing to submit products for testing or examination to determine acceptability for inclusion on a Public Transportation. Any potential Supplier, even though not solicited, may offer its products for consideration. Inclusion on a Public Transportation shall be based on results of tests or examinations conducted in accordance with prior published requirements. Except as otherwise provided by law, trade secrets, test data, and similar information provided by the Supplier will be kept confidential when requested in writing by the Supplier. However, test results used in formulating Public Transportations shall be



made public but, in a manner, so as to protect the confidentiality of the identity of the competitors by, for example, using numerical designations.

**Section 4-205 Full and Open Competition**

All specifications shall be written in such a manner as to describe the requirements to be met, without having the effect of exclusively requiring a proprietary supply, service, or construction item, or Procurement from a sole source, unless no other manner of description will suffice. In that event, a written determination shall be made that it is not practicable to use a less restrictive specification.

**Section 4-206 Specifications Prepared by Others**

The requirements of this Chapter shall apply to all specifications prepared by other than ATP personnel, including, but not limited to, those prepared by consultants, architects, engineers, designers, and other draftsmen of specifications for public contracts. Contracts for the preparation of specifications by other than ATP personnel shall require the specification writer to adhere to such requirements.

**Section 4-300 Administrative Remedies**

This chapter provides for administrative remedies for protests against solicitations and awards, suspensions and debarments, and contractual disputes. The remedies are intended to foster public confidence in the integrity of ATP's Procurement system and provide for fair and impartial resolution of controversies in an expeditious and cost-efficient manner.

**Section 4-300A Solicitation Provision**

All solicitations for ATP contracts shall contain the following provision:

**ADMINISTRATIVE REMEDIES**

By submission of a bid, proposal, offer, or quotation in response to this solicitation, the bidder or offeror agrees to exhaust its administrative remedies under Chapter 4 of ATP's Procurement Policy and Guidelines or the Disputes Clause of any resulting contract prior to seeking judicial relief of any type in connection with any matter related to this solicitation, the award of any contract, and any dispute under any resulting contract.

**Section 4-301 Protests of Solicitations and Awards**

**Section 4-301A Right to Protest**

Any interested party who is aggrieved or adversely affected in connection with the solicitation or award of a contract may protest to ATP and appeal any adverse decision in accordance with the provisions of this section. Interested parties are encouraged to seek resolution of their complaint initially with the Contracting Officer who issued the solicitation. Any such complaint must be made in writing.

**Section 4-301B Definitions**

- (1) "Interested Party" means an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or a prospective or actual award of a contract or by the protest.
- (2) "Protest" means a claim that there has been a violation of law or the Procurement Policy and Guidelines or some other impropriety in connection with an ATP Procurement.
- (3) "Protester" means any interested party who files a protest.

**Section 4-302 Filing of Protest**

- (1) Protests shall be made in writing to the Procurement Director and shall be filed in duplicate within 10 days after the protester knows or should have known of the facts giving rise thereto. A protest is considered filed when received by the Director of Procurement. Protests filed after the 10-day period shall not be considered.
- (2) Protesters may file a protest on any phase of solicitation or award including, but not limited to, specifications preparation, bid or proposal solicitation, award, or disclosure of information marked confidential in the bid or offer.
- (3) To expedite handling of protests, the envelope should be labeled "Protest." The written protest shall include as a minimum the following:
  - (a) the name and address of the protester;
  - (b) appropriate identification of the Procurement and, if a contract has been awarded, its number;
  - (c) a statement of reasons for the protest; and
  - (d) supporting exhibits, evidence, or documents to substantiate any claims unless not available within the filing time, in which case the expected availability date shall be indicated.

- (4) Any additional information requested by any of the parties should be submitted within the time periods established by the Procurement Director in order to expedite consideration of the protest. Failure of any party to comply expeditiously with a request for information may result in resolution of the protest without consideration of any information which is not timely filed.

#### **Section 4-303 Stay of Procurements**

When a protest has been filed within 10 days and before an award has been made, ATP shall make no award of the contract until the protest has been settled, unless the Executive Director makes a written determination that the award of the contract without delay is necessary to protect substantial interests of ATP.

#### **Section 4-404 Availability of Information**

ATP shall, upon written request, make available to any interested party information submitted that bears on the substance of the protest except where information is proprietary, confidential, or otherwise permitted or required to be withheld by applicable law. Persons who wish to keep such information submitted by them confidential should so request by specifically identifying such information within documents submitted and indicating on the front page of each document that it contains such information. Any such written request for confidentiality of data shall be honored only to the extent permitted by applicable law and subject to Section 1-401 (Public Access to Procurement Information) and the other provisions of this Policy and applicable law.

#### **Section 4-305 Protest Decision**

- (1) A decision on a protest shall be made by ATP as expeditiously as possible after receiving all relevant, requested information. If a protest is sustained, the available remedies include, but are not limited to, amendment to the solicitation, re-solicitation, cancellation of the solicitation, and termination of the contract.
- (2) In addition to any other relief, a recommendation may be made to the Board that the protesting bidder or offeror be awarded the reasonable costs incurred in connection with the solicitation, including bid preparation costs other than attorney's fees, when a protest is sustained and the protesting bidder or offeror should have been, but was not, awarded the contract under the solicitation. such recommendations shall confer no rights on the protester and shall not be binding on ATP.

#### **Section 4-306 Request for Reconsideration**

- (1) Reconsideration of a decision of the Procurement Director may be requested

by the protester, appellant, or any interested party who submitted comments during consideration of the protest. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

- (2) Requests for reconsideration of the decision by the Procurement Director shall be filed with the Executive Director not later than five days after receipt of such decision. A request for reconsideration shall be acted upon as expeditiously as possible. The Executive Director may uphold the previous decision or reopen the case as such officer deems appropriate.

**Section 4-307      Finality of Decision**

A decision under this Section 4-407 shall be final and conclusive unless fraudulent or appealed administratively to the Board within seven days after receipt of the decision.

**Section 4-308      Debarment or Suspension**

**Section 4-309      Scope of Coverage**

This section applies to all debarments or suspensions of persons from consideration for award of contracts imposed by the Executive Director.

**Section 4-310      Authority to Debar or Suspend**

- (1) After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Executive Director shall have authority to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than three years. The Executive Director shall have authority to suspend a person from consideration for award of contracts if there is probable cause for debarment. The suspension shall not be for a period exceeding three months.
- (2) The causes for debarment or suspension may include the following:
  - (a) conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;
  - (b) conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects

responsibility as a contractor;

- (c) conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;
- (d) violation of contract provisions, as set forth below, of a character which is regarded by the Executive Director to be so serious as to justify debarment action:
  - (i) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or
  - (ii) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more ATP contracts; provided, that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment; and
- (e) any other cause specified in the Procurement documents or that the Executive Director determines to be so serious and compelling as to affect responsibility as a contractor with ATP, including debarment by another government entity.

**Section 4-311      Suspension**

- (1) Upon written determination by the Executive Director that probable cause exists for debarment as set forth in Section 10-302, a contractor or prospective contractor shall be suspended. A notice of suspension, including a copy of such determination, shall be sent to the suspended contractor or prospective contractor. Such notice shall state that:
  - (a) the suspension is for the period it takes to complete an investigation into possible debarment including any appeals of a debarment decision but not for a period in excess of three months;
  - (b) bids or proposals will not be solicited from the suspended person, and, if they are received, they will not be considered during the period of suspension; and
  - (c) if a hearing has not been held, the suspended person may request a hearing in accordance with the Procurement Policy and Guidelines.

- (2) A contractor or prospective contractor is suspended upon issuance of the notice of suspension. The suspension shall remain in effect during any appeals. The suspension may be ended by the Executive Director or the Board but, otherwise, shall only be ended when the suspension has been in effect for three months or a debarment decision takes effect.

#### **Section 4-312          Initiation of Debarment Action**

Written notice of the proposed debarment action shall be sent by certified mail, return receipt requested, to the contractor or prospective contractor. This notice shall:

- (1) state that debarment is being considered;
- (2) set forth the reasons for the action;
- (3) state that, if the contractor or prospective contractor so requests, a hearing will be held, provided such request is received by the Executive Director within 10 days after the contractor or prospective contractor receives notice of the proposed action; and
- (4) state that the contractor or prospective contractor maybe represented by counsel.

#### **Section 4-313          Request for Hearing**

A contractor or prospective contractor that has been notified of a proposed debarment action may request in writing that a hearing be held. Such request must be received by the Executive Director within 10 days of receipt of notice of the proposed action. If no request is received within the 10-day period, a final determination may be made as set forth in Section 4-317.

#### **Section 4-314          Notice of Hearing**

If a hearing is requested, the Executive Director may appoint a hearing officer to conduct the hearing and recommend a final decision. Otherwise, the Executive Director shall act as the hearing officer. The hearing officer shall send a written notice of the time and place of the hearing. Such notice shall be sent by certified mail, return receipt requested, and shall state the nature and purpose of the proceedings.

#### **Section 4-315          Authority of Hearing Officer**

The hearing officer, in the conduct of the hearing, has the power, among others, to:

- (1) hold informal conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding either by consent of the parties or upon such officer's own motion;
- (2) require parties to state their positions with respect to the various issues in the proceeding;
- (3) require parties to produce for examination those relevant witnesses and documents under their control;
- (4) rule on motions and other procedural items on matters pending before such officer;
- (5) regulate the course of the hearing and conduct of participants therein;
- (6) receive, rule on, exclude or limit evidence, and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;
- (7) fix time limits for submission of written documents in matters before such officer;
- (8) impose appropriate sanctions against any party or person failing to obey an order under these procedures, which sanctions may include:
  - (a) refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
  - (b) excluding all testimony of an unresponsive or evasive witness; and
  - (c) expelling any party or person from further participation in the hearing; and
- (9) take official notice of any material fact not appearing in evidence in the record, if such fact is among the traditional matters of judicial notice.

**Section 4-316 Hearings**

- (1) Hearings shall be as informal as may be reasonable and appropriate under the circumstances and in accordance with applicable due process requirements. ATP will be represented in hearings by legal counsel. The weight to be attached to evidence presented in any particular form will be within the discretion of the hearing officer. Stipulations of fact agreed upon by the parties may be regarded



and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The hearing officer may require evidence in addition to that offered by the parties.

- (2) A hearing may be recorded but need not be transcribed except at the request and expense of the person making such request. 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.
- (3) Opening statements may be made unless a party waives this right.
- (4) Witnesses shall testify under oath or affirmation. All witnesses may be cross-examined.

#### **Section 4-317      Debarment Decision**

The hearing officer shall prepare a written determination recommending a course of action. Such determination shall be given to the Executive Director. Copies shall also be sent to the contractor or prospective contractor. The contractor or prospective contractor shall have 10 days to file comments upon the hearing officer's determination. The Executive Director may request oral argument. The Executive Director shall issue a final decision. Both the hearing officer's determination and the final decision shall recite the evidence relied upon. When debarment is recommended or ordered, the length of the debarment (not to exceed three years), the reasons for such action, and to what extent affiliates are affected shall be set forth. In addition, the final determination shall inform the debarred person of his rights to administrative review under the Procurement Policy and Guidelines.

#### **Section 4-318      Effect of Debarment Decision**

A debarment decision will take effect upon issuance and receipt by the contractor or prospective contractor. After the debarment decision takes effect, the contractor shall remain debarred until a court, the Board, or the Executive Director orders otherwise or until the debarment period specified in the decision expires.

#### **Section 4-319      Appeal of Decision**

A contractor may appeal administratively any debarment decision to the Board within seven days after receipt of the decision.

#### **Section 4-320      Contract Disputes Procedures**

#### **Section 4-320A      Scope of Coverage**

- (1) This section contains the procedures for resolving contract disputes pursuant to the Disputes Clause intended to be included in ATP contracts unless otherwise determined by the [Procurement Director or General Counsel] and specified in the applicable contract. It is ATP's Policy to try to resolve all controversies by mutual agreement without litigation. In appropriate circumstances, informal discussions between the parties can aid in the resolution of differences by mutual agreements and are encouraged. If such informal discussions do not resolve the controversy, individuals who have not participated substantially in the matter in controversy may be brought in to conduct discussions if this is feasible.
  
- (2) Unless otherwise determined by the [Procurement Director or General Counsel] and specified in the applicable contract, this section is intended applicable to controversies between ATP and a contractor which arise under, or by virtue of, a contract between them. This includes, without limitation, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification, reformation, or rescission. The word "controversy" is meant to be broad and all-encompassing. It includes the full spectrum of disagreements from pricing of routine contract changes to claims of breach of contract.

**Section 4-321          Delegation of ATP**

- (1) Subject to subsection (2), below, unless a provision of the contract specifies that authority to settle and resolve controversies and to issue decisions is reserved to the Executive Director, such authority is hereby delegated to the Contracting Officer. Within the Procurement Policy and Guidelines, therefore, "Contracting Officer" denotes the person with such authority whether that is the Contracting Officer or a of such officer.
  
- (2) The settlement or resolution of controversies involving claims in excess of \$25,000 is subject to the prior written approval of the Executive Director. In such cases, the Contracting Officer shall prepare a recommended decision for the Executive Director.

**Section 4-322          Contracting Officer's Decision**

- (1) When a controversy cannot be resolved by mutual agreement, the Contracting Officer shall, after written request by the contractor for a final decision, promptly issue a written decision. Before issuing a final decision, the Contracting Officer shall:
  - (a) review the facts pertinent to the controversy; and

- (b) secure any necessary assistance from legal, fiscal, and other advisors.
- (2) The Contracting Officer immediately shall furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt, and include in the decision:
- (a) a description of the controversy;
  - (b) a reference to pertinent contract provisions;
  - (c) a statement of the factual areas of agreement or disagreement;
  - (d) a statement of the Contracting Officer's decision, with supporting rationale; and
  - (e) a Section substantially as follows:  
  
"This is the final decision of the Contracting Officer. This decision may be appealed to the Board of Directors of ATP. If you decide to make such an appeal, you must mail or otherwise furnish written notice of appeal to the Board on or before the 90th day from the date you receive this decision. A copy of the notice of appeal shall be furnished to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference the decision from which the appeal is being taken, and identify the contract involved."
- (3) If the Contracting Officer does not issue a written decision within 120 days after written request by the contractor for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

**Section 4-323      Claims by ATP**

All controversies involving claims asserted by ATP against a contractor which cannot be resolved by mutual agreement shall be the subject of a decision by the Contracting Officer.

**Section 4-324      Administrative Appeals**

**Section 4-325      Scope of Coverage**



This section provides for the administrative appeal to the Board or its duly authorized representative.

**Section 4-326 Authorized Representative**

The Board may, by resolution evidenced by an appointment signed by the Chairman, designate a duly authorized representative to decide administrative appeals fairly and impartially pursuant to this section and according to the facts, the Procurement Policy and Guidelines, contract provisions, and the applicable law. Such authorized representative may be an administrative judge, a hearing officer, or an administrative board of appeals.

**Section 4-327 Hearings**

Any person appealing a decision administratively under this chapter or the Disputes Clause of an ATP contract shall be entitled to a hearing in accordance with this section. All proceedings in an administrative appeal shall be de novo. The Board or its duly authorized representative shall have all ATP of a hearing officer under Section 4-315 (Authority of Hearing Officer) of the Procurement Policy and Guidelines. If not previously established by the Board, the duly authorized representative shall prescribe hearing procedures appropriate under the circumstances and in accordance with applicable due process requirements. A transcript of the hearings shall be taken by a notary public authorized by law to administer oaths. Witnesses shall testify under oath or affirmation.

**Section 4-328 Finality of Decision**

The decision of ATP or its duly authorized representative in an administrative appeal shall be final and conclusive as to questions of fact unless determined by a court of competent jurisdiction to have been fraudulent, capricious, arbitrary, so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. The decision of ATP or its duly authorized representative shall not be final and conclusive as to questions of law. No action challenging such decision shall be brought more than two years from the date of the contractor's receipt of such decision.

**Section 4-400 Organizational Conflicts of Interest**

Organizational Conflict of Interest (OCI) arises where because of other activities or relationships with other persons, a person is potentially unable to render impartial assistance or advice to ATP; or the person's objectivity in performing the contract is or might be otherwise impaired; or a person has an unfair competitive advantage. Contracting Officers have the responsibility to avoid, neutralize, or mitigate potential conflicts of interest to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity.



ATP will examine each individual contracting situation on the basis of its particular facts and the nature of the proposed contract. Contracting Officers are required to examine each potential conflict and exercise common sense, good judgment, and sound discretion when assessing whether a significant potential OCI exists and then developing an appropriate way to resolve it.

There are three areas of concern examined in order to avoid, neutralize, or mitigate OCI:

Unequal Access to Information: If during the performance under a previous or current contract or task order for ATP a firm has access to non-public information and that information could provide them a competitive advantage in a later competition for a follow-on contract, their performance may create an organizational conflict of interest. For example, an OCI would exist

if a firm involved in the development or validation of ATP's independent cost estimate (i.e., non- public information) and subsequently competes for the contract for which the ICE was developed.

Biased Ground Rules: If during the performance under a previous or current contract or task order for ATP a firm in some sense set the ground rules for another task/contract with ATP by, for example, writing the statement of work, evaluation factors, specifications, or system design. By participating in such activities, the firm could skew the competition in its favor (whether intentional or not). The firm by virtue of its special knowledge of ATP's future requirements would have an unfair competitive advantage.

Lack of Impartiality or Impaired Objectivity: When the firm is unable, or potentially unable, to provide impartial and objective assistance or advice to ATP due to other activities, relationships, contracts, or circumstances. For example, if a firm's work under one ATP contract/task entails it evaluating itself either through an assessment of performance under another contract/task or through an evaluation of proposals. Doing so could lead to impaired objectivity, where the firm's ability to render impartial advice to ATP could appear to be undermined by its relationship with the entity whose work product is being evaluated.

#### **Section 4-401      Scope**

This chapter prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest. It also provides examples to assist the Contracting Officer in applying these rules and procedures to individual contracting situations.

#### **Section 4-402      Definitions**

An "organizational conflict of interest" exists when one of the three circumstances

described in Section 4-400 arises, that is, (a) unequal access to information, (b) biased ground rules, or (c) lack of impartiality or impaired objectivity.

**Section 4-403      Applicability**

- (1) This chapter applies to contracts with either profit or nonprofit organizations.
- (2) The applicability of this chapter is not limited to any particular kind of Procurement. However, organizational conflicts of interest are more likely to occur in contracts involving
  - (a) management support services;
  - (b) consultant or other professional services;
  - (c) contractor performance of, or assistance in, technical evaluations; or
  - (d) systems engineering and technical direction work performed by a contractor that does not have overall contractual responsibility for development or production.

**Section 4-404      Waiver**

The Executive Director or his Designee may waive any general rule or procedure of this chapter by determining that its application in a particular situation would not be in ATP's interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the Executive Director or his Designee.

**Section 4-405      Contracting Officer's Responsibilities**

- (1) Using the general rules, procedures, and examples in this chapter, the Contracting Officer shall analyze planned Procurements in order to :
  - (a) identify and evaluate potential organizational conflicts of interest as early in the Procurement process as possible; and
  - (b) avoid, neutralize, or mitigate significant potential conflicts before contract award.
- (2) The Contracting Officer should obtain the advice of legal counsel and the assistance of appropriate technical specialists in evaluating potential conflicts and in developing any necessary solicitation provisions and contract clauses (see Section 4-414).

- (3) Before issuing a solicitation for a contract that may involve a significant potential conflict, the Contracting Officer shall recommend to the Executive Director a course of action for resolving the conflict (see Section 4-411).
- (4) In fulfilling his responsibilities for identifying and resolving potential conflicts, the Contracting Officer should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation. The Contracting Officer's judgment need be formally documented only when a substantive issue concerning potential organizational conflict of interest exists.

## **Section 4-406 Rules and Application**

### **Section 4-406A Introduction**

The general rules in Section 4-406B through Section 4-409 prescribe limitations on contracting as the means of avoiding, neutralizing, or mitigating organizational conflicts of interest that might otherwise exist in the stated situations. Some examples are provided in Section 11-208. These examples are illustrative only and each individual contracting situation should be examined, and a determination as to appropriate mitigations made, on a case-by-case basis taking into account the particular facts and circumstances at issue and the nature of the proposed contract. Conflicts may arise in situations not expressly covered in this section or in the examples in Section 4-412.

The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a potential or actual organizational conflict exists and, if it does, the development of an appropriate means for resolving it. The two underlying principles are :

- (1) preventing the existence of conflicting roles that might bias a contractor's judgment; and
- (2) preventing unfair competitive advantage.

### **Section 4-406B Providing Systems Engineering and Technical Direction**

- (1) A contractor that provides systems engineering and technical direction for a Procurement but does not have overall contractual responsibility for its development, integration, assembly, testing, or production shall not (1) be awarded a contract to supply the system or any of its major components or (2) be a subcontractor or consultant to a Supplier of the system or any of its major components, unless the potential or actual OCI can be mitigated in accordance with this Section 4-406.
- (2) Systems engineering includes a combination of substantially all of the following

activities: determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design. Technical direction includes a combination of substantially all of the following activities: developing work statements, determining parameters, directing other contractors' operations, and resolving technical controversies. In performing these activities, a contractor occupies a highly influential and responsible position in determining a system's basic concepts and supervising their execution by other contractors. Therefore, this contractor should not be in a position to make decisions favoring its own products or capabilities, unless appropriate steps can be taken to prevent or mitigate the potential or actual OCI.

#### **Section 4-407      Preparing Specifications or Work Statements**

- (1) (a) If a contractor prepares and furnishes complete specifications covering non-developmental items to be used in a competitive Procurement, that contractor shall not be allowed to furnish these items, either as a Prime Contractor as a subcontractor, for a reasonable period of time including, at least, the duration of the initial production contract. This rule shall not apply to:
  - (i) contractors that furnish, at ATP's request, specifications or data regarding a product they provide even though the specifications or data may have been paid for separately or in the price of the product;
  - (ii) situations in which contractors, acting as industry representatives, help ATP prepare, refine, or coordinate specifications, regardless of source; provided that this assistance is supervised and controlled by ATP representatives; or
  - (iii) circumstances where the appropriate steps can be taken to prevent or mitigate the potential or actual OCI.
- (b) If a single contractor drafts complete specifications for non-developmental equipment, it should be eliminated for a reasonable time from competition for production based on the specifications, unless the potential or actual OCI can be mitigated in accordance with this Section 4-406. This should be done in order to is intended to avoid a situation in which the contractor could draft specifications favoring its own products or capabilities. ATP should take steps to assure it obtains unbiased advice as to the content of the specifications and to avoid allegations of favoritism in the award of production contracts.



- (c) In development work, it is normal to select firms that have done the most advanced work in the field. These firms can be expected to design and develop around their own prior knowledge. Development contractors frequently can start production earlier and more knowledgeably than firms that did not participate in the development, and this can affect the time and quality of production, both of which are important to ATP. In some instances, ATP may have financed the development. Thus, while the development contractor has a competitive advantage, it is an unavoidable one that is not considered unfair; hence, no prohibition should be imposed.
- (2) If a contractor prepares, or assists in preparing, a work statement to be used in competitively procuring a system or services, or provides material leading directly, predictably, and without delay to such a work statement, that contractor may not supply the system, major components of the system, or the services unless:
- (i) it is the sole source;
  - (ii) it has participated in the development and design work;
  - (iii) more than one contractor has been involved in preparing the work statement; or
  - (iv) appropriate steps can be taken to prevent or mitigate the potential or actual OCI.
- (b) ATP normally should prepare its own work statements. When contractor assistance is necessary, the contractor might often be in a position to favor its own products or capabilities. To overcome the possibility of bias, contractors are prohibited from supplying a system or services acquired on the basis of work statements growing out of their services, unless excepted in subsection (a) above.

#### **Section 4-408 Providing Technical Evaluation or Consulting Services**

Contracts involving (1) technical evaluations of other contractors' offers or products or (2) consulting services generally shall not be awarded to a contractor that would evaluate, or advise ATP concerning, its own products or activities or those of a competitor without proper safeguards to ensure objectivity and protect ATP's interests.

#### **Section 4-409      Obtaining Access to Proprietary Information**

- (1) A contractor that gains access to proprietary information of other companies in performing advisory services for ATP must agree with the other companies to (a) protect their information from unauthorized use or disclosure for as long as it remains proprietary and (b) refrain from using the information for any purpose other than that for which it was furnished. The Contracting Officer shall obtain copies of these agreements and ensure that they are properly executed.
  
- (2) Proprietary information is information considered so valuable by its owners that it is held secret by them and their licensees. When a contractor requires such information from others to perform an ATP contract and can use the leverage of the contract to obtain it, the contractor may gain an unfair competitive advantage unless restrictions are imposed. These restrictions protect the information and encourage companies to provide it when necessary for contract performance. They are not intended to protect information (a) furnished voluntarily without limitations on its use or (b) available to ATP or contractor from other sources without restriction.

#### **Section 4-410      Information Sources**

When information concerning prospective contractors is necessary to identify and evaluate potential organizational conflicts of interest or to develop recommended actions, the Contracting Officer should first seek it from within ATP or from other readily available sources. Non-ATP sources include publications and commercial services, such as credit rating services, trade and financial journals, and business directories and registers.

#### **Section 4-411      Procedures**

- (1) If the Contracting Officer initially decides that a particular Procurement involves a potential or actual organizational conflict of interest, the Contracting Officer shall, before issuing the solicitation, submit to the Executive Director for approval:
  - (a) a written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict, based on the general rules in Section 4-406, on another basis not expressly stated in that section or in accordance with the Federal Requirements;
  
  - (b) a draft solicitation provision (see Section 4-414A); and

- (c) if appropriate, a proposed contract clause (see Section 4.415).
- (2) The Executive Director shall :
- (a) review the Contracting Officer's analysis and recommended course of action, including the draft provision and any proposed clause;
  - (b) consider the benefits and detriments to ATP and prospective contractors; and
  - (c) approve, modify, or reject the recommendation in writing.
- (3) The Contracting Officer shall:
- (a) include the approved provision and any approved clause in the solicitation;
  - (b) consider additional information provided by prospective contractors in response to the solicitation or during negotiations; and
  - (c) before awarding the contract, resolve the potential conflict in a manner consistent with the approval or other direction by the Executive Director; or
  - (d) if the prospective contractor disagrees and requests higher level review, provide the decision and the contractor's position to the Executive Director or his Designee for review and final decision.

**Section 4.412**            **Examples**

The examples in Sections (1) through (6), below, illustrate situations in which questions concerning organizational conflicts of interest may arise. They are not all-inclusive and each individual contracting situation should be examined, and a determination as to appropriate mitigations made, on a case-by-case basis taking into account the particular facts and circumstances at issue and the nature of the proposed contract. The examples are intended to help the Contracting Officer apply the general rules in Section 4-406 to individual contract situations.

- (1) Company A agrees to provide systems engineering and technical direction for ATP on a power plant (i.e., turbines, drive shafts, etc.). Company A should not be allowed to supply any power plant components. Company A can, however, supply items unrelated to the power plant. In this example, the system is the power plant, and the ban on supplying components is limited to those for that system only.

- (2) Company A is the systems engineering and technical direction contractor for system X. After some progress, but before completion, the system is cancelled. Later, system Y is developed to achieve the same purposes as system X but in a fundamentally different fashion. Company B is the systems engineering and technical direction contractor for system Y. Company A may supply system Y or its components.
- (3) Company A develops new electronic equipment and, as a result of this development, prepares specifications. Company A may supply the equipment.
- (4) XYZ Tool Company and PQR Machinery Company, representing the American Tool Institute, work under ATP supervision and control to refine specifications or to clarify the requirements of a specific Procurement. These companies may supply the item.
- (5) Before a computer equipment Procurement is conducted, Company A is awarded a contract to prepare data system specifications and equipment performance criteria to be used as the basis for the equipment competition. Since the specifications are the basis for selection of commercial hardware, a potential conflict of interest exists. Company A should be excluded from the initial follow-on computer hardware Procurement.
- (6) Company A receives a contract to prepare a detailed plan for technical training of ATP personnel. It suggests a curriculum that ATP endorses and incorporates in its request for proposals to institutions to establish and conduct the training. Company A may not be awarded a contract to conduct the training.

#### **Section 4-413            Unsolicited Proposals**

Unsolicited Proposal is defined as a written proposal that is submitted to ATP on the initiative of the submitter for the purpose of obtaining a contract with ATP and which is not in response to a formal or informal request.

Unsolicited Proposals that ATP determines to be acceptable based on need, favorable evaluation, and available funding will be processed as Sole Source Procurements in accordance with Section 3-205.

Unsolicited Proposals are a valuable means for ATP to obtain innovative or unique methods or approaches to accomplishing its mission.

Advertising material, commercial item offers, contributions or technical



correspondence are not considered to be Unsolicited Proposals.

An Unsolicited Proposal is a proposal that is:

- innovative and unique.
- independently originated and developed by the offeror.
- prepared without ATP supervision, endorsement, direction, or direct involvement.
- sufficiently details that its benefits in support of ATP's mission and responsibilities are apparent and to permit a determination that ATP support could be worthwhile, and the proposed work could benefit the agency's mission responsibilities.
- Not an advance proposal for property or service that can be acquired by competitive methods.
- Not in response to a publicized statement of need or request for proposals.

Advance Guidance

ATP shall encourage potential offerors to make preliminary contacts with appropriate agency personnel before expending extensive effort on a detailed Unsolicited Proposal or submitting proprietary data to ATP. These preliminary contacts include:

- Inquiries as to the general need for the type of effort contemplated.
- Contacts with agency technical personnel for the limited purpose of obtaining an understanding of the agency mission and responsibilities relative to the type of effort contemplated.

ATP shall make available to potential offerors of Unsolicited Proposals at least the following information:

- Definition and content of an Unsolicited Proposal acceptable for evaluation.
- Requirements concerning responsible prospective contractors and organizational conflicts of interest.
- Role of technical correspondence before proposal preparation.
- Agency contact points for information regarding advertising, contributions, solicitation mailing lists and other types of transactions frequently mistaken for Unsolicited Proposals.

- Procedures for submission and evaluation of Unsolicited Proposals.
- Information sources on agency objectives and areas of potential interest.
- Instructions for identifying and marking proprietary information.
- Agency personnel shall conduct personal contacts without making any agency commitments concerning the acceptance of Unsolicited Proposals.

#### Content of Unsolicited Proposals

Unless otherwise determined by the Procurement Department, Unsolicited Proposals should contain the following information to permit consideration in an objective and timely manner:

(a) Basic information including:

- Offeror's name and address and type of organization; e.g., profit, nonprofit, educational, small business.
- Names and telephone numbers of technical and business personnel to be contacted for evaluation or negotiation purposes.
- Identity of proprietary data to be used only for evaluation purposes.
- Names of other federal, state, local agencies, transit authorities receiving the proposal or funding the proposed effort.
- Date of submission.
- Signature of person authorized to represent and contractually obligate the offeror.

(b) Technical information including:

- Concise title and abstract of the proposed effort;
- A reasonably complete discussion stating the objectives of the effort or activity, the method of approach and extent of effort to be employed, the nature and extent of the anticipated results, and the manner in which the work will help to support accomplishment of the agency's mission;
- Names and biographical information on the offeror's key personnel who would be involved, including alternates; and

- Type of support needed from the agency; e.g. facilities, equipment, materials, or personnel resources.

Supporting information including:

- Proposed price or total estimated cost for the effort in sufficient detail for meaningful evaluation.
- A six-month period of time for which the proposal is valid.
- Type of contract preferred.
- Proposed duration of effort.
- Brief description of the organization, previous experience in the field and facilities to be used.
- Required statements about organizational conflicts of interest.

#### Award of Unsolicited Proposals

The requirements in this section apply to all Procurements funded with Federal assistance and, to the extent practicable, to locally funded Procurements. Receipt of an Unsolicited Proposal does not, by itself, justify contract award without providing for full and open competition. Unless the Unsolicited Proposal offers a proprietary concept that is essential to contract performance to satisfy the requirement for full and open competition, ATP will take the following actions before entering into a contract resulting from an Unsolicited Proposal:

- Publicize receipt of the Unsolicited Proposal and include an adequate description of the property or services offered without improperly disclosing proprietary information or disclosing the originality of thought or innovativeness of the property or services sought;
- Publicize ATP's interest in acquiring the property or services described in the proposal and provide an adequate opportunity for interested parties to comment or submit competing proposals; and
- Publicize ATP's intention to award a contract based on the Unsolicited Proposal or another proposal submitted in response to the publication.

If it is impossible to describe the property or services offered without revealing

proprietary information or disclosing the originality of thought or innovativeness of the property or services sought, ATP may make a sole source award to the offeror. A sole source award may not be based solely on the unique capability of the offeror to provide the specific property or services proposed.

#### **Section 4-414 Solicitation Provision and Contract Clause**

##### **Section 4-414A Solicitation Provision**

As indicated in the general rules in Section 4-406, significant potential organizational conflicts of interest normally are resolved by imposing some restraint or mitigation measure, appropriate to the nature of the conflict, upon the contractor's eligibility for future contracts or subcontracts. Therefore, affected solicitations shall contain a provision that:

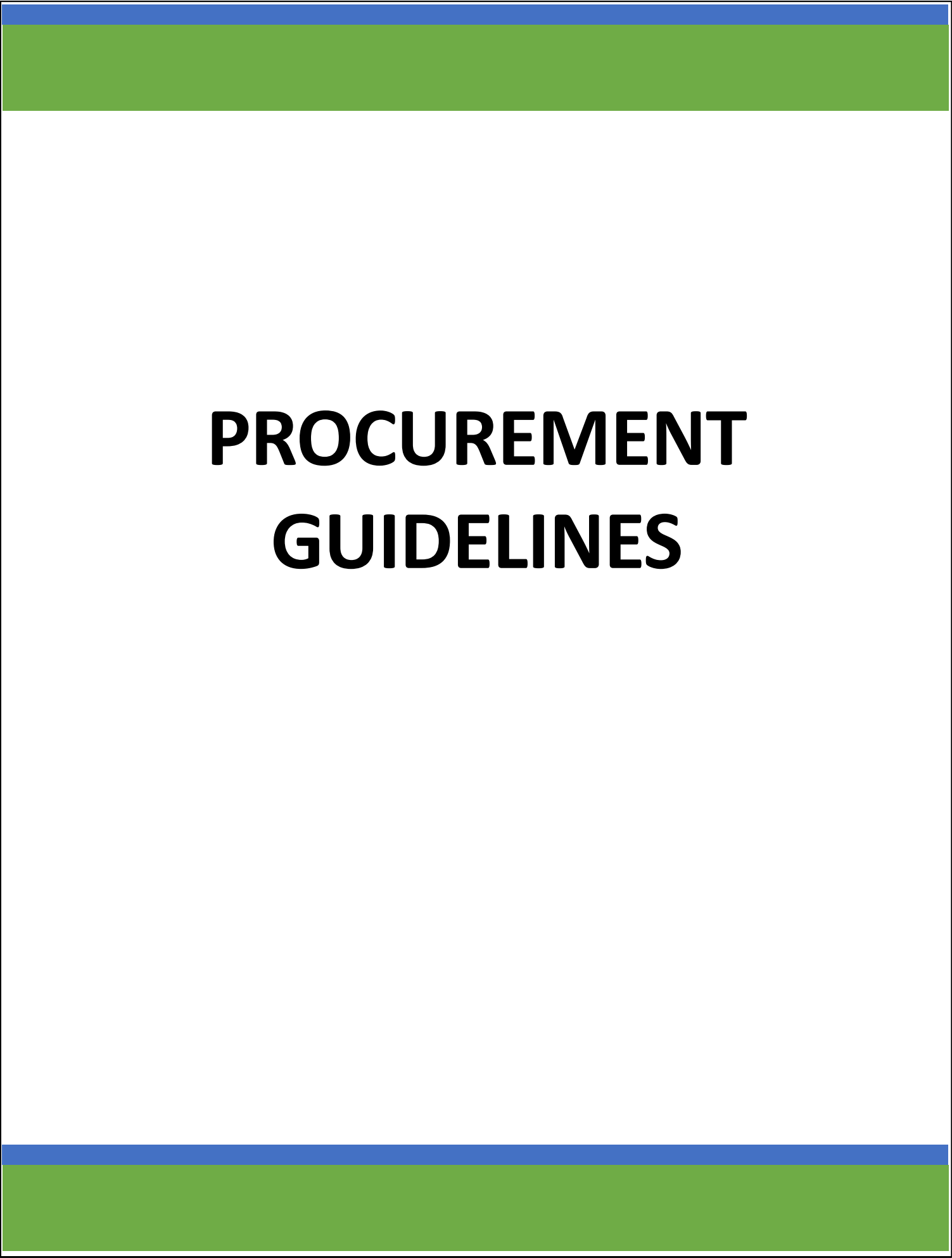
- (1) invites offerors' attention to the Procurement Policy and Guidelines;
- (2) states the nature of the potential conflict as seen by the Contracting Officer;
- (3) states the nature of the proposed restraint upon future contractor activities; and
- (4) depending on the nature of the Procurement, states whether or not the terms of any proposed clause and the application of this chapter to the contract are subject to negotiation.

##### **Section 4-415 Contract Clause**

- (1) If, as a condition of award, the contractor's eligibility for future prime contract or subcontract awards will be restricted or the contractor must agree to some other restraint or mitigation measure, the solicitation shall contain a proposed clause that specifies both the nature and duration of the proposed restraint or mitigation measure. The Contracting Officer shall include the clause in the contract, first negotiating the clause's final terms with the successful offeror if it is appropriate to do so [see Section 4-414(A)(4)].
- (2) The restraint or mitigation measure imposed by a clause shall be limited to a fixed term of reasonable duration (if applicable), sufficient to avoid the circumstance of unfair competitive advantage or potential bias. This period varies. It might end, for example, when the first production contract using the contractor's specifications or work statement is awarded, or it might extend through the entire life of a system for which the contractor has performed systems engineering and technical direction. In every case, the restriction shall specify termination by a specific date or upon the occurrence of an identifiable event.







# **PROCUREMENT GUIDELINES**



**CHAPTER 5                    PROCUREMENT OF CONSTRUCTION, ARCHITECT-ENGINEER, AND LAND SURVEYING SERVICES**

**Section 5-100                Definitions and Application**

**Section 5-101                Definitions**

- (1) "Architect-Engineer and Land Surveying Services" are those professional services within the scope of the practice of architecture, professional engineering, or land surveying. They may include services described in Section 3-207 (Statutory Professional Services).
- (2) "Prime Contractor," as used in Chapter 5, means a person who has a contract with ATP to build, alter, repair, improve, or demolish any structure, building, or other improvements of any kind to any real property.

**Section 5-102                Application**

The provisions of this Chapter shall apply to all Procurements of construction, architect-engineer and land surveying services which are expected to be greater than \$50,000. Procurement of construction, architect-engineer and land surveying services expected to be \$50,000 or less may be made in accordance with Section 3-204 (Small Purchases).

**Section 5-200                Management of Construction Contracts**

**Section 5-201                General Policy**

- (1) This Section 5-200 contains provisions applicable to the selection of the appropriate method for management for construction contracts; that is, the contracting method and configuration that most likely will result in timely, economical, and otherwise successful completion of the construction project in accordance with ATP's goals.
- (2) It is intended that the Executive Director or his Designee have sufficient flexibility in formulating the project delivery approach in a particular project to fulfill ATP's needs. In each instance, consideration commensurate with the project's size and importance should be given to identify the appropriate and effective means of obtaining both the design and construction of the project. A variety of project delivery methods and contracting techniques are available and the methods for achieving those purposes set forth in this section are not to be construed as an exclusive list.
- (3) In selecting the construction contracting method, the Executive Director or his Designee should consider the results achieved on similar projects in the past and the methods used. Consideration should be given to all appropriate and effective methods and their comparative advantages and disadvantages and how they might be adapted or

combined to fulfill ATP's requirements.

- (4) This section is intended to guide ATP personnel in selecting the appropriate contracting method. It is not intended to create any third-party rights nor to bind nor restrict ATP in selecting the most appropriate delivery method.

#### **Section 5-202 Lease, Buy, or Build**

Before initiating a construction project for a building, consideration shall be given to leasing or buying existing building space as well as to constructing new space including conducting lease versus purchase analysis in accordance with Section 3-610 (Leases). Factors to consider when choosing between these three alternatives include, but are not limited to:

- (1) whether ATP's requirements will be continuing or temporary;
- (2) the need for control by ATP over the building;
- (3) the adequacy of available space to fit ATP's needs;
- (4) to the extent they are reasonably known or ascertainable, the life-cycle costs associated with leasing, buying, or building;
- (5) which method can most timely meet and continue to meet ATP's requirements;
- (6) the need to physically separate and distinguish ATP's facilities from private facilities;
- (7) the dislocation of existing tenants, both commercial and residential, that may result; and
- (8) environmental effects.

#### **Section 5-203 General Descriptions**

- (1) The following descriptions are to provide a common vocabulary for use in the context of this section and for general discussion concerning the construction contracting activities of ATP. The project delivery methods described are not intended to be exhaustive, are not all mutually exclusive and often may be combined on one project. These descriptions are not intended to be fixed in respect to all construction projects of ATP. In each project, these descriptions may be adapted to fit the circumstances of that project. However, the Contracting Officer should endeavor to ensure that these terms are described adequately in the appropriate contracts, are not used in a misleading manner, and are understood by all relevant parties. Significant deviations from the descriptions provided in this section should be explicitly noted.
- (4) The single Prime Contract method of contracting normally has one business (general contractor) contracting with ATP to complete an entire construction project on a timely basis

in accordance with plans and specifications provided by ATP. These plans and specifications may be prepared by a private architectural firm under contract to ATP. 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.

- (3) Under the multiple Prime Contract method, ATP contracts directly with a number of specialty contractors to complete portions of the project in accordance with ATP's plans and specifications. ATP or its agent may have primary responsibility for successful completion of the entire project, or the contracts may provide that one of the multiple prime contractors has this responsibility.
- (4) In a design-build or turnkey project, a Business contracts directly to meet ATP's requirements as described in a set of Performance Specifications by constructing a facility to its own drawings, 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.
- (5) A construction manager is a person experienced in construction who 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 and construction of the project, including the administration of Change Orders. ATP contracts with a qualified construction manager to act for ATP in the construction project as specified in the construction management contract. At times, the construction manager may become the single Prime Contractor may guarantee that the project will be completed on time and will not exceed a specified maximum price. At such times, the construction manager will become responsible, just as any single prime contractor, to complete the project at or below the specified price. Examples may include a construction manager/ general contractor (or CM/GC) or a construction manager at-risk delivery method.

#### **Section 5-204          Criteria for Method Selection**

- (1) Before choosing the construction contracting method to use, a careful assessment must be made of requirements the project must satisfy and those other characteristics that would be desirable. In addition to those set forth in subsections (2) and (3), some of the factors to consider are:
  - (a) the date the project must be ready to be occupied;
  - (b) the overall scope and type of project;
  - (c) the extent to which ATP's requirements and the ways in which they are to be met are known;

- (d) the location of the project and whether a contractor's site may be used; and
  - (e) the size, scope, complexity, and economics of the project;
  - (f) the goals and objectives for the project;
  - (g) ATP's current and anticipated design approach to the project;
  - (h) the preferred allocation of risk between ATP, the construction contractors, and third parties; and
  - (i) any limitations imposed by applicable law or Federal Requirements.
- (2) The following factors relating to ATP's resources should be considered:
- (a) the amount and type of financing available for the project, including whether the budget is fixed or flexible, and the source of funding (for example, general or special authorization, federal assistance monies, or bonds);
  - (b) a realistic appraisal of the qualifications and experience ATP's personnel can bring to the project and, of equal importance, how much time such personnel can devote to the project;
  - (c) the availability of outside consultants may be considered (such consultants may be able to handle tasks and supply valuable expertise otherwise unavailable to ATP).
- (3) Choice of the proper construction contracting method entails not only the internal examination described in this section but must take into account the characteristics, experience, and availability of the contractors who can work on the project. The design firms ATP may contract with to prepare the plans and specifications must be evaluated as a group to determine whether they can efficiently divide the work into specialty packages, if multiple prime contractors are to be used, or if the project can be designed in phases appropriate to use of phased design and construction. Prospective construction contractors also must be appraised as a group to determine whether they have the capability and willingness to bid on the construction project as designed and as required by the contracting method chosen. Similarly, if the contracting method involves use of consultants, an evaluation of the availability of qualified consultants also should be made. If the design-build method or some variation of it is considered, availability of firms capable of both designing and constructing the facility must be ascertained. In respect to all of the potential contractors, it is important to consider the amount of competition currently in the market for the particular type of contract and whether a price can be

obtained that is fair and reasonable when considered together with the benefit to ATP potentially obtainable from such a contract.

### **Section 5-205      Single Prime Contractor**

- (1) When sequential design and construction are used with a single prime contractor, comprehensive plans and specifications that are precise enough to allow prospective prime (general) contractors to submit a competitive sealed bid or proposal should be prepared. The contractor awarded the contract takes responsibility for the coordination of the specialty subcontractors and timely completion of the project at the price specified in the contract. The architect-engineer, ATP's project manager, and (if used) the construction manager shall monitor the progress of the project and otherwise represent ATP's interest all as set forth in the pertinent contracts.
- (2) The primary advantage of the single Prime Contract method is that ATP can look to one Prime Contract who has principal responsibility for completing the project. The single Prime Contract method also may give ATP contractual insulation from many subcontractor claims. Also, when sequential design and construction are used, ATP is given a fixed price for completion of the entire project before the construction has begun.
- (3) The single Prime Contract method removes specialty contractors from direct ATP control. This method is likely to entail including in the cost of the total project the prime contractor's potential markup on each specialty contract. On the other hand, the prime contractor's services in managing these contractors may well offset any possible markup by eliminating the need for a construction manager.
- (4) A single Prime Contract also may be used with phased design and construction, for example through the letting by ATP of the early construction phases to specialty contractors and the letting of a portion of the project to a Prime Contract when the plans and specifications are sufficiently complete to allow bids to be made. If found advantageous after letting the prime contract, ATP may transfer or assign to the contractor the administration of the specialty contracts it let earlier, as provided in the contract. Using a single Prime Contract with phased design and construction has the advantages of having a single Prime Contract responsible for the entire job and also allowing construction to begin before all of the design is completed. The disadvantages are that ATP or its construction manager must supervise and coordinate the work of the early specialty contractors, and the Prime Contract will not be able to choose those early specialty contractors and may have to work with someone the Prime Contract would not have chosen. As a consequence, ATP may be exposed to more claims based upon assertions of mismanagement, and the Prime Contract bids may be proportionately higher than they would have been otherwise.
- (5) The rights, duties, and responsibilities of ATP's representatives, the architect-engineer,

the general prime contractor, and (if applicable) the construction manager and any specialty contractors who contract with ATP must be carefully detailed. If phased design and construction is used, administration of any ongoing specialty contracts let before the prime contract will have to be transferred or assigned to the prime contractor. The terms of this assignment or transfer (including the duties of ATP to ensure that the specialty contractors are at a certain point of completion at the time of the assignment), what liability to the specialty contractors remains with ATP after assignment, if any, and what duties and responsibilities the general Prime Contract has with respect to the assigned specialty contractors must all be set forth in the specialty contracts and the contract with the prime contractor.

### **Section 5-206 Multiple Prime Contractors**

- (1) Multiple prime contractors may be used with sequential design and construction by splitting the plans and specifications into packages pertinent to recognized trade specialties. ATP may undertake to manage and coordinate their work or contract with a construction manager to do so. The contracts may provide that responsibility for successful completion of the entire project rests with ATP, ATP's agent, or one of the multiple prime contractors. The contracts shall specify where this responsibility shall rest. Multiple prime contractors may be used effectively with phased design and construction only if the architect-engineer's work is closely coordinated with the specialty contractors' work. The specialty contractors may either contract directly with ATP or with its construction manager.
- (2) The multiple prime contractors method can lessen the prime contractor's markup (if any) on the specialty contractors' contracts and gives ATP much greater control over the contractors doing the work. It permits ATP to be more involved in the selection of specialty contractors, allows ATP to prescribe how they will compete for the contract, and gives ATP more flexibility in deciding when to enter the construction market and with what size contracts.
- (3) There are disadvantages to this method, however, since it places all the risk of managing and coordinating the construction work with ATP. ATP or its representatives must actively and aggressively supervise the project to ensure timely and successful completion. A contract that merely requires specialty contractors to cooperate and to coordinate their work is insufficient. To undertake this responsibility successfully requires vesting clear authority in an ATP representative to quickly make decisions essential to the continuation of the project.
- (4) Whenever multiple prime contractors are used, the contract between ATP and each Prime Contract must clearly state the scope of each contractor's responsibility and when the portions of its work are to be complete and must provide a system of timely reports on progress of the contractor's work and problems encountered. The contract also should specify that each contractor is liable for damages caused to other contractors and ATP



whether because of delay or otherwise. Such clauses should not, however, attempt to relieve ATP's liability where it fails to coordinate and manage the project properly.

Further, the duties of ATP's representative, the architect-engineer, and the construction manager (if one is employed) with respect to the specialty contractors should be clearly delineated in all the parties' contracts.

## **Section 5-207      Design-Build or Turnkey**

- (1) Design-Build (DB) – This method of project delivery includes one entity (design-builder) and a single contract with the owner to provide both architectural/engineering design services and construction.
- (2) The design-build or turnkey method gives the contractor maximum control of the construction project consistent with ATP's needs. ATP prepares a set of Performance Specifications including functional criteria, any life-cycle cost considerations, and other evaluation factors.

Under a lump-sum, fixed price design-build, ATP also shall specify the degree of detail necessary in a design proposal and the contractor is selected on the basis of its design proposal, proposed price, and other stated evaluation criteria. It may be appropriate to use a multi-step process to lessen the number of firms submitting final design proposals to reduce administrative burden and to keep preparation costs down. In appropriate circumstances, it may be advantageous to provide in the solicitation for payment (to all or any of the firms) stipulated amounts for proposal preparation costs to ensure adequate continuing competition. After award, the contractor completes the design (subject to review by ATP or its architect-engineer as set forth in the contract) and constructs the project for the fixed price proposed and by the scheduled date for completion. The contractor chooses whether to phase the design and construction for the project to achieve the scheduled date for completion. Upon completion, ATP either accepts or rejects the project depending on whether the contractor has met the specifications. An advantage of a fixed-price, lump-sum design-build, is that the fixed price for the project is established early, and the cost may increase only through compensable delay claims and Change Orders. A disadvantage is that because the price is fixed at an early level of design and where there may still be material unknowns in the project risk profile, the price may contain substantial risk contingency pricing and/or the project may be exposed to material claims or changes after entry into contract.

Under the progressive design-build delivery method, the final firm price for the construction work is established (as a lump-sum or guaranteed maximum price) on a stepped or progressive basis and at a later stage in design development (typically, at 60-90% design). During the Solicitation, proposals may be evaluated on the basis of the technical qualifications and the proposed approach to the project, among other evaluation factors. The price factors evaluated may include the fees for the

preconstruction and design services and the design-builder's fee and margin for the construction phase. An advantage of a progressive design-build is that the construction pricing and schedule commitments are deferred until after the design has been sufficiently defined and risks are better understood – enhancing collaboration and the likelihood of project success and reducing risk contingency pricing and the likelihood of material change orders. The disadvantage is that the construction cost is negotiated after contract award and without the benefit of competition, with the risk of ATP having to exercise an "off ramp" to procure the construction separately if agreement cannot be reached. A progressive design-build is therefore more suited to projects with sequence and schedule sensitivities and where the design or material risks are complex, difficult to define and/or subject to change and the advantages of agreeing a firm price at a later stage outweigh the disadvantages.

- (3) Another advantage of design-build is that the contractor designs and builds the project with its own forces. Consequently, the duty and risk of proper management of project design and construction lies with the contractor. It also allows the contractor to design and perform in a manner best suited to its operations and experience. It may give ATP earlier definition of the project. This method is most appropriate when ATP will not need to be deeply involved in the project's design and construction. A disadvantage of the design-build method is that there is less control over the design and construction process. The contract is awarded on the basis of a design proposal in the case of a fixed price, lump sum design build, not a complete set of plans and specifications. ATP's needs may not be met if the specifications are deficient, if the contractor's design proposals are not carefully evaluated, and if the design and construction process is not carefully monitored to ensure that both the specifications and the design proposal are being followed.
- (4) Careful preparation of the specifications and evaluation criteria is crucial to successful use of the design-build method. The contract documents also should delineate clearly ATP's rights to inspect plans and specifications and the construction work in progress. They should also indicate precisely what will constitute completion of the project by the contractor

#### **Section 5-208      Construction Manager**

- (1) A construction manager may bring a valuable practical construction perspective to ATP in both the planning and design phases of the project. For purposes of this section, the planning phase encompasses those activities involved in determining ATP's requirements, selecting the construction contracting management method, selecting an architect-engineer, and establishing progress schedules. During design, the construction manager reviews plans and makes suggestions to cut construction costs that may relate to the practicality of construction, market conditions in the construction industry, and items which should be ordered early. A construction manager also would assist in phasing the design and construction process.

- (2) Once construction commences, the construction manager's role may be limited to monitoring construction progress and inspecting and otherwise representing ATP's interest if sequential design and construction with a single Prime Contract are used. If the project is constructed by the phased design and construction method or the multiple prime contractor's method, the construction manager will be responsible for the supervision and management of their work and may let contracts to the specialty contractors pursuant to the management contract with ATP. In a project using phased design, the construction manager also may give ATP a guaranteed maximum price for completion of the project prior to completion of all the drawings and specifications. To the extent the construction manager is ATP's representative, the construction manager may assist in the final inspection and acceptance of the project by ATP.
- (3) The construction manager adds construction expertise to ATP's team. Several benefits of this expertise are listed below.
  - (a) The selection of the construction contract management technique, project design, and other crucial decisions in the early phases of the project can be made with a better understanding of their impact upon construction.
  - (b) The construction manager can manage the work of the various construction contractors as ATP's representative instead of a single Prime Contract whose interests may not coincide with those of ATP. In this way, ATP may gain more control of the actual construction project.
  - (c) Phased design and construction may be used more readily because a construction manager can relieve the burden on ATP to coordinate its duties with those of the architect-engineer and the various contractors.
  - (d) A construction manager may be able to give ATP a guaranteed maximum price earlier in the design process than a general contractor because of its involvement in the project from the beginning. This may permit ATP to phase the design and construction effectively and still have a fixed price for funding purposes before construction is begun.
- (5) It is imperative that the construction management contract clearly set forth the duties and authority of the construction manager with respect to all the participants in the project. The contract should define the possible liability of ATP and the construction manager for failure to coordinate the specialty contractors' work properly.
- (6) Delivery methods that build on the potential to expand the role of the construction manager include construction manager/general contractor (CM/GC) and variations to this, such as a construction manager at risk (CMAR). Under a CM/GC, the construction manager is engaged early and is also the construction contractor. The CM/GC collaborates with the designer and conducts constructability reviews during design to achieve

construction efficiencies. As with a progressive design-build, the construction price is negotiated (as a lump-sum or guaranteed maximum price) on a stepped or progressive basis as design packages are readied for construction. This delivery method works best where ATP wishes to retain a high degree of control over the design and where, similar to a progressive design-build, a project has sequence or schedule sensitivities or where the design and risk profile is complex, difficult to define and/or subject to change.

#### **Section 5-208A Construction Manager/General Contractor (CM/GC)**

Construction Management at Risk (CMR) also called CM at Risk or CM/GC) – This delivery method entails a commitment by the CMR for construction performance to deliver the project within a defined schedules and price, either a fixed lump sum or a guaranteed maximum price (GMP). The CMR provides construction input to the owner during the design phases and becomes the general contractor during the construction phase.

#### **Section 5-209 Sequential Design and Construction**

- (1) The initial step in using sequential design and construction is to gather a team to design the project and provide a complete set of drawings and specifications to use in awarding the construction contract or contracts. This team may include a construction manager who, in addition to reviewing the plans as they develop, may assist in separating them into packets if multiple prime contractors are to be used. Except for redesign necessitated by changes in ATP's requirements or problems encountered during construction, design is complete at the time construction has begun.
- (2) A project using sequential design and construction proceeds in clearly defined steps which may aid in financing and gaining any necessary approvals as well as aid in managing the entire project. Complex or unique projects can be completely thought through and planned before construction has begun. Also, before any construction has begun, a fixed price for the project can be established. A disadvantage of sequential design and construction is that it requires a longer time to complete the project than phased design and construction. The complete package of drawings and specifications also freezes design decisions months or years before occupancy (which will reduce flexibility).

#### **Section 5-210 Phased Design and Construction**

- (1) Phased design and construction may be used when the architect-engineer, working with the construction manager (if one is used), can settle on the major design decisions and then do the detailed design work in the sequence necessary to construct the project. This design process then allows construction to begin before design is complete for the entire project (of course, design is complete on those portions being constructed). Construction should be begun only after ATP's requirements are set, the overall (schematic) design is complete, and the complete drawings and specifications for the first construction phase are ready. (It may be possible to start site preparation prior to this stage.) A construction

manager often is necessary to assist in packaging the various specialty contracts and to manage the work under these contracts.

- (2) Phased design and construction can result in reduced project completion time. It also can allow reduction in the scope of the project if prices on early portions indicate the project may exceed the budget (in a sequential project, such redesign might delay the entire project). It also gives ATP added flexibility in deciding when to let the various specialty contracts to take advantage of market conditions. A disadvantage of phased design and construction is that portions of the project are begun before later portions are completely designed. Major changes in these later portions may necessitate costly changes in the early portions and result in costly delays to many other specialty contractors. ATP bears the risks both for at least some coordination of specialty contractors and for ensuring that design of later portions does not adversely affect earlier ones. Neither of these risks need be assumed by ATP in sequential design and construction.
- (3) The contract must clearly establish the architect-engineer's duty to design to allow phasing, and the contracts with the specialty contractors must clearly delineate their scope of work and duties to other contractors and ATP. Further, the management rights of ATP and its construction manager, if one is used, must be set forth.

**Section 5-300        Bonds**

**Section 5-301        Bid Security**

- (1) Invitations for Bids on construction contracts shall require the submission of bid security in an amount equal to at least five percent of the bid at the time the bid is submitted. If a bidder fails to accompany its bid with the required bid security, the bid shall be deemed nonresponsive in accordance with Section 3-202.13 (Bid Evaluation) of the Procurement Policy and Guidelines, except as provided by subsection (3), below.
- (2) Acceptable bid security shall be limited to:
  - (a) an annual or one-time bid bond in a form satisfactory to ATP underwritten by a company licensed to issue bid bonds in Texas; or
  - (b) a certified check from a bank acceptable to ATP.
- (3) If a bid does not comply with the security requirements of this section, the bid shall be rejected as nonresponsive, unless the failure to comply is determined by the Executive Director to be non-substantial when:
  - (a) only one bid is received, and there is not sufficient time to rebid the contract;
  - (b) the amount of the bid security submitted, though less than the amount required



by the Invitation for Bids, is equal to or greater than the difference in the price stated in the next higher acceptable bid; or

- (c) the bid guarantee becomes inadequate as a result of the correction of a mistake in the bid or bid modification in accordance with Section 3-202.12 (Mistakes in Bids) of the Policy and Guidelines, if the bidder increases the amount of guarantee to required limits within 48 hours after the bid opening.

- (4) The bid bond required by this section shall be in substantially the following form:

#### BID BOND

KNOW ALL MEN BY THESE PRESENTS, that we, the Principal and Surety(ies) hereto, are firmly bound to the Austin Transit Partnership ATP (hereinafter called ATP) in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally; provided, that, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly, and severally with the Principal, for the payment of such sums only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the Principal has submitted the bid identified above, if the Principal, upon acceptance by ATP of his bid identified above, within the period specified therein for acceptance (60 days if no period is specified), shall execute such further contractual documents, if any, and give such bond(s) as may be required by the terms of the bid as accepted within the time specified (10 days if no period is specified) after receipt of the forms by him, or in the event of failure so to execute such further contractual documents and give such bonds, if the Principal shall pay ATP for any cost of procuring the work (including administrative costs) which exceeds the amount of his bid, then the above obligation shall be void and of no effect.

Each Surety executing this instrument hereby agrees that its obligation shall not be impaired by any extension(s) of the time for acceptance of the bid that the Principal may grant to ATP, notice of which extension(s) to the Surety(ies) being hereby waived; provided, that such waiver of notice shall apply only with respect to extensions aggregating not more than 60 calendar days in addition to the period originally allowed for acceptance of the bid; provided further, that if any legal action be filed upon this bond, venue shall lie exclusively in Travis County, Texas.

IN WITNESS WHEREOF, the Principal and Surety(ies) have executed this bid bond and have affixed their seals on the date set forth above.



[Signatures of Principal and Surety]

NOTE: The bond must include the name and address of the Surety's Resident Agent in Travis County, Texas, for delivery of notice and service of process. Any bond executed by an attorney-in-fact must have a certified copy of Power of Attorney attached.

**Section 5-302 Performance Bonds**

- (1) A performance bond is required for all construction contracts in excess of \$100,000 in the amount of 100% of the contract price in accordance with the Texas Government Code, Chapter 2253, as amended. The performance bond shall be solely for the protection of ATP (and not third parties) and shall be delivered by the contractor to ATP before receiving a notice to proceed with the work or being allowed to start work. If a contractor fails to deliver the required performance bond, ATP may terminate the contract for default and award of the contract may be made to the next lowest bidder in accordance with Section 3-202.15 (Award) of the Policy and Guidelines.
- (2) A performance bond shall not be required if the contract amount is \$100,000 or less.
- (3) If permitted by the contract and solicitation, the Contracting Officer may reduce the amount of the performance bond as work is completed if such officer determines in writing that such reduction is in the best interest of ATP.
- (3) The performance bond required by this section shall be in substantially the following form:

**PERFORMANCE BOND**

KNOW ALL MEN BY THESE PRESENTS, that we, the Principal and Surety(ies) hereto, are firmly bound to the Austin Transit Partnership ATP (hereinafter called ATP) in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally; provided, that, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sums only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

THE CONDITION OF THE OBLIGATION IS SUCH that, whereas the Principal has entered into the contract identified above,

NOW, THEREFORE, if the Principal shall perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by ATP, with or without notice to the Surety(ies), and during the life of any guaranty required under the contract, and



shall also perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the Surety(ies) being hereby waived; and, if the Principal shall repair and/or replace all defects due to faulty materials and workmanship that appear within a period of one (1) year from the date of final completion and acceptance of the work by ATP; and, if the Principal shall fully indemnify and save harmless ATP from all costs and damages which ATP may suffer by reason of failure to so perform and shall fully reimburse and repay ATP all outlay and expense which ATP may incur in making good any default or deficiency, then this obligation shall be void; otherwise, it shall remain in full force and effect. This bond is given pursuant to the provisions of Chapter 2253 of the Government Code, as amended, all of the requirements of which are fully incorporated by reference herein. If any legal action be filed upon this bond, venue shall lie exclusively in Travis County, Texas.

IN WITNESS WHEREOF, the Principal and Surety(ies) have executed this performance bond and have affixed their seals on the date set forth above.

[Signatures of Principal and Surety]

NOTE: The bond must include the name and address of the Surety's Resident Agent in Travis County, Texas, for delivery of notice and service of process. Any bond executed by an attorney-in-fact must have a certified copy of Power of Attorney attached.

**Section 5-303      Payment Bonds**

- (1) A payment bond is required for all construction contracts in excess of \$25,000 in the amount of 100% of the contract price in accordance with the Texas Government Code, Chapter 2253, as amended. The payment bond shall be solely for the protection of claimants (as defined in Chapter 2253) and shall be delivered by the contractor to ATP before receiving a notice to proceed with the work or being allowed to start work. If a contractor fails to deliver the required payment bond, ATP may terminate the contract for default and award of the contract may be made to the next lowest bidder in accordance with Section 3-202.15 (Award) of the Policy and Guidelines.
- (2) A payment bond shall not be required if the contract amount is \$25,000 or less.
- (3) The payment bond required by this section shall be in substantially the following form:

**PAYMENT BOND**

KNOW ALL MEN BY THESE PRESENTS, that we, the Principal and Surety(ies) hereto, are firmly bound to the Austin Transit Partnership ATP (hereinafter called ATP) in the above





penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally; provided, that, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly, and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

THE CONDITION OF THE OBLIGATION IS SUCH that, whereas the Principal has entered into the contract identified above,

NOW, THEREFORE, if the Principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications to the Surety(ies) being hereby waived, then the above obligation shall be void and of no effect. This bond is given pursuant to the provisions of Chapter 2253 of the Government Code, as amended, all of the requirements of which are fully incorporated by reference herein. If any legal action be filed upon this bond, venue shall lie exclusively in Travis County, Texas.

IN WITNESS WHEREOF, the Principal and Surety(ies) have executed this payment bond and have affixed their seals on the date set forth above.

[Signatures of Principal and Surety]

NOTE: The bond must include the name and address of the Surety's Resident Agent in Travis County, Texas, for delivery of notice and service of process. Any bond executed by an attorney-in-fact must have a certified copy of Power of Attorney attached.

**Section 5-500      Architect-Engineer and Land Surveying Services**

**Section 5-501      Application**

The provisions of this section apply to every Procurement of services within the scope of the practice of architecture, professional engineering, or land surveying, as defined by the laws of Texas, except as authorized by Section 3-204.03 (Small Purchases of Professional Services), Section 3-205 (Sole Source Procurement), and Section 3-206 (Emergency Procurements) of the Policy and Guidelines.

**Section 5-502      Policy and Guidelines**

Under the Guidelines, ATP follows Policy to:

- (1) give public notice of all requirements for architect-engineer and land surveying services; and
- (2) negotiate contracts for such services on the basis of demonstrated competence and qualification for the type of services required and at fair and reasonable prices.

**Section 5-503          Selection Panel**

When a contract for architect-engineer or land surveying services is expected to exceed \$50,000, the Executive Director shall designate a Selection Panel composed of no less than three persons (which may include representatives who are not Employees of ATP), one of which shall be designated to act as Contracting Officer or Contracting Officer's Representative to negotiate a contract in accordance with the Policy and Guidelines.

**Section 5-504          Required Determinations**

Prior to announcing the need for any architect-engineer or land surveying services, the Executive Director or his Designee shall determine:

- (1) that ATP personnel are unable or unavailable to perform the services required under the proposed contract;
- (2) the nature of the relationship to be established between ATP and the contractor by the proposed contract; and
- (3) that ATP has developed, and fully intends to implement, a written plan for utilizing such services, which shall be included in the contractual statement of work.

**Section 5-505          Annual Statement of Qualifications**

The Executive Director or a Designee shall encourage firms engaged in providing architect-engineer or land surveying services to submit annually a statement of qualifications and performance data which shall include, but not be limited to, the following:

- (1) the name of the firm and the location of all of its offices, specifically indicating the principal place of business;
- (2) the age of the firm and its average number of Employees over the past five years;
- (3) the education, training, and qualifications of members of the firm and key Employees;
- (4) the experience of the firm reflecting technical capabilities and project experience;
- (5) the names of five clients who may be contacted, including at least three for whom services were rendered within the 90- day period immediately preceding the submission of the



statement of qualifications; and

- (6) any other pertinent information requested by the Contracting Officer.

A standard form or format may be developed for these statements of qualifications and performance data. Firms may amend statements of qualifications and performance data at any time by filing a new statement.

#### **Section 5-506 Public Announcement**

- (1) Notice of need for architect-engineer or land surveying services shall be given by the Contracting Officer as provided in Section 3-202.05 (Public Notice). Such notice shall be published sufficiently in advance of when responses must be received in order that firms have an adequate opportunity to submit a proposal. The notice shall contain a brief statement of the services required which adequately describes the project and specifies how a solicitation containing specific information on the project may be obtained.
- (2) A solicitation shall be prepared which describes ATP's requirements and sets forth the evaluation criteria. It shall be distributed upon request, if any. The solicitation shall include notice of any conference to be held and the criteria to be used in evaluating the proposals and selecting firms, including, but not limited to:
  - (a) competence to perform the services as reflected by technical training and education; general experience; experience in providing the required services; and the qualifications, experience, and competence of all persons who would be assigned to perform the services;
  - (b) ability to perform the services as reflected by workload and the availability of adequate personnel, equipment, and facilities to perform the services expeditiously;
  - (c) past performance as reflected by the evaluations of private persons and officials of other governmental entities that have retained the services of the firm with respect to factors such as control of costs, quality of work, and an ability to meet deadlines;
  - (d) a listing of other contracts under which services or projects similar in scope, size, or discipline of the required services were performed or undertaken within a previous period of time specified in the solicitation; and
  - (e) the professional fees proposed for the services to be provided.

Amendments of proposals may be required to obtain additional information deemed necessary or desirable by the Selection Committee.

### **Section 5-507 Evaluation and Selection of Firms for Discussions**

- (1) The Selection Panel shall evaluate:
  - (a) annual statements of qualifications and performance data; and
  - (b) proposals submitted in response to the solicitation for architect-engineer and land surveying services, including proposals for joint ventures.

All annual statements of qualifications and performance data and proposals shall be evaluated in light of the criteria set forth in the solicitation for architect-engineer or land surveying services.

- (2) If fewer than three responses are received in response to the public announcement provided for in Section 5-506 (Public Announcement), a second public announcement shall be made. If, after this announcement, there remain fewer than three responses, the Selection Panel shall evaluate the responding firm or firms in accordance with this section. If the firm or firms responding are qualified, the procedures set forth in Section 5-510 (Negotiation and Award of Contract) shall be followed.
- (3) The Selection Panel shall select for discussions no fewer than three firms receiving the highest evaluations. The Contracting Officer shall notify each firm in writing of the date, time, and place of discussions and, if necessary, shall provide each firm with additional information on the project and the services required. Such notice shall provide that a representative of each firm must attend discussions in order for the firm to be considered further.

### **Section 5-508 Discussions**

Following evaluations, the Selection Panel shall hold discussions regarding the proposed contract with the firms selected pursuant to Section 5-507. The purposes of such discussions shall be to:

- (1) determine each firm's general competence and qualifications for performing the contract; and
- (2) explore the scope and nature of the required services and the relative utility of alternative methods of approach; and
- (5) evaluate the fairness and reasonableness of the professional fees proposed.

### **Section 5-509 Selection of Most Qualified Firms**

After discussions, the Selection Panel shall reevaluate and select, in order of preference, no fewer than three firms receiving the highest evaluations. The Selection Panel shall prepare a



memorandum of the selection process which indicates how the evaluation criteria were applied to determine the ranking of the firms selected.

### **Section 5-510          Negotiation and Award of Contract**

- (1) The Contracting Officer shall negotiate a contract with the firm receiving the highest evaluation for the required services at compensation determined in writing to be fair and reasonable to ATP. Contract negotiations shall be directed toward:
  - (a) making certain that the firm has a clear understanding of the scope of the work (specifically, the essential requirements involved in providing the required services);
  - (b) determining that the firm will make available the necessary personnel and facilities to perform the services within the required time; and
  - (c) agreeing upon compensation, which is fair and reasonable, taking into account the estimated value, scope, complexity, and nature of the required services.
- (2) If fair and reasonable compensation, contract requirements, and contract documents can be agreed upon with the most competent and qualified firm, the contract shall be awarded to that firm.
- (3) If fair and reasonable compensation, contract requirements, and contract documents cannot be agreed upon with the highest evaluated firm, the Contracting Officer shall advise the firm in writing of the termination of negotiations. Upon failure to negotiate a contract with the highest evaluated firm, the Contracting Officer shall enter into negotiations with the next highest evaluated firm. If fair and reasonable compensation, contract requirements, and contract documents can be agreed upon, then the contract shall be awarded to that firm. If negotiations again fail, negotiations shall be terminated and commenced with the next highest evaluated firm.
- (4) Written notice of the award shall be sent to the firm with whom the contract is successfully negotiated. Each firm with whom discussions were held shall be notified of the award. Notice of award shall be made available to the public.
- (5) Should the Contracting Officer be unable to negotiate a contract with any of the firms initially selected, additional firms shall be selected in preferential order based on the Selection Panel's evaluation, and negotiations shall continue in accordance with this section until an agreement is reached and the contract awarded.
- (6) After award of the proposed contract, a memorandum setting forth the principal elements of the negotiations with each firm shall be prepared by the Contracting Officer. Such memorandum shall contain sufficient detail to reflect the significant considerations affecting price and the other terms of the contract. Such memorandum shall be included



in the Procurement file and be available to the public upon request.

## **CHAPTER 6 - CONTRACT CLAUSES**

### **Section 6-100 Scope of Coverage**

This chapter sets forth standard contract clauses that may be used in contracts entered into by ATP. The clauses in this chapter may be modified, as applicable.

### **Section 6-200 Fixed Price Supply Contracts**

#### **Section 6-201 Applicability**

The provisions of this section apply to all fixed price supply contracts. As used in this section, the phrase "fixed price supply contract" shall mean any contract:

- (1) entered into either by competitive sealed bidding or by competitive sealed proposals other than small purchases;
- (2) at a fixed price (with or without provision for price redetermination, economic price adjustment, or other form of price revision);
- (3) for property other than (a) the construction, alteration, or repair of buildings, roads, or other kinds of real property, or (b) experimental, developmental, or research work.

The Contracting Officer may adapt and abbreviate the clauses in this Section 6-200 for use in small purchase and purchase order forms.

### **Section 6-202 Guideline Clauses for Fixed Price Supply Contracts**

The following clauses may be included in all fixed price supply contracts, as applicable.

#### **Section 6-202.01 Definitions**

As used throughout this contract, the following terms shall have the meaning set forth below:

- (a) The term "ATP" means the Austin Transit Partnership Local Government Corporation; and the term "duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized in writing to act for ATP.
- (b) The term "Contracting Officer" means the person executing this contract on behalf of ATP or his duly appointed successor; and the term includes, except as otherwise provided in this contract, the authorized representative of the Contracting Officer acting within the limits of his authority.

- (c) Except as otherwise provided in this contract, the term "subcontracts" includes purchase orders under this contract.
- (d) In computing any period of time established under this contract, "days" means calendar days, and the day of the event from which the designated period of time begins to run shall not be included, but the last day shall be included unless it is a Saturday, Sunday, or Federal or State of Texas holiday, in which event the period shall run to the end of the next business day.

[Additional definitions may be added as appropriate and applicable to the Contract, as determined by the [Procurement Director and General Counsel].

### **Section 6-202.02 Changes**

- (a) The Contracting Officer may at any time, and without notice to the sureties, if any, by a written order, make changes within the general scope of this contract in any one or more of the following: (i) drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for ATP in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether changed or not changed by the order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly.
- (b) Any notice of intent to assert a claim for adjustment under this clause must be asserted by the Contractor within 30 days from the date of receipt of the Contracting Officer's written order; provided, however, that later notice shall not bar the Contractor's claim if the Contractor can demonstrate that ATP was not prejudiced by the delay in notification. In no event shall any claim be asserted after final payment.
- (c) Failure to agree to any adjustment under this clause shall be a dispute concerning a question of fact within the meaning of the Disputes Clause of this contract. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed pending resolution of the dispute.

### **Section 6-202.03 Extras**

Except as otherwise provided in this contract, no payment for extras shall be made unless such extras and the prices therefor have been authorized in writing by the Contracting Officer.

#### **Section 6-202.04 Variation in Quantity**

No variation in the quantity of any item called for by this contract will be accepted unless such variation has been caused by conditions of loading, shipping, or packing, or allowances in manufacturing processes, and then only to the extent, if any, specified elsewhere in this contract.

#### **Section 6-202.05 Inspection**

- (a) All supplies (which term throughout this clause includes without limitation raw materials, components, intermediate assemblies, and end products) shall be subject to inspection and test by ATP or its authorized representative, to the extent practicable, at all times (including the period of manufacture) and places and, in any event, prior to acceptance.
- (b) In the event any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity with the requirements of this contract, ATP shall have the right either to reject those supplies (with or without instructions as to their disposition) or to require their correction. Supplies or lots of supplies which have been rejected or required to be corrected shall be removed or, if permitted or required by the Contracting Officer, corrected in place by and at the expense of the Contractor promptly after notice and shall not thereafter be tendered for acceptance unless the former rejection or requirement of correction is disclosed. If the Contractor fails promptly to remove such supplies or lots of supplies which are required to be removed, or promptly to replace or correct such supplies or lots of supplies, ATP either (i) may by contract or otherwise replace or correct such supplies and charge to the Contractor the cost occasioned ATP thereby, or (ii) may terminate this contract for default as provided in the Termination for Default Clause of this contract. Unless the Contractor corrects or replaces such supplies within the delivery schedule, the Contracting Officer may require the delivery of such supplies at a reduction in price which is equitable under the circumstances. Failure to agree to such reduction of price shall be a dispute concerning a question of fact within the meaning of the Disputes Clause of this contract.
- (c) If any inspection or test is made by ATP or its authorized representative on the premises of the Contractor or a subcontractor, the Contractor without additional charge shall provide all reasonable facilities and assistance for the safety and convenience of ATP's inspectors in the performance of their duties. If ATP's inspection or test is made at a point other than the premises of the Contractor or a subcontractor, it shall be at the expense of ATP, except as otherwise provided in this contract; provided, that in case of rejection, ATP shall not be liable for any reduction in value of samples used in connection with such inspection or test. All inspections and tests by ATP shall be performed in such a manner as not to unduly



delay the work. ATP reserves the right to charge to the Contractor any additional cost of ATP's inspection and test when supplies are not ready at the time such inspection and test is required by the contract or when reinspection or retest is necessitated by prior rejection. Acceptance or rejection of the supplies shall be made as promptly as practicable after delivery, except as otherwise provided in this contract; but failure to inspect and accept or reject supplies shall neither relieve the Contractor from responsibility for such supplies as are not in accordance with the contract requirements nor impose liability on ATP therefor.

- (d) The inspection and test by ATP of any supplies or lots thereof does not relieve the Contractor from any responsibility regarding defects or other failures to meet the contract requirements which may be discovered prior to acceptance. Except as otherwise provided in this contract, acceptance shall be conclusive except for latent defects, fraud, or such gross mistakes as amount to fraud.

#### **Section 6-202.06 Risk of Loss or Damage**

Except as otherwise provided in this contract, the Contractor shall be responsible for the supplies covered by this contract until they are delivered at the designated delivery point, regardless of the point of inspection. After delivery to ATP at the designated point and prior to acceptance by ATP or rejection and giving notice thereof by ATP, ATP shall be responsible for the loss, destruction of, or damage to the supplies only if such loss, destruction, or damage results from the negligence of officers, agents, or Employees of ATP acting within the scope of their employment. The Contractor shall bear all risks as to rejected supplies after notice of rejection, except that ATP shall be responsible for the loss, destruction of, or damage to the supplies only if such loss, destruction, or damage results from the gross negligence of officers, agents, or Employees of ATP acting within the scope of their employment.

#### **Section 6-202.07 Payments**

The Contractor shall be paid, upon the submission of proper invoices or vouchers, the prices stipulated herein for supplies delivered and accepted or services rendered and accepted, less deductions, if any, as herein provided. Unless otherwise specified, payment will be made on partial deliveries accepted by ATP when the amount due on such deliveries so warrants; or, when requested by the Contractor, payment for accepted partial deliveries shall be made whenever such payment would equal or exceed either \$1,000 or 50% of the total amount of this contract.

#### **Section 6-202.08 Additional Bond Security**

The Contractor shall promptly furnish additional security required to protect ATP and persons supplying labor or materials under this contract if:

- (a) any surety upon any bond furnished with this contract becomes unacceptable to ATP;

- (b) any surety fails to furnish reports on its financial condition as required by ATP; or
- (c) the contract price is increased so that the penal sum of any bond becomes inadequate in the opinion of the Contracting Officer.

#### **Section 6-202.09 Termination for Default**

- (a) ATP may, subject to the provisions of Section (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in either one of the following circumstances:
  - (1) if the Contractor fails to make delivery of the supplies or to perform the service within the time specified herein or any extension thereof; or
  - (2) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.
- (b) In the event ATP terminates this contract in whole or in part as provided in Section (a) of this clause, ATP may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to ATP for any excess costs for such similar supplies or services; provided, that the Contractor shall continue the performance of this contract to the extent, if any, it has not been terminated under the provisions of this clause.
- (c) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, the following: acts of God or of the public enemy, acts of ATP, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; provided, however, in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the default of a subcontractor and if such default arises out of causes beyond the control of both the Contractor and subcontractor and without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet

the required delivery schedule.

- (d) If this contract is terminated as provided in Section (a) of this clause, ATP, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to ATP in the manner and to the extent directed by the Contracting Officer (i) any completed supplies and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which ATP has an interest. Payment for completed supplies delivered to and accepted by ATP shall be at the contract price. Payment for manufacturing materials delivered to and accepted by ATP and for the protection and preservation of property shall be in an amount agreed upon by the Contractor and Contracting Officer. Failure to agree to such amount shall be a dispute concerning a question of fact within the meaning of the Disputes Clause of this contract. ATP may withhold from amounts otherwise due the Contractor for such completed supplies or manufacturing materials such sum as the Contracting Officer determines to be necessary to protect ATP against loss because of outstanding liens or claims of former lien holders.
- (e) If, after notice of termination of this contract under the provisions of this clause, it is determined for any reason that the Contractor was not in default or that the default was excusable under the provisions of this clause, the rights and obligations of the parties shall be those provided in the Termination for the Convenience of ATP Clause hereof. Failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the Disputes Clause of this contract.
- (f) The rights and remedies of ATP provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract. Time is of the essence for all delivery, performance, submittal, and completion dates in this contract.
- (g) As used in Section (c) of this clause, the terms "subcontractor" and "subcontractors" mean subcontractor(s) at any tier.

#### **Section 6-202.10 Termination for Convenience**

The Contracting Officer may, whenever the interests of ATP so require, terminate this contract, in whole or in part, for the convenience of ATP. The Contracting Officer shall give written notice of the termination to the Contractor specifying the part of the contract terminated and when termination becomes effective.

- (a) The Contractor shall incur no further obligations in connection with the terminated work, and, on the date set forth in the notice of termination, the Contractor will stop work to the extent specified. The Contractor also shall 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 Contracting Officer may direct the Contractor to assign the Contractor's right, title, and interest under terminated orders or subcontracts to ATP. The Contractor must still complete the work not terminated by the notice of termination and may incur such obligations as are necessary to do so.
  
- (b) The Contracting Officer may require the Contractor to transfer title and deliver to ATP in the manner and to the extent directed by the Contracting Officer: (i) any completed supplies; and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specially acquired for the performance of the terminated part of this contract. The Contractor shall, upon direction of the Contracting Officer, protect and preserve property in the possession of the Contractor in which ATP has an interest. If the Contracting Officer does not exercise this right, the Contractor shall use its best efforts to sell such supplies and manufacturing materials.
  
- (c) ATP shall pay the Contractor the following amounts:
  - (1) contract prices for supplies or services accepted under the contract;
  
  - (2) costs incurred in preparing to perform and performing 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 or to be paid for accepted supplies or services; provided, however, that if it appears that the Contractor would have 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;
  
  - (3) costs of settling and paying claims arising out of the termination of subcontracts (these costs must not include costs paid in accordance with subsection (2) of this Section); and
  
  - (4) 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 or disposition of property allocable to the

terminated portion of this contract.

The total sum to be paid the Contractor under this section shall not exceed the total contract price plus the reasonable settlement costs of the Contractor reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under this Section, and the contract price of work not terminated.

#### **Section 6-202.11 Disputes**

- (a) Except as otherwise provided in this contract, any dispute concerning a question of fact or law arising under or related to this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, on or before the 90th day from the date of receipt of such copy, the Contractor mails or otherwise furnishes a written appeal addressed to ATP. The decision of ATP or its duly authorized representative on such appeal shall be final and conclusive as to questions of fact unless determined by a court of competent jurisdiction to have been fraudulent, capricious, arbitrary, so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. The decision of ATP or its duly authorized representative shall not be final and conclusive as to questions of law. No action challenging such decision shall be brought more than two years from the date of the Contractor's receipt of such decision. In connection with any appeal of the Contracting Officer's decision, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending the final resolution of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.
- (b) If it is determined, on appeal, that the Contracting Officer's interpretation of the contract, direction to the Contractor, or any other action required by the Contracting Officer's decision was an erroneous determination of the rights and obligations of the parties under the contract, the Contractor's remedy shall be the same as if such action were a Change Order under the Changes Clause of this contract.

#### **Section 6-202.12 Payment of Interest on Contractor's Claims**

- (a) If an appeal is filed by the Contractor under the Disputes Clause from a final decision of the Contracting denying a claim arising under the contract, interest on the amount of the claim finally determined to be owed by ATP (if any) shall be payable to the Contractor. In no event shall the interest charged or payable hereunder (if any) exceed that allowable under Texas law.
- (b) Notwithstanding (a), above, (1) interest shall be applied only from the date payment was due, if such date is later than the filing of the appeal, and (2) interest shall not be paid for any period of time that the Contracting Officer determines the Contractor has unduly



delayed in pursuing his remedies under this contract or before a court of competent jurisdiction.

**Section 6-202.13 Federal, State, and Local Taxes**

The contract price includes all applicable federal, state, and local taxes and duties. ATP is exempt from Texas state and local sales and use taxes, and any such taxes included on any invoice or voucher received by ATP shall be deducted from the amount of the invoice or voucher for purposes of payment.

**Section 6-202.14 Assignment**

The Contractor shall not assign the whole or any part of this contract or any monies due or to become due hereunder without the prior written consent of the Contracting Officer.

**Section 6-202.15 Equal Opportunity and Disadvantaged Business Enterprises**

The Contractor shall comply with ATP's Equal Opportunity Program and DBE Program Requirements and all applicable federal, state, and local law requirements relating to nondiscrimination and equal opportunity employment including the respect to affording an equal opportunity to disadvantaged business enterprises, as further described in the specific requirements of this contract.

**Section 6-202.16 Interest of Public Officials**

The Contractor represents and warrants that no Employee, official, or member of the Board (Executive Committee) of ATP is or will be pecuniarily interested or benefited directly or indirectly in this contract. The Contractor further represents and warrants that it has not offered or given gratuities (in the form of entertainment, gifts, or otherwise) to any Employee, official, or member of the Board (Executive Committee) of ATP with a view toward securing favorable treatment in the awarding, amending, or evaluating the performance of this contract. For breach of any representation or warranty in this clause, ATP shall have the right to annul this contract without liability and/or have recourse to any other remedy it may have at law.

**Section 6-202.17 Order of Precedence**

Include the clause at Section 3-802.10.

**Section 6-202.18 Governing Law**

The rights, obligations, and remedies of the parties shall be governed by the laws of the State of Texas. Venue for any action shall lie exclusively in Travis County, Texas.

**Section 6-203 Clauses to be Used When Applicable**

The clauses in this Section 6-203 may be used when applicable to the circumstances of the particular Procurement. In addition, clauses contained in sections of the Policy and Guidelines for other types of contracts may be used if the circumstances warrant.

#### **Section 6-203.01 Pricing of Adjustments**

When costs are a factor in any determination of a contract price adjustment pursuant to the Changes Clause or any other provision of this contract, such costs shall be in accordance with Chapter 7 (Cost Principles) of ATP's Procurement Policy and Guidelines in effect on the date of this contract.

#### **Section 6-203.02 First Article Approval**

- (a) The contractor shall deliver \_\_\_ unit(s) of Lot/Item\_\_\_\_ [the “first article(s)”] within \_\_\_\_ calendar days from the date of this contract to ATP at \_\_\_\_\_ [insert name and address of testing facility] for first article tests. The shipping documentation shall contain this contract number and the Lot/Item identification. The characteristics that the first article must meet and the testing requirements are specified elsewhere in this contract.
  
- (a) Within calendar days after ATP receives the first article, the Contracting Officer shall notify the Contractor, in writing, of the conditional approval, approval, or disapproval of the first article. The notice of conditional approval or approval shall not relieve the Contractor from complying with all requirements of the specifications and all other terms and conditions of this contract. A notice of conditional approval shall state any further action required of the Contractor. A notice of disapproval shall cite reasons for the disapproval.
  
- (b) If the first article is disapproved, the Contractor, upon a request by ATP, shall submit an additional first article for testing. After each request, the Contractor shall make any necessary changes, modifications, or repairs to the first article or select another first article for testing. All costs related to these tests are to be borne by the Contractor, including any and all costs for additional tests following a disapproval. The Contractor shall furnish any additional first article to ATP under the terms and conditions and within the time specified by ATP. ATP shall act on this first article within the time limit specified in Section (b) above. ATP reserves the right to require equitable adjustment of the contract price for any extension of the delivery schedule or for any additional costs to ATP related to these tests.
  
- (c) If the Contractor fails to deliver any first article on time, or the Contracting Officer disapproves any first article, the Contractor shall be deemed to have failed to make delivery within the meaning of the Default Clause of this contract.
  
- (d) Unless otherwise provided in the contract, the Contractor :



- (1) may deliver the approved first article as a part of the contract quantity, provided it meets all contract requirements for acceptance and was not consumed or destroyed in testing; and
  - (2) shall remove and dispose of any first article from the test facility designated by ATP at the Contractor's expense.
- (e) If ATP does not act within the time specified in Section (b) or (c), above, the Contracting Officer shall, upon timely written request from the Contractor, equitably adjust under the Changes Clause of this contract the delivery or performance dates and/or the contract price and any other contractual term affected by the delay.
- (f) The Contractor is responsible for providing operating and maintenance instructions, spare parts support, and repair of the first article during any first article test.
- (g) Before first article approval, the acquisition of materials or components for, or the commencement of production of, the balance of the contract quantity is at the sole risk of the Contractor. Before first article approval, the costs thereof shall not be allocable to this contract for (1) progress payments, or (2) termination settlements if the contract is terminated for the convenience of ATP.

**Section 6-203.03 New Material**

Unless this contract specifies otherwise, the Contractor represents that the supplies and components (including any former property of ATP identified in this contract) are new, including recycled (not used or reconditioned) and are not of such age or so deteriorated as to impair their usefulness or safety. If the Contractor believes that furnishing used or reconditioned supplies or components will be in ATP's interest, the Contractor shall so notify the Contracting Officer in writing. The Contractor's notice shall include the reasons for the request along with a proposal for any consideration to ATP if the Contracting Officer authorizes the use of used or reconditioned supplies or components.

**Section 6-203.04 Cancellation of Items**

- (a) "Cancellation," as used in this clause, means that ATP is canceling its requirements for all items in program years subsequent to that in which notice of cancellation is provided. Cancellation shall occur by the date or within the time period specified in the contract (unless a later date is agreed to) if the Contracting Officer (1) notifies the Contractor that funds are not available for contract performance for any subsequent program year or (2) fails to notify the Contractor that funds are available for performance of the succeeding program year requirement.
- (b) Except for cancellation under this clause or termination under the Default Clause, any



reduction by the Contracting Officer in the requirements of this contract shall be considered a termination under the Termination for Convenience of ATP Clause.

- (c) If cancellation under this clause occurs, the Contractor will be paid a cancellation charge not over the cancellation ceiling specified in the contract as applicable at the time of cancellation.
- (d) The cancellation charge will cover only (1) costs (i) incurred by the Contractor and/or subcontractor, (ii) reasonably necessary for performance of the contract, and (iii) that would have been equitably amortized in the unit prices for the entire multiyear contract period but, because of the cancellation, are not so amortized, and (2) a reasonable profit on the costs.
- (e) The cancellation charge shall be computed and the claim made for it as if the claim were being made under the Termination for Convenience of ATP Clause of this contract. The Contractor shall submit the claim promptly but no later than one year from the date (1) of notification of the nonavailability of funds, or (2) specified in the contract by which notification of the availability of additional funds for the next succeeding program year is required to be issued, whichever is earlier, unless extensions in writing are granted by the Contracting Officer.
- (f) The Contractor's claim may include :
  - (1) reasonable nonrecurring costs which are applicable to and normally would have been amortized in all items to be furnished under the multiyear requirements;
  - (2) allocable portions of the costs of facilities acquired or established for the conduct of the work, to the extent that it is impracticable for the Contractor to use the facilities in its commercial work and if the costs are not charged to the contract through overhead and otherwise depreciated;
  - (3) costs incurred for the assembly, training, and transportation to and from the job site of a specialized work force; and
  - (4) costs not amortized by the unit price solely because the cancellation had precluded anticipated benefits of Contractor or subcontractor learning.
- (g) The claim shall not include :
  - (1) labor, material, or other expenses incurred by the Contractor or subcontractors for performance of the cancelled work;
  - (2) any cost already paid to the Contractor;
  - (3) anticipated profit on the canceled work; or

- (4) for service contracts, the cost or value of the remaining useful commercial life of facilities. "Useful commercial life" means the commercial utility of the facilities rather than their physical life with due consideration given to such factors as location of facilities, their specialized nature, and obsolescence.
- (h) This contract may include an Option Clause with the period for exercising the option limited to the date in the contract for notification that funds are available for the next succeeding program year. If so, the Contractor agrees not to include in the price for option quantities any costs of a startup or nonrecurring nature that have been fully provided for in the unit prices of the firm quantities of the program years. The Contractor further agrees that the prices offered for option quantities will reflect only those recurring costs and a reasonable profit necessary to furnish the additional option quantities.
- (i) Quantities added to the original contract through the Option Clause of this contract shall be included in the quantity canceled for the purpose of computing allowable cancellation charges.

**Section 6-203.05 Option for Increased Quantity**

ATP may increase the quantity of supplies called for in the Schedule at the unit price specified. The Contracting Officer may exercise the option by written notice to the Contractor within the period specified in the contract. Delivery of the added items shall continue at the same rate as the like items called for under the contract, unless the parties otherwise agree.

**Section 6-203.06 Notice of Labor Disputes**

- (a) If the Contractor has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract, the Contractor immediately shall give notice, including all relevant information, to the Contracting Officer.
- (b) The Contractor agrees to insert the substance of this clause, including this Section (b), in any subcontract under which a labor dispute may delay the timely performance of this contract; except that each subcontract shall provide that in the event its timely performance is delayed or threatened by delay by any actual or potential labor dispute, the subcontractor shall immediately notify the next higher tier subcontractor or the Contractor, as the case may be, of all relevant information concerning the dispute.

**Section 6-203.07 Insurance - Work on ATP Installation**

- (a) The Contractor shall, at its own expense, provide and maintain during the entire performance period of this contract at least the kinds and minimum amounts of insurance required in the contract.
- (b) Before commencing work under this contract, the Contractor shall certify to the

Contracting Officer in writing that the required insurance has been obtained. The policies evidencing required insurance shall contain an endorsement to the effect that any cancellation or any material change adversely affecting ATP's interest shall not be effective (1) for such period as the laws of Texas prescribe or (2) until 30 days after the insurer or the Contractor gives written notice to the Contracting Officer, whichever period is longer.

- (c) The Contractor shall insert the substance of this clause, including this Section (c), in subcontracts under this contract that require work on an installation owned or operated by, or under the control of, ATP and shall require subcontractors to provide and maintain the insurance required in the contract. At least five days before entry of each such subcontractor's personnel on the installation, the Contractor shall furnish (or ensure that there has been furnished) to the Contracting Officer a current certificate of insurance, meeting the requirements of Section (b) above, for each such subcontractor.

#### **Section 6-203.08 Discounts for Prompt Payment**

Unless covered by the solicitation instructions (e.g., Section 3-802.06), insert the following clause:

In connection with any discount offered for prompt payment, time shall be computed from (1) the date of completion of performance of the services or delivery of the supplies to the carrier if acceptance is at a point of origin, or date of delivery at destination or port of embarkation if delivery and acceptance are at either of these points, or (2) the date the correct invoice or voucher is received in the office specified by ATP, if the latter is later than the date of performance or delivery. For the purpose of computing the discount earned, payment shall be considered to have been made on the date of ATP's check.

#### **Section 6-203.09 Progress Payments**

Progress payments shall be made to the Contractor when requested as work progresses, but not more frequently than monthly, in amounts approved by the Contracting Officer, under the following conditions.

- (a) Computation of Amounts.
  - (1) Unless the Contractor requests a smaller amount, each progress payment shall be computed as (i) 80 percent of the Contractor's cumulative total costs under this contract, as shown by records maintained by the Contractor, plus (ii) progress payments to subcontractors (see Section (j) below), all less the sum of all previous progress payments made by ATP under this contract.
  - (2) The following conditions apply to the timing of including costs in progress payment requests.

- (i) The costs of supplies and services purchased by the Contractor directly for this contract may be included only after payment by cash, check, or other form of actual payment.
  - (ii) When the Contractor is not delinquent in payment of the costs of contract performance in the ordinary course of business, costs incurred which, in the ordinary course of business, will be paid prior to receipt of payment from ATP for:
    - (A) materials issued from the Contractor's stores inventory and placed in the production process for use on this contract;
    - (B) direct labor, direct travel, and other direct in- house costs; and
    - (C) properly allocable and allowable indirect costs.
- (3) The Contractor shall not include the following in total costs for progress payment purposes in subsection Section (a)(1)(i) above:
- (i) costs that are not reasonable, allocable to this contract, and consistent with sound and generally accepted accounting principles and practices;
  - (ii) costs incurred by subcontractors or Suppliers;
  - (iii) costs ordinarily capitalized and subject to depreciation or amortization except for the properly depreciated or amortized portion of such costs; and
  - (iv) payments made or amount payable to subcontractors or Suppliers, except for :
    - (A) completed work, including partial deliveries, to which the Contractor has acquired title; and
    - (B) work under cost-reimbursement or time-and-material subcontracts to which the Contractor has acquired title.
- (4) The amount of unliquidated progress payments may exceed neither (i) the progress payments made against incomplete work (including allowable unliquidated progress payments to subcontractors) nor (ii) the value, for progress payment purposes, of the incomplete work. Incomplete work shall be considered to be the supplies and services required by this contract, for which delivery and invoicing by the Contractor and acceptance by ATP are incomplete.

- (5) The total amount of progress payments shall not exceed 80 percent of the total contract price.
  - (6) If a progress payment or the unliquidated progress payments exceed the amounts permitted by subsections (a)(4) or (a)(5) above, the Contractor shall repay the amount of such excess to ATP on demand.
- (b) Liquidation. Except as provided in the Termination for Convenience of ATP Clause, all progress payments shall be liquidated by deducting from any payment under this contract, other than advance or progress payments, the unliquidated progress payments, or 80 percent of the amount invoiced, whichever is less. The Contractor shall repay to ATP any amounts required by a retroactive price reduction after computing liquidations and payments on past invoices at the reduced prices and adjusting the unliquidated progress payments accordingly. ATP reserves the right unilaterally to change from the ordinary liquidation rate to an alternate rate when deemed appropriate for proper contract financing.
- (c) Reduction or Suspension. The Contracting Officer may reduce or suspend progress payments, increase the rate of liquidation, or take a combination of these actions, after finding on substantial evidence any of the following conditions.
- (1) The Contractor failed to comply with any material requirement of his contract (which includes Sections (f) and (g), below).
  - (2) Performance of this contract is endangered by the Contractor's (i) failure to make progress or (ii) unsatisfactory financial condition.
  - (3) Inventory allocated to this contract substantially exceeds reasonable requirements.
  - (4) The Contractor is delinquent in payment of the costs of performing this contract in the ordinary course of business.
  - (5) The unliquidated progress payments exceed the fair value of the work accomplished on the undelivered portion of this contract.
  - (6) The Contractor is realizing less profit than that reflected in the establishment of any alternate liquidation rate in Section (b), above, and that rate is less than the progress payment rate stated in subsection (a)(1), above.
- (d) Title.
- (1) Title to the property described in this Section (d) shall vest in ATP. Vestiture shall be immediately upon the date of this contract, for property acquired or produced before that date. Otherwise, vestiture shall occur when the property is or should

have been allocable or properly chargeable to this contract.

- (2) "Property," as used in this clause, includes all of the below-described items acquired or produced by the Contractor that are or should be allocable or properly chargeable to this contract under sound and generally accepted accounting principles and practices:
  - (i) parts, materials, inventories, and work in process;
  - (ii) special tooling and special test equipment to which ATP is to acquire title under any other clause of this contract;
  - (iii) nondurable (i.e., noncapital) tools, jigs, dies, fixtures, molds, patterns, taps, gauges, test equipment, and other similar manufacturing aids, title to which would not be obtained as special tooling under subsection (ii) above; and
  - (iv) drawings and technical data, to the extent the Contractor or subcontractors are required to deliver them to ATP by other clauses of this contract.
- (3) Although title to property is in ATP under this clause, other applicable clauses of this contract (e.g., the termination or special tooling clauses) shall determine the handling and disposition of the property.
- (4) The Contractor may sell any scrap resulting from production under this contract without requesting the Contracting Officer's approval, but the proceeds shall be credited against the costs of performance.
- (5) To acquire for its own use or dispose of property to which title is vested in ATP under this clause, the Contractor must obtain the Contracting Officer's advance approval of the action and the terms. The Contractor shall (i) exclude the allocable costs of the property from the costs of contract performance, and (ii) repay to ATP any amount of unliquidated progress payments allocable to the property. Repayment may be by cash or credit memorandum.
- (6) When the Contractor completes all of the obligations under this contract, including liquidation of all progress payments, title shall vest in the Contractor for all property (or the proceeds thereof) not :
  - (i) delivered to and accepted by ATP under this contract; or
  - (ii) incorporated in supplies delivered to and accepted by ATP under this contract and to which title is vested in ATP under this clause.

- (7) The terms of this contract concerning liability for property furnished by ATP shall not apply to property to which ATP acquired title solely under this clause.
- (e) Risk of Loss. Before delivery to and acceptance by ATP, the Contractor shall bear the risk of loss for property, the title to which vests in ATP under this clause, except to the extent ATP expressly assumes the risk. The Contractor shall repay ATP an amount equal to the unliquidated progress payments that are based on costs allocable to property that is damaged, lost, stolen, or destroyed.
- (f) Control of Costs and Property. The Contractor shall maintain an accounting system and controls adequate for the proper administration of this clause.
- (g) Reports and Access to Records. The Contractor shall promptly furnish reports, certificates, financial statements, and other pertinent information reasonably requested by the Contracting Officer for the administration of this clause. Also, the Contractor shall give ATP reasonable opportunity to examine and verify the Contractor's books, records, and accounts.
- (h) Special Terms Regarding Default. If this contract is terminated under the Termination for Default Clause, (i) the Contractor shall, on demand, repay to ATP the amount of unliquidated progress payments and (ii) title shall vest in the Contractor, on full liquidation of progress payments, for all property for which ATP elects not to require delivery under the Termination for Default Clause. ATP shall be liable for no payment except as provided by the Termination for Default Clause.
- (i) Reservations of Rights.
  - (1) No payment or vesting of title under this clause shall (i) excuse the Contractor from performance of obligations under this contract or (ii) constitute a waiver of any of the rights or remedies of the parties under the contract.
  - (2) ATP's rights and remedies under this clause (i) shall not be exclusive but rather shall be in addition to any other rights and remedies provided by law or this contract and (ii) shall not be affected by delayed, partial, or omitted exercise of any right, remedy, power, or privilege, nor shall such exercise or any single exercise preclude or impair any further exercise under this clause or the exercise of any other right, power, or privilege of ATP.
- (j) Progress Payments to Subcontractors. The amounts mentioned in (a)(1)(ii), above, shall be all progress payments to subcontractors or divisions, if the following conditions are met.
  - (1) The amounts included are limited to the unliquidated remainder of progress payments made.

- (2) The subcontract or interdivisional order is expected to involve a minimum of approximately six months between the beginning of work and the first delivery.
- (3) The terms of the subcontract or interdivisional order concerning progress payments :
  - (i) are substantially similar to the terms of this clause;
  - (ii) are at least as favorable to ATP as the terms of this clause;
  - (iii) are not more favorable to the subcontractor or division than the terms of this clause are to the Contractor; and
  - (iv) subordinate all subcontractor rights concerning property to which ATP has title under the subcontract to ATP's right to require delivery of the property to ATP if (A) the Contractor defaults or (B) the subcontractor becomes bankrupt or insolvent.
- (4) The progress payment rate in the subcontract is the rate not greater than the rate stated herein.
- (5) The parties agree, concerning any proceeds received by ATP for property to which title has vested in ATP under the subcontract terms, that the proceeds shall be applied to reducing any unliquidated progress payments by ATP to the Contractor under this contract.
- (6) If no unliquidated progress payments to the Contractor remain, but there are unliquidated progress payments that the Contractor has made to any subcontractor, the Contractor shall be subrogated to all the rights ATP obtained through the terms required by this clause to be in any subcontract, as if all such rights had been assigned and transferred to the Contractor.
- (7) The Contractor shall pay the subcontractor's progress payment request under subdivision (j)(1)(ii) above, with- in a reasonable time after receiving ATP's progress payment covering those amounts.

**Section 6-203.10 Interest on Contractor Indebtedness**

- (a) Notwithstanding any other clause of this contract, all amounts that become payable by the Contractor to ATP under this contract shall bear simple interest from the date due until paid unless paid within 30 days of becoming due. In no event shall the interest



charged or payable hereunder exceed that allowable under Texas law.

(b) Amounts shall be due at the earliest of the following dates:

- (1) the date fixed under this contract;
- (2) the date of the first written demand for payment consistent with this contract, including any demand resulting from a default termination;
- (3) the date ATP transmits to the Contractor a proposed supplemental agreement to confirm completed negotiations establishing the amount of debt (unless a later date is set forth therein); or
- (4) if this contract provides for revision of prices, the date of written notice to the Contractor stating the amount of refund payable in connection with a pricing proposal or a negotiated pricing agreement not confirmed by contract modification.

#### **Section 6-203.11 Protection of ATP Property**

The Contractor shall use reasonable care to avoid damaging existing buildings, equipment, and vegetation on or about premises owned by, or under the control of, ATP. If the Contractor's failure to use reasonable care causes damage to any of this property, the Contractor shall replace or repair the damage at no expense to ATP as the Contracting Officer directs. If the Contractor fails or refuses to make such repair or replacement, the Contractor shall be liable for the cost, which may be deducted from the contract price.

#### **Section 6-203.12 ATP Property**

(a) ATP-Furnished Property.

- (1) ATP shall supply to the Contractor, for use in connection with and under the terms of this contract, the property described in the contract or specifications together with any related data and information that the Contractor may request and is reasonably required for the intended use of the property (hereinafter referred to as "ATP-furnished property").
- (2) The delivery or performance dates for this contract are based upon the expectation that ATP-furnished property suitable for use (except for property furnished "as-is") will be supplied to the Contractor at the times stated in the contract or, if not so stated, in sufficient time to enable the Contractor to meet the contract's delivery or performance dates.
- (3) If ATP-furnished property is received by the Contractor in a condition not suitable

for the intended use, the Contractor shall, upon receipt of it, notify the Contracting Officer, detailing the facts, and, as directed by the Contracting Officer and at ATP's expense, either repair, modify, return, or otherwise dispose of the property. After the Contractor completes the directed action and upon written request of the Contractor, the Contracting Officer shall make an equitable adjustment as provided in Section (h) of this clause.

- (4) If ATP-furnished property is not delivered to the Contractor by the required time, the Contracting Officer shall, upon the Contractor's timely written request, make a determination of the delay, if any, caused the Contractor and shall make an equitable adjustment in accordance with Section (h) of this clause.

(b) Changes in ATP-Furnished Property.

- (1) The Contracting Officer may, by written notice, (i) decrease ATP-furnished property provided or to be provided under this contract, or (ii) substitute other ATP-furnished property for the property to be provided by ATP, or to be acquired by the Contractor for ATP, under this contract. The Contractor shall promptly take such action as the Contracting Officer may direct regarding the removal, shipment, or disposal of the property covered by such notice.
- (2) Upon the Contractor's written request, the Contracting Officer shall make an equitable adjustment to the contract in accordance with Section (h) of this clause, if ATP has agreed in the contract to make the property available for performing this contract and there is any :
  - (i) decrease or substitution in this property pursuant to subsection (b)(1) above; or
  - (ii) withdrawal of ATP to use this property, if provided under any other contract or lease.

(c) Title in ATP Property.

- (1) ATP shall retain title to all ATP-furnished property.
- (2) All ATP-furnished property and all property acquired by the Contractor, title to which vests in ATP under this Section (collectively referred to as "property of ATP"), are subject to the provisions of this clause. Title to property of ATP shall not be affected by its incorporation into or attachment to any property not owned by ATP, nor shall property of ATP become a fixture or lose its identity as personal property by being attached to any real property.
- (3) Title to each item of facilities, special test equipment, and special tooling (other

than that subject to a Special Tooling clause) acquired by the Contractor for ATP under this contract shall pass to and vest in ATP when its use in performing this contract commences or when ATP has paid for it, whichever is earlier, whether or not title previously vested in ATP.

- (4) If this contract contains a provision directing the Contractor to purchase material for which ATP will reimburse the Contractor as a direct item of cost under this contract :
  - (i) title to material purchased from a vendor shall pass to and vest in ATP upon the vendor's delivery of such material; and
  - (ii) title to all other material shall pass to and vest in ATP upon :
    - (A) issuance of the material for use in contract performance;
    - (B) commencement of processing of the material or its use in contract performance; or
    - (C) reimbursement of the cost of the material by ATP, whichever occurs first.
- (d) Use of ATP Property. The property of ATP shall be used only for performing this contract, unless otherwise provided in this contract or approved by the Contracting Officer.
- (e) Property Administration.
  - (1) The Contractor shall be responsible and accountable for all property of ATP provided under this contract.
  - (2) The Contractor shall establish and maintain a program for the use, maintenance, repair, protection, and preservation of property of ATP in accordance with sound industrial practice.
  - (3) If damage occurs to property of ATP, the risk of which has been assumed by ATP under this contract, ATP shall replace the items or the Contractor shall make such repairs as ATP directs. However, if the Contractor cannot effect such repairs within the time required, the Contractor shall dispose of the property as directed by the Contracting Officer. When any property for which ATP is responsible is replaced or repaired, the Contracting Officer shall make an equitable adjustment in accordance with Section (h) of this clause.
  - (4) The Contractor represents that the contract price does not include any amount for repairs or replacement for which ATP is responsible. Repair or replacement of property for which the Contractor is responsible shall be accomplished by the

Contractor at its own expense.

- (f) Access. ATP and all its Designees shall have access at all reasonable times to the premises in which any property of ATP is located for the purpose of inspecting the property of ATP.
- (g) Risk of Loss. Unless otherwise provided in this contract, the Contractor assumes the risk of, and shall be responsible for, any loss or destruction of, or damage to, property of ATP upon its delivery to the Contractor or upon passage of title to ATP under Section (c) of this clause. However, the Contractor is not responsible for reasonable wear and tear to property of ATP or for property of ATP properly consumed in performing this contract.
- (h) Equitable Adjustment. When this clause specifies an equitable adjustment, it shall be made to any affected contract provision in accordance with the procedures of the Changes Clause. When appropriate, the Contracting Officer may initiate an equitable adjustment in favor of ATP. The right to an equitable adjustment shall be the Contractor's exclusive remedy. ATP shall not be liable to suit for breach of contract for :
  - (1) any delay in delivery of ATP-furnished property;
  - (2) delivery of ATP-furnished property in a condition not suitable for its intended use;
  - (3) a decrease in, or substitution of, ATP-furnished property; or
  - (4) failure to repair or replace property of ATP for which ATP is responsible.
- (i) Final Accounting and Disposition of Property of ATP. Upon completing this contract, or at such earlier dates as may be fixed by the Contracting Officer, the Contractor shall submit, in a form acceptable to the Contracting Officer, inventory schedules covering all items of property of ATP (including any resulting scrap) not consumed in performing this contract or delivered to ATP. The Contractor shall prepare for shipment, deliver f.o.b. origin, or dispose of the property of ATP as may be directed or authorized by the Contracting Officer. The net proceeds of any such disposal shall be credited to the contract price or shall be paid to ATP as the Contracting Officer directs.
- (j) Abandonment and Restoration of Contractor's Premises. Unless otherwise provided herein, ATP :
  - (1) may abandon any property of ATP in place, at which time all obligations of ATP regarding such abandoned property shall cease; and
  - (2) has no obligation to restore or rehabilitate the Contractor's premises under any circumstances (e.g., abandonment, disposition upon completion of need, or upon contract completion). However, if ATP-furnished property (listed in the contract

or specifications) is withdrawn or is unsuitable for the intended use, or if other property of ATP is substituted, then the equitable adjustment under Section (h) of this clause may properly include restoration or rehabilitation costs.

- (k) Communications. All communications under this clause shall be in writing.

**Section 6-203.13 Certificate of Conformance**

- (a) When authorized in writing by the Contracting Officer, the Contractor shall ship with a Certificate of Conformance any supplies for which the contract would otherwise require inspection at source. In no case shall ATP's right to inspect supplies under the inspection provisions of this contract be prejudiced. Shipments of such supplies will not be made under this contract until use of the Certificate of Conformance has been authorized in writing by the Contracting Officer or inspection and acceptance have occurred.
- (b) The Contractor's signed certificate shall be attached to or included on the top copy of the inspection or receiving report distributed to ATP. In addition, a copy of the signed certificate shall be attached to or entered on copies of the inspection or receiving report accompanying the shipment.
- (c) ATP has the right to reject defective supplies or services within a reasonable time after delivery by written notification to the Contractor. The Contractor shall in such event promptly replace, correct, or repair the rejected supplies or services at the Contractor's expense.
- (g) The certificate shall read as follows:

*"I certify that on \_\_\_\_\_ [insert date], the \_\_\_\_\_ [insert Contractor's name] furnished the supplies or services called for by Contract No. \_\_\_\_\_ via \_\_\_\_\_ [Carrier] on \_\_\_\_\_ [identify the bill of lading or shipping document] in accordance with all applicable requirements. I further certify that the supplies or services are of the quality specified and conform in all respects with the contract requirements, including specifications, drawings, testing, preservation, packaging, packing, marking requirements, and physical item identification (part number), and are in the quantity shown on this or on the attached acceptance document."*

*Date of Execution:* \_\_\_\_\_

*Signature:* \_\_\_\_\_

*Title:* \_\_\_\_\_

**Section 6-203.14 Liquidated Damages**

The following clause may be used when the anticipated or actual harm caused by a breach is uncertain or incapable or very difficult of accurate estimation or proof. The amount specified shall be a reasonable forecast of just compensation for the harm that is caused by the breach,

and the Contracting Officer shall include the basis for such estimate in the contract file.

- (a) If the Contractor fails to deliver the supplies or perform the services within the time specified in this contract, or any extension, the Contractor shall, in place of actual damages, pay to ATP as fixed, agreed, and liquidated damages, for each calendar day of delay, the sum set forth in the contract as "liquidated damages".
- (b) Alternatively, if delivery or performance is inexcusably delayed by the contractor, ATP may terminate this contract in whole or in part under the Termination for Default Clause in this contract and assess fixed, agreed, and liquidated damages accruing until the time ATP may reasonably obtain delivery or performance of similar supplies or services. The liquidated damages shall be in addition to excess costs under the Termination Clause.
- (c) The amount of liquidated damages provided in this contract is neither a penalty nor a forfeiture and shall compensate ATP solely for ATP's inability to use the supplies or services and is not intended to, and does not, include: (i) any damages, additional costs or extended costs incurred by ATP for extended administration of this contract or by ATP's agents, consultants, or independent contractors for extended administration of this contract, (ii) any increases in financing costs resulting from the delay, or (iii) any additional services relating to, or arising as a result of, the delay. ATP shall be entitled to claim against the Contractor for its actual damages and amounts not specifically included within the liquidated damages as set forth herein. Such costs shall be computed separately. Together with liquidated damages, they shall be either deducted from the contract price or billed to the Contractor.
- (d) The Contractor shall not be charged with liquidated damages when the delay in delivery or performance arises out of causes beyond the control and without the fault or negligence of the Contractor as defined in the Termination for Default Clause in this contract.

**Section 6-203.15    Warranty**

- (a) Definitions. "Acceptance," as used in this clause, means the act of an authorized representative of ATP by which ATP assumes for itself, or as an agent of another, ownership of existing supplies, or approves specific services as partial or complete performance of the contract.

"Correction," as used in this clause, means the elimination of a defect.

"Supplies," as used in this clause, means the end item furnished by the Contractor and related services required under the contract. The word does not include "data."

- (b) Contractor's Obligations.

- (1) Notwithstanding inspection and acceptance by ATP of supplies furnished under this contract, or any condition of this contract concerning the conclusiveness thereof, the Contractor warrants that for \_\_\_\_\_ [Contracting Officer shall state specific period of time after delivery, or the specified event whose occurrence will terminate the warranty period; e.g., the number of miles or hours of use, or combinations of any applicable events or periods of time] :
    - (i) all supplies furnished under this contract will be free from defects in material or workmanship and will conform with all requirements of this contract; and
    - (ii) the preservation, packaging, packing, and marking, and the preparation for and method of, shipment of such supplies will conform with the requirements of this contract.
  - (2) When return, correction, or replacement is required, transportation charges and responsibility for the supplies while in transit shall be borne by the Contractor. However, the Contractor's liability for the transportation charges shall not exceed an amount equal to the cost of transportation by the usual commercial method of shipment between the place of delivery specified in this contract and the Contractor's plant, and return.
  - (3) Any supplies or parts thereof, corrected or furnished in replacement under this clause, shall also be subject to the terms of this clause to the same extent as supplies initially delivered. The warranty, with respect to supplies or parts thereof, shall be equal in duration to that in Section (b)(1) of this clause and shall run from the date of delivery of the corrected or replaced supplies.
  - (4) All implied warranties of merchantability and "fitness for a particular purpose" are excluded from any obligation contained in this contract.
- (c) Remedies Available to ATP.
- (1) The Contracting Officer shall give written notice to the Contractor of any breach of warranties in Section (b)(1) of this clause within \_\_\_\_\_ [Contracting Officer shall insert specific period of time; e.g., "45 days of the last delivery under this contract," or "45 days after discovery of the defect"].
  - (2) Within a reasonable time after the notice, the Contracting Officer may either:
    - (i) require, by written notice, the prompt correction or re- placement of any supplies or parts thereof (including preservation, packaging, packing, and marking) that do not conform with the requirements of this contract within the meaning of Section (b)(1) of this clause; or

- (ii) retain such supplies and reduce the contract price by an amount equitable under the circumstances.
- (3) If the contract provides for inspection of supplies by sampling procedures, conformance of supplies or components subject to warranty action shall be determined by the applicable sampling procedures in the contract. The Contracting Officer:
  - (i) may, for sampling purposes, group any supplies delivered under this contract;
  - (ii) shall require the size of the sample to be that required by sampling procedures specified in the contract for the quantity of supplies on which warranty action is proposed;
  - (iii) may project warranty sampling results over supplies in the same shipment or other supplies contained in other shipments even though all of such supplies are not present at the point of reinspection; provided, that the supplies remaining are reasonably representative of the quantity on which warranty action is proposed; and
  - (iv) need not use the same lot size as on original inspection or reconstitute the original inspection lots.
- (4) Within a reasonable time after notice of any breach of the warranties specified in Section (b)(1) of this clause, the Contracting Officer may exercise one or more of the following options:
  - (i) require an equitable adjustment in the contract price for any group of supplies;
  - (ii) screen the supplies grouped for warranty action under this clause at the Contractor's expense and return all nonconforming supplies to the Contractor for correction or replacement;
  - (iii) require the Contractor to screen the supplies at locations designated by ATP within the continental United States and to correct or replace all nonconforming supplies; or
  - (iv) return the supplies grouped for warranty action under this clause to the Contractor (irrespective of the f.o.b. point or the point of acceptance) for screening and correction or replacement.
- (5) The Contracting Officer may, by contract or otherwise, correct or replace the



nonconforming supplies with similar supplies from another source and charge to the Contractor the cost occasioned to ATP thereby if the Contractor :

- (i) fails to make redelivery of the corrected or replaced supplies within the time established for their return; or
  - (ii) fails either to accept return of the nonconforming supplies or fails to make progress after their return to correct or replace them so as to endanger performance of the delivery schedule, and in either of these circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.
- (6) Instead of correction or replacement by ATP, the Contracting Officer may require an equitable adjustment of the contract price. In addition, if the Contractor fails to furnish timely disposition instructions, the Contracting Officer may dispose of the nonconforming supplies for the Contractor's account in a reasonable manner. ATP is entitled to reimbursement from the Contractor, or from the proceeds of such disposal, for the reasonable expenses of the care and disposition of the nonconforming supplies, as well as for excess costs incurred or to be incurred.
- (7) The rights and remedies of ATP provided in this clause are in addition to and do not limit any rights afforded to ATP by law, equity, or any other clause of this contract.

#### **Section 6-203.16    Publicity Releases**

All publicity releases or releases of reports, papers, articles, maps, or other documents in any way concerning this contract or the work hereunder which the Contractor or any of its subcontractors desires to make for purposes of publication in whole or in part, shall be subject to approval by the Contracting Officer prior to release.

#### **Section 6-203.17    Royalties and Patents**

The Contractor shall pay all royalties and license fees. The Contractor shall defend all suits or claims for infringement of any patent rights and shall save ATP harmless from loss on account thereof, except when a particular design, process, or product of a particular manufacturer is specified by ATP; provided, that, if the Contractor has reason to believe that the design, process, or product specified infringes a patent, the Contractor shall be responsible for such loss unless it promptly gives such information to the Contracting Officer.

#### **Section 6-203.18    Equal Opportunity Reporting**

The Contractor shall comply with all reporting requirements under ATP's Equal Opportunity



Program and DBE Program Requirements and all applicable federal, state and local law reporting requirements relating to equal opportunity employment, as further described in the specific requirements of this contract.

### **Section 6-203.19 Examination and Retention of Records**

The following clause is required for all contracts specified in Section 3-704 and Section 3-706(1) and in other contracts where substantial modifications may occur or where necessary or appropriate to protect the interests of ATP.

- (a) The Contracting Officer and his representatives shall have the audit and inspection rights described in the applicable Sections (b) and (c), below.
- (b) If this is a cost-reimbursement type, incentive, time and materials, labor hour, or price re-determinable contract, or any combination thereof, the Contractor shall maintain, and the Contracting Officer and his representatives shall have the right to examine, all books, records, documents, and other evidence and accounting procedures and practices sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract. Such right of examination shall include inspection at all reasonable times at the Contractor's plants, or such parts thereof, as may be engaged in or maintain records in connection with the performance of this contract.
- (c) If the Contractor submitted certified cost or pricing data in connection with the pricing of this contract or if the Contractor's cost of performance is relevant to any change or modification to this contract, the Contracting Officer and his representatives shall have the right to examine all books, records, documents, and other data of the Contractor related to the negotiation, pricing, or performance of such contract, change, or modification for the purpose of evaluating the costs incurred and the accuracy, completeness, and currency of the cost or pricing data submitted. The right of examination shall extend to all documents necessary to permit adequate evaluation of the costs incurred and the cost or pricing data submitted, along with the computations and projections used therein.
- (d) The materials described in (b) and (c), above, shall be made available at the office of the Contractor at all reasonable times for inspection, audit, or reproduction until the expiration of three (3) years from the date of final payment under this contract, except that:
  - (1) if this contract is completely or partially terminated, the records relating to the work terminated shall be made available for a period of three (3) years from the date of any final settlement; and
  - (2) records which relate to appeals under the Disputes Clause of this contract or

litigation, or the settlement of claims arising out of the performance of this contract, shall be made available until such appeals, litigation, or claims have been resolved.

- (e) The Contractor shall insert a clause containing all the provisions of this clause, including this Section (e), in all subcontracts exceeding \$10,000 hereunder, altered to reflect the proper identification of the contracting parties and the Contracting Officer under the prime contract.

**Section 6-203.20 Price Reduction for Defective Cost or Pricing Data**

Include the following clause in solicitations and contracts when cost or pricing data are expected to be required to be submitted and certified prior to award in accordance with Section 3-502 (1)(a):

- (a) If any price, including profit or fee, negotiated in connection with this contract or any cost reimbursable under this contract (including any modifications thereto) was increased by any significant amount because (1) the Contractor or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its respective Certificate of Current Cost or Pricing Data, (2) a subcontractor or prospective subcontractor furnished the Contractor cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data, or (3) any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly, and the contract shall be modified to reflect the reduction.
- (b) Any reduction in the contract price under Section (a), above, due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor (if there was no subcontract) was less than the prospective subcontract cost estimate submitted by the Contractor; provided that the actual subcontract price was not itself affected by defective cost or pricing data.
- (c) Before awarding any subcontract expected to exceed \$100,000 when entered into, or before pricing any subcontract modification involving a pricing adjustment expected to exceed \$100,000, the Contractor shall require the subcontractor to submit cost or pricing data (actually or by specific identification in writing), unless the price of the subcontract or modification thereto is :
  - (1) based on adequate price competition;
  - (2) based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or

- (3) set by law or regulation.
- (d) The Contractor shall require the subcontractor to certify in substantially the form prescribed in Section 3-505 of ATP's Procurement Policy and Guidelines that, to the best of its knowledge and belief, the data submitted under Section (a),above, were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.
- (e) The substance of subsections (c) and (d) and this subsection (e) of this clause shall be included in all subcontracts expected to exceed \$100,000 when entered into.

**Section 6-203.21 Price Reduction for Defective Cost or Pricing Data (Modifications)**

As prescribed in Section 3-502, when cost or pricing data are not expected to be required to be submitted prior to award of a contract, insert the following clause if the contract amount is expected to exceed \$500,000:

- (a) This clause shall become operative only for any modification to this contract involving aggregate increases and/or decreases in costs, plus applicable profits, of more than \$100,000, except that this clause does not apply to any modification for which the price is:
  - (1) based on adequate price competition;
  - (2) based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or
  - (3) set by law or regulation.
- (b) If any price (including profit) or fee negotiated in connection with any modification covered by this clause under Section (a),above, was increased by any significant amount because (1) the Contractor or subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its respective Certificate of Current Cost or Pricing Data, (2) a subcontractor or prospective subcontractor furnished to the Contractor (in support of the subcontractor cost estimates)cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data, or (3) any of these parties furnished data of any description that were not accurate, the price shall be reduced accordingly and the contract shall be modified to reflect the reduction.
- (c) Any reduction in the contract price under Section (b),above, due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which(1) the actual subcontract or (2) the actual cost to the Contractor(if there was no subcontract) was less than the prospective subcontract cost estimate submitted by the Contractor; provided,

that the actual subcontract price was not itself affected by defective cost or pricing data.

- (d) Before awarding any subcontract expected to exceed \$100,000 when entered into, or pricing any subcontract modification involving a pricing adjustment expected to exceed \$100,000, the Contractor shall require the subcontractor to submit cost or pricing data (actually or by specific identification in writing), unless the price of the subcontract or modification thereto is :
  - (1) based on adequate price competition;
  - (2) based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or
  - (3) set by law or regulation.
- (e) The Contractor shall require the subcontractor to certify in substantially the form prescribed in Section 3-505 of ATP's Procurement Policy and Guidelines that, to the best of its knowledge and belief, the data submitted under Section (d), above, were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.
- (f) The Contractor shall insert the substance of subsections (d) and (e) and this subsection (f) of this clause in each subcontract that exceeds \$100,000 when entered into.

#### **Section 6-203.22 Indemnification**

The Contractor shall fully indemnify and hold harmless ATP and all of its directors, officers, Employees, and agents from any and all claims, demands, causes of action, damages, losses, and expenses (including attorney's fees) of what so ever nature, character, or description that any person or entity has or may have arising out of or related to the breach of or failure to perform the contract or any sub-agreements thereunder or resulting from any negligent act, omission, misconduct, or fault of the Contractor or subcontractors and their Employees and agents.



## **Section 6-300 Service Contracts**

### **Section 6-301 Applicability**

As used in this section, "service contract" means any contract entered into by competitive sealed bidding or by competitive sealed proposals which calls directly for a Contractor's time and effort rather than for delivery of an end product. Service contracts generally are used in areas involving the following:

- (a) maintenance, overhaul, repair, servicing, rehabilitation, salvage, and modernization or modification of supplies, systems, and equipment;
- (b) maintenance, repair, rehabilitation, and modification of real property;
- (c) installation of equipment obtained under separate contract;
- (d) operation of equipment, facilities, or other property owned by ATP;
- (e) engineering and technical services (except architect- engineer and land surveying services);
- (f) housekeeping and facilities services;
- (g) training and education;
- (h) photographic, printing, and publication services;
- (i) test services;
- (j) data processing; and
- (k) warehousing.

### **Section 6-302 Guideline Clauses for Service Contracts**

The clauses in this Section 6-302 are applicable to service contracts.

#### **Section 6-302.01 Definitions**

Include the clause at Section 6-202.01.

#### **Section 6-302.02 Independent Contractor**

The Contractor at all times shall be an independent contractor. The Contractor shall be fully



responsible for all acts and omissions of its Employees, subcontractors, and their Suppliers, and shall be specifically responsible for sufficient supervision and inspection to ensure compliance in every respect with the contract requirements. There shall be no contractual relationship between any subcontractor or Supplier of the Contractor and ATP by virtue of this contract. No provision of this contract shall be for the benefit of any party other than ATP and the Contractor.

**Section 6-302.03      Composition of Contractor**

If the Contractor hereunder is comprised of more than one legal entity, each such entity shall be jointly and severally liable hereunder.

**Section 6-302.04      Subcontractors and Outside Consultants**

Any subcontractors and outside associates or consultants required by the Contractor in connection with the services covered by the contract will be limited to such individuals or firms as were specifically identified and agreed to by ATP in connection with the award of this contract. Any substitution in such subcontractors, associates, or consultants will be subject to the prior approval of the Contracting Officer.

**Section 6-302.05      Changes**

- (a) The Contracting Officer may, at any time, by written order, make changes within the general scope of the contract in the services to be performed. If such changes cause an increase or decrease in the Contractor's cost of, or time required for, performance of any services under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim of the Contractor for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the Contractor of the notification of change unless the Contracting Officer grants a further period of time before the date of final payment under the contract.
- (b) No services for which an additional cost or fee will be charged by the Contractor shall be furnished without the prior written authorization of the Contracting Officer.

**Section 6-302.06      Termination**

**TERMINATION**

- (a) The Contracting Officer may, by written notice to the Contractor, terminate this contract in whole or in part at any time, either for ATP's convenience or because of the failure of the Contractor to fulfill its contract obligations. Upon receipt of such notice, the Contractor shall: (1) immediately discontinue all services affected (unless the notice directs otherwise), and (2) deliver to the Contracting Officer all data, drawings, specifications, reports, estimates, summaries, and such other information and materials

as may have been accumulated by the Contractor in performing this contract, whether completed or in process.

- (b) If the termination is for the convenience of ATP and if this is a fixed price contract, an equitable adjustment in the contract price shall be made, but no amount shall be allowed for anticipated profit on unperformed services.
- (c) If the termination is due to the failure of the Contractor to fulfill its contract obligations, ATP may take over the work and prosecute the same to completion by contract or otherwise. In such case, the Contractor shall be liable to ATP for any additional cost occasioned to ATP thereby.
- (d) If, after notice of termination for failure to fulfill contract obligations, it is determined that the Contractor had not so failed, the termination shall be deemed to have been effected for the convenience of ATP. In such event, adjustment in the contract price shall be made as provided in Section (b) of this clause.
- (e) The rights and remedies of ATP provided in this clause are in addition to any other rights and remedies provided by law or under this contract. Time is of the essence for all delivery, performance, submittal, and completion dates in this contract.

#### **Section 6-302.07 Disputes**

Include the clause at Section 6-202.11.

#### **Section 6-302.08 Drawings and Other Data**

All designs, drawings, specifications, notes and other works developed in the performance of this contract shall become the sole property of ATP and may be used in any manner by ATP and without additional compensation to the Contractor. ATP shall be considered the "person for whom the work was prepared" for the purpose of authorship in any copyrightable work under Section 201(b) of Title 17, United States Code. With respect thereto, the Contractor agrees not to assert or authorize others to assert any rights or establish any claim under the design patent or copyright laws. The Contractor, for a period of three years after completion of the project, agrees to retain all works developed in the performance of the contract and to furnish all retained works to ATP on the request of the Contracting Officer. Unless otherwise provided in this contract, the Contractor shall have the right to retain copies of all works beyond such period.

#### **Section 6-302.09 Standards of Performance**

The Contractor shall perform all services required by this contract in accordance with high professional standards prevailing in the Contractor's field of work.





**Section 6-302.10 Compliance with Law**

The Contractor shall perform all work hereunder in compliance with all applicable federal, state, and local laws and regulations. The Contractor shall use only licensed personnel to perform work required by law to be performed by such personnel.

**Section 6-302.11 Payment of Interest on Contractor's Claims**

Include the clause at Section 6-202.12.

**Section 6-302.12 Suspension of Work**

- (a) The Contracting Officer may order the Contractor in writing to suspend all or any part of the work for such period of time as he may determine to be appropriate for the convenience of ATP.
- (b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended or delayed by an act of the Contracting Officer in the administration of this contract, or by his failure to act within the time specified in this contract (or, if no time is specified, within a reasonable time), an adjustment shall be made for any increase in cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension or delay, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension or delay to the extent (1) that performance would have been suspended or delayed by any other cause, including the fault or negligence of the Contractor, or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.
- (c) No claim under this clause shall be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension or delay, but not later than the date of final payment. No part of any claim based on the provisions of this clause shall be allowed if not supported by adequate evidence showing that the cost would not have been incurred but for a delay within the provisions of this clause.

**Section 6-302.13 Interest of Public Officials**

Include the clause at Section 6-202.16.

**Section 6-302.14 Equal Opportunity**

Include the clause at Section 6-202.15.



**Section 6-302.15     Governing Law**

Include the clause at Section 6-202.18.

**Section 6-302.16     Order of Precedence**

Include the clause at Section 3-802.10.

**Section 6-302.17     Federal, State and Local Taxes**

Include the clause at Section 6-202.13.

**Section 6-303           Clauses to Be Used When Applicable**

The clauses in this Section 6-303 may be used when applicable to the circumstances of the particular Procurement

**Section 6-303.01     Option to Extend Services**

ATP may require continued performance of any services within the limits and at the rates stated in the Schedule. The Contracting Officer may exercise the option by written notice to the Contractor within the period specified in the contract.

**Section 6-303.02     Option to Extend Term**

- (a) ATP may extend the term of this contract by written notice to the Contractor within the time specified in the contract. If feasible, ATP shall give the Contractor a preliminary written notice of its intent to extend at least 60 days before the contract expires. The preliminary notice does not commit ATP to an extension, and any absence of notice shall not affect the validity of any exercise of the option to extend the term of this contract.
- (b) If ATP exercises this option, the extended contract shall be considered to include this option provision.
- (c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed \_\_\_\_\_(months) (years).

**Section 6-303.03     Notice of Labor Disputes**

Include the clause at Section 6-203.06

**Section 6-303.04     Insurance - Work on ATP Installation**

Include the clause at Section 6-203.07.



### **Section 6-303.05 Inspection**

- (a) "Services," as used in this clause, includes services performed, workmanship, and material furnished or utilized in the performance of services.
- (b) The Contractor shall provide and maintain an inspection system acceptable to ATP covering the services under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to ATP during contract performance and for as long afterwards as the contract requires.
- (c) ATP has the right to inspect and test all services called for by the contract, to the extent practicable, at all times and places during the term of the contract. ATP shall perform inspections and tests in a manner that will not unduly delay the work.
- (d) If any of the services do not conform with contract requirements, ATP may require the Contractor to perform the services again in conformity with contract requirements, at no increase in contract amount. When the defects in services cannot be corrected by reperformance, ATP may (1) require the Contractor to take necessary action to ensure that future performance conforms to contract requirements and (2) reduce the contract price to reflect the reduced value of the services performed.
- (e) If the Contractor fails promptly to perform the services again or to take the necessary action to ensure future performance in conformity with contract requirements, ATP may (1) by contract or otherwise, perform the services and charge to the Contractor any cost incurred by ATP that is directly related to the performance of such service or (2) terminate the contract for default.

### **Section 6-303.06 Interest on Contractor Indebtedness**

Include the clause at Section 6-203.10.

### **Section 6-303.07 Protection of ATP Property**

Include the clause at Section 6-203.11.

### **Section 6-303.08 ATP Property**

Include the clause at Section 6-203.12.

### **Section 6-303.09 Liquidated Damages**

Include the clause at Section 6-203.14 in accordance with the instructions in that section.

### **Section 6-303.10 Warranty of Services**

- (a) "Acceptance," as used in this clause, means the act of an authorized representative of ATP by which ATP assumes for itself, or as an agent of another, ownership of existing and identified supplies, or approves specific services, as partial or complete performance of the contract. "Correction," as used in this clause, means the elimination of a defect.
- (b) Notwithstanding inspection and acceptance by ATP or any provision concerning the conclusiveness thereof, the Contractor warrants that all services performed under this contract will, at the time of acceptance, be free from defects in workmanship and conform to the requirements of this contract. The Contracting Officer shall give written notice of any defect or nonconformance to the Contractor

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[Contracting Officer shall insert the specific period of time in which notice shall be given to the Contractor; e.g., "within 30 days from the date of acceptance by ATP,"; "within 1000 hours of use by ATP,"; or other specified event whose occurrence will terminate the period of notice, or combination of any applicable events or period of time.] This notice shall state either (1) that the Contractor shall correct or reperform any defective or nonconforming services, or (2) that ATP does not require correction or reperformance.

- (c) If the Contractor is required to correct or reperform, it shall be at no cost to ATP, and any services corrected or reperformed by the Contractor shall be subject to this clause to the same extent as work initially performed. If the Contractor fails or refuses to correct or reperform, the Contracting Officer may, by contract or otherwise, correct or replace with similar services and charge to the Contractor the cost occasioned to ATP thereby, or make an equitable adjustment in the contract price.
- (d) If ATP does not require correction or reperformance, the Contracting Officer shall make an equitable adjustment in the contract price.

#### **Section 6-303.11 Excusable Delay**

- (a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of ATP in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. "Default" includes failure to make progress in the work so as to endanger performance.
- (b) If the failure to perform is caused by the failure of a subcontractor at any tier to perform or make progress, and if the cause of the failure was beyond the control of both the Contractor and subcontractor and without the fault or negligence of either, the



Contractor shall not be deemed to be in default, unless-

- (1) the subcontracted supplies or services were obtainable from other sources;
  - (2) the Contracting Officer ordered the Contractor in writing to purchase these supplies or services from the other source; and
  - (3) the Contractor failed to comply reasonably with this order.
- (c) Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of the failure. If the Contracting Officer determines that any failure to perform results from one or more of the causes above, the delivery schedule shall be revised, subject to the rights of ATP under the Termination Clause of this contract.

**Section 6-303.12    Publicity Releases**

Include the clause at Section 6-203.16.

**Section 6-303.13    Equal Opportunity Reporting**

Include the clause at Section 6-203.18 if the amount of the contract is in excess of \$5,000.

**Section 6-303.14    Examination and Retention of Records**

Include the clause at Section 6-203.19 in accordance with the instructions in that section.

**Section 6-303.15    Indemnification**

Include the clause at Section 6-203.22.

**Section 6-303.16    Living Wage Rates**

Pursuant to the Living Wages Policy adopted by Austin City Council Resolution No. 20160324-020, as amended or replaced, the Prime Contract is required to pay to all Employees directly assigned to this contract a minimum Living Wage equal to or greater than \$15.00 per hour, as amended by the Austin City Council, and is further responsible for assuring that Employees of all tiers of subcontractors are likewise paid a minimum hourly Living Wage equal to or greater than \$15.00, as amended by the Austin City Council. In addition, Employees of both the Prime Contract and all tiers of subcontractors directly assigned to this contract are required to certify that they are compensated in accordance with the Living Wage provision. Contractors are prohibited from retaliating against any Employee claiming non-compliance with the Living Wage provision.

**Section 6-400        Construction Contracts**

## **Section 6-401      Applicability**

This section sets forth contract clauses applicable to the Procurement of construction. The term "construction" means the erection, alteration, improvement, demolishing, or repair (including excavating and painting) of buildings, structures, or other real property (including, but not limited to, improvements of all types, plants, bridges, streets, subways, sewers, power lines, and railways). It does not include the routine repair or routine maintenance of existing structures, buildings, or real property.

## **Section 6-402      Recommended Clauses for Construction Contracts**

The following clauses shall be inserted in all fixed price construction contracts (with or without provisions for price redetermination, economic price adjustment, or other form of price revision).

### **Section 6-402.01      Definitions**

Include the clause at Section 6-202.01.

### **Section 6-402.02      Site Investigation and Conditions Affecting the Work**

- (a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including, but not limited to, (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, flooding patterns and water drainage, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminarily to and during work performance. The Contractor acknowledges that its undertaking to complete the contract within the contract schedule includes an allowance for the normal number of days in which contract work maybe partially or totally delayed because of weather during the season and at the location the contract will be performed and that the Contractor shall not be entitled to excusable delays or compensation for such delays. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be countered insofar as this information is reasonably ascertainable from an inspection of the site, access to the site, and territory surrounding the site, including all exploratory work done by ATP as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this Section will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work or for proceeding to perform the work successfully without additional expense to ATP.
- (b) ATP assumes no responsibility for any conclusions or interpretations made by the

Contractor based on the information made available by ATP. Nor does ATP assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

### **Section 6-402.03 Differing Site Conditions**

- (a) The Contractor shall promptly, and before the conditions are disturbed, give written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.
- (b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.
- (c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed unless the Contractor has given the written notice required; provided, that the time prescribed in (a), above, for giving written notice maybe extended by the Contracting Officer.
- (d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.

### **Section 6-402.04 Permits and Responsibilities**

The Contractor shall, without additional expense to ATP, be responsible for obtaining any necessary licenses and permits and for complying with any federal, state, county, and municipal laws, codes, and regulations applicable to the performance of the work, including, but not limited to, any laws or regulations requiring the use of licensed contractors to perform parts of the work. The Contractor also shall be responsible for all damages to persons or property that occur as a result of the Contractor's fault or negligence and shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others. The Contractor also shall be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract.

### **Section 6-402.05 Specifications and Drawings**

- (a) The Contractor shall keep on the work site a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In case of a discrepancy in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any action or adjustment by the Contractor without such a determination shall be at its own risk and expense. The Contracting Officer shall furnish from time to time such detailed drawings and other information as considered necessary, unless otherwise provided.
- (b) Wherever in the specifications or upon the drawings the words "directed", "required", "ordered", "designated", "prescribed", or words of like import are used, it shall be understood that the "direction", "requirement", "order", "designation", or "prescription", of the Contracting Officer is intended; and similarly the words "approved", "acceptable", "satisfactory", or words of like import shall mean "approved by", or "acceptable to", or "satisfactory to" the Contracting Officer, unless otherwise expressly stated.
- (c) Where "as shown", "as indicated", "as detailed", or words of similar import are used, it shall be understood that the reference is made to the drawings accompanying this contract unless stated otherwise. The word "provided" as used herein shall be understood to mean "provide complete in place" (that is, "furnished and installed").
- (d) Shop drawings means drawings submitted to ATP by the Contractor, subcontractor, or any lower tier subcontractor pursuant to a construction contract, showing in detail (1) the proposed fabrication and assembly of structural elements and (2) the installation (i.e., form, fit, and attachment details) of materials or equipment. It includes drawings, diagrams, layouts, schematics, descriptive literature, illustrations, schedules, performance and test data, and similar materials furnished by the Contractor to explain in detail specific portions of the work required by the contract. ATP may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.
- (e) If this contract requires shop drawings, the Contractor shall coordinate all such drawings and review them for accuracy, completeness, and compliance with contract requirements and shall indicate its approval thereon as evidence of such coordination and review. Shop drawings submitted to the Contracting Officer without evidence of the Contractor's approval may be returned for resubmission. The Contracting Officer will indicate an approval or disapproval of the shop drawings and, if not approved as submitted, shall indicate ATP's reasons therefor. Any work done before such approval shall be at the Contractor's risk. Approval by the Contracting Officer shall not relieve the Contractor from responsibility for any errors or omissions in such drawings or from responsibility for



complying with the requirements of this contract, except with respect to variations described and approved in accordance with (f) below.

- (f) If shop drawings show variations from the contract requirements, the Contractor shall describe such variations in writing, separate from the drawings, at the time of submission. If the Contracting Officer approves any such variation, the Contracting Officer shall issue an appropriate contract modification, except that, if the variation is minor or does not involve a change in price or in time of performance, a modification need not be issued.
- (g) The Contractor shall submit to the Contracting Officer for approval electronic copies (unless otherwise indicated) of all shop drawings as called for under the various headings of the specifications. The approval of such documents will be outlined in the solicitation and any resulting contract.
- (h) This clause shall be included in all subcontracts at any tier.

#### **Section 6-402.06 Other Contracts**

ATP may undertake, or award other contracts for, additional work at or near the site of the work under this contract. The Contractor shall fully cooperate with the other contractors and with Employees of ATP and shall carefully adapt scheduling and performing the work under this contract to accommodate the additional work, heeding any direction that may be provided by the Contracting Officer. The Contractor shall not commit or permit any act that will interfere with the performance of work by any other contractor or by Employees of ATP.

#### **Section 6-402.07 Protection of Existing Site Conditions**

- (a) The Contractor shall preserve and protect all structures, equipment, and vegetation (such as trees, shrubs, and grass) on or adjacent to the work site which are not to be removed and which do not unreasonably interfere with the work required under this contract. The Contractor shall remove trees only when specifically authorized to do so and shall avoid damaging vegetation that will remain in place. If any limbs or branches of trees are broken during contract performance, or by the careless operation of equipment, or by workmen, the Contractor shall trim those limbs or branches with a clean cut and paint the cut with a tree-pruning compound as directed by the Contracting Officer.
- (b) The Contractor shall protect from damage all existing improvements and utilities (1) at or near the work site and (2) on adjacent property of a third party, the locations of which are made known to or should be known by the Contractor. The Contractor shall repair any damage to those facilities, including those that are the property of a third party, resulting from failure to comply with the requirements of this contract or failure to exercise reasonable care in performing the work. If the Contractor fails or refuses to repair the damage promptly, the Contracting Officer may have the necessary work performed and charge the cost to the Contractor.

### **Section 6-402.08 Operations and Storage Areas**

- (a) The Contractor shall confine all operations (including storage of materials) on ATP premises to areas authorized or approved by the Contracting Officer. The Contractor shall hold and save ATP, and its officers and agents, free and harmless from liability of any nature occasioned by the Contractor's performance.
- (b) Temporary buildings (e.g., storage sheds, shops, offices) and utilities may be erected by the Contractor only with the approval of the Contracting Officer and shall be built with labor and materials furnished by the Contractor without expense to ATP. The temporary buildings and utilities shall remain the property of the Contractor and shall be removed by the Contractor at its expense upon completion of the work. With the written consent of the Contracting Officer, the buildings and utilities maybe abandoned and need not be removed.
- (c) The Contractor shall, under Policy and Guidelines prescribed by the Contracting Officer, use only established roadways or use temporary roadways constructed by the Contractor when and as authorized by the Contracting Officer. When materials are transported in prosecuting the work, vehicles shall not be loaded beyond the loading capacity recommended by the manufacturer of the vehicle or prescribed by any federal, state, or local law or regulation. When it is necessary to cross curbs or sidewalks, the Contractor shall protect them from damage. The Contractor shall repair or pay for the repair of any damaged curbs, sidewalks, or roads.

### **Section 6-402.09 Superintendence by Contractor**

At all times during performance of this contract and until the work is completed and accepted, the Contractor shall directly superintend the work or assign and have on the work a competent superintendent who is satisfactory to the Contracting Officer and has ATP to act for the Contractor.

### **Section 6-402.10 Variation in Estimated Quantity**

If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contractor may request (in writing) an extension of time to be received by the Contracting Officer within 10 days from the beginning of the delay, or within such further period as may be granted by the Contracting Officer before the date of final settlement of the contract. Upon the receipt of a written request for an extension, the Contracting Officer shall ascertain the facts and make an adjustment for extending the completion date as, in the judgment of the Contracting Officer, is

justified.

#### **Section 6-402.11 Material and Workmanship**

- (a) All equipment, material, and articles incorporated into the work covered by this contract shall be new and of the most suitable grade for the purpose intended, unless otherwise specifically provided in this contract. References in the specifications to equipment, material, articles, or patented processes by trade name, make, or catalog number shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may, at its option, use any equipment, material, article, or process that, in the judgment of the Contracting Officer, is equal to that named in the specifications, unless otherwise specifically provided in this contract.
- (b) The Contractor shall obtain the Contracting Officer's approval of the machinery and mechanical and other equipment to be incorporated into the work. When requesting approval, the Contractor shall furnish to the Contracting Officer the name of the manufacturer, the model number, and other information concerning the performance, capacity, nature, and rating of the machinery and mechanical and other equipment. When required by this contractor by the Contracting Officer, the Contractor also shall obtain the Contracting Officer's approval of the material or articles which the Contractor contemplates incorporating into the work. When requesting approval, the Contractor shall provide full information concerning the material or articles. When directed to do so, the Contractor shall submit samples for approval at the Contractor's expense, with all shipping charges prepaid. Machinery, equipment, material, and articles that do not have the required approval shall be installed or used at the risk of subsequent rejection.
- (c) All work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may require, in writing, that the Contractor remove from the work any Employee the Contracting Officer deems incompetent, careless, or otherwise objectionable.

#### **Section 6-402.12 Suspension of Work**

Include the clause at Section 6-302.12.

#### **Section 6-402.13 Use and Possession Prior to Completion**

- (a) ATP shall have the right to take possession of or use any completed or partially completed part of the work. Before taking possession of or using any work, the Contracting Officer shall furnish the Contractor a list of items of work remaining to be performed or corrected on those portions of the work that ATP intends to take possession of or use. However, failure of the Contracting Officer to list any item of work shall not relieve the Contractor of responsibility for complying with the terms of the contract. ATP's possession or use shall not be deemed an acceptance of any work under the contract.

- (b) While ATP has such possession or use, the Contractor shall be relieved of the responsibility for the loss of or damage to the work resulting from ATP's possession or use, notwithstanding the terms of the Permits and Responsibilities Clause of this contract. If prior possession or use by ATP delays the progress of the work or causes additional expense to the Contractor, an equitable adjustment shall be made in the contract price or the time of completion, and the contract shall be modified in writing accordingly.

**Section 6-402.14 Inspection of Construction**

- (a) The word "work" includes, but is not limited to, materials, workmanship, and manufacture and fabrication of components.
- (b) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work called for by this contract conforms to contract requirements. The Contractor shall maintain complete inspection records and make them available to ATP. All work shall be conducted under the general direction of the Contracting Officer and is subject to inspection and testing by ATP at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the contract.
- (c) Inspections and tests by ATP are for the sole benefit of ATP and do not:
  - (1) relieve the Contractor of responsibility for providing adequate quality control measures;
  - (2) relieve the Contractor of responsibility for damage to or loss of the material before acceptance;
  - (3) constitute or imply acceptance; or
  - (4) affect the continuing rights of ATP after acceptance of the completed work under Section (i) below.
- (d) The presence or absence of an inspector from ATP does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any term or condition of the specifications without the Contracting Officer's written authorization.
- (e) The Contractor shall promptly furnish, without additional charge, all facilities, labor, and material reasonably needed for performing such safe and convenient inspections and tests as may be required by the Contracting Officer. ATP may charge to the Contractor any additional cost of inspection or test when work is not ready at the time specified by the Contractor for inspection or test, or when prior rejection makes reinspection or retest necessary. ATP shall perform all inspections and tests in a manner that will not unnecessarily delay the work. Special, full size, and performance tests shall be performed

as described in the contract.

- (f) The Contractor shall, without charge, replace or correct work found by ATP not to conform to contract requirements, unless in the public interest ATP consents to accept the work with an appropriate downward adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.
- (g) If the Contractor does not promptly replace or correct rejected work, ATP may (1) by contract or otherwise, replace or correct the work and charge the cost to the Contractor or (2) terminate for default the Contractor's right to proceed.
- (h) If, before acceptance of the entire work, ATP decides to examine already completed work by removing it or tearing it out, the Contractor, on request, shall promptly furnish all necessary facilities, labor, and material. If the work is found to be defective or nonconforming in any material respect due to the fault of the Contractor or its subcontractors, the Contractor shall defray the expenses of the examination and of satisfactory reconstruction. However, if the work is found to meet contract requirements, the Contracting Officer shall make an equitable adjustment for the additional services involved in the examination and reconstruction, including, if completion of the work was thereby delayed, an extension of time.
- (i) Unless otherwise specified in the contract, ATP shall accept, as promptly as practicable after completion and inspection, all work required by the contract or that portion of the work the Contracting Officer determines can be accepted separately. Subject to the provisions of the Warranty of Construction Clause hereof, acceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or ATP's rights under any warranty or guarantee.

**Section 6-402.15    Warranty of Construction**

- (a) In addition to any other warranties in this contract, the Contractor warrants, except as provided in Section (j) of this clause, that work performed under this contract conforms to the contract requirements and is free of any defect in equipment, material, or design furnished, or workmanship performed, by the Contractor or any subcontractor or Supplier at any tier.
- (b) This warranty shall continue for a period of one year from the date of final acceptance of the work. If ATP takes possession of any part of the work before final acceptance, this warranty for such part of the work shall continue for a period of one year from the date ATP takes possession.
- (c) The Contractor shall remedy at the Contractor's expense (i) any failure to conform to the contract requirements or (ii) any defect. In addition, the Contractor shall remedy at the Contractor's expense any damage to real or personal property owned or controlled by ATP, when the damage is the result of :

- (1) the Contractor's failure to conform to contract requirements; or
  - (2) any defect of equipment, material, workmanship, or design furnished.
- (d) The Contractor shall restore any work damaged in fulfilling the terms and conditions of this clause. The Contractor's warranty with respect to work repaired or replaced will run for one year from the date of repair or replacement.
- (e) The Contracting Officer shall notify the Contractor, in writing, within a reasonable time after the discovery of any failure, defect, or damage.
- (f) If the Contractor fails to remedy any failure, defect, or damage within a reasonable time after receipt of notice, ATP shall have the right to replace, remove, or otherwise remedy the failure, defect, or damage at the Contractor's expense.
- (g) With respect to all warranties, express or implied, from subcontractors, manufacturers, or Suppliers for work performed and materials furnished under this contract, the Contractor shall :
- (1) obtain all warranties that would be given in normal commercial practice;
  - (2) require all warranties to be executed, in writing, for the benefit of ATP, if directed by the Contracting Officer; and
  - (3) enforce all warranties for the benefit of ATP, if directed by the Contracting Officer.
- (h) In the event the Contractor's warranty under Section (b) of this clause has expired, ATP may bring suit at its expense to enforce a subcontractor's, manufacturer's, or Supplier's warranty.
- (i) Unless a defect is caused by the negligence of the Contractor or subcontractor or Supplier at any tier, the Contractor shall not be liable for the repair of any defects of material or design furnished by ATP or for the repair of any damage that results from any defect in material or designs furnished by ATP.
- (j) This warranty shall not limit ATP's rights under the Inspection of Construction Clause of this contract with respect to latent defects, gross mistakes, or fraud.

#### **Section 6-402.16 Changes**

- (a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a Change Order, make changes in the work within the general scope of the contract, including changes :
- (1) in the specifications (including drawings and designs);

- (2) in the method or manner of performance of the work;
  - (3) in the facilities, equipment, materials, services, or site to be furnished by ATP; or
  - (4) directing acceleration in the performance of the work.
- (b) Any other written or oral order (which, as used in this Section (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change in the Contractor's obligations shall be treated as a Change Order under this clause; provided, that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a Change Order.
- (c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.
- (d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for a "proposal for adjustment" (hereafter referred to as proposal) based on defective specifications, no proposal for any change under Section (b), above, shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which ATP is responsible, the equitable adjustment shall include the increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.
- (e) The Contractor must submit any proposal under this clause within 30 days after (1) receipt of a written Change Order under Section (a), above, or (2) the furnishing of a written notice under Section (b), above, by submitting to the Contracting Officer a written statement describing the general nature and amount of the proposal, unless this period is extended by ATP. The proposal may be included in the notice under Section (b), above.
- (f) No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.

#### **Section 6-402.17 Termination for Convenience**

The Contracting Officer may, whenever the interests of ATP so require, terminate this contract, in whole or in part, for the convenience of ATP. The Contracting Officer shall give written notice of the termination to the Contractor specifying the part of the contract terminated and when termination becomes effective.

- (a) 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 Contracting Officer may direct the Contractor to assign the Contractor's right, title, and interest under terminated orders or subcontracts to ATP. The Contractor must still complete the work not terminated by the notice of termination and may incur obligations as are necessary to do so.
  
- (b) The Contracting Officer may require the Contractor to transfer title and deliver to ATP in the manner and to the extent directed by the Contracting Officer: (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated; and (ii) the completed or partially completed plans, drawings, information, and other property that, if the contract had been completed, would be required to be furnished to ATP. The Contractor shall, upon direction of the Contracting Officer, protect and preserve property in the possession of the Contractor in which ATP has an interest. If the Contracting Officer does not exercise this right, the Contractor shall use its best efforts to sell such supplies and manufacturing materials.
  
- (c) ATP shall pay the Contractor the following amounts:
  - (1) For contract work performed before the effective date of termination, the total (without duplication of any items) of :
    - (i) the cost of this work;
    - (ii) the cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subsection (i), above; and
    - (iii) a sum, as profit on (i), above, determined by the Contracting Officer to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subsection (iii) and shall reduce the settlement to reflect the indicated rate of loss.
  - (2) The reasonable costs of settlement of the work terminated, including:
    - (i) accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;
    - (ii) the termination and settlement of subcontracts (excluding the amounts of such settlements); and



- (iii) storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.
- (3) The total sum to be paid the Contractor under this subsection shall not exceed the total contract price plus the reasonable settlement costs of the Contractor reduced by the amount of payments otherwise made, the proceeds of any sales of construction, supplies, and construction materials under this subsection, and the contract price of work not terminated.

### **Section 6-402.18 Default and Termination for Cause**

#### DEFAULT AND TERMINATION FOR CAUSE

- (a) If the Contractor refuses or fails (i) to commence the work within the time required by this contract, (ii) to prosecute the work or any separable part with the diligence that will ensure its completion within the time specified in this contract, including any extension, (i) to provide sufficient and properly skilled workmen or proper materials or equipment to complete the work in an acceptable manner and without delay, (iv) to promptly pay its subcontractors, laborers, and materialmen, (v) to perform any of its other obligations under this contract, (vi) to complete the work within the time specified in this contract, or (vii) [*other events of default will be established in the contract itself*] (“events of default”), ATP may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work). In this event, ATP may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to ATP resulting from events of default, whether or not the Contractor’s right to proceed with the work is terminated. This liability includes any increased costs incurred by ATP in completing the work.
- (b) The Contractor’s right to proceed shall not be terminated because of delays nor the Contractor charged with damages under this clause, if:
- (1) the delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor (examples of such causes include (i) acts of God or of the public enemy, (ii) acts of ATP in either its public or contractual capacity, (iii) acts of another Contractor in the performance of a contract with ATP, (iv) fires, (v) floods, (vi) epidemics, (vii) quarantine restrictions, (viii) strikes, (ix) freight embargoes, (x) unusually severe weather, or (xi) delays of subcontractors or Suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or Suppliers); and
  - (2) the Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes

of delay. The Contracting Officer shall ascertain the facts and the extent of the delay. If, in the judgment of the Contracting Officer, the findings of fact warrant such action, the time for completing the work shall be extended. The findings of the Contracting Officer shall be final and conclusive on the parties but subject to appeal under the Disputes Clause.

- (c) If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable in accordance with this contract, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of ATP.
- (d) The rights and remedies of ATP in this clause are in addition to any other rights and remedies provided by law or under this contract. Time is of the essence for all delivery, performance, submittal, and completion dates in this contract.

#### **Section 6-402.19 ATP's Right to Carry Out the Work**

##### **ATP'S RIGHT TO CARRY OUT THE WORK**

If the Contractor fails or refuses to carry out all or any part of the work in accordance with the contract requirements or within the contract schedule and fails or refuses to correct such deficiency within seven days of receipt of written notice thereof from ATP, ATP, in its sole discretion and without waiving any other rights it may have, may elect to correct such deficiencies and charge the Contractor the cost of such corrections. Nothing in this clause shall relieve the Contractor of its obligation to perform the remainder of the work in accordance with the contract.

#### **Section 6-402.20 No Damages for Delay**

##### **NO DAMAGES FOR DELAY**

Unless otherwise specifically provided for by the contract, the Contractor shall not be entitled to damages of any type resulting from hindrances, delays, or any other cause under this contract except when the work is stopped or suspended by a written order signed by the Contracting Officer or by intentional interference by ATP.

#### **Section 6-402.21 Disputes**

Include the clause at Section 6-202.11.



## Section 6-402.22 Payments

### PAYMENTS

- (a) ATP shall pay the Contractor the contract price as provided in this contract.
- (b) ATP shall make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer. If requested by the Contracting Officer, the Contractor shall furnish a breakdown of the total contract price showing the amount included therein for each principal category of the work, in such detail as requested, to provide a basis for determining progress payments. In the preparation of estimates, the Contracting Officer may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the Contractor at locations other than the site may also be taken into consideration if consideration is specifically authorized by this contract and the Contractor furnishes satisfactory evidence that it has acquired title to such material and that the material will be used to perform this contract.
- (c) In making these progress payments, there shall be retained 10 percent of the estimated amount until final completion and acceptance of the contract work. However, if the Contracting Officer finds that satisfactory progress was achieved during any period for which a progress payment is to be made, the Contracting Officer may authorize payment to be made in full without retention of a percentage. When the work is substantially complete, the Contracting Officer shall retain an amount that the Contracting Officer considers adequate protection of ATP and may release to the Contractor all or a portion of any excess amount. Also, on completion and acceptance of each separate building, public work, or other division of the contract for which the price is stated separately in the contract, payment may be made for the completed work without retention of a percentage.
- (d) All materials and work covered by progress payments made shall, at the time of the payment, become the sole property of ATP, but this shall not be construed as relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work, or waiving the right of ATP to require the fulfillment of all of the terms of the contract.
- (e) ATP shall, upon request, reimburse the Contractor for the entire amount of premiums paid for performance and payment bonds (including coinsurance and reinsurance agreements, when applicable) after the Contractor furnishes evidence of full payment to the surety. Such reimbursement shall be part of, and not in addition to, the contract price.
- (f) ATP shall pay the amount due the Contractor under this contract after
  - (1) completion and acceptance of all work;

- (2) presentation of a properly executed voucher; and
  - (3) presentation of a release of all claims against ATP arising by virtue of this contract, other than claims, in stated amounts, that the Contractor has specifically excepted from the operation of the release.
- (g) Concurrently with the submission of each request for a progress payment under this contract, the Contractor shall certify that all due and payable bills with respect to the contract work either have been paid or will be paid with the proceeds of the current request for progress payment.
- (h) ATP may withhold all or part of any progress payment otherwise due the Contractor if any one or more of the following conditions exist:
- (1) the Contractor fails to prosecute the work to completion in a diligent, efficient, timely, and workman like manner and in strict accordance with the provisions of the contract;
  - (2) the Contractor fails to use an adequate amount or quality of personnel or equipment to complete the work without undue delay;
  - (3) the Contractor fails to make prompt payments to its subcontractors, Suppliers, materialmen, or laborers;
  - (4) any part of such payment to the Contractor is attributable to work which is defective or not performed in accordance with the contract requirements; provided, however, such payment shall be made as to the part thereof attributable to work which is performed in accordance with the contract requirements and is not defective; or
  - (5) the Contractor is otherwise in default of any of its obligations under the contract.

**Section 6-402.23 Royalties and Patents**

Include the clause at Section 6-203.17.

**Section 6-402.24 Federal, State, and Local Taxes**

Include the clause at Section 6-202.13.

**Section 6-402.25 Assignment**

Include the clause at Section 6-202.14.



**Section 6-402.26 Equal Opportunity**

Include the clause at Section 6-202.15.

**Section 6-402.27 Interest of Public Officials**

Include the clause at Section 6-202.16.

**Section 6-402.28 Prevailing Wage Rates**

All persons employed in the performance of the work under this contract, or any subcontracts hereunder, shall be paid not less than the general rates of per diem, holiday, and overtime wages prevailing in the locality for work of a similar character (which wages are specified in an attachment to this contract). Failure to comply with this provision shall subject the Contractor to the penalties prescribed in the Texas Government Code, Chapter 2258, Prevailing Wage Rates, as amended.

**Section 6-402.29 Additional Bond Security**

Include the clause at Section 6-202.08.

**Section 6-402.30 Order of Precedence**

Include the clause at Section 3-802.10.

**Section 6-402.31 Governing Law**

Include the clause at Section 6-202.18.

**Section 6-402.32 Drug-Free Workplace Program**

**DRUG-FREE WORKPLACE PROGRAM**

- (1) To the extent applicable, the Contractor shall comply with, and ensure that each subcontractor performing work under the Contract complies with ATP's Drug Free Workplace Program Requirements and all applicable federal, state, and local law requirements.
- (2) Notwithstanding the foregoing and any provision of ATP's then applicable Drug Free Workplace Program Requirements to the contrary, the Contractor shall at all times comply with and ensure that each subcontractor performing work under the Contract complies with, all applicable Federal Requirements prohibiting drug use and alcohol misuse in the workplace including , without limitation, 41 U.S.C.701 (the "Drug Free Workplace Act"). To the extent of any conflict between any applicable Federal



Requirements, including the provisions of the Drug Free Workplace Act, and ATP's Drug Free Workplace Program Requirements, the more restrictive provision shall control.

**Section 6-403            Clauses to Be Used When Applicable**

The clauses in this Section 6-403 may be used when applicable to the circumstances of the particular Procurement.

**Section 6-403.01      Pricing of Adjustments**

Include the clause at Section 6-203.01.

**Section 6-403.02      Notice of Labor Disputes**

Include the clause at Section 6-203.06.

**Section 6-403.03      Interest on Contractor Indebtedness**

Include the clause at Section 6-203.10.

**Section 6-403.04      Protection of ATP Property**

Include the clause at Section 6-203.11.

**Section 6-403.05      ATP Property**

Include the clause at Section 6-203.12.

**Section 6-403.06      Title to Submittals**

TITLE TO SUBMITTALS

All information, drawings, or other submittals required to be furnished by the Contractor to ATP under this contract shall become the property of ATP.

**Section 6-403.07      Construction Schedule**

CONSTRUCTION SCHEDULE

- (a) Promptly after contract award, the Contractor shall meet with the Contracting Officer to discuss project scheduling and, at that meeting, shall submit a practicable schedule showing the order in which the Contractor proposes to perform the work and the dates on which the Contractor contemplates starting and completing the several salient features of the work (including acquiring materials, plant, and equipment).The schedule

shall be in the form of a network analysis of suitable scale to indicate appropriately the percentage of the Contractor's work breakdown schedule which will be completed by any given date during the period. If the Contractor fails to submit a schedule within the time prescribed, the Contracting Officer may withhold approval of progress payments until the Contractor submits the required schedule.

- (b) The Contractor shall enter the actual progress on the schedule as directed by the Contracting Officer and, upon doing so, immediately shall deliver a copy of the annotated schedule to the Contracting Officer. If, in the opinion of the Contracting Officer, the Contractor falls behind the approved schedule, the Contractor shall take steps necessary to improve its progress, including those that may be required by the Contracting Officer, without additional cost to ATP. In this circumstance, the Contracting Officer may require the Contractor to increase the number of shifts, overtime operations, days of work, and/or the amount of construction plant, and to submit for approval any supplementary schedule or schedules in chart form as the Contracting Officer deems necessary to demonstrate how the approved rate of progress will be regained.
- (c) Failure of the Contractor to comply with the requirements of the Contracting Officer under this clause shall be grounds for a determination by the Contracting Officer that the Contractor is not prosecuting the work with sufficient diligence to ensure completion within the time specified in the contract. Upon making this determination, the Contracting Officer may terminate the Contractor's right to proceed with the work, or any separable part of it, in accordance with the terms of this contract.

#### **Section 6-403.08 Examination of Bid Documents**

##### EXAMINATION OF BID DOCUMENTS

ATP shall have the right to examine and review the Contractor's original bid and estimating documents used in preparing its bid as a reference to aid in ATP's evaluation of the Contractor's scheduling and construction progress. A certified copy of such documents shall be submitted to ATP if requested by the Contracting Officer. ATP shall maintain in confidence all information contained in such bid and estimating documents. It is ATP's position that the Contractor's estimating documents in support of its original bid are exempt from mandatory release prior to award of contract under the Texas Open Records Act. After award, the documents would require individual review to determine whether or not an exemption from release under the Act is available.

#### **Section 6-403.09 Commencement and Completion of Work**

##### COMMENCEMENT AND COMPLETION OF WORK



The Contractor shall (a) commence work under this contract within \_\_\_\_\_ [Contracting Officer insert number] calendar days after the date the Contractor receives the notice to proceed, (b) prosecute the work diligently, and (c) complete the entire work ready for use not later than \_\_\_\_\_. \*The time stated for completion shall include final cleanup of the premises.

\* The Contracting Officer shall specify either a number of days after the date the Contractor receives the notice to proceed or a calendar date.

### **Section 6-403.10 Liquidated Damages – Construction**

The following clause may be used under the criteria and requirements set forth in 6-203.14.

#### **LIQUIDATED DAMAGES – CONSTRUCTION**

- (a) If the Contractor fails to complete the work within the time specified in the contract, or any extension, the Contractor shall pay to ATP, as liquidated damages, the sum of \_\_\_\_\_ [Contracting Officer insert amount] for each day of delay.
- (b) If ATP terminates the Contractor’s right to proceed, the resulting damage will consist of liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned ATP in completing the work.
- (c) If ATP does not terminate the Contractor’s right to proceed, the resulting damage will consist of liquidated damages until the work is completed or accepted.

### **Section 6-403.11 Time Extensions**

#### **TIME EXTENSIONS**

Notwithstanding any other provisions of this contract, the time extensions for changes in the work will depend upon the extent, if any, by which the changes cause delay in the completion of the various elements of construction. The contract modification granting the time extension may provide that the contract completion date will be extended only for those specific elements so delayed and that the remaining contract completion dates for all other portions of the work will not be altered and may further provide for an equitable readjustment of liquidated damages under the new completion schedule.

### **Section 6-403.12 Insurance – Work on ATP Installation**

Include the clause at Section 6-203.07.





### **Section 6-403.13 Identification of ATP-Furnished Property**

#### IDENTIFICATION OF ATP-FURNISHED PROPERTY

- (a) ATP will furnish to the Contractor the property identified in the contract to be incorporated or installed into the work or used in performing the contract. The listed property will be furnished f.o.b. railroad cars at the place specified in the contract or f.o.b. truck at the project site. The Contractor is required to accept delivery, pay any demurrage or detention charges, and unload and transport the property to the job site at its own expense. When the property is delivered, the Contractor shall verify its quantity and condition and acknowledge receipt in writing to the Contracting Officer. The Contractor also shall report in writing to the Contracting Officer (within 24 hours of delivery) any damage to or shortage of the property as received. All such property shall be installed or incorporated into the work at the expense of the Contractor, unless otherwise indicated in this contract.
- (b) Each item of property to be furnished under this clause shall be identified in the contract by quantity, item, and description.

### **Section 6-403.14 ATP Property Furnished "As Is"**

#### ATP PROPERTY FURNISHED "AS IS"

- (a) ATP makes no warranty whatsoever with respect to ATP property furnished "as is," except that the property is in the same condition when placed at the f.o.b. point specified in the solicitation as when inspected by the Contractor pursuant to the solicitation or, if not inspected by the Contractor, as when last available for inspection under the solicitation.
- (b) The Contractor may repair any property made available on an "as is" basis. Such repair will be at the Contractor's expense, except as otherwise provided in this clause. Such property may be modified at the Contractor's expense, but only with the written permission of the Contracting Officer. Any repair or modification of property furnished "as is" shall not affect the title of ATP.
- (c) If there is any change in the condition of ATP property furnished "as is" from the time inspected or last available for inspection under the solicitation to the time placed on board at the location specified in the solicitation, and such change will adversely affect the Contractor, the Contractor shall, upon receipt of the property, notify the Contracting Officer detailing the facts and, as directed by the Contracting Officer, either (1) return such property at ATP's expense or otherwise dispose of the property or (2) effect repairs to return the property to its condition when inspected under the solicitation or, if not inspected, last available for inspection under the solicitation. After completing the directed action and upon written request of the Contractor, the Contracting Officer shall equitably adjust any contractual provisions affected by the return, disposition, or repair

in accordance with the procedures provided for in the Changes Clause of this contract. The foregoing provisions for adjustment are the exclusive remedy available to the Contractor, and ATP shall not be otherwise liable for any delivery of ATP property furnished “as is” in a condition other than that in which it was originally offered.

- (d) Except as otherwise provided in this clause, ATP property furnished “as is” shall be governed by ATP Property Clause of this contract.

### **Section 6-403.15 Cleaning Up**

#### CLEANING UP

The Contractor shall at all times keep the work area, including storage areas, free from accumulations of waste materials. Before completing the work, the Contractor shall remove from the work and premises any rubbish, tools, scaffolding, equipment, and materials that are not the property of ATP. Upon completing the work, the Contractor shall leave the work area in a clean, neat, and orderly condition satisfactory to the Contracting Officer.

### **Section 6-403.16 Accident Prevention**

#### ACCIDENT PREVENTION

- (a) In performing this contract, the Contractor shall provide for protecting the lives and health of Employees and other persons; preventing damage to property, materials, supplies, and equipment; and avoiding work interruptions. For these purposes, the Contractor shall –
  - (1) provide appropriate safety barricades, signs, and signal lights;
  - (2) comply with all safety standards required by federal, state, or local law and any additional standards customarily employed in connection with the type of work being performed or the conditions at the site; and
  - (3) ensure that any additional measures the Contracting Officer determines to be reasonably necessary for this purpose are taken.
- (b) The Contractor shall maintain an accurate record of exposure data on all accidents incident to work performed under this contract resulting in death, traumatic injury, occupational disease, or damage to property, materials, supplies, or equipment. The Contractor shall report this data in the manner prescribed by the Contracting Officer.
- (c) The Contracting Officer shall notify the Contractor of any noncompliance with these requirements and of the corrective action required. This notice, when delivered to the Contractor or the Contractor’s representative at the site of the work, shall be deemed sufficient notice of the noncompliance and corrective action required. After receiving the



notice, the Contractor shall immediately take corrective action. If the Contractor fails or refuses to take corrective action promptly, the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action has been taken. The Contractor shall not base any claim or request for equitable adjustment for additional time or money on any stop order issued under these circumstances.

(d) The Contractor shall be responsible for its subcontractors' compliance with this clause.

#### **Section 6-403.17 Layout of Work**

##### LAYOUT OF WORK

The Contractor shall lay out its work from ATP-established base lines and benchmarks indicated on the drawings and shall be responsible for all measurements in connection with the layout. The Contractor shall furnish, at its own expense, all stakes, templates, platforms, equipment, tools, materials, and labor required to lay out any part of the work. The Contractor shall be responsible for executing the work to the lines and grades that may be established or indicated by the Contracting Officer. The Contractor shall also be responsible for maintaining and preserving all stakes and other marks established by the Contracting Officer until authorized to remove them. If such marks are destroyed by the Contractor or through its negligence before their removal is authorized, the Contracting Officer may replace them and deduct the expense of the replacement from any amounts due or to become due to the Contractor.

#### **Section 6-403.18 Publicity Releases**

Include the clause at Section 6-203.16.

#### **Section 6-403.19 Equal Opportunity Reporting**

Include the clause at Section 6-203.18 if the amount of the contract exceeds \$5,000.

#### **Section 6-403.20 Examination and Retention of Records**

Include the clause at Section 6-203.19 in accordance with the instructions in that section.

#### **Section 6-403.21 Indemnification**

Include the clause at Section 6-203.22.

#### **Section 6-403.22 Workforce Program**

The Contractor shall participate in an ATP-derived program with worker protections for all construction workers, including City of Austin hiring goals as allowed by federal law and



regulation, completion of OSHA 10-hour training, workers' compensation, on-site monitoring independent of construction companies and their affiliates, and in compliance with all applicable state, federal, and local laws.

**Section 6-500 Architect-Engineer Contracts**

**Section 6-501 Applicability**

This section sets forth contract clauses applicable to the Procurement of architect-engineer services for the production and delivery of designs, plans, drawings, and specifications, or for supervision and inspection of construction, or both.

**Section 6-502 Guideline Clauses for Architect-Engineer Contracts**

The following clauses may be included in all contracts for architect-engineer services, as applicable.

**Section 6-502.01 Definitions**

Include the clause at Section 6-202.01.

**Section 6-502.02 Responsibility of the Architect-Engineer**

**RESPONSIBILITY OF THE ARCHITECT-ENGINEER**

- (a) The Architect-Engineer shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other services furnished by the Architect-Engineer under this contract. The Architect-Engineer shall, without additional compensation, correct or revise any errors or deficiencies in his designs, drawings, specifications, and other services.
- (b) Neither ATP's review, approval, or acceptance of, nor payment for, any of the services required under this contract shall be construed to operate as a waiver of any rights under this contract or of any cause of action arising out of the performance of this contract, and the Architect-Engineer shall be and remain liable to ATP in accordance with applicable law for all damages to ATP caused by the Architect-Engineer's negligent performance of any of the services furnished under this contract.
- (c) The rights and remedies of ATP provided for under this contract are in addition to any other rights and remedies provided by law.



### **Section 6-502.03 Composition of Architect-Engineer**

#### COMPOSITION OF ARCHITECT-ENGINEER

If the Architect-Engineer hereunder is comprised of more than one legal entity, each such entity shall be jointly and severally liable hereunder.

### **Section 6-502.04 Subcontractors and Outside Consultants**

#### SUBCONTRACTORS AND OUTSIDE CONSULTANTS

Any subcontractors and outside associates or consultants required by the Architect-Engineer in connection with the services covered by the contract will be limited to such individuals or firms as were specifically identified and agreed to by ATP in connection with the award of this contract. Any substitution in such subcontractors, associates, or consultants will be subject to the prior written approval of the Contracting Officer.

### **Section 6-502.05 Changes**

#### CHANGES

- (a) The Contracting Officer may, at any time, by written order, make changes within the general scope of the contract in the services to be performed. If such changes cause an increase or decrease in the Architect- Engineer's cost of, or time required for, performance of any services under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim of the Architect-Engineer for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the Architect-Engineer of the notification of change unless the Contracting Officer grants a further period of time before the date of final payment under the contract.
- (b) No services for which an additional cost or fee will be charged by the Architect- Engineer shall be furnished without the prior written authorization of the Contracting Officer.

### **Section 6-502.06 Termination**

- (a) The Contracting Officer may, by written notice to the Architect-Engineer, terminate this contract in whole or in part at any time, either for ATP's convenience or because of the failure of the Architect-Engineer to fulfill his contract obligations. Upon receipt of such notice, the Architect-Engineer shall: (1) immediately discontinue all services affected (unless the notice directs otherwise), and (2) deliver to the Contracting Officer all data, drawings, specifications, reports, estimates, summaries, and such other information and materials as may have been accumulated by the Architect-Engineer in performing this contract, whether completed or in process.

- (b) If the termination is for the convenience of ATP and if this is a fixed price contract, an equitable adjustment in the contract price shall be made, but no amount shall be allowed for anticipated profit on unperformed services.
- (c) If the termination is due to the failure of the Architect-Engineer to fulfill his contract obligations, ATP may take over the work and prosecute the same to completion by contract or otherwise. In such case, the Architect-Engineer shall be liable to ATP for any additional cost occasioned to ATP thereby.
- (d) If, after notice of termination for failure to fulfill its contract obligations, it is determined that the Architect-Engineer had not so failed, the termination shall be deemed to have been effected for the convenience of ATP. In such event, adjustment in the contract price shall be made as provided in Section (b) of this clause.
- (e) The rights and remedies of ATP provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

#### **Section 6-502.07 Disputes**

Include the clause at Section 6-202.11 substituting "Architect-Engineer" for "Contractor".

#### **Section 6-502.08 Drawings and Other Data**

##### **DRAWINGS AND OTHER DATA**

All designs, drawings, specifications, notes and other works developed in the performance of this contract shall become the sole property of ATP and may be used on any other design or construction without additional compensation to the Architect-Engineer. ATP shall be considered the "person for whom the work was prepared" for the purpose of authorship in any copyrightable work under Section 201(b) of Title 17, United States Code. With respect thereto, the Architect-Engineer agrees not to assert or authorize others to assert any rights or establish any claim under the design patent or copyright laws. The Architect-Engineer, for a period of three years after completion of the project, agrees to furnish all retained works on the request of the Contracting Officer. Unless otherwise provided in this contract, the Architect-Engineer shall have the right to retain copies of all works beyond such period.

#### **Section 6-502.09 Notice and Approval of Restricted Designs**

##### **NOTICE AND APPROVAL OF RESTRICTED DESIGNS**

In the performance of this contract, the Architect-Engineer shall, to the extent practicable, make maximum use of structures, machines, products, materials, construction methods, and equipment which are readily available through competitive commercial channels, or through

standard or proven production techniques, methods, and processes. Unless approved by the Contracting Officer, the Architect-Engineer shall not, in the performance of the work called for by this contract, produce a design or specification such as to require in this construction work the use of structures, products, materials, construction equipment, or processes which are known by the Architect-Engineer to be available only from a sole source. As to any such design or specification, the Architect-Engineer shall report to the Contracting Officer giving the reason or reasons why it is considered necessary to so restrict the design or specification.

#### **Section 6-502.10 Registration of Designers**

##### REGISTRATION OF DESIGNERS

The design of architectural, structural, mechanical, electrical, civil, or other engineering features of the work shall be accomplished or reviewed and approved by architects or engineers registered to practice in the State of Texas in the particular professional field involved.

#### **Section 6-502.11 Payment of Interest on Claims**

##### PAYMENT OF INTEREST ON CLAIMS

- (a) If an appeal is filed by the Architect-Engineer under the Disputes Clause of this contract from a final decision of the Contracting Officer denying a claim arising under the contract, interest on the amount of the claim finally determined to be owed by ATP may be payable to the Architect-Engineer. In no event shall the interest payable hereunder (if any) exceed that allowable under law.
- (b) Notwithstanding (a), above, (1) interest shall be applied only from the date payment was due, if such date is later than the filing of the appeal, and (2) interest shall not be paid for any period of time that the Contracting Officer determines the Architect-Engineer has unduly delayed in pursuing his remedies under this contract or before a court of competent jurisdiction.

#### **Section 6-502.12 Suspension of Work**

##### SUSPENSION OF WORK

- (a) The Contracting Officer may order the Architect-Engineer in writing to suspend all or any part of the work for such period of time as he may determine to be appropriate for the convenience of ATP.
- (b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended or delayed by an act of the Contracting Officer in the administration of this contract, or by his failure to act within the time specified in this contract (or, if no time is specified, within a reasonable time), an adjustment shall be made for any increase in cost

of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension or delay, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension or delay to the extent (1) that performance would have been suspended or delayed by any other cause, including the fault or negligence of the Architect-Engineer, or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.

- (c) No claim under this clause shall be allowed (1) for any costs incurred more than 20 days before the Architect-Engineer shall have notified the Contracting Officer in writing of the actor failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension or delay, but not later than the date of final payment. No part of any claim based on the provisions of this clause shall be allowed if not supported by adequate evidence showing that the cost would not have been incurred but for a delay within the provisions of this clause.

**Section 6-502.13 Equal Opportunity**

Include the clause at Section 6-202.15 substituting "Architect-Engineer" for "Contractor".

**Section 6-502.14 Interest of Public Officials**

Include the clause at Section 6-202.16 substituting "Architect-Engineer" for "Contractor".

**Section 6-502.15 Governing Law**

Include the clause at Section 6-202.18.

**Section 6-503 Clauses to Be Used When Applicable**

The clauses in this Section 6-503 may be used when applicable to the circumstances of the particular Procurement. In addition, the clauses in Section 6-303, appropriately modified, may be applicable to architect-engineer contracts.

**Section 6-503.01 Insurance**

**INSURANCE**

- (a) In addition to all insurance required by federal, state, or local law or regulation, the Architect-Engineer shall obtain and maintain, from a company licensed to do business in Texas and acceptable to ATP, comprehensive general liability insurance, with all extended coverages normally carried in the industry, protecting the Architect-Engineer and ATP from claims which may arise out of or result from the Architect-Engineer's obligations





under this contract. Such Policy shall have limits no less than \_\_\_\_\_\* per occurrence and in the aggregate. Evidence of such insurance, together with an endorsement in favor of ATP, shall be furnished to the Contracting Officer within 10 days after the date of this contract.

- (b) The Architect-Engineer shall secure and maintain during the performance of this contract errors and omissions (professional liability) insurance in an amount not less than \_\_\_\_\_\*. Evidence of such insurance shall be furnished to the Contracting Officer within 10 days after the date of this contract.

\*Contracting Officer to insert amount.

### **Section 6-503.02 Construction Contract Administration & Support**

#### **CONSTRUCTION CONTRACT ADMINISTRATION**

The Architect-Engineer's responsibilities in connection with administration of the construction contract contemplated by this contract shall not be an assumption of, or relieve the construction contractor of liability for, the construction contractor's obligations to ATP for satisfactory performance and timely completion of the construction contract.

### **Section 6-503.03 Equal Opportunity Reporting**

Include the clause at Section 6-203.18 if the amount of the contract exceeds \$5,000.

### **Section 6-600 Cost Reimbursement and Special Contract Clauses**

#### **Section 6-601 Applicability**

The contract clauses in this section are intended to be applicable for use in cost-reimbursement type contracts. All such contracts must be approved by legal counsel prior to issuance of the solicitation and prior to award.

### **Section 6-602 Allowable Cost and Payment**

#### **ALLOWABLE COST AND PAYMENT**

- (a) Invoicing. ATP shall make payments to the Contractor when requested as work progresses, but not more often than once every 30 days, in amounts determined to be allowable by the Contracting Officer in accordance with the cost principles and procedures in Chapter 7 (Cost Principles) of ATP's Procurement Policy and Guidelines in effect on the date of this contract. The Contractor may submit to the Contracting Officer, in such form and reasonable detail as the Contracting Officer may require, an invoice or

voucher supported by a statement of the claimed allowable costs for performing this contract.

(b) Reimbursing Costs.

(1) For the purpose of reimbursing allowable costs (except as provided in subsection (2) below, with respect to pension, deferred profit sharing, and Employee stock ownership plan contributions), the term "costs" includes only :

(i) those recorded costs that, at the time of the request for reimbursement, the Contractor has paid by cash, check, or other form of actual payment for items or services purchased directly for the contract;

(ii) when the Contractor is not delinquent in paying costs of contract performance in the ordinary course of business, costs incurred, which, in the ordinary course of business, will be paid prior to receipt of payment from ATP, for :

(A) materials issued from the Contractor's inventory and placed in the production process for use on the contract;

(B) direct labor;

(C) direct travel;

(D) other direct in-house costs; and

(E) properly allocable and allowable indirect costs, as shown in the records maintained by the Contractor for purposes of obtaining reimbursement under contracts let by ATP; and

(iii) the amount of progress payments that has been paid to the Contractor's subcontractors under similar cost standards.

(2) Any statements in specifications or other documents incorporated in this contract by reference designating performance of services or furnishing of materials at the Contractor's expense or at no cost to ATP shall be disregarded for purposes of cost-reimbursement under this clause.

(c) Audit. At any time or times before final payment, the Contracting Officer may have the Contractor's invoices or vouchers and statements of cost audited. Any payment may be (1) reduced by amounts found by the Contracting Officer not to constitute allowable costs or (2) adjusted for prior overpayments or under payments.

(d) Final Payment.

- (1) The Contractor shall submit a completion invoice or voucher, designated as such, promptly upon completion of the work, but no later than one year (or longer, as the Contracting Officer may approve in writing) from the completion date. Upon approval of that invoice or voucher, and upon the Contractor's compliance with all terms of this contract, ATP shall promptly pay any balance of allowable costs and that part of the fee (if any) not previously paid.
- (2) The Contractor shall pay to ATP any refunds, rebates, credits, or other amounts (including interest, if any) accruing to or received by the Contractor or any assignee under this contract, to the extent that those amounts are properly allocable to costs for which the Contractor has been reimbursed by ATP. Reasonable expenses incurred by the Contractor for securing refunds, rebates, credits, or other amounts shall be allowable costs if approved by the Contracting Officer. Before final payment under this contract, the Contractor and each assignee whose assignment is in effect at the time of final payment shall execute and deliver :
  - (i) an assignment to ATP, in form and substance satisfactory to the Contracting Officer, of refunds, rebates, credits, or other amounts (including interest, if any) properly allocable to costs for which the Contractor has been reimbursed by ATP under this contract; and
  - (ii) a release discharging ATP, its officers, agents, and Employees from all liabilities, obligations, and claims arising out of or under this contract, except :
    - (A) specified claims stated in exact amounts, or in estimated amounts when the exact amounts are not known;
    - (B) claims (including reasonable incidental expenses) based upon liabilities of the Contractor to third parties arising out of the performance of this contract; provided, that the claims are not known to the Contractor on the date of the execution of the release and that the Contractor gives notice of the claims in writing to the Contracting Officer within six years following the release date or notice of final payment date, whichever is earlier; and
    - (C) claims for reimbursement of costs, including reasonable incidental expenses, incurred by the Contractor under the patent clauses of this contract, excluding, however, any expenses arising from the Contractor's indemnification of ATP against patent liability.



**Section 6-603      Fixed Fee**

**FIXED FEE**

- (a) ATP shall pay the Contractor for performing this contract the fixed fee specified in the contract.
- (b) Payment of the fixed fee shall be made as specified in the contract; provided, that after payment of 80 percent of the fixed fee, the Contracting Officer may withhold further payment of fee until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect ATP's interest. This reserve shall not exceed 20 percent of the total fixed fee or \$100,000, whichever is less.

**Section 6-604      Incentive Fee**

**INCENTIVE FEE**

- (a) General. ATP shall pay the Contractor for performing this contract a fee determined as provided in this contract.
- (b) Target Cost and Target Fee. The target cost and target fee specified in the contract are subject to adjustment if the contract is modified in accordance with Section (d) below.
  - (1) "Target cost," as used in this contract, means the estimated cost of this contract as initially negotiated, adjusted in accordance with Section (d) below.
  - (2) "Target fee," as used in this contract, means the fee initially negotiated on the assumption that this contract would be performed for a cost equal to the target cost.
- (c) Withholding of Payment. Normally, ATP shall pay the fee to the Contractor as specified in the contract. However, when the Contracting Officer considers that performance or cost indicates that the Contractor will not achieve the target cost, ATP shall pay on the basis of an appropriate lesser fee. When the Contractor demonstrates that performance or cost clearly indicates that the Contractor will earn a fee significantly above the target fee, ATP may, at the sole discretion of the Contracting Officer, pay on the basis of an appropriate higher fee. After payment of 80 percent of the applicable fee, the Contracting Officer may withhold further payment of a fee until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect ATP's interest. This reserve shall not exceed 20 percent of the applicable fee or \$100,000, whichever is less.
- (d) Equitable Adjustments. When the work under this contract is increased or decreased by a modification to this contract or when any equitable adjustment in the target cost is authorized under any other clause, equitable adjustments in the target cost, target fee,

minimum fee, and maximum fee, as appropriate, shall be stated in a supplemental agreement to this contract.

(e) Fee Payable.

- (1) The fee payable under this contract shall be the target fee increased by \_\_\_\_\_[Contracting Officer insert Contractor's participation] cents for every dollar that the total allowable cost is less than the target cost or decreased by \_\_\_\_\_[Contracting Officer insert Contractor's participation] cents for every dollar that the total allowable cost exceeds the target cost. In no event shall the fee be greater than \_\_\_\_\_[Contracting Officer insert percentage] percent or less than \_\_\_\_\_[Contracting Officer insert percentage] percent of the target cost.
- (2) The fee shall be subject to adjustment, to the extent provided in Section (d) above, and within the minimum and maximum fee limitations in subsection (1) above, when the total allowable cost is increased or decreased as a consequence of (i) payments made under assignments or (ii) claims excepted from their lease as required by Section (d) (2) of the Allowable Cost and Payment Clause.
- (3) If this contract is terminated in its entirety, the portion of the target fee payable shall not be subject to an increase or decrease as provided in this Section (e). The termination shall be accomplished in accordance with other applicable clauses of this contract.
- (4) For the purpose of fee adjustment, "total allowable cost" shall not include allowable costs arising out of:
  - (i) any of the causes covered by the Excusable Delays Clause to the extent that they are beyond the control and without the fault or negligence of the Contractor or any subcontractor;
  - (ii) the taking effect, after negotiating the target cost, of a statute, court decision, written ruling, or regulation that results in the Contractor's being required to pay or bear the burden of any tax or duty or rate increase in a tax or duty;
  - (iii) any direct cost attributed to the Contractor's involvement in litigation as required by the Contracting Officer pursuant to a clause of this contract;
  - (iv) the purchase and maintenance of additional insurance not in the target cost and required by the Contracting Officer, or claims for reimbursement for liabilities to third persons pursuant to a clause of this contract; or
  - (v) any claim, loss, or damage resulting from a risk for which the Contractor



has been relieved of liability by the Property of ATP Clause.

- (5) All other allowable costs are included in "total allowable cost" for fee adjustment in accordance with this Section (e), unless otherwise specifically provided in this contract.
- (f) Contract Modification. The total allowable cost and the adjusted fee determined as provided in this clause shall be evidenced by a modification to this contract signed by the Contractor and Contracting Officer.
- (g) Inconsistencies. In the event of any inconsistencies between this clause and provisioning documents or options under this contract, compensation for spare parts or other supplies and services ordered under such documents shall be determined in accordance with this clause.

**Section 6-605 Cost Contract - No Fee**

**COST CONTRACT - NO FEE**

- (a) ATP shall not pay the Contractor a fee for performing this contract.
- (b) After payment of 80 percent of the total estimated cost shown in the Schedule, the Contracting Officer may withhold further payment of allowable cost until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect ATP's interest. This reserve shall not exceed 20 percent of the total estimated cost shown in the Schedule or \$100,000, whichever is less.

**Section 6-606 Predetermined Indirect Cost Rates**

**PREDETERMINED INDIRECT COST RATES**

- (a) Notwithstanding the Allowable Cost and Payment Clause of this contract, the allowable indirect costs under this contract shall be obtained by applying predetermined indirect cost rates to bases agreed upon by the parties, as specified below.
- (b) Not later than 90 days after the expiration of the Contractor's fiscal year, the Contractor shall submit to the Contracting Officer proposed predetermined indirect cost rates and supporting cost data. The proposed rate shall be based on the Contractor's actual cost experience during the fiscal year. Negotiations of predetermined indirect cost rates shall begin as soon as practical after receipt of the Contractor's proposal.
- (c) Allowability of costs and acceptability of cost allocation methods shall be determined in accordance with Chapter 7 of ATP's Procurement Policy and Guidelines in effect on the date of this contract.

- (d) Predetermined rate agreements in effect on the date of this contract shall be incorporated into the contract. The Contracting Officer and Contractor shall negotiate rates for subsequent periods and execute a written indirect cost rate agreement setting forth the results. The agreement shall specify (1) the agreed-upon predetermined indirect cost rates, (2) the bases to which the rates apply, (3) the fiscal year (unless the parties agree to a different period) for which the rates apply, and (4) the specific items treated as direct costs or any changes in the items previously agreed to be direct costs. The indirect cost rate agreement shall not change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in this contract. The agreement is incorporated into this contract upon execution.
- (e) Pending establishment of predetermined indirect cost rates for any fiscal year (or other period agreed to by the parties), the Contractor shall be reimbursed either at the rates fixed for the previous fiscal year (or other period) or at billing rates acceptable to the Contracting Officer, subject to appropriate adjustment when the final rates for that period are established.
- (f) Any failure by the parties to agree on any predetermined indirect cost rates under this clause shall not be considered a dispute within the meaning of the Disputes Clause. If for any fiscal year (or other period specified in the contract) the parties fail to agree to predetermined indirect cost rates, the allowable indirect costs shall be obtained by applying final indirect cost rates established in accordance with the Allowable Cost and Payment Clause.
- (g) Allowable indirect costs for the period from the beginning of performance until the end of the Contractor's fiscal year shall be obtained using the predetermined indirect cost rates and the bases shown in the contract.

**Section 6-607      Limitation of Liability**

LIMITATION OF LIABILITY

- (a) In performing this contract, the Contractor is not authorized to make expenditures or incur obligations exceeding \_\_\_\_\_ dollars.
- (b) The maximum amount for which ATP shall be liable if this contract is terminated is \_\_\_\_\_ dollars.

**Section 6-608      Limitation of Costs**

LIMITATION OF COST

- (a) The parties estimate that performance of this contract, exclusive of any fee, will not cost ATP more than (1) the estimated cost specified in the Schedule or, (2) if this is a cost-

sharing contract, ATP's share of the estimated cost specified in the contract. The Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within the estimated cost, which, if this is a cost-sharing contract, includes both ATP's and the Contractor's share of the cost.

- (b) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that:
  - (1) the costs the Contractor expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost specified in the Schedule; or
  - (2) the total cost for the performance of this contract, exclusive of any fee, will be either greater or substantially less than had been previously estimated.
- (c) As part of the notification, the Contractor shall provide the Contracting Officer a revised estimate of the total cost of performing this contract.
- (d) Except as required by other provisions of this contract specifically citing, and stated to be an exception to, this clause:
  - (1) ATP is not obligated to reimburse the Contractor for costs incurred in excess of (i) the estimated cost specified in the Schedule or, (ii) if this is a cost-sharing contract, the estimated cost to ATP specified in the Schedule; and
  - (2) the Contractor is not obligated to continue performance under this contract (including actions under the Termination Clause of this contract) or otherwise incur costs in excess of the estimated cost specified in the Schedule, until the Contracting Officer (i) notifies the Contractor in writing that the estimated cost has been increased and (ii) provides a revised estimated total cost of performing this contract.
- (e) No notice, communication, or representation in any form other than that specified in subsection (d)(2) above, or from any person other than the Contracting Officer, shall affect this contract's estimated cost to ATP. In the absence of the specified notice, ATP is not obligated to reimburse the Contractor for any costs in excess of the estimated cost or, if this is a cost-sharing contract, for any costs in excess of the estimated cost to ATP specified in the Schedule, whether those excess costs were incurred during the course of the contractor as a result of termination.
- (f) If the estimated cost specified in the Schedule is increased, any costs the Contractor incurs before the increase that are in excess of the previously estimated cost shall be allowable to the same extent as if they were incurred afterward, unless the Contracting Officer issues a termination or other notice directing that the increase is solely to cover





termination or other specified expenses.

- (g) Change Orders shall not be considered an authorization to exceed the estimated cost to ATP specified in the Schedule unless they contain a statement increasing the estimated cost.
- (h) If this contract is terminated or the estimated cost is not increased, ATP and the Contractor shall negotiate an equitable distribution of all property produced or purchased under the contract, based upon the share of costs incurred by each.

## **Section 6-609          Payment for Overtime Premiums**

### **PAYMENT FOR OVERTIME PREMIUMS**

- (a) The use of overtime is authorized under this contract if the overtime premium cost does not exceed \* \_\_\_\_\_. In addition to this dollar ceiling, overtime is permitted only for work –
  - (1) necessary to cope with emergencies such as those resulting from accidents, natural disasters, breakdowns of production equipment, or occasional production bottlenecks of a sporadic nature;
  - (2) by indirect-labor Employees such as those performing duties in connection with administration, protection, transportation, maintenance, standby plant protection, operation of utilities, or accounting;
  - (3) to perform tests, industrial processes, laboratory procedures, loading or unloading of transportation conveyances, and operations in flight or afloat that are continuous in nature and cannot reasonably be interrupted or completed otherwise; or
  - (4) that will result in lower overall costs to ATP.
- (b) Any request for estimated overtime premiums that exceeds the amount specified above shall include all estimated overtime for contract completion and shall :
  - (1) identify the work unit; e.g., department or section in which the requested overtime will be used, together with present workload, staffing, and other data of the affected unit sufficient to permit the Contracting Officer to evaluate the necessity for the overtime;
  - (2) demonstrate the effect that denial of the request will have on the contract delivery or performance schedule;

- (3) identify the extent to which approval of overtime would affect the performance or payments in connection with other ATP contracts, together with identification of each affected contract; and
- (4) provide reasons why the required work cannot be performed by using multi shift operations or by employing additional personnel.

\*Insert either "zero" or the dollar amount agreed to during negotiations.

### **Section 6-610      Availability of Funds**

#### **AVAILABILITY OF FUNDS**

ATP's obligation under this contract is contingent upon the availability of authorized funds from which payment for contract purposes can be made. No legal liability on the part of ATP for any payment may arise until funds are made available to the Contracting Officer for this contract and until the Contractor receives notice of such availability, to be confirmed in writing by the Contracting Officer.

### **Section 6-611      Property of ATP**

#### **PROPERTY OF ATP (COST-REIMBURSEMENT, TIME-AND-MATERIAL, OR LABOR-HOUR CONTRACTS)**

- (a) ATP-Furnished Property.
  - (1) The term "Contractor's managerial personnel," as used in Section (g) of this clause, means any of the Contractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of :
    - (i) all or substantially all of the Contractor's business;
    - (ii) all or substantially all of the Contractor's operation at any one plant, or separate location at which the contract is being performed; or
    - (iii) a separate and complete major industrial operation connected with performing this contract.
  - (2) ATP shall deliver to the Contractor, for use in connection with and under the terms of this contract, the property described in the contract or specifications, together with such related data and information as the Contractor may request and as may be reasonably required for the intended use of the property (hereinafter referred to as "ATP-furnished property").

- (3) The delivery or performance dates for this contract are based upon the expectation that ATP-furnished property suitable for use will be delivered to the Contractor at the times stated in the contract or, if not so stated, in sufficient time to enable the Contractor to meet the contract's delivery or performance dates.
  - (4) If ATP-furnished property is received by the Contractor in a condition not suitable for the intended use, the Contractor shall, upon receipt, notify the Contracting Officer, detailing the facts and, as directed by the Contracting Officer and at ATP expense, either affect repairs or modifications or return or otherwise dispose of the property. After completing the directed action and upon written request of the Contractor, the Contracting Officer shall make an equitable adjustment as provided in Section (h) of this clause.
  - (5) If ATP-furnished property is not delivered to the Contractor by the required time or times, the Contracting Officer shall, upon the Contractor's timely written request, make a determination of the delay, if any, caused the Contractor and shall make an equitable adjustment in accordance with Section (h) of this clause.
- (b) Changes in ATP-Furnished Property.
- (1) The Contracting Officer may, by written notice, (i) decrease ATP-furnished property provided or to be provided under this contract or (ii) substitute other ATP-furnished property for the property to be provided by ATP or to be acquired by the Contractor for ATP under this contract. The Contractor shall promptly take such action as the Contracting Officer may direct regarding the removal, shipment, or disposal of the property covered by this notice.
  - (2) Upon the Contractor's written request, the Contracting Officer shall make an equitable adjustment to the contract in accordance with Section (h) of this clause, if ATP has agreed in the Schedule to make such property available for performing this contract and there is any:
    - (i) decrease or substitution in this property pursuant to subsection (b)(1) above; or
    - (ii) withdrawal of ATP to use property, if provided under any other contract or lease.
- (c) Title.
- (1) ATP shall retain title to all ATP-furnished property.
  - (2) Title to all property purchased by the Contractor for which the Contractor is entitled to be reimbursed as a direct item of cost under this contract shall pass to and vest in ATP upon the vendor's delivery of such property.

- (3) Title to all other property, the cost of which is reimbursable to the Contractor, shall pass to and vest in ATP upon :
  - (i) issuance of the property for use in contract performance;
  - (ii) commencement of processing of the property or use in contract performance; or
  - (iii) reimbursement of the cost of the property by ATP, whichever occurs first.
- (4) All ATP-furnished property and all property acquired by the Contractor, title to which vests in ATP under this Section (collectively referred to as "property of ATP"), are subject to the provisions of this clause. Title to property of ATP shall not be affected by its incorporation into or attachment to any property not owned by ATP, nor shall property of ATP become a fixture or lose its identity as personal property by being attached to any real property.
- (d) Use of Property of ATP. The property of ATP shall be used only for performing this contract, unless otherwise provided in this contract or approved by the Contracting Officer.
- (e) Property Administration.
  - (1) The Contractor shall be responsible and accountable for all property of ATP provided under this contract.
  - (2) The Contractor shall establish and maintain a program for the use, maintenance, repair, protection, and preservation of property of ATP in accordance with sound business practice.
  - (3) If damage occurs to property of ATP, the risk of which has been assumed by ATP under this contract, ATP shall replace the items or the Contractor shall make such repairs as ATP may require. However, if the Contractor cannot effect such repairs within the time required, the Contractor shall dispose of the property as directed by the Contracting Officer. When any property for which ATP is responsible is replaced or repaired, the Contracting Officer shall make an equitable adjustment in accordance with Section (h) of this clause.
- (f) Access. ATP and all its Designees shall have access at all reasonable times to the premises in which any property of ATP is located for the purpose of inspecting the property of ATP.
- (g) Limited Risk of Loss.
  - (1) The Contractor shall not be liable for loss or destruction of, or damage to, the property of ATP provided under this contract or for expenses incidental to such

loss, destruction, or damage, except as provided in subsections (2) and (3), below.

- (2) The Contractor shall be responsible for loss or destruction of, or damage to, the property of ATP provided under this contract (including expenses incidental to such loss, destruction, or damage) :
  - (i) that results from a risk expressly required to be insured under this contract, but only to the extent of the insurance required to be purchased and maintained or to the extent of insurance actually purchased and maintained, whichever is greater;
  - (ii) that results from a risk that is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement;
  - (iii) for which the Contractor is otherwise responsible under the express terms of this contract;
  - (iv) that results from willful misconduct or lack of good faith on the part of the Contractor's managerial personnel; or
  - (v) that results from a failure on the part of the Contractor, due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel, to establish and administer a program or system for the control, use, protection, preservation, maintenance, and repair of property of ATP as required by Section (e) of this clause.
  
- (3)
  - (i) If the Contractor fails to act as provided by subdivision (g)(2)(v), above, after being notified (by certified mail addressed to one of the Contractor's managerial personnel) of ATP's disapproval, withdrawal of approval, or nonacceptance of the system or program, it shall be conclusively presumed that such failure was due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel.
  - (ii) in such event, any loss or destruction of, or damage to, the property of ATP shall be presumed to have resulted from such failure unless the Contractor can establish by clear and convincing evidence that such loss, destruction, or damage :
    - (A) did not result from the Contractor's failure to maintain an approved program or system; or
    - (B) occurred while an approved program or system was maintained by the Contractor.

- (4) If the Contractor transfers property of ATP to the possession and control of a subcontractor, the transfer shall not affect the liability of the Contractor for loss or destruction of, or damage to, the property as set forth above. However, the Contractor shall require the subcontractor to assume the risk of, and be responsible for, any loss or destruction of, or damage to, the property while in the subcontractor's possession or control, except to the extent that the subcontract, with the advance approval of the Contracting Officer, relieves the subcontractor from such liability. In the absence of such approval, the subcontract shall contain appropriate provisions requiring the return of all property of ATP in as good condition as when received, except for reasonable wear and tear or for its use in accordance with the provisions of the prime contract.
- (5) Upon loss or destruction of, or damage to, property of ATP provided under this contract, the Contractor shall so notify the Contracting Officer and shall communicate with the loss and salvage organization, if any, designated by the Contracting Officer. With the assistance of any such organization, the Contractor shall take all reasonable action to protect the property of ATP from further damage, separate the damaged and undamaged property of ATP, put all the affected property of ATP in the best possible order, and furnish to the Contracting Officer a statement of :
- (i) the lost, destroyed, or damaged property of ATP;
  - (ii) the time and origin of the loss, destruction, or damage;
  - (iii) all known interests in commingled property of which the property of ATP is a part; and
  - (iv) the insurance, if any, covering any part of or interest in such commingled property.
- (6) The Contractor shall repair, renovate, and take such other action with respect to damaged property of ATP as the Contracting Officer directs. If the property of ATP is destroyed or damaged beyond practical repair, or is damaged and so commingled or combined with property of others (including the Contractor's) that separation is impractical, the Contractor may, with the approval of and subject to any conditions imposed by the Contracting Officer, sell such property for the account of ATP. Such sales may be made in order to minimize the loss to ATP, to permit the resumption of business, or to accomplish a similar purpose. The Contractor shall be entitled to an equitable adjustment in the contract price for the expenditures made in performing the obligations under this subsection (g)(6) in accordance with Section (h) of this clause. However, ATP may directly reimburse the loss and salvage organization for any of their charges. The Contracting Officer shall give due regard to the Contractor's liability under this Section (g) when making any such equitable

adjustment.

- (7) The Contractor shall not be reimbursed for, and shall not include as an item of overhead, the cost of insurance or of any reserve covering risk of loss or destruction of, or damage to, property of ATP, except to the extent that ATP may have expressly required the Contractor to carry such insurance under another provision of this contract.
  - (8) In the event the Contractor is reimbursed or otherwise compensated for any loss or destruction of, or damage to, property of ATP, the Contractor shall use the proceeds to repair, renovate, or replace the lost, destroyed, or damaged property of ATP or shall otherwise credit the proceeds to, or equitably reimburse, ATP, as directed by the Contracting Officer.
  - (9) The Contractor shall do nothing to prejudice ATP's rights to recover against third parties for any loss or destruction of, or damage to, property of ATP. Upon the request of the Contracting Officer, the Contractor shall, at ATP's expense, furnish to ATP all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of ATP) in obtaining recovery. In addition, where a subcontractor has not been relieved from liability for any loss or destruction of, or damage to, property of ATP, the Contractor shall enforce for the benefit of ATP the liability of the subcontractor for such loss, destruction, or damage.
- (h) Equitable Adjustment. When this clause specifies an equitable adjustment, it shall be made to any affected contract provision in accordance with the procedures of the Changes Clause. When appropriate, the Contracting Officer may initiate an equitable adjustment in favor of ATP. The right to an equitable adjustment shall be the Contractor's exclusive remedy. ATP shall not be liable to suit for breach of contract for :
- (1) any delay in delivery of ATP-furnished property;
  - (2) delivery of ATP-furnished property in a condition not suitable for its intended use;
  - (3) a decrease in or substitution of ATP-furnished property; or
  - (4) failure to repair or replace property of ATP for which ATP is responsible.
- (i) Final Accounting and Disposition of Property of ATP. Upon completing this contract, or at such earlier dates as may be fixed by the Contracting Officer, the Contractor shall submit, in a form acceptable to the Contracting Officer, inventory schedules covering all items of property of ATP not consumed in performing this contract or delivered to ATP. The Contractor shall prepare for shipment, deliver f.o.b. origin, or dispose of the property of ATP as may be directed or authorized by the Contracting Officer. The net proceeds of any

such disposal shall be credited to the cost of the work covered by this contract or paid to the property of ATP as may be directed by the Contracting Officer. The net proceeds of any such disposal shall be credited to the cost of the work covered by this contract or paid to ATP as directed by the Contracting Officer. The foregoing provisions shall apply to scrap from property of ATP; provided, however, that the Contracting Officer may authorize or direct the Contractor to omit from such inventory schedules any scrap consisting of faulty castings or forgings or of cutting and processing waste, such as chips, cuttings, borings, turnings, short ends, circles, trimmings, clippings, and remnants, and to dispose of such scrap in accordance with the Contractor's normal practice and account for it as a part of general overhead or other reimbursable costs in accordance with the Contractor's established accounting procedures.

- (j) Abandonment and Restoration of Contractor Premises. Unless otherwise provided herein, ATP :
- (1) may abandon any property of ATP in place, at which time all obligations of ATP regarding such abandoned property shall cease; and
  - (2) has no obligation to restore or rehabilitate the Contractor's premises under any circumstances (e.g., abandonment, disposition upon completion of need, or contract completion). However, if ATP-furnished property (listed in the contract or specifications) is withdrawn or is unsuitable for the intended use, or if other property of ATP is substituted, then the equitable adjustment under Section (h) of this clause may properly include restoration or rehabilitation costs.
- (k) Communications. All communications under this clause shall be in writing.

### **Section 6-612 Inspection of Supplies**

#### **INSPECTION OF SUPPLIES (COST-REIMBURSEMENT)**

- (a) Definitions.
- "Contractor's managerial personnel," as used in this clause, means any of the Contractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of :
- (1) all or substantially all of the Contractor's business;
  - (2) all or substantially all of the Contractor's operation at a plant or separate location at which the contract is being performed; or
  - (3) a separate and complete major industrial operation connected with performing this contract.



"Supplies," as used in this clause, includes, but is not limited to, raw materials, components, intermediate assemblies, end products, lots of supplies, and, when the contract does not include the Warranty of Data Clause, data.

- (b) The Contractor shall provide and maintain an inspection system acceptable to ATP covering the supplies, fabricating methods, and special tooling under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to ATP during contract performance and for as long afterwards as the contract requires.
- (c) ATP has the right to inspect and test the contract supplies, to the extent practicable at all places and times, including the period of manufacture, and in any event before acceptance. ATP may also inspect the plant or plants of the Contractor or any subcontractor engaged in the contract performance. ATP shall perform inspections and tests in a manner that will not unduly delay the work.
- (d) If ATP performs inspection or tests on the premises of the Contractor or a subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, all reasonable facilities and assistance for the safe and convenient performance of these duties.
- (e) Unless otherwise specified in the contract, ATP shall accept supplies as promptly as practicable after delivery, and supplies shall be deemed accepted 60 days after delivery, unless accepted earlier.
- (f) At any time during contract performance, but no later than six months (or such other time as may be specified in the contract) after acceptance of the supplies to be delivered under the contract, ATP may require the Contractor to replace or correct any supplies that are nonconforming at time of delivery. Supplies are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with contract requirements. Except as otherwise provided in Section (h) below, the cost of replacement or correction shall be included in allowable cost, determined as provided in the Allowable Cost and Payment Clause, but no additional fee shall be paid. The Contractor shall not tender for acceptance supplies required to be replaced or corrected without disclosing the former requirement for replacement or correction and, when required, shall disclose the corrective action taken.
- (g)
  - (1) If the Contractor fails to proceed with reasonable promptness to perform required replacement or correction, ATP may:
    - (i) by contract or otherwise, perform there placement or correction and charge to the Contractor any increased cost or make an equitable reduction in any fixed fee paid or payable under the contract;
    - (ii) require delivery of undelivered supplies at an equitable reduction in any

fixed fee paid or payable under the contract; or

(iii) terminate the contract for default.

(2) Failure to agree on the amount of increased cost to be charged to the Contractor or to the reduction in the fixed fee shall be a dispute within the meaning of the Disputes Clause.

- (h) Notwithstanding Sections (f) and (g) above, ATP may at any time require the Contractor to correct or replace, without cost to ATP, nonconforming supplies, if the nonconformances are due to (1) fraud, lack of good faith, or willful misconduct on the part of the Contractor's managerial personnel or (2) the conduct of one or more of the Contractor's Employees selected or retained by the Contractor after any of the Contractor's managerial personnel has reasonable grounds to believe that the Employee is habitually careless or unqualified.
- (i) This clause applies in the same manner to corrected or replacement supplies as to supplies originally delivered.
- (j) The Contractor shall have no obligation or liability under this contract to replace supplies that were nonconforming at the time of delivery, except as provided in this clause or as may be otherwise provided in the contract.
- (k) Except as otherwise specified in the contract, the Contractor's obligation to correct or replace ATP-furnished property shall be governed by the Property of ATP Clause.

### **Section 6-613      Inspection of Services**

#### **INSPECTION OF SERVICES (COST-REIMBURSEMENT)**

- (a) The word "services," as used in this clause, includes services performed, workmanship, and material furnished or used in performing services.
- (b) The Contractor shall provide and maintain an inspection system acceptable to ATP covering the services under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to ATP during contract performance and for as long afterwards as the contract requires.
- (c) ATP has the right to inspect and test all services called for by the contract, to the extent practicable at all places and times during the term of the contract. ATP shall perform inspections and tests in a manner that will not unduly delay the work.
- (d) If any of the services performed do not conform with contract requirements, ATP may require the Contractor to perform the services again in conformity with contract

requirements, for no additional fee. When the defects in services cannot be corrected by reperformance, ATP may (1) require the Contractor to take necessary action to ensure that future performance conforms to contract requirements and (2) reduce any fee payable under the contract to reflect the reduced value of the services performed.

- (e) If the Contractor fails to promptly perform the services again or take the action necessary to ensure future performance in conformity with contract requirements, ATP may (1) by contract or otherwise, perform the services and reduce any fee payable by an amount that is equitable under the circumstances or (2) terminate the contract for default.

## **Section 6-614 Termination**

### **TERMINATION (COST-REIMBURSEMENT)**

- (a) ATP may terminate performance of work under this contract in whole or, from time to time, in part:
- (1) for convenience, the unilateral right to terminate a contract for the convenience of ATP when the contract no longer serves the best interest of ATP, changes in priorities, program termination or downsizing, or other significant events that were not anticipated at the time of contract formation.
  - (2) for cause (default), a right or law as well as a right vested as the result of the inclusion of terms and conditions in the contract. Termination can result if the Contractor fails to perform one or more actions required by the contract.
- (b) The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying whether termination is for default of the Contractor or for the convenience of ATP, the extent of termination, and the effective date. If, after termination for default, it is determined that the Contractor was not in default or that the Contractor's failure to perform or to make progress in performance was due to causes beyond the control and without the fault or negligence of the Contractor as set forth in the Excusable Delays Clause, the rights and obligations of the parties will be the same as if the termination was for the convenience of ATP.
- (c) After receipt of a Notice of Termination, and except as directed by the Contracting Officer, the Contractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this clause.
- (1) Stop work as specified in the notice.
  - (2) Place no further subcontracts or orders (referred to as subcontracts in this clause),

except as necessary to complete the continued portion of the Contract.

- (3) Terminate all subcontracts to the extent they relate to the work terminated.
  - (4) Assign to ATP, as directed by the Contracting Officer, all right, title, and interest of the Contractor under the subcontracts terminated, in which case ATP shall have the right to settle or to pay any termination settlement proposal arising out of those terminations.
  - (5) With approval or ratification to the extent required by the Contracting Officer, settle all outstanding liabilities and termination settlement proposals arising from the termination of subcontracts, the cost of which would be reimbursable in whole or in part, under this contract; approval or ratification will be final for purposes of this clause.
  - (6) Transfer title (if not already transferred) and, as directed by the Contracting Officer, deliver to ATP (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated, (ii) the completed or partially completed plans, drawings, information, and other property that, if the contract had been completed, would be required to be furnished to ATP, and (iii) the jigs, dies, fixtures, and other special tools and tooling acquired or manufactured for this contract, the cost of which the Contractor has been or will be reimbursed under this contract.
  - (7) Complete performance of the work not terminated.
  - (8) Take any action that may be necessary, or that the Contracting Officer may direct, for the protection and preservation of the property related to this contract that is in the possession of the Contractor and in which ATP has or may acquire an interest.
  - (9) Use its best efforts to sell, as directed or authorized by the Contracting Officer, any property of the types referred to in subsection (6) above; provided, however, that the Contractor (i) is not required to extend credit to any purchaser and (ii) may acquire the property under the conditions prescribed by, and at prices approved by, the Contracting Officer. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by ATP under this contract, credited to the price or cost of the work, or paid in any other manner directed by the Contracting Officer.
- (d) The Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of termination inventory not previously disposed of, excluding items authorized for disposition by the Contracting Officer. The Contractor may request ATP to remove

those items or enter into an agreement for their storage. Within 15 days, ATP will accept the items and remove them or enter into a storage agreement. The Contracting Officer may verify the list upon removal of the items, or if stored, within 45 days from submission of the list, and shall correct the list, as necessary, before final settlement.

- (e) After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed by the Contracting Officer. The Contractor shall submit the proposal promptly, but no later than one year from the effective date of termination, unless this period is extended in writing by the Contracting Officer upon written request of the Contractor within this one-year period. However, if the Contracting Officer determines that the facts justify it, a termination settlement proposal may be received and acted on after one year or any extension. If the Contractor fails to submit the proposal within the time allowed, the Contracting Officer may determine, on the basis of information available, the amount, if any, due the Contractor because of the termination and shall pay the amount determined.
- (f) Subject to Section (e), above, the Contractor and the Contracting Officer may agree on the whole or any part of the amount to be paid (including an allowance for fee) because of the termination. The contract shall be amended, and the Contractor paid the agreed amount.
- (g) If the Contractor and the Contracting Officer fail to agree in whole or in part on the amount of costs and/or fee to be paid because of the termination of work, the Contracting Officer shall determine, on the basis of information available, the amount, if any, due the Contractor, and shall pay that amount, which shall include the following:
  - (1) All costs reimbursable under this contract, not previously paid, for the performance of this contract before the effective date of the termination, and part of those costs that may continue for a reasonable time with the approval of or as directed by the Contracting Officer; however, the Contractor shall discontinue those costs as rapidly as practicable.
  - (2) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subsection (1) above.
  - (3) The reasonable costs of settlement of the work terminated, including:
    - (i) accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;
    - (ii) the termination and settlement of subcontracts (excluding the amounts of such settlements); and
    - (iii) storage, transportation, and other costs incurred, reasonably necessary for

the preservation, protection, or disposition of the termination inventory. If the termination is for default, no amounts for the preparation of the Contractor's termination settlement proposal may be included.

(4) A portion of the fee payable under the contract, determined as follows:

- (i) if the contract is terminated for the convenience of ATP, the settlement shall include a percentage of the fee equal to the percentage of completion of work contemplated under the contract, but excluding subcontract effort included in subcontractors' termination proposals, less previous payments for fee; or
- (ii) if the contract is terminated for default, the total fee payable shall be such proportionate part of the fee as the total number of articles (or amount of services) delivered to and accepted by ATP is to the total number of articles (or amount of services) of a like kind required by the contract.

(5) If the settlement includes only fee, it will be determined under subsection (g)(4) above.

- (h) The cost principles and procedures in Chapter 7 (Cost Principles) of ATP's Procurement Policy and Guidelines in effect on the date of this contract shall govern all costs claimed, agreed to, or determined under this clause.
- (i) The Contractor shall have the right of appeal, under the Disputes Clause, from any determination made by the Contracting Officer under Section (e) or (g), above, or Section (k), below, except that if the Contractor failed to submit the termination settlement proposal within the time provided in Section (e) and failed to request a time extension, there is no right of appeal. If the Contracting Officer has made a determination of the amount due under Section (e), (g), or (k), ATP shall pay the Contractor (1) the amount determined by the Contracting Officer if there is no right of appeal or if no timely appeal has been taken, or (2) the amount finally determined on an appeal.
- (j) In arriving at the amount due the Contractor under this clause, there shall be deducted :
  - (1) all unliquidated advance or other payments to the Contractor under the terminated portion of this contract;
  - (2) any claim which ATP has against the Contractor under this contract; and
  - (3) the agreed price for, or the proceeds of sale of materials, supplies, or other things acquired by the Contractor or sold under this clause and not recovered by or credited to ATP.
- (k) The Contractor and Contracting Officer must agree to any equitable adjustment in fee for

the continued portion of the contract when there is a partial termination. The Contracting Officer shall amend the contract to reflect the agreement.

- (l) ATP may, under the terms and conditions it prescribes, make partial payments and payments against costs incurred by the Contractor for the terminated portion of the contract if the Contracting Officer believes the total of these payments will not exceed the amount to which the Contractor will be entitled. If the total payments exceed the amount finally determined to be due, the Contractor shall repay the excess to ATP upon demand, together with interest computed at the rate established by the Secretary of the Treasury under 50 U.S.C. App. 1215(b)(2). Interest shall be computed for the period from the date the excess payment is received by the Contractor to the date the excess is repaid. Interest shall not be charged on any excess payment due to a reduction in the Contractor's termination settlement proposal because of retention or other disposition of termination inventory until 10 days after the date of the retention or disposition, or a later date determined by the Contracting Officer because of the circumstances. Interest charged or payable shall not exceed the amount payable under Texas law.
  
- (m) The provisions of this clause relating to fee are inapplicable if this contract does not include a fee.

#### **Section 6-615      Excusable Delays**

##### **EXCUSABLE DELAYS**

- (a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its term if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of ATP in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. "Default" includes failure to make progress in the work so as to endanger performance.
  
- (b) If the failure to perform is caused by the failure of a subcontractor at any tier to perform or make progress, and if the cause of the failure was beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be deemed to be in default, unless :
  - (1) the subcontracted supplies or services were obtainable from other sources;
  - (2) the Contracting Officer ordered the Contractor in writing to purchase these supplies or services from the other source; and
  - (3) the Contractor failed to comply reasonably with this order.

- (c) Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of the failure. If the Contracting Officer determines that any failure to perform results from one or more of the causes above, the delivery schedule shall be revised, subject to the rights of ATP under the Termination Clause of this contract.

**Section 6-616 Equal Opportunity Reporting**

The Contractor/Consultant agrees that, in connection with the award of any subcontracts more than \$5,000 under an ATP contract, the Contractor will require the subcontractor to certify to the Contractor (on a form furnished or approved by ATP) if the subcontractor is, or is not, a Disadvantaged Business Enterprise ("DBE"), Women Business Enterprise ("WBE"), or Minority Business Enterprise ("MBE") and other small and minority businesses (as defined, by ATP). As a condition to final payment under this contract, the Contractor shall submit to ATP and certify a list of all DBE, WBE, and MBE, and other small and minority subcontractors, which list shall include a description of the item, work, or services provided by such subcontractors and the dollar amount paid for each subcontract.

**Section 6-617 Examination and Retention of Records**

Include the clause at Section 6-203.19 in accordance with the instructions in that section.



## CHAPTER 7 - COST PRINCIPLES

### Section 7-101 Definitions

- (1) "Actual Costs" are all direct and indirect costs which have been incurred for services rendered, property delivered, or construction built, as distinguished from allowable costs only.
- (2) "Cost Objective" is any unit of work such as a function, an organizational subdivision, or a contract for which provision is made to accumulate and measure separately the cost of processes, products, jobs, capitalized projects, and similar items. A final cost objective is one that has allocated to it both direct and indirect costs and, in the contractor's accumulation system, is one of the final accumulation points.

### Section 7-102 Applicability of Cost Principles

- (1) The cost principles and procedures contained in this Chapter shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions which provide for the reimbursement of costs; provided, that any deviation from these cost principles may be made as provided in Section 7-111 (ATP to Deviate from Cost Principles). The cost principles and procedures set forth in this Chapter may be used as guidance in:
  - (a) the establishment of contract cost estimates and prices under contracts awarded on the basis of competitive proposals where the award may not be based on adequate price competition (Section 3-503); sole source Procurement (Section 3-205); statutory professional services (Section 3-207); and architect- engineer and land surveying services (Section 5-100);
  - (b) the establishment of price adjustments for contract changes, including contracts that have been let on the basis of competitive sealed bidding or otherwise based on adequate price competition;
  - (c) the pricing of termination for convenience settlements; and
  - (d) any other situation in which cost analysis is used.
- (2) These cost principles guidelines are not applicable to:
  - (a) the establishment of prices under contracts awarded on the basis of competitive sealed bidding or otherwise based on adequate price competition rather than the analysis of individual, specific cost elements, except that this Chapter does apply to the establishment of adjustments of price for changes made to such contracts;
  - (b) prices which are fixed by law or regulation; and

- (c) prices which are based on established catalogue prices as defined in Section 3-101(5) (Established Catalogue Price).

**Section 7-103 Allowable Costs**

- (1) Any contract costs proposed for estimating purposes or invoiced for cost-reimbursement purposes are allowable to the extent provided in the contract, and costs inconsistent with these cost principles are allowable only if approved as a deviation under 7-111 (ATP to Deviate from Cost Principles.). The contract shall provide that the total allowable cost of a contract is the sum of the allowable direct costs actually 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).
- (2) 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 its other activities. In pricing a proposal, a contractor shall estimate costs in a manner consistent with its cost accounting practices used in accumulating and reporting costs.
- (3) The contract shall provide that costs shall be allowed to the extent they are:
  - (a) reasonable, as defined in Section 7-104(Reasonable Costs);
  - (b) allocable, as defined in Section 7-105 (Allocable Costs);
  - (c) lawful under any applicable law;
  - (d) not unallowable under Section 7-106(Treatment of Specific Costs) or Section 7-107 (Costs Requiring Prior Approval); and
  - (e) in the case of costs invoiced for reimbursement, actually incurred or accrued and accounted for in accordance with generally accepted accounting principles.

**Section 7-104 Reasonable Costs**

Any cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. In determining the reasonableness of a given cost, consideration shall be given to:

- (1) requirements imposed by the contract terms and conditions;
- (2) 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;

- (3) the restraints inherent in, and the requirements imposed by, such factors as generally accepted sound business practices, arms' length bargaining, and federal and state laws and regulations;
- (4) the action that a prudent business manager would take under the circumstances, including general public Policy and considering responsibilities to the owners of the business, Employees, customers, and ATP;
- (5) significant deviations from the contractor's established practices which may unjustifiably increase the contract costs; and
- (6) any other relevant circumstances.

#### **Section 7-105 Allocable Costs**

- (1) 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:
  - (a) is incurred specifically for the contract;
  - (b) benefits both the contract and other work and can be distributed to both in reasonable proportion to the benefits received; or
  - (c) is necessary to the overall operation of the business, although a direct relationship to any particular cost objective may not be evident.
- (2) 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 the Procurement Policy and Guidelines. 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.
- (3) A direct cost is any cost which can be identified specifically with a particular final 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.
- (4) Indirect costs shall be determined in accordance with this subsection.
  - (a) An indirect cost is one identified with no specific final cost objective or with more than one final cost objective. Indirect costs are those remaining to be allocated to the several final cost objectives after direct costs have been determined and

charged directly to the contract or other work as appropriate. Any direct costs of minor dollar amount may be treated as indirect costs; provided, that such treatment produces substantially the same results as treating the cost as a direct cost.

- (b) Indirect costs shall be accumulated into logical cost groups (or pools), 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.
- (c) The contractor's method of distribution may require examination when:
  - (i) any substantial difference exists between the cost patterns of the work performed under the contract and the contractor's other work;
  - (ii) 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
  - (iii) indirect cost groups developed for a contractor's primary location are applied to off-site locations. Separate cost groups for costs allocable to offsite locations may be necessary to distribute the contractor's costs on the basis of the benefits accruing to the appropriate cost objectives.
- (d) 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 certain circumstances. In such cases, an appropriate period should be agreed to in advance.

## **Section 7-106 Treatment of Specific Costs**

The specific types of costs covered in this section shall be accorded the treatment provided herein.

### **Section 7-106.01 Advertising**

- (1) Advertising costs are those incurred in using any advertising media when the advertiser has control over the form and content of what will appear, the media in which it will

appear, or when it will appear. Advertising media include newspapers, magazines, radio, television, direct mail, trade papers, billboards, window displays, conventions, exhibits, free samples, and the like. All advertising costs except those set forth in subsection (2) of this section are unallowable.

- (2) The only allowable advertising costs are those for:
  - (a) the recruitment of personnel;
  - (b) the Procurement of scarce items;
  - (c) the disposal of scrap or surplus materials; and
  - (d) the listing of a business name and location in a classified directory.

#### **Section 7-106.02 Bad Debts**

Bad debts (debts which have been determined to be uncollectable) include losses arising from uncollectible accounts and other claims, such as dishonored checks, uncollected Employee advances, and related collection and legal costs. All bad debt costs are unallowable.

#### **Section 7-106.03 Contingencies**

- (1) Contingency costs are contributions to a reserve account for unforeseen costs. Such contingency costs are unallowable except as provided in subsection (2) of this section.
- (2) 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.

#### **Section 7-106.04 Depreciation and Use Allowances**

- (1) Depreciation and use allowances (that is, the allowance made for fully depreciated assets) are allowable to compensate contractors for the use of buildings, capital improvements, and equipment or for the provision of such facilities on a standby basis for subsequent use when such facilities are temporarily idle because of suspensions or delays not caused by the contractor, not reasonably foreseeable, and not otherwise avoidable when the contract was awarded. 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.

- (2) The computation of depreciation or use allowances shall be based on acquisition costs. When the acquisition costs are unknown, reasonable estimates may be used.
- (3) 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, ATP will accept any method which is accepted by the Internal Revenue Service.
- (4) 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 may be allowed as a cost of that contract. Use allowances are allowable; provided that they are computed in accordance with an established industry 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, and the effect of any increased maintenance or decreased efficiency.

#### **Section 7-106.05 Entertainment**

- (1) Entertainment costs include costs of amusement, diversion, social activities, and incidental costs relating thereto, such as meals, beverages, lodging, transportation, and gratuities. Entertainment costs are unallowable.
- (2) Nothing herein shall make unallowable a legitimate expense for Employee morale, health, welfare, food service, or lodging costs; except that, where a net profit is generated by such services, it shall be treated as a credit as provided in Section 7-108 (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.

#### **Section 7-106.06 Fines and Penalties**

Fines and penalties include all costs incurred as the result of violations of, or alleged 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 Contracting Officer.

### **Section 7-106.07      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 is not transferred in exchange for supplies or services of equivalent fair market value rendered by a nonprofit institution. Gifts, contributions, and donations are unallowable.

### **Section 7-106.08      Interest Costs**

- (1) Interest generally is an unallowable cost for purposes of determining the original contract price. Compensation for any interest expense incurred in connection with work originally contemplated under the contract will be deemed to be included in the fee or profit negotiated on the contract.
- (2) Imputed interest on a contractor's expenditures made to pay allowable costs which are allocable to the performance of work required by Change Orders, suspension of work, or other acts of ATP requiring additional work over and above that required by the original contract (hereinafter called "Additional Work") shall be an allowable cost. Imputed interest is an allowable cost in relation to such Additional Work in a negotiated settlement, if one can be agreed upon, or to the extent that it is determined administratively or judicially that ATP is liable for such Additional Work. Such imputed interest shall be computed on expenditures from the date or dates on which the contractor made expenditures for the performance of such Additional Work until the date of payment therefor by ATP. The rate of interest shall be the prevailing prime rate charged by the three largest banks in the city of Austin as determined by the Executive Director at the time or times the contractor made such expenditures for Additional Work. Imputed interest on the costs of Additional Work shall not be allowable to the extent that it is otherwise recovered as profit, fee, or as interest on contractor claims.

### **Section 7-106.09      Losses Incurred Under Other Contracts**

A loss is the excess of costs over income earned under a particular contract and is unallowable. Losses may include both direct and indirect costs. A loss incurred under one contract may not be charged to any other contract.

### **Section 7-106.10      Material Costs**

- (1) Material costs are the costs of all supplies, including raw materials, 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 (2) and (3) of this section. In determining material costs,

consideration shall be given to reasonable spoilage, reasonable inventory losses, and reasonable overages.

- (2) 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.
- (3) 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 this Chapter), except that the transfer may be made at the established price; provided, that the price of materials is not determined to be unreasonable by the Contracting Officer, 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 the price is established either:
  - (a) by the established catalogue price, as defined in Section 3-101(5); 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.

#### **Section 7-106.11 Taxes**

- (1) Except as limited in subsection (2) of this section, all allocable taxes which the contractor is required to pay and which are paid and accrued in accordance with generally accepted accounting principles are allowable.
- (2) 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 Contracting Officer; and
  - (d) income tax accruals designed to account for the tax effects of differences between taxable income and pretax income as reflected by the contractor's books of account and financial statements.



- (3) 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 any contracts being priced or costs being reimbursed during the period in which the refund is made.
- (4) Direct government charges for services (such as water) or capital improvements (such as sidewalks) are not considered taxes and are allowable costs.

### **Section 7-107      Costs Requiring Prior Approval**

The costs described in this Section 7-107 are allowable as direct costs to cost-reimbursement type contracts to the extent that they have been approved in advance by the Contracting Officer. In other situations, the allowability of these costs shall be determined in accordance with general standards set out in these cost principles.

#### **Section 7-107.01      Pre-Contract Costs**

Pre-contract costs are those incurred in anticipation of, and prior to, the effective date 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 is inserted in the contract setting forth the period of time and maximum amount of cost which will be covered as allowable pre-contract costs.

#### **Section 7-107.02      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 indirect costs in accordance with these cost principles. 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.

#### **Section 7-107.03      Insurance**

- (1) Ordinary and necessary insurance costs normally are allowable as indirect costs. Direct 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. Self-insurance contributions are allowable only to the extent of the cost to the contractor to obtain similar insurance.
- (2) Insurance costs may be approved as a direct cost only if the insurance is specifically required for the performance of the contract.
- (3) Actual losses which reasonably should 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.

#### **Section 7-107.04      Litigation Costs**

Litigation costs include all filing fees, legal fees, expert witness fees, and all other costs involved in litigating claims in court or under administrative procedures. Litigation costs incident to the contract are allowable as indirect costs in accordance with these cost principles, except that costs incurred in litigation by or against ATP are unallowable.

#### **Section 7-108            Applicable Credits**

- (1) 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, allowances, recoveries or indemnification for losses, sale of scrap and surplus equipment and materials, adjustments for overpayments or erroneous charges, and income from Employee recreational or incidental services and food sales.
- (2) Credits shall be applied to reduce related direct or indirect costs.
- (3) ATP shall be entitled to a cash refund if the related expenditures have been paid to the contractor under a cost-reimbursement type contract.

#### **Section 7-109            Advance Agreements**

- (1) Both ATP and the contractor should seek to avoid disputes and litigation arising from potential problems by providing in the terms of the solicitation and the contract the treatment to be accorded special or unusual costs which are expected to be incurred.
- (2) Advance agreements may be negotiated either before or after contract award (depending upon when the parties realize the cost may be incurred) 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.
- (3) An advance agreement shall not provide for any treatment of costs inconsistent with these cost principles unless a determination has been made pursuant to Section 7-111 (ATP to Deviate from Cost Principles).

#### **Section 7-110 Use of Federal Cost Principles**

In dealing with contractors operating according to federal government cost principles, the Contracting Officer, after notifying the contractor, may use the Federal Cost Principles as guidance in contract negotiations. In addition, the Contracting Officer may utilize applicable



overhead and G&A rates determined by audit by any federal audit agency for the applicable period.

**Section 7-111 ATP to Deviate from Cost Principles**

When the best interest of ATP would be served by a deviation, the Contracting Officer may deviate from the cost principles set forth in the Procurement Policy and Guidelines; provided, that a written determination shall be made by such officer specifying the reasons for the deviation. Such determination shall be effective only upon approval by the Procurement Director and General Counsel in accordance with Sections 1-101(4) and 2-301 and upon incorporation into the contract. However, all costs must be reasonable, lawful, allocable, and accounted for in accordance with generally accepted accounting principles to be reimbursed, and a deviation shall not contravene this principle.

## CHAPTER 8 - CONTRACT ADMINISTRATION

### Section 8-101      General

Contract administration includes all activities involved with ATP's supervision and, when necessary, direction of contract performance. The following are among the normal contract administration functions to be performed by ATP:

- (1) reviewing the contractor's compensation structure;
- (2) reviewing the contractor's insurance plans;
- (3) conducting post award orientation conferences;
- (4) reviewing and evaluating the contractor's proposals for modifications;
- (5) negotiating forward pricing rate agreements;
- (6) negotiating advance agreements applicable to treatment of costs under contracts;
- (7) determining the allowability of costs suspended or disapproved as required, directing the suspension or disapproval of costs when there is reason to believe they should be suspended or disapproved, and approving final vouchers;
- (8) establishing billing and final indirect cost rates;
- (9) preparing findings of fact and issuing decisions under the Disputes Clause;
- (10) reviewing and approving or disapproving the contractor's requests for payments under the Progress Payments Clause;
- (11) making payments on contracts;
- (12) ensuring timely notification by the contractor of any anticipated overrun or under run of the estimated cost under cost-reimbursement contracts;
- (13) monitoring the contractor's financial condition and taking appropriate action when it jeopardizes contract performance;
- (14) analyzing quarterly limitation on payments statements and recovering overpayments from the contractor;
- (15) issuing tax exemption certificates;
- (16) negotiating and executing contractual documents for settlement of partial and total

- contract terminations for convenience;
- (17) negotiating and executing contractual documents settling cancellation charges under multi-year contracts;
- (18) processing and executing novation and change of name agreements;
- (19) performing property administration;
- (20) performing necessary screening, redistribution, and disposal of contractor inventory;
- (21) performing production support, surveillance, and status reporting, including timely reporting of potential and actual slippages in contract delivery schedules;
- (22) reviewing and evaluating preservation, packaging, and packing;
- (23) ensuring contractor compliance with contractual quality assurance requirements;
- (24) ensuring contractor compliance with applicable safety requirements;
- (25) performing surveillance to assess compliance with contractual terms for schedule, cost, and technical performance in the areas of design, development, and production;
- (26) evaluating for adequacy and performing surveillance of contractor engineering efforts and management systems that relate to design, development, production, engineering changes, subcontractors, tests, management of engineering resources, reliability and maintainability, data control systems, configuration management, and independent research and development;
- (27) reviewing and evaluating for technical adequacy the contractor's logistics support, maintenance, and modification programs;
- (28) performing engineering analyses of contractor cost proposals;
- (29) reviewing and analyzing contractor proposed engineering and design studies;
- (30) assisting in evaluating and making recommendations for acceptance or rejection of waivers and deviations;
- (31) evaluating and monitoring the contractor's procedures for complying with requirements regarding restrictive markings on data;
- (32) consenting to the placement of subcontracts;



- (33) ensuring timely submission of required reports; and
- (34) closing out the contract.

**Section 8-200 Post Award Orientations**

**Section 8-201 Scope of Section**

This section describes guidelines for the post award orientation of contractors and subcontractors through a conference or a letter or other form of written communication where ATP elects to conduct a post award orientation.

**Section 8-202 General**

- (1) A post award orientation aids both ATP and contractor personnel to (a) achieve a clear and mutual understanding of all contract requirements and (b) identify and resolve potential problems. However, it is not a substitute for the contractor's full understanding of the work requirements at the time offers are submitted, nor is it to be used to alter the final agreement arrived at in any negotiations leading to contract award.
- (2) While cognizant ATP or contractor personnel may request the Contracting Officer to arrange for an orientation, it is the Contracting Officer's decision whether a post award orientation in any form is necessary.
- (3) Maximum benefits will be realized when an orientation is conducted promptly after award.

**Section 8-203 Selecting Contracts for Post Award Orientation**

When deciding whether post award orientation is necessary and, if so, what form it shall take, the Contracting Officer shall consider, as a minimum, the :

- (1) nature and extent of the pre-award survey and any other prior discussions with the contractor;
- (2) type, value, and complexity of the contract;
- (3) complexity and acquisition history of the product or service;
- (4) requirements for spare parts and related equipment;
- (5) urgency of the delivery schedule and relationship of the product or service to critical programs;



- (6) length of the planned production cycle or construction schedule;
- (7) extent of subcontracting; and
- (8) contractor's performance history and experience with the product or service.

**Section 8-204 Post award Conference Arrangements**

When the Contracting Officer decides that a post award conference is needed, he is responsible for:

- (1) establishing the time and place of the conference;
- (2) preparing the agenda, when necessary;
- (3) notifying appropriate ATP and contractor personnel;
- (4) designating or acting as the chairman;
- (5) conducting a preliminary meeting of ATP personnel; and
- (6) preparing a summary report of the conference.

**Section 8-205 Post award Conference Procedure**

The chairman of the conference shall conduct the meeting. Unless a contract change is contemplated, the chairman shall emphasize that it is not the purpose of the meeting to change the contract. The Contracting Officer may make commitments or give directions within the scope of the Contracting Officer's authority and shall put in writing and sign any commitment or direction, whether or not it changes the contract. Any change to the contract that results from the post award conference shall be made only by a contract modification referencing the applicable terms of the contract. Participants without authorization to bind ATP shall not take action that in any way alters the contract. The chairman shall include in the summary report all information and guidance provided to the contractor.

**Section 8-206 Post award Conference Report**

The chairman shall prepare and sign a report of the post award conference. The report shall cover all items discussed, including areas requiring resolution, controversial matters, the names of the participants assigned responsibility for further actions, and the due dates for the actions. The chairman shall furnish copies of the report to the contractor and others who require the information.



**Section 8-207 Post award Letters**

In some circumstances, a letter or other written form of communication to the contractor may be adequate post award orientation (in lieu of a conference). The letter should identify ATP representative responsible for administering the contract and cite any unusual or significant contract requirements.

**Section 8-300 Contract Modifications**

**Section 8-301 Definitions**

- (1) "Administrative Change" means a unilateral contract change, in writing, that does not affect the substantive rights of the parties (e.g., changes of address for submittals of documents, reports, etc. ).
- (2) "Bilateral Contract Modification" means a modification which is signed by the Contractor and the Contracting Officer; also referred to as a supplemental agreement. They are used to (1) make negotiated equitable adjustments to the contract price, delivery schedule and other contract terms resulting from the issuance of a Change Order, (2) definitize letter contracts, and (3) reflect other agreements of the parties modifying the terms of the contract.

**Section 8-302 Contract Modification Policy and Guidelines**

- (1) Only the Contracting Officer acting within the scope of his authority is empowered to execute contract modifications on behalf of ATP. Other ATP personnel shall not :
  - (a) execute contract modifications;
  - (b) act in such a manner as to cause the contractor to believe that they can bind ATP;  
or
  - (c) direct or encourage the contractor to perform work that should be the subject of a contract modification.
- (2) Contract modifications, including Change Orders that could be issued unilaterally, shall be priced before their execution if this can be done without adversely affecting the interest of ATP. If a significant cost increase could result from a contract modification and time does not permit negotiation of a price, at least a maximum price shall be negotiated unless impractical.



## Section 8-303      Types of Contract Modifications

There are two types of contract modifications.

- (1) A bilateral modification (supplemental agreement) is a contract modification that is signed by the contractor and the Contracting Officer. Bilateral modifications are used to:
  - (a) make negotiated equitable adjustments resulting from the issuance of a Change Order;
  - (b) modify the specifications or scope of work when both parties agree to both the modification and all other matters affected by the modification (including price and delivery or completion dates);
  - (c) settle claims and disputes by mutual agreement; and
  - (d) reflect other agreements of the parties modifying the terms of contracts.
- (2) A unilateral modification is a contract modification that is signed only by the Contracting Officer. Unilateral modifications are used, for example, to:
  - (a) make administrative changes;
  - (b) issue Change Orders;
  - (c) make changes authorized by clauses other than the Changes Clause (e.g., ATP Property Clause, Options Clause, Suspension of Work Clause, etc.); and
  - (d) issue termination notices.

## Section 8-304      Change Orders

Changes Clause means a clause that permits ATP's Contracting Officer to make unilateral changes, in designated areas, *within the general scope of the contract*, to be followed by such equitable adjustments in the price and delivery schedule as the change makes necessary. Although ATP has a unilateral right, two general principles are important: (1) the right exists only because it is specifically conferred by the terms of the contract; and (2) when such unilateral rights are exercised, ATP has an obligation to adjust the price and/or other provisions to compensate for the alteration in the contractor's obligations.

- (1) Generally, ATP contracts contain a Changes Clause that permits the Contracting Officer to make unilateral changes, in designated areas, within the general scope of the contract. These are accomplished by issuing written change orders.

- (2) The contractor must continue performance of the contract as changed, except that in cost-reimbursement or incrementally funded contracts, the contractor is not obligated to continue performance or incur costs beyond the limits established in the Limitation of Cost Clause.
- (3) The Contracting Officer may issue a Change Order under unusual or urgent circumstances; provided, that:
  - (a) copies of the message are furnished promptly to the same address that received the basic contract;
  - (b) immediate action is taken to confirm the change by issuance of a written Change Order form;
  - (c) the message contains substantially the information required by the written Change Order form, including in the body of the message the statement, "Signed by [Name], Contracting Officer"; and
  - (d) the Contracting Officer manually signs the original copy of the message.
- (4) Change Orders shall be issued only by the Contracting Officer except when authority to issue such orders has been delegated in writing to another.
- (5) Unless the parties previously have agreed concerning the equitable adjustment associated with a Change Order, the Change Order shall not contain a price or adjustment in the delivery schedule or require the contractor's signature. The equitable adjustment resulting from the Change Order shall be the subject of negotiation.

#### **Section 8-305      Equitable Adjustments**

- (1) An equitable adjustment pursuant to the Changes Clause is designed to keep the contractor whole and to keep the parties to the contract in the same position relative to one another after the changed work as they were in before the change. Therefore, the measure of an equitable adjustment for increased work is the difference between the reasonable cost of the work originally required by the contract and the actual reasonable cost to the contractor of performing the changed work plus a reasonable amount for overhead and profit. For purposes of computing the amount of an equitable adjustment, a contractor's actual costs for the increased work through a cost and price analysis. A downward equitable adjustment is required when work is deleted from the contract by Change Order.
- (2) The Contracting Officer shall negotiate an equitable adjustment resulting from Change Orders in the shortest practicable time.
- (3) In determining the amount of an equitable adjustment, the Contracting Officer shall

ensure that a cost analysis or price analysis is made, if appropriate, and shall consider the contractor's segregable costs of the change, if available. If additional funds are required as a result of the change, the Contracting Officer shall secure the funds before making any adjustment to the contract.

(4) To avoid subsequent controversies that may result from a supplemental agreement containing an equitable adjustment as the result of a Change Order, the Contracting Officer should:

- (a) ensure that all elements of the equitable adjustment have been presented and resolved; and
- (b) include, in the supplemental agreement, a release similar to the following:

**CONTRACTOR'S STATEMENT OF RELEASE**

In consideration of the modification(s) agreed to herein as complete equitable adjustments for the Contractor's \_\_\_\_\_  
 \_\_\_\_\_ (describe claim)

, the Contractor hereby releases ATP from any and all liability under this contract for further equitable adjustments, damages, or any other relief based on or attributable to such facts or circumstances giving rise to the "proposal(s) for adjustment" (except for \_\_\_\_\_).

**Section 8-306 Reports**

All supplemental agreements shall be reported quarterly by the Executive Director in a written report to the Board of Directors.

**Section 8-307 Forms**

- (a) Bilateral modifications (supplemental agreements) shall be in writing and shall include at a minimum:
  - (1) the contract and supplemental agreement numbers, the effective dates, and the actual signature dates by the contractor and the Contracting Officer;
  - (2) the impact on dollar amounts and time, if any, citing the current data, the change(s), and the revised data;
  - (3) a description of the change; and
  - (4) a statement which reads, "Except as modified by this supplemental agreement, all



other provisions of the contract (including, but not limited to, price and delivery and completion dates) shall remain unchanged."

- (b) Unilateral Change Orders shall be in writing and shall include at a minimum:
  - (1) the contract and Change Order numbers, the effective dates of both, and the actual signature date by the Contracting Officer;
  - (2) a statement which reads, "Pursuant to ATP of the Changes Clause in the contract referenced above, the contract is changed as provided below"; and
  - (3) a description of the change.

**Section 8-400 Property Administration**

**Section 8-401 Scope of Section**

This section describes guidelines for providing ATP property to contractors, contractors' use and management of ATP property, and reporting, redistributing, and disposing of contractor inventory. Contractor management of this property must be in accordance with this Section unless simplified procedures are authorized.

**Section 8-401.01 Simplified Property Management Procedures**

Unless otherwise required by the Contracting Officer, contractors responsible for contractor-acquired (as defined in Section 8-402(1)) or ATP-furnished property with a total cost not expected to exceed \$50,000 (single contract or aggregate) are not required to possess a formal property management system. However, contractors shall ensure this property is properly inventoried, controlled, maintained and safeguarded; and that the management procedures employed provide a clear audit trail. Contractor records must reflect the following:

- (1) item description,
- (2) date of acquisition,
- (3) asset cost,
- (4) ATP contract number,
- (5) source,
- (6) asset location,
- (7) ATP property tag number, and

- (8) serial number (if applicable).

#### **Section 8-402        Definitions**

- (1) "Contractor-acquired property," as used in this section, means property acquired or otherwise provided by the contractor for performing a contract and to which ATP has title.
- (2) "ATP-furnished property," as used in this section, means property in the possession of, or directly acquired by, ATP and subsequently made available to the contractor.
- (3) "ATP property" means all property owned by or leased to ATP or acquired by ATP under the terms of the contract. It includes ATP-furnished property.
- (4) "Plant equipment," as used in this section, means personal property of a capital nature (including equipment, machine tools, test equipment, furniture, vehicles, and accessory and auxiliary items) for use in manufacturing supplies, in performing services, or for any administrative or general plant purpose. It does not include special tooling or special test equipment.
- (5) "Property," as used in this section, means all property, both real and personal. It includes facilities, material, equipment, transportation vehicles, special tooling, and special test equipment.
- (6) "Real property," as used in this section, means land and rights in land, ground improvements, utility distribution systems, and buildings and other structures. It does not include foundations and other work necessary for installing special tooling, special test equipment, or plant equipment.
- (7) "Special test equipment," as used in this section, means either single or multipurpose integrated test units engineered, designed, fabricated, or modified to accomplish special purpose testing in performing a contract. It consists of items or assemblies of equipment that are interconnected and interdependent so as to become a new functional entity for special testing purposes. It does not include material, special tooling, facilities (except foundations and similar improvements necessary for installing special test equipment), and plant equipment items used for general plant testing purposes.
- (8) "Special tooling," as used in this section, means jigs, dies, fixtures, molds, patterns, taps, gauges, other equipment and manufacturing aids, all components of these items, and replacement of these items, which are of such a specialized nature that, with- out substantial modification or alteration, their use is limited to the development or production of particular supplies or parts thereof or to the performance of particular services. It does not include material, special test equipment, facilities (except foundations and similar improvements necessary for installing similar tooling), general or

special machine tools, or similar capital items.

- (9) Additional definitions also applying throughout this section appear in those subsections where the terms are most frequently used.

#### **Section 8-403 Policy and Guidelines**

Contractors ordinarily are required to furnish all property necessary to perform ATP contracts.

However, if contractors possess ATP property, ATP shall:

- (1) eliminate to the maximum practical extent any competitive advantage that might arise from using such property;
- (2) require contractors to use ATP property to the maximum practical extent in performing ATP contracts;
- (3) permit the property to be used only when authorized;
- (4) charge appropriate rentals when the property is authorized for use on other than a rent-free basis;
- (5) require contractors to be responsible and accountable for, and keep ATP's official records of, ATP property in their possession or control;
- (6) require contractors to review and provide justification for retaining ATP property not currently in use; and
- (7) ensure maximum practical reutilization of contractor inventory within ATP.

#### **Section 8-404 Responsibility and Liability for ATP Property**

- (1) Contractors are responsible and liable for ATP property in their possession, unless otherwise provided by the Contract.
- (2) When justified by the circumstances, the contract may require the contractor to assume greater liability for loss of or damage to ATP property.
- (3) If ATP provides ATP property directly to a subcontractor, the terms of Section (2) above shall apply to the subcontractor. A Prime Contract that provides ATP property to a subcontractor shall not be relieved of any responsibility to ATP that the Prime Contract may have under the terms of the prime contract.



#### **Section 8-405          Review and Correction of Contractor's Property Control Systems**

- (1) The Contracting Officer shall review contractors' property control systems to assure compliance with ATP Property Clause of the contract.
- (2) The Contracting Officer shall notify the contractor in writing when its property control system does not comply with contract requirements and shall request prompt correction of deficiencies. Specifically, the Contracting Officer shall :
  - (a) notify the contractor in writing of any required corrections and establish a schedule for completion of actions;
  - (b) caution the contractor that failure to take the required corrective actions within the time specified will result in withholding or withdrawing system approval; and
  - (c) advise the contractor that its liability for loss of or damage to ATP property may increase if approval is withheld or withdrawn.

#### **Section 8-406          Records of ATP Property**

- (1) Contractor records of ATP property established and maintained under the terms of the contract are ATP's official property records. Duplicate official records shall not be furnished to or maintained by ATP personnel, except as provided in Section (2), below.
- (2) Contracts may provide for the Contracting Officer to maintain ATP's official property records when ATP property is furnished to a contractor (a) for repair or servicing and return to the shipping organization, (b) for use on an ATP installation, (c) under a contract with a short performance period or involving ATP property having an acquisition cost of \$25,000 or less, or (d) when otherwise determined by the Contracting Officer to be in ATP's interest.

#### **Section 8-407          ATP Property Clauses**

This section prescribes the principal ATP property clauses.

- (1) The Contracting Officer shall insert ATP Property Clause (Fixed-Price Contracts), when appropriate in solicitations and contracts when a fixed-price contract is contemplated.
- (2) The Contracting Officer shall insert ATP Property Clause (Cost-Reimbursement, Time-and-Material, or Labor-Hour Contracts), when appropriate, in solicitations and contracts when a cost-reimbursement, time-and-material, or labor-hour contract is contemplated.



## **Section 8-408 Contractor Management of ATP Property**

### **Section 8-408.01 Scope of Section**

This section prescribes the minimum requirements contractors must meet in establishing and maintaining control over ATP property.

### **Section 8-408.02 Contractor Responsibility**

- (1) The contractor is directly responsible and accountable for all ATP property in accordance with the provisions of the contract. This includes ATP property in the possession or control of a subcontractor. The contractor shall establish and maintain a system in accordance with this section to control, protect, preserve, and maintain all ATP property. This property control system shall be in writing unless the Contracting Officer determines that maintaining a written system is unnecessary. The system shall be reviewed and, if satisfactory, approved in writing by the Contracting Officer.
- (2) The contractor shall maintain and make available the records required by this section and account for all ATP property until relieved of that responsibility. The contractor shall furnish all necessary data to substantiate any request for relief from responsibility.
- (3) The contractor shall require subcontractors who are furnished ATP property under the prime contract to comply with the requirements of this section. Procedures for assuring subcontractor compliance shall be included in the contractor's property control system.
- (4) If the Contracting Officer finds any portion of the contractor's property control system to be inadequate, the contractor must take any necessary corrective action before the system can be approved.
- (5) When ATP property is disclosed to be in the possession or control of the contractor but not provided under any contract, the contractor shall promptly (a) record such property according to the established property control procedure and (b) furnish to the Contracting Officer all known circumstances and data pertaining to its receipt and a statement as to whether there is a need for its retention.
- (6) The contractor shall promptly report all ATP property in excess of the amounts needed to complete full performance of the contracts under which it was provided or its use was authorized.
- (7) When unrecorded ATP property is found, both the cause of the discrepancy and actions taken or needed to prevent recurrence shall be determined and reported to the Contracting Officer.



### **Section 8-408.03 Discrepancies Incident to Shipment**

- (1) If overages, shortages, or damages are discovered upon receipt of ATP-furnished property, the contractor shall provide a statement of the condition and apparent causes to the Contracting Officer. Only that quantity of property actually received will be recorded on the official records.
- (2) The contractor shall take all actions necessary in adjusting overages, shortages, or damages in shipment of contractor-acquired property from a vendor or Supplier. However, when the shipment is moved by ATP bill of lading and carrier liability is indicated, the contractor shall report the discrepancy in accordance with Section (1), above.

### **Section 8-408.04 Relief from Responsibility**

Unless the contract or Contracting Officer provides otherwise, the contractor shall be relieved of property control responsibility for ATP property by :

- (1) reasonable and proper consumption of property in the performance of the contract as determined by the Contracting Officer;
- (2) retention by the contractor, with the approval of the Contracting Officer, of property for which ATP has received consideration;
- (3) the authorized sale of property; provided, that the proceeds are received by or credited to ATP;
- (4) shipment from the contractor's plant, under ATP instructions, except when shipment is to a subcontractor or other location of the contractor; or
- (5) a determination by the Contracting Officer of the contractor's liability for any property that is lost, damaged, destroyed, or consumed in excess of that normally anticipated in a manufacturing or processing operation, if:
  - (a) the determination is furnished to the contractor in writing;
  - (b) ATP is reimbursed where required by the determination; and
  - (c) property rendered unserviceable by damage is properly disposed of, and the determination is cross-referenced to the shipping or other documents evidencing disposal.

#### **Section 8-408.05 Contractor's Liability**

- (1) Subject to the terms of the contract and the circumstances surrounding the particular case, the contractor may be liable for shortages, loss, damages, or destruction of ATP property. The contractor also may be liable when the use or consumption of ATP property unreasonably exceeds the allowances provided for by the contract, the bill of material, or other appropriate criteria.
- (2) The contractor shall investigate and report to the Contracting Officer all cases of loss, damage, or destruction of ATP property in its possession or control as soon as the facts become known or when requested by the Contracting Officer. A report also shall be furnished when completed and accepted products or end items are lost, damaged, or destroyed while in the contractor's possession or control.
- (3) The contractor shall require any of its subcontractors possessing or controlling ATP property accountable under the contract to investigate and report all instances of loss, damage, or destruction of such property.

#### **Section 8-408.06 Records and Reports of ATP Property**

- (1) The contractor's property control records shall constitute ATP's official property records unless an exception has been authorized. The contractor shall establish and maintain adequate control records for all ATP property, including property provided to and in the possession or control of a subcontractor. The property control records specified in this section are the minimum required by ATP. Unless the Contracting Officer directs otherwise, when a subcontractor has an approved property control system for ATP property provided under its own prime contracts, the contractor shall use the records created and maintained under that system.
- (2) The contractor's property control system shall provide financial accounts for ATP-owned property in the contractor's possession or control. The system shall be subject to internal control standards and be supported by property records for such property.
- (3) Official ATP property records must identify all ATP property and provide a complete, current, and auditable record of all transactions. The records shall be safeguarded from tampering or destruction. Records shall be accessible to authorized ATP personnel.
- (4) Special tooling and special test equipment fabricated from materials that are the property of ATP shall be recorded as ATP-owned immediately upon fabrication. Special tooling and special test equipment fabricated from materials that are the property of the contractor shall be recorded as ATP property at the time title passes to ATP.
- (5) Property records of the type established for components acquired separately shall be used for serviceable components permanently removed from items of ATP property as a

result of modification.

- (6) The contractor's property control system shall contain a system or technique to locate any item of ATP property within a reasonable period of time.

#### **Section 8-408.07 Basic Information**

Unless summary records are used as authorized, the contractor's property control records shall provide the following basic information for every item of ATP property in the contractor's possession, regardless of value:

- (1) the name and description;
- (2) quantity received (or fabricated), issued, and on hand;
- (3) unit price (and unit of measure);
- (4) contract number or equivalent code designation;
- (5) location;
- (6) disposition; and
- (7) posting reference and date of transaction.

#### **Section 8-408.08 Records of Material**

- (1) "Material," as used in this Section 8-408.08, means property that may be incorporated into or attached to a deliverable end item or that may be consumed in performing a contract.
- (2) All ATP material furnished to the contractor, as well as other material to which title has passed to ATP by reason of allocation from contractor-owned stores or purchase by the contractor for direct charge to an ATP contract or otherwise, shall be recorded in accordance with the contractor's property control system and the requirements of this section.
- (3) The Contracting Officer may authorize the contractor to maintain, in lieu of stock records, a file of appropriately cross-referenced documents evidencing receipt, issue, and use of ATP-provided material that is issued for immediate consumption and is not entered in the inventory record as a matter of sound business practice. This method of control may be authorized for :
  - (a) material charged through overhead;

- (b) material under research and development contracts;
- (c) subcontracted or outside production items;
- (d) nonstock or special items;
- (e) items that are produced for direct charge to a contract, or are acquired and issued for installation upon receipt, and involve no spoilage; and
- (f) items issued from contractor-owned inventory direct to production or maintenance, etc.

#### **Section 8-408.09 Records of Special Tooling and Special Test Equipment**

- (1) The contractor's property control system shall provide basic information regarding each item of ATP-owned special tooling and special test equipment, including any general-purpose test equipment incorporated as components in such a manner that removal and reuse may be feasible and economical.
- (2) Records identifying special tooling and special test equipment shall include the identification number and item on which used.
- (3) The contractor shall, when specified by the contract, identify and report special tooling and special test equipment by retention category (e.g., assembly tooling or critical tooling for spares or replacements).

#### **Section 8-408.10 Records of Related Data and Information**

The contractor shall maintain property control and accountability, in accordance with sound business practice, of manufacturing or assembly drawings; installation, operation, repair, or maintenance instructions; and other similar information furnished to the contractor by ATP or generated or acquired by the contractor under the contract and for which title vests in ATP.

#### **Section 8-408.11 Records of Completed Products**

The contractor shall maintain a record of all completed products produced under a contract as provided in this section:

- (1) When there is no time lapse between ATP inspection and acceptance of the completed products and shipment from the plant site, the records shall, as a minimum, consist of a summary of quantities accepted and shipped. When end items are accepted by ATP and stored with the contractor awaiting shipment, the record shall identify quantities stored, location, and disposition action.

- (2) On contracts that provide for the contractor to retain completed products for further use under the contract or other contracts, such items shall be considered "ATP-furnished property" upon acceptance and shall be recorded as required by this section.
- (3) When completed products are returned to a contractor under the terms of a warranty clause, the contractor shall maintain, by contract, a record containing a description of the items involved, quantities received and returned to ATP, and other pertinent data necessary to determine that a proper accounting for all property has been made.

#### **Section 8-408.12 Records of Property Returned for Rework**

The contractor shall maintain quantitative records of property returned for processing to assure control from time of receipt through return of the items to ATP. The contractor shall establish item records under its property control system. The records shall specify the quantity of units returned to ATP and the quantity otherwise disposed of with proper authority.

#### **Section 8-408.13 Identification**

The contractor shall identify, mark, and record all ATP property promptly upon receipt, unless the nature of the property makes marking impractical, and shall record assigned numbers on all applicable documents pertaining to the property control system.

#### **Section 8-408.14 Segregation of ATP Property**

ATP property generally shall be kept physically separate from contractor-owned property. However, when advantageous to ATP and consistent with the contractor's right to use such property, the property may be commingled:

- (1) when ATP property is special tooling, special test equipment, or plant equipment clearly identified and recorded as ATP property; or
- (2) when otherwise approved by the Contracting Officer.

#### **Section 8-408.15 Physical Inventories**

The contractor periodically shall physically inventory all ATP property (except materials issued from stock for manufacturing, research, design, or other services required by the contract) in its possession or control and shall cause subcontractors to do likewise. Physical inventories consist of sighting, tagging or marking, describing, recording, reporting, and reconciling the property with the records. The contractor, with the approval of the Contracting Officer, shall establish the type, frequency, and procedures for such inventories. Type and frequency of inventory should be based on the contractor's established practices, the type and use of ATP property involved, or the amount of ATP property involved and its monetary value, and the reliability of the contractor's property control system. Type and frequency of physical inventories normally will

not vary between contracts being performed by the contractor but may vary with the types of property being controlled. Personnel who perform the physical inventory shall not be the same individuals who maintain the property records or have custody of the property unless the contractor's operation is too small to do otherwise.

#### **Section 8-408.16 Inventories Upon Termination or Completion**

Immediately upon termination or completion of a contract, the contractor shall perform and cause each subcontractor to perform a physical inventory, adequate for disposal purposes, of all ATP property applicable to the contract.

#### **Section 8-408.17 Reporting Results of Inventories**

The contractor shall, as a minimum, submit the following to the Contracting Officer promptly after completing the physical inventory:

- (1) a listing that identifies all discrepancies disclosed by a physical inventory; and
- (2) a signed statement that physical inventory of all or certain classes of ATP property was completed on a given date and that the official property records were found to be in agreement except for discrepancies reported.

#### **Section 8-408.18 Care, Maintenance, and Use**

The contractor shall be responsible for the proper care, maintenance, and use of ATP property in its possession or control from the time of receipt until properly relieved of responsibility, in accordance with sound industrial practice and the terms of the contract. The removal of ATP property to storage, or its contemplated transfer, does not relieve the contractor of these responsibilities.

#### **Section 8-408.19 Contractor's Maintenance Program**

- (1) Consistent with the terms of the contract, the contractor's maintenance program shall provide for:
  - (a) disclosure of need for and the performance of preventive maintenance;
  - (b) disclosure and reporting of need for capital rehabilitation; and
  - (c) recording of work accomplished under the program.
- (2) Preventive maintenance is maintenance performed on a regularly scheduled basis to prevent the occurrence of defects and to detect and correct minor defects before they result in serious consequences. An effective preventive maintenance program shall

include at least :

- (a) inspection of buildings at periodic intervals to assure detection of deterioration and the need for repairs;
  - (b) inspection of plant equipment at periodic intervals to ensure detection of maladjustment, wear, or impending breakdown;
  - (c) regular lubrication of bearings and moving parts in accordance with a lubrication plan;
  - (d) adjustments for wear, repair, or replacement of worn or damaged parts and the elimination of causes of deterioration;
  - (e) removal of sludge, chips, and cutting oils from equipment that will not be used for a period of time;
  - (f) taking necessary precautions to prevent deterioration caused by contamination, corrosion, and other substances; and
  - (g) proper storage and preservation of accessories and special tools furnished with an item of plant equipment but not regularly used with it.
- (3) The contractor's maintenance program shall provide for disclosing and reporting the need for major repair, replacement, and other capital rehabilitation work for ATP property in its possession or control.
- (4) The contractor shall keep records of maintenance actions performed and any deficiencies in ATP property discovered as a result of inspections.

**Section 8-408.20 Use of ATP Property**

The contractor's procedures shall be in writing and adequate (1) to ensure that ATP property will be used only for those purposes authorized in the contract and that any required approvals will be obtained, and (2) to provide a basis for determining and allocating rental charges.

**Section 8-408.21 Property in Possession of Subcontractors**

The contractor shall require any of its subcontractors possessing or controlling ATP property to care for and maintain that property adequately and ensure that it is used only as authorized by the contract. The contractor's property control system shall include procedures necessary for accomplishing this responsibility.

## **Section 8-408.22      Audit of Property Control System**

ATP may audit the contractor's property control system as frequently as conditions warrant. These audits may take place at any time during contract performance, upon contract completion or termination, or at any time thereafter during the period the contractor is required to retain such records. The contractor shall make all such records and related correspondence available to the auditors.

## **Section 8-409            Contractor Inventory Procedures**

### **Section 8-409.01      Scope of Section**

This section establishes policies and procedures for the reporting, redistribution, and disposal of ATP property in excess of contract requirements and of property that forms the basis of a claim against ATP (e.g., termination inventory under fixed-price contracts). This section does not apply to the disposal of real property or to property for which ATP has a lien or title solely as a result of advance or progress payments that have been liquidated.

### **Section 8-409.02      Definitions**

- (1) "Common item," as used in this section, means material that is common to the applicable ATP contract and the contractor's other work.
- (2) "Contractor inventory," as used in this section, means:
  - (a) any property acquired by and in the possession of a contractor or subcontractor under a contract for which title is vested in ATP and which exceeds the amounts needed to complete full performance under the entire contract;
  - (b) any property that ATP is obligated or has the option to take over under any type of contract as a result either of any changes in the specifications or plans there under or of the termination of the contract (or subcontract thereunder), before completion of the work, for the convenience or at the option of ATP; and
  - (c) ATP-furnished property that exceeds the amounts needed to complete full performance under the entire contract.
- (3) "Personal property," as used in this section, means property of any kind or interest in it except real property.
- (4) "Plant clearance," as used in this section, means all actions relating to the screening, redistribution, and disposal of contractor inventory from a contractor's plant or work site. The term "contractor's plant" includes a contractor-operated ATP facility.
- (5) "Plant clearance period," as used in this section, means the period beginning on the



effective date of contract completion or termination and ending 90 days (or such longer period as may be agreed to) after receipt by the Contracting Officer of acceptable inventory schedules for each property classification. The final phase of the plant clearance period means that period after receipt of acceptable inventory schedules.

- (6) "Reportable property," as used in this section, means contractor inventory that must be reported for screening in accordance with this section before disposition as surplus.
- (7) "Serviceable or usable property," as used in this section, means property that has a reasonable prospect of use or sale either in its existing form or after minor repairs or alterations.
- (8) "Surplus property," as used in this section, means contractor inventory not required by ATP.
- (9) "Termination inventory," as used in this section, means any property purchased, supplied, manufactured, furnished, or otherwise acquired for the performance of a contract subsequently terminated and properly allocable to the terminated portion of the contract. It includes ATP-furnished property. It does not include any facilities, material, special test equipment, or special tooling that are subject to a separate contract or to a special contract requirement governing their use or disposition.

### **Section 8-409.03 Disposal Methods**

ATP may exercise its rights to require delivery of any contractor inventory. If ATP does not exercise these rights, the contractor inventory shall be disposed of by one of the following methods in the priority indicated:

- (1) purchase or retention at cost by the contractor or subcontractor of contractor-acquired property;
- (2) return of contractor-acquired property to Suppliers;
- (3) use within ATP through the use of prescribed screening procedures;
- (4) sale (including purchase or retention at less than cost by the Prime Contractor subcontractor); or
- (5) abandonment or destruction.

### **Section 8-409.04 Restrictions on Purchase or Retention of Contractor Inventory**

A contractor's or subcontractor's authority to purchase, retain, or dispose of contractor inventory is subject to any contract provisions and to applicable ATP restrictions on the disposition of



property that is dangerous to public health, safety, or welfare.

## **Section 8-410 Contractor-Acquired Property**

### **Section 8-410.01 Purchase or Retention at Cost**

- (1) The Contracting Officer shall encourage contractors to purchase or retain contractor-acquired property at cost. However, the contractor shall not include any part of the cost of property purchased or retained in any claim for reimbursement against ATP. Under cost-reimbursement contracts, appropriate adjustments shall be made for previously reimbursed costs. When the property is for use on a continuing ATP contract or commercial operation, handling and transportation charges may be considered an allowable cost (included in the contractor's settlement proposal as "other costs" in the case of a termination); provided, that the charges are reasonable.
- (2) If a contractor purchases or retains contractor inventory for use on a continuing ATP contract that is subsequently terminated, the property shall be allocated to the continuing contract, even though its purchase would otherwise constitute undue anticipation of production schedules. If, as a result of the purchase or retention of property from a terminated contract for use on other ATP contracts, the contractor terminates subcontracts under the other ATP contracts, reasonable termination charges of the subcontracts may be included as an allocable cost under the contract that generated the excess property.

### **Section 8-410.02 Return to Suppliers**

The Contracting Officer shall encourage contractors to return allocable quantities of contractor-acquired property to Suppliers for full credit less either the Supplier's normal restocking charge or 25 percent of the cost, whichever is less. Contractors may be reimbursed for reasonable transportation, handling, and restocking charges but not for the cost of the returned property. Under cost-reimbursement contracts, appropriate adjustments shall be made for costs previously reimbursed.

### **Section 8-410.03 Cost-Reimbursement Contracts**

Under cost-reimbursement contracts, property purchased or retained by the contractor or returned to Suppliers shall not be reported on inventory schedules. The Contracting Officer shall periodically review such transactions to protect ATP's interests.

## **Section 8-411 Inventory Schedules**

### **Section 8-411.01 Submission**

- (1) When property no longer is needed to perform the contract, the contractor shall prepare

inventory schedules in accordance with the contract and instructions from the Contracting Officer and shall promptly submit the schedules to the Contracting Officer.

- (2) The certificate on the inventory schedule (which tenders title to the property) must be executed when contractor inventory is reported. The Prime Contract shall execute this certificate, except that for subcontractor termination inventory the subcontractor shall execute the certificate.

#### **Section 8-411.02 Common Items**

The contractor's inventory schedules shall not include any items that the contractor reasonably can use on other work without financial loss. However, the schedules shall include common items specified by the Contracting Officer for delivery to ATP or which are ATP-furnished property.

#### **Section 8-411.03 Acceptance**

- (1) Within 15 days after receipt of inventory schedules, the Contracting Officer shall review them, determine their acceptability, and request the contractor to correct any inadequate listings. Inventory schedules should not be rejected if the information is adequate for disposal purposes, even if complete cost data on work-in-process are not available. Rejection shall be limited, when possible, to specific items and shall not necessarily render the entire schedule unacceptable.
- (2) The Contracting Officer, with the assistance of other ATP personnel as necessary, shall verify that (a) the inventory is present at the location indicated, (b) the inventory is allocable to the contract, (c) the quantity and condition are correctly stated, and (d) the contractor has endeavored to divert items to other work or to return contractor-acquired property to the Supplier for appropriate credit. The Contracting Officer shall require the contractor promptly to correct any discrepancies on the inventory schedule or resubmit the schedule as necessary.

#### **Section 8-411.04 Withdrawals**

If, before final disposition, the contractor becomes aware that any items of contractor-acquired property listed in the inventory schedules are usable on other work without financial loss, the contractor shall purchase the items or retain them at cost and amend the inventory schedules and claim accordingly. Upon notifying the Contracting Officer, the contractor may purchase or retain at cost any other items of property included in the inventory schedules. Withdrawal of any ATP-furnished property is subject to the written approval of the Contracting Officer.

#### **Section 8-412 Scrap**

- (1) The contractor need not itemize scrap on inventory schedules if (a) the material is physically segregated in the contractor's plant and (b) the contractor submits a statement

describing the material, estimating its cost, and providing other information necessary for the Contracting Officer to verify whether the property is scrap. The contractor shall sort the scrap to the extent economically feasible to assure the highest sale proceeds.

- (2) The Contracting Officer shall review the schedules of property reported as scrap and, if necessary, physically inspect the property involved. If the Contracting Officer determines that any of the property is serviceable, usable, or salvageable, the contractor shall resubmit it on appropriate inventory schedules.

### **Section 8-413          Screening of Contractor Inventory**

Serviceable or usable property included in the contractor's inventory schedules that is not purchased or retained by the Prime Contractor subcontractor or returned to Suppliers shall be screened for use by ATP before disposition.

### **Section 8-414          Destruction or Abandonment**

- (1) Surplus property may be destroyed or abandoned only after every effort has been made to dispose of it by other authorized methods. Before authorizing destruction or abandonment, the Contracting Officer shall determine in writing that :
  - (a) the property has no commercial value and no value to ATP;
  - (b) the estimated cost of care and handling is greater than the probable sale price; or
  - (c) because of its nature, the property constitutes a danger to public health, safety, or welfare.
- (2) Unless permitted by the contract, no contractor inventory shall be abandoned on the contractor's premises without the contractor's written consent.

### **Section 8-415          Removal and Storage**

#### **Section 8-415.01      General**

Contractor inventory shall be removed from the contractor's premises as soon as possible to preclude storage expenses.

#### **Section 8-415.02      Special Storage at Contractor's Risk**

When the contractor finds it necessary to remove property from its premises, the contractor may, with the concurrence of the Contracting Officer, store property in a warehouse or other storage location on or off the contractor's premises. Storage shall in no way modify the contractor's responsibility for the property. The expense of storage, including any cost incident

to the transportation to and from the storage area, normally shall be borne by the contractor and shall not be charged directly or indirectly to ATP contracts unless the Contracting Officer determines that the storage is for the convenience of ATP.

#### **Section 8-415.03 Special Storage at ATP's Expense**

Contractor inventory may be stored at ATP's expense only when the Contracting Officer determines that it should be retained in storage for anticipated use. When the Contracting Officer recommends that ATP execute a storage agreement with the contractor, the request shall be accompanied with adequate data to justify the agreement (e.g., property to be stored, storage period, and cost to ATP). If the contractor will not agree to storage on its premises, the Contracting Officer shall submit adequate information to permit a decision by ATP for storage in an ATP or commercial facility (e.g., storage space required; necessary packing, crating, and shipping services; and information as to available ATP or commercial storage facilities in the local area).

#### **Section 8-416 Property Disposal Determinations**

Written determinations supporting abandonment, destruction, or other appropriate disposition shall be made by the Contracting Officer.

#### **Section 8-417 Subcontractor Inventory**

- (1) The disposal policies and procedures in this section are applicable to contractor inventory in the possession of subcontractors, except inventory under terminated subcontracts for which the Contracting Officer has authorized the contractor to conclude settlements.
- (2) Subcontractors in all tiers shall prepare inventory schedules in accordance with the requirements of this section. Forms prescribed for use by prime contractors may be used by subcontractors, but their use is not required if substantially equivalent information is provided. Subcontractor inventory and any disposal recommendations (including scrap recommendations) shall be reported through the next-higher-tier subcontractor to the contractor, who is responsible for reporting property to the Contracting Officer. The Prime Contract and each subcontractor are responsible for review and approval of inventory schedules submitted by their respective next-lower-tier subcontractors.
- (3) In the interest of expediting disposition of termination inventory, the Contracting Officer may authorize subcontractors to submit their next-lower-tier subcontractors' inventory schedules directly to the Prime Contract for transmittal to the Contracting Officer for review and disposition instructions. Any rights which the Prime Contract has or acquires in the inventory of first-tier or lower-tier subcontractors shall, to the extent directed by the Contracting Officer, be exercised for the benefit of ATP in accordance with the provisions of the prime contract.

#### **Section 8-418 Accounting for Contractor Inventory**

Following disposition of all contractor inventory, and after due application of proceeds, the Contracting Officer shall prepare an accounting for all property reported by the contractor and its disposition. The report shall indicate any inventory lost, damaged, destroyed, or otherwise unaccounted for, as well as any changes in quantity or value of inventory made by the contractor after submission of the initial schedules.

## **Section 8-500          Quality Assurance**

### **Section 8-501          Scope of Section**

This section describes policies and procedures to guide the provisions intended to be included in a Procurement and the applicable contract to ensure that supplies and services acquired under that contract conform to the contract's quality and quantity requirements and policies and procedures for implementation and administration of those provisions by ATP. Included are inspection, acceptance, warranty, and other measures associated with quality requirements. Modified or alternative terms may be included if authorized by the Contracting Officer (where such discretion is provided for in this Section 8-500) or by the [Procurement Director and General Counsel] in accordance with Sections 1-101(4) and 2-301, subject in each case to compliance with applicable law and any applicable Federal Requirements.

### **Section 8-502          Definitions**

- (1) "Acceptance," as used in this section, means the act of an authorized representative of ATP by which ATP, for itself or as agent of another, assumes ownership of existing identified supplies tendered or approves specific services rendered as partial or complete performance of the contract.
- (2) "Contract quality requirements" means the technical requirements in the contract relating to the quality of the product or service and those contract clauses prescribing inspection (and other quality controls incumbent on the contractor) to ensure that the product or service conforms to the contractual requirements.
- (3) "ATP contract quality assurance" means the various functions, including inspection, performed by ATP to determine whether a contractor has fulfilled the contract obligations pertaining to quality and quantity.
- (4) "Inspection" means examining and testing supplies or services (including, when appropriate, raw materials, components, and intermediate assemblies) to determine whether they conform to contract requirements.
- (5) "Off-the-shelf item" means an item produced and placed in stock by a contractor, or stocked by a distributor, before receiving orders or contracts for its sale.
- (6) "Testing" means that element of inspection that determines the properties or elements,



including functional operation of supplies or their components, by the application of established objective principles and procedures.

**Section 8-503 Guidelines**

ATP shall ensure that:

- (1) contracts include inspection and other quality requirements, including warranty clauses when appropriate, that are determined necessary to protect ATP's interest;
- (2) supplies or services tendered by contractors meet contract requirements;
- (3) ATP contract quality assurance is conducted before acceptance (except as otherwise provided in this section) by or under the direction of ATP personnel;
- (4) no contract precludes ATP from performing inspection;
- (5) nonconforming supplies or services are rejected, except as otherwise provided in the Procurement Policy and Guidelines; and
- (6) the quality assurance and acceptance services of other agencies are used when this will be effective, economical, or otherwise in ATP's interest.

**Section 8-504 Contracting Officer Responsibilities**

Contracting Officers are responsible for:

- (1) obtaining specifications for inspection, testing, and other contract quality requirements essential to ensure the integrity of the supplies or services;
- (2) including in solicitations and contracts the appropriate requirements for the contractor's control of quality for the supplies or services to be acquired;
- (3) verifying that the contractor fulfills the contract quality requirements;
- (7) developing and applying efficient procedures for performing ATP contract quality assurance actions under the contract;
- (5) performing all actions necessary to verify whether the supplies or services conform to contract quality requirements;
- (6) maintaining, as part of the performance records of the contract, suitable records reflecting:
  - (a) the nature of ATP's contract quality assurance actions, including, when

appropriate, the number of observations made and the number and type of defects; and

- (b) decisions regarding the acceptability of the products, the processes, and the requirements, as well as action to correct defects;
- (7) noting any defects observed in design or technical requirements, including contract quality requirements; and
- (8) recommending any changes necessary to the contract, specifications, instructions, or other requirements that will provide more effective operations or eliminate unnecessary costs.

### **Section 8-505 Contractor Responsibilities**

- (1) The contractor is responsible for carrying out its obligations under the contract by:
- (a) controlling the quality of supplies or services;
  - (b) tendering to ATP for acceptance only those supplies or services that conform to contract requirements;
  - (c) ensuring that vendors or Suppliers of raw materials, parts, components, subassemblies, etc., have an acceptance quality control system; and
  - (d) maintaining substantiating evidence, when required by the contract, that the supplies or services conform to contract quality requirements and furnishing such information to ATP as required.
- (2) The contractor may be required to provide and maintain an inspection system or program for the control of quality that is acceptable to ATP.
- (3) The control of quality by the contractor may relate to, but is not limited to:
- (a) manufacturing processes, to ensure that the product is produced to, and meets, the contract's technical requirements;
  - (b) drawings, specifications, and engineering changes, to ensure that manufacturing methods and operations meet the contract's technical requirements;
  - (c) testing and examination, to ensure that practices and equipment provide the means for optimum evaluation of the characteristics subject to inspection;
  - (d) reliability and maintainability assessment (life, endurance, and continued



readiness);

- (e) fabrication and delivery of products, to ensure that only conforming products are tendered to ATP;
  - (f) technical documentation, including drawings, specifications, handbooks, manuals, and other technical publications;
  - (g) preservation, packaging, packing, and marking; and
  - (h) procedures and processes for services to ensure that services meet contract performance requirements.
- (4) The contractor is responsible for performing all inspections and tests required by the contract except those specifically reserved for performance by ATP.

#### **Section 8-506 Contract Quality Requirements**

- (1) The Contracting Officer shall include the appropriate quality requirements in the solicitation and contract. The type and extent of contract quality requirements needed depends on the particular acquisition and may range from inspection at time of acceptance to a requirement for the contractor's implementation of a comprehensive program for controlling quality.
- (2) When feasible, solicitations and contracts may provide for alternative, but substantially equivalent, inspection methods to obtain wide competition and low cost. The Contracting Officer also may authorize contractor-recommended alternatives when in ATP's interest.
- (3) Although contracts generally make contractors responsible for performing inspection before tendering supplies to ATP, there are circumstances in which contracts will provide for specialized inspections to be performed solely by ATP. Among circumstances of this kind are:
- (a) tests that require use of specialized test equipment or facilities not ordinarily available in Suppliers' plants or commercial laboratories (e.g., unusual environmental tests and simulated service tests); and
  - (b) contracts that require ATP testing for first article approval.
- (4) Except as otherwise specified by the contract, required contractor testing may be performed in the contractor's or subcontractor's laboratory or testing facility, or in any other laboratory or testing facility acceptable to ATP.

#### **Section 8-506.01 Types of Contract Quality Requirements**

Contract quality requirements fall into the three general categories described in Section 8-506.02 through Section 8-506.04, depending on the extent of quality assurance needed by ATP for the acquisition involved.

**Section 8-506.02 Reliance on Inspection by Contractor**

- (1) Except as specified in (2), below, ATP shall rely on the contractor to accomplish all inspection and testing needed to ensure that supplies or services acquired under small purchases conform to contract quality requirements before they are tendered to ATP.
- (2) ATP shall not rely on inspection by the contractor if the Contracting Officer determines that ATP has a need to test the supplies or services in advance of their tender for acceptance or to pass upon the adequacy of the contractor's internal work processes. In making the determination, the Contracting Officer shall consider :
  - (a) the nature of the supplies and services being purchased and their intended use;
  - (b) the potential losses in the event of defects;
  - (c) the likelihood of uncontested replacement or correction of defective work; and
  - (d) the cost of detailed ATP inspection.

**Section 8-506.03 Standard Inspection Requirements**

- (1) Standard inspection requirements are contained in the clauses prescribed in Chapter 6 of the Procurement Policy and Guidelines and in the product and service specifications that are included in solicitations and contracts.
- (2) The clauses referred to in (1) above:
  - (a) require the contractor to provide and maintain an inspection system that is acceptable to ATP;
  - (b) give ATP the right to make inspections and tests while work is in process; and
  - (c) require the contractor to keep complete, and make available to ATP, records of its inspection work.

**Section 8-506.04 Higher-Level Contract Quality Requirements**

- (1) Higher-level contract quality requirements are appropriate in solicitations and contracts for complex and critical items or when the technical requirements of the contract are such as to require:

- (a) control of such things as work operations, in-process controls, and inspection; or
  - (b) attention to such factors as organization, planning, work instructions, and documentation control.
- (2) If it is in ATP's interest to require that higher-level contract quality requirements be maintained, the contract shall require the contractor to comply with an ATP-specified inspection system, quality control system, or quality program. The Contracting Officer shall consult technical personnel before including one of these specifications in a contract.

#### **Section 8-506.05 Criteria for Use of Contract Quality Requirements**

The extent of contract quality requirements, including contractor inspection, required under a contract usually shall be based upon the classification of the contract item (supply or service) as determined by its technical description, complexity, and the criticality of its application.

- (1) Contract items may be technically classified as:
- (a) commercial (described in commercial catalogs, drawings, or industrial standards);
  - (b) ATP-specified (described in ATP drawings and specifications); or
  - (c) off-the-shelf.
- (2) Complex items have quality characteristics, not wholly visible in the end item, for which contractual conformance must be established progressively through precise measurements, tests, and controls applied during purchasing, manufacturing, performance, assembly, and functional operation either as an individual item or in conjunction with other items. Noncomplex items have quality characteristics for which simple measurement and test of the end item are sufficient to determine conformance to contract requirements.
- (3) A critical application of an item is one in which the failure of the item could injure personnel or jeopardize a vital program of ATP. A critical item may be either peculiar (meaning it has only one application) or common (meaning it has multiple applications). A noncritical application is any other application. Noncritical items also may be either peculiar or common.

#### **Section 8-507 ATP Contract Quality Assurance**

ATP contract quality assurance shall be performed at such times (including any stage of manufacture or performance of services) and places (including subcontractors' plants) as may be necessary to determine that the supplies or services conform to contract requirements. If a

contract provides for delivery and acceptance at destination and ATP inspects the supplies at a place other than destination, the supplies shall not ordinarily be reinspected at destination but should be examined for quantity, damage in transit, and possible substitution or fraud. ATP may prescribe the use of inspection approval or disapproval stamps to identify and control supplies and material that have been inspected for conformance with contract quality requirements.

#### **Section 8-507.01 Quality Assurance at Source**

ATP shall perform contract quality assurance, including inspection, at source if :

- (1) performance at any other place would require uneconomical disassembly or destructive testing;
- (2) considerable loss would result from the manufacture and shipment of unacceptable supplies or from the delay in making necessary corrections;
- (3) special required instruments, gauges, or facilities are available only at source;
- (4) performance at any other place would destroy or require the replacement of costly special packing and packaging;
- (5) a higher-level contractor quality requirement is included in the contract;
- (6) ATP inspection during contract performance is essential; or
- (7) it is determined for other reasons to be in ATP's interest.

#### **Section 8-507.02 Quality Assurance at Destination**

ATP contract quality assurance that can be performed at destination normally is limited to inspection of the supplies or services. Inspection shall be performed at destination under the following circumstances :

- (1) supplies are purchased off-the-shelf and require no technical inspection;
- (2) necessary testing equipment is located only at destination;
- (3) the contract is for services performed at destination; or
- (4) it is determined for other reasons to be in ATP's interest.

#### **Section 8-507.03 Quality Assurance of Small Purchases**

- (1) In determining the type and extent of ATP contract quality assurance to be required for small purchases, the Contracting Officer shall consider the criticality of application of the supplies or services, the amount of possible losses, and the likelihood of uncontested

replacement of defective work. Unless a special situation exists, ATP shall inspect small purchases at destination and only for type and kind; quantity; damage; operability (if readily determinable); and preservation, packaging, packing, and marking, if applicable.

- (2) Special situations may require more detailed quality assurance and the use of a standard inspection or higher-level contract quality requirement. These situations include contracts for items having critical applications. Detailed ATP inspection may be limited to those characteristics that are special or likely to cause harm to personnel or property. If repetitive purchases of the same item are made from the same manufacturer with a history of defect-free work, ATP inspection may be reduced to a periodic check of occasional purchases.

#### **Section 8-507.04 Subcontracts**

- (1) ATP contract quality assurance on subcontracted supplies or services shall be performed only when required in ATP's interest. The primary purpose is to assist the Contracting Officer in determining the conformance of subcontracted supplies or services with contract requirements or to satisfy one or more of the factors included in (2), below. It does not relieve the Prime Contract of any responsibilities under the contract. When appropriate, the Prime Contract shall be re-quested to arrange for timely ATP access to the subcontractor's facility.
- (2) ATP shall perform quality assurance at the subcontract level when :
  - (a) the item is to be shipped from the subcontractor's plant to the using activity and inspection at source is required;
  - (b) the conditions for quality assurance at source are applicable;
  - (c) the contract specifies that certain quality assurance functions, which can be performed only at the subcontractor's plant, are to be performed by ATP; or
  - (d) it is otherwise required by the contract or determined to be in ATP's interest.
- (3) Supplies or services for which certificates, records, reports, or similar evidence of quality are available at the prime contractor's plant shall not be inspected at the subcontractor's plant, except occasionally to verify this evidence or when required under (2), above.
- (4) All oral and written statements and contract terms and conditions relating to ATP quality assurance actions at the subcontract level shall be worded so as not to:
  - (a) affect the contractual relationship between the Prime Contract and ATP or between the Prime Contract and the subcontractor;
  - (b) establish a contractual relationship between ATP and the subcontractor; or

- (c) constitute a waiver of ATP's right to accept or reject the supplies or services.

#### **Section 8-507.05 Nonconforming Supplies or Services**

- (1) The Contracting Officer should reject supplies or services not conforming in all respects to contract requirements. In those instances where deviation from this Policy is found to be in ATP's interest, such supplies or services may be accepted only as authorized in this section.

- (2) Contractors ordinarily shall be given an opportunity to correct or replace nonconforming supplies or services when this can be accomplished within the required delivery schedule.

Unless the contract specifies otherwise (as may be the case in some cost-reimbursement contracts), correction or replacement shall be without additional cost to ATP. The Inspection Clause for fixed price contracts (6-202.05) reserves to ATP the right to charge the contractor the cost of ATP reinspection and retests because of prior rejection.

- (3) In circumstances not covered by (2), above, the Contracting Officer ordinarily shall reject supplies or services when the nonconformance adversely affects safety, health, reliability, durability, performance, interchangeability of parts or assemblies, weight or appearance (where a consideration), or any other basic objective of the specification. However, there may be circumstances (e.g., reasons of economy or urgency) when acceptance of such supplies or services is determined by the Contracting Officer to be in ATP's interest. The Contracting Officer shall make this determination based upon :

- (a) advice of the technical activity that the material is safe to use and will perform its intended purpose;
- (b) information regarding the nature and extent of the nonconformance;
- (c) a request from the contractor for acceptance of the supplies or services (if feasible);
- (d) a recommendation for acceptance or rejection, with supporting rationale; and
- (e) the contract adjustment considered appropriate, including any adjustment offered by the contractor.

- (4) The Contracting Officer shall discourage the repeated tender of nonconforming supplies or services, including those with only minor nonconformances, by appropriate action, such as rejection and documenting the contractor's performance record.

- (5) Each contract under which nonconforming supplies or services are accepted as authorized

in (3), above, shall be modified to provide for an equitable price reduction or other consideration. However, when supplies or services involving minor nonconformances are accepted, the contract shall not be modified unless (a) it appears that the savings to the contractor in fabricating the nonconforming supplies or performing the nonconforming services will exceed the cost to ATP of processing the modification, or (b) ATP's interests otherwise require a contract modification.

- (6) Notices of rejection shall include the reasons for rejection and be furnished promptly to the contractor. The notice shall be in writing if :
- (a) the supplies or services have been rejected at a place other than the contractor's plant;
  - (b) the contractor persists in offering nonconforming supplies or services for acceptance; or
  - (c) delivery or performance was late without excusable cause.

### **Section 8-508      Acceptance**

Acceptance constitutes acknowledgment that the supplies or services conform with applicable contract quality and quantity requirements, except as provided in this section and subject to the terms and conditions of the contract. Acceptance may take place before delivery, at the time of delivery, or after delivery, depending on the provisions of the terms and conditions of the contract. Supplies or services ordinarily shall not be accepted before completion of ATP contract quality assurance actions. Acceptance ordinarily shall be evidenced by execution of an acceptance certificate on an inspection or receiving report form or commercial shipping document/packing list.

#### **Section 8-508.01      Responsibility for Acceptance**

Acceptance of supplies or services is the responsibility of the Contracting Officer.

#### **Section 8-508.02      Place of Acceptance**

Each contract shall specify the place of acceptance. Contracts that provide for ATP contract quality assurance at source ordinarily shall provide for acceptance at source. Contracts that provide for ATP contract quality assurance at destination ordinarily shall provide for acceptance at destination. Supplies accepted at a place other than destination shall not be reinspected at destination for acceptance purposes but should be examined at destination for quantity, damage in transit, and possible substitution or fraud.

#### **Section 8-508.03      Certificate of Conformance**

A certificate of conformance may be used in certain instances instead of source inspection (whether the contract calls for acceptance at source or destination) at the discretion of the Contracting Officer if the following conditions apply:

- (a) acceptance on the basis of a contractor's certificate of conformance is in ATP's interest;
- (b) small losses would be incurred in the event of a defect; or
- (c) because of the contractor's reputation or past performance, it is likely that the supplies or services furnished will be acceptable and any defective work would be replaced, corrected, or repaired without contest (in no case shall ATP's right to inspect supplies under the inspection provisions of the contract be prejudiced).

**Section 8-508.04 Transfer of Title and Risk of Loss**

- (1) Title to supplies shall pass to ATP upon formal acceptance, regardless of when or where ATP takes physical possession, unless the contract specifically provides for earlier passage of title.
- (2) Unless the contract specifically provides otherwise, risk of loss of or damage to supplies shall remain with the contractor until, and shall pass to ATP upon :
  - (a) delivery of the supplies to a carrier if transportation is f.o.b. origin; or
  - (b) acceptance by ATP or delivery of the supplies to ATP at the destination specified in the contract, whichever is later, if transportation is f.o.b. destination.
- (3) Section (b), above, shall not apply to supplies that so fail to conform to contract requirements as to give a right of rejection. The risk of loss of or damage to such nonconforming supplies remains with the contractor until cure or acceptance. After cure or acceptance, Section (b), above, shall apply.
- (4) Under Section (b), above, the contractor shall not be liable for loss of or damage to supplies caused by the negligence of officers, agents, or Employees of ATP acting within the scope of their employment.

**Section 8-600 Warranties**

**Section 8-601 Definitions**

"Correction," as used in this section, means the elimination of a defect.

"Warranty," as used in this section, means a promise or affirmation given by a contractor to ATP



regarding the nature, usefulness, or condition of the supplies or performance of services furnished under the contract.

**Section 8-602          General**

- (1) The principal purposes of a warranty in an ATP contract are (a) to delineate the rights and obligations of the contractor and ATP for defective items and services and (b) to foster quality performance.
- (2) Generally, a warranty should provide :
  - (a) a contractual right for the correction of defects notwithstanding any other requirement of the contract pertaining to acceptance of the supplies or services by ATP; and
  - (b) a stated period of time or use, or the occurrence of a specified event, after acceptance by ATP to assert a contractual right for the correction of defects.
- (3) The benefits to be derived from a warranty must be commensurate with the cost of the warranty to ATP.

**Section 8-603          Criteria for Use of Warranties**

The use of warranties is not mandatory. In determining whether a warranty is appropriate for a specific acquisition, the Contracting Officer shall consider the factors described in this section:

- (1) Nature and Use of the Supplies or Services. This includes such factors as :
  - (a) complexity and function;
  - (b) degree of development;
  - (c) state of the art;
  - (d) end use;
  - (e) difficulty in detecting defects before acceptance; and
  - (f) potential harm to ATP if the item is defective.
- (2) Cost. Warranty costs arise from :
  - (a) the contractor's charge for accepting the deferred liability created by the warranty; and

- (b) ATP administration and enforcement of the warranty (see Section (3), below).
- (3) Administration and Enforcement. ATP's ability to enforce the warranty is essential to the effectiveness of any warranty. There must be some assurance that an adequate administrative system for reporting defects exists or can be established. The adequacy of a reporting system may depend upon such factors as the :
  - (a) nature and complexity of the item;
  - (b) location and proposed use of the item;
  - (c) storage time for the item;
  - (d) distance from the source of the item;
  - (e) difficulty in establishing existence of defects; and
  - (f) difficulty in tracing responsibility for defects.
- (4) Trade Practice. In many instances, an item is customarily warranted in the trade, and, as a result of that practice, the cost of an item to ATP will be the same whether or not a warranty is included. In those instances, it would be in ATP's interest to include such a warranty.
- (5) Reduced Requirements. The contractor's charge for assumption of added liability may be partially or completely offset by reducing ATP's contract quality assurance requirements where the warranty provides adequate assurance of a satisfactory product.

**Section 8-604      Limitations**

- (1) Warranty clauses shall not limit ATP's rights under an inspection clause in relation to latent defects, fraud, or gross mistakes that amount to fraud.
- (2) Warranty clauses shall provide that the warranty applies notwithstanding inspection and acceptance or other clauses or terms of the contract.

**Section 8-605      Warranty Terms and Conditions**

- (1) To facilitate the pricing and enforcement of warranties, the Contracting Officer shall ensure that warranties clearly state the:
  - (a) exact nature of the item and its components and characteristics that the contractor warrants;

- (b) extent of the contractor's warranty, including all of the contractor's obligations to ATP for breach of warranty;
  - (c) specific remedies available to ATP; and
  - (d) scope and duration of the warranty.
- (2) The Contracting Officer shall consider the following guidelines when preparing warranty terms and conditions.
- (a) Extent of Contractor Obligations.
    - (i) Generally, the contractor's obligations under warranties extend to all defects discovered during the warranty period but do not include damage caused by ATP. When a warranty for the entire item is not advisable, a warranty may be required for a particular aspect of the item that may require special protection (e.g., installation, components, accessories, subassemblies preservation, packaging, and packing, etc.).
    - (ii) If ATP specifies the design of the end item and its measurements, tolerances, materials, tests, or inspection requirements, the contractor's obligations for correction of defects usually shall be limited to defects in material and workmanship or failure to conform to specifications. If ATP does not specify the design, the warranty extends also to the usefulness of the design.
    - (iii) If express warranties are included in a contract (except contracts for commercial items), all implied warranties of merchantability and fitness for a particular purpose shall be negated by the use of specific language in the clause.
  - (b) Remedies.
    - (i) Normally, a warranty shall provide as a minimum, that ATP may (A) obtain an equitable adjustment of the contract, or (B) direct the contractor to repair or replace the defective items at the contractor's expense.
    - (ii) If it is not practical to direct the contractor to make the repair or replacement, or, because of the nature of the item the repair or replacement does not afford an appropriate remedy to ATP, the warranty should provide alternate remedies, such as authorizing ATP to:
      - (A) retain the defective item and reduce the contract price by an amount equitable under the circumstances; or

- (B) arrange for the repair or replacement of the defective item, by ATP or by another source, at the contractor's expense.
- (iii) If it can be foreseen that it will not be practical to return an item to the contractor for repair, to remove it to an alternate source for repair, or to replace the defective item, the warranty should provide that ATP may repair, or require the contractor to repair, the item in place at the contractor's expense. The contract shall provide that, in the circumstance where ATP is to accomplish the repair, the contractor will furnish at the place of delivery the material or parts and the installation instructions required to successfully accomplish the repair.
- (iv) Unless provided otherwise in the warranty, the contractor's obligation to repair or replace the defective item, or to agree to an equitable adjustment of the contract, shall include responsibility for the costs of furnishing all labor and material to (A) reinspect items that ATP reasonably expected to be defective, (B) accomplish the required repair or replacement of defective items, and (C) test, inspect, package, pack, and mark repaired or replaced items.
- (v) If repair or replacement of defective items is required, the contractor generally shall be required by the warranty to bear the expense of transportation for returning the defective item from the place of delivery specified in the contract (irrespective of the f.o.b. point or the point of acceptance) to the contractor's plant and subsequent return. When defective items are returned to the contractor from other than the place of delivery specified in the contract, or when ATP exercises alternate remedies, the contractor's liability for transportation charges incurred shall not exceed an amount equal to the cost of transportation by the usual commercial method of shipment between the place of delivery specified in the contract and the contractor's plant and subsequent return.
- (c) Duration of the Warranty. The time period or duration of the warranty must be clearly specified and shall be established after consideration of such factors as (i) the estimated useful life of the item, (ii) the nature of the item, including storage or shelf-life, and (iii) trade practice. The period specified shall not extend the contractor's liability for patent defects beyond a reasonable time after acceptance by ATP.
- (d) Notice. The warranty shall specify a reasonable time for furnishing notice to the contractor regarding the discovery of defects. This notice period (which shall apply to all defects discovered during the warranty period) shall be long enough to ensure that ATP has adequate time to give notice to the contractor. The Contracting Officer shall consider the following factors when establishing the notice period:

- (i) the time necessary for ATP to discover the defects;
  - (ii) the time reasonably required for ATP to take necessary administrative steps and make a timely report of discovery of the defects to the contractor; and
  - (iii) the time required to discover and report defective replacements.
- (e) Markings. The packaging and preservation requirements of the contract shall require the contractor to stamp or mark the supplies delivered or otherwise furnish notice with the supplies of the existence of the warranty. The purpose of the markings or notice is to inform ATP personnel who store, stock, or use the supplies that the supplies are under warranty. Markings may be brief but should include (i) a brief statement that a warranty exists, (ii) the substance of the warranty, (iii) its duration, and (iv) whom to notify if the supplies are found to be defective. For commercial items, the contractor's trade practice in warranty marking is acceptable if sufficient information is presented for supply personnel and users to identify warranted supplies.
- (f) Consistency. The Contracting Officer shall ensure that the Warranty Clause and any other warranty conditions in the contract (e.g., in the specifications or in the Inspection Clause) are consistent. To the extent practicable, all of the warranties to be contained in the contract should be expressed in the warranty clause.

#### **Section 8-606          Warranties of Commercial Items**

If a warranty of commercial items is appropriate, the Contracting Officer may include a warranty of supplies clause modified for commercial items. More appropriate warranty language may be included if the Contracting Officer determines that ATP's planned usage of the item is inconsistent with the item's normal usage or that ATP's specifications have substantially altered the item. ATP may adopt the contractor's standard commercial warranty if the Contracting Officer determines it is not inconsistent with the rights that would be afforded ATP under a warranty of supplies clause or other terms of the contract.

#### **Section 8-607          Contract Clauses**

The clauses and alternates prescribed in the appropriate sections of Chapter 6 may be used in solicitations and contracts in which inclusion of warranty coverage is appropriate. However, because of the many situations that may influence the warranty terms and conditions appropriate to a particular acquisition, the Contracting Officer may vary the terms and conditions of the clauses and alternates to the extent necessary. The alternates prescribed in this section address the clauses; however, the conditions pertaining to each alternate must be considered if the terms and conditions are varied to meet a particular need.

## **Section 8-700 Termination of Contracts**

### **Section 8-701 Scope of Section**

This section establishes policies and procedures relating to the inclusion in a Procurement and the applicable contract of provisions relating to the complete or partial termination of contracts for the convenience of ATP or for default and policies and procedures for implementation and administration of those provisions by ATP. It includes instructions for using termination and settlement forms. Modifications to these policies and procedures may be authorized by the Contracting Officer (where such discretion is provided for in this Section 8-700) or by the [Procurement Director and General Counsel] in accordance with Sections 1-101(4) and 2-301, subject in each case to compliance with applicable law and any applicable Federal Requirements.

### **Section 8-702 Definitions**

- (1) "Continued portion of the contract," as used in this section, means the portion of a partially terminated contract that the contractor must continue to perform.
- (2) "Effective date of termination" means the date on which the notice of termination requires the contractor to stop performance under the contract. If the termination notice is received by the contractor subsequent to the date fixed for termination, then the effective date of termination means the date the notice is received.
- (3) "Other work," as used in this section, means any current or scheduled work of the contractor, whether ATP or commercial, other than work related to the terminated contract.
- (4) "Partial termination" means the termination of a part, but not all, of the work that has not been completed and accepted under a contract.
- (5) "Settlement agreement," as used in this section, means a written agreement in the form of an amendment to a contract settling all or a severable portion of a settlement proposal.
- (6) "Settlement proposal," as used in this section, means a proposal for effecting settlement of a contract terminated in whole or in part submitted by a contractor or subcontractor in the form, and supported by the data, required by this section.
- (7) "Terminated portion of the contract" means the portion of a terminated contract that relates to work or end items not completed and accepted before the effective date of termination that the contractor is not to continue to perform. For construction contracts that have been completely terminated for convenience, it means the entire contract, notwithstanding the completion of, and payment for, individual items of work before termination.

- (8) "Unsettled contract change" means any contract change or contract term for which a definitive modification is required but has not been executed.

### **Section 8-703      Applicability**

- (1) This section applies to contracts that provide for termination for the convenience of ATP or for the default of the contractor.
- (2) Contractors shall use this section, unless inappropriate, to settle subcontracts terminated as a result of modification of prime contracts. The Contracting Officer shall use this section as a guide in evaluating settlements of subcontracts terminated for the convenience of a contractor whenever the settlement will be the basis of a proposal for reimbursement from ATP under a cost-reimbursement contract.
- (3) The Contracting Officer may use this section in determining an equitable adjustment resulting from a modification under the Changes Clause of any contract, except cost-reimbursement contracts.
- (4) When action to be taken or authority to be exercised under this section depends upon the "amount" of the settlement proposal, that amount shall be determined by deducting from the gross settlement proposed the amounts payable for completed items or work at the contract price and amounts for the settlement of subcontractor settlement proposals. Credits for retention or other disposal of termination inventory and amounts for advance or partial payments shall not be deducted.

### **Section 8-704      Termination Procedures and Settlements**

This section governs the:

- (1) authority and responsibility of the Contracting Officer to terminate contracts in whole or in part for the convenience of ATP or for default;
- (2) duties of the contractor and the Contracting Officer after issuance of the notice of termination;
- (3) general procedures for the settlement of terminated contracts; and
- (4) settlement agreements.

#### **Section 8-704.01      Authorities and Responsibilities**

- (1) The termination clauses or other contract clauses authorize the Contracting Officer to terminate contracts for convenience, or for default, and to enter into settlement agreements under this regulation.

- (2) The Contracting Officer shall terminate contracts, whether for default or convenience, only when it is in ATP's best interest. The Contracting Officer shall effect a no-cost settlement instead of issuing a termination notice when (a) it is known that the contractor will accept one, (b) ATP property was not furnished, and (c) there are no outstanding payments, debts due ATP, or other contractor obligations.
- (3) When the price of the undelivered balance of the contract is less than \$2,000, the contract normally should not be terminated for convenience but should be permitted to run to completion.
- (4) After the Contracting Officer issues a notice of termination, the Contracting Officer is responsible for negotiating any settlement with the contractor, including a no-cost settlement if appropriate. The Contracting Officer shall promptly schedule and complete audit reviews and negotiations.

#### **Section 8-704.02 Notice of Termination**

- (1) The Contracting Officer shall terminate contracts for convenience or default only by a written notice to the contractor. When the notice is mailed, it shall be sent by certified mail, return receipt requested. When the Contracting Officer arranges for hand delivery of the notice, a written acknowledgement shall be obtained from the contractor. The notice shall state –
  - (a) that the contract is being terminated for the convenience of ATP (or for default) under the contract clause authorizing the termination;
  - (b) the effective date of termination;
  - (c) the extent of termination;
  - (d) any special instructions; and
  - (e) the steps the contractor should take to minimize the impact on personnel if the termination, together with all other outstanding terminations, will result in a significant reduction in the contractor's work force.
- (2) The Contracting Officer simultaneously shall send the termination notice to the contractor and a copy to any known assignee, guarantor, or surety of the contractor.
- (3) The Contracting Officer may amend a termination notice to:
  - (a) correct non-substantive mistakes in the notice;
  - (b) add supplemental data or instructions; or



- (c) rescind the notice if it is determined that items terminated had been completed or shipped before the contractor's receipt of the notice.
- (4) Upon written consent of the contractor, the Contracting Officer may reinstate the terminated portion of a contract in whole or in part by amending the notice of termination if it has been determined in writing that:
  - (a) circumstances clearly indicate a requirement for the terminated items; and
  - (b) reinstatement is advantageous to ATP.

### **Section 8-704.03 Methods of Settlement**

Settlement of terminated cost-reimbursement contracts and fixed-price contracts terminated for convenience may be effected by (1) negotiated agreement, (2) determination by the Contracting Officer, (3) costing-out under vouchers for cost-reimbursement contracts, or (4) a combination of these methods. When possible, the Contracting Officer should negotiate a fair and prompt settlement with the contractor. The Contracting Officer shall settle a settlement proposal by determination only when it cannot be settled by agreement.

### **Section 8-704.04 Contracting Officer's Duties After Notice**

- (1) Consistent with the termination clause and the notice of termination, the Contracting Officer shall:
  - (a) direct the action required of the prime contractor;
  - (b) examine the settlement proposal of the Prime Contract and, when appropriate, the settlement proposals of subcontractors;
  - (c) promptly negotiate settlement with the contractor and enter into a settlement agreement; and
  - (d) promptly settle the contractor's settlement proposal by determination for the elements that cannot be agreed on, if unable to negotiate a complete settlement.
- (2) To expedite the settlement, the Contracting Officer may request specially qualified personnel to:
  - (a) assist in dealings with the contractor;
  - (b) advise on legal and contractual matters;

- (c) conduct accounting reviews and advise and assist on accounting matters; and
  - (d) perform the following functions regarding termination inventory:
    - (i) verify its existence;
    - (ii) determine qualitative and quantitative allocability;
    - (iii) make recommendations concerning serviceability;
    - (iv) undertake necessary screening and redistribution; and
    - (v) assist the contractor in accomplishing other disposition.
- (3) The Contracting Officer should promptly hold a conference with the contractor to develop a definite program for effecting the settlement. When appropriate in the judgment of the Contracting Officer, after consulting with the contractor, principal subcontractors should be requested to attend. Topics that should be discussed at the conference and documented include:
- (a) general principles relating to the settlement of any settlement proposal, including obligations of the contractor under the termination clause of the contract;
  - (b) extent of the termination, point at which work is stopped, and status of any plans, drawings, and information that would have been delivered had the contract been completed;
  - (c) status of any continuing work;
  - (d) obligation of the contractor to terminate subcontracts and general principles to be followed in settling subcontractor settlement proposals;
  - (e) names of subcontractors involved and the dates termination notices were issued to them;
  - (f) contractor personnel handling review and settlement of subcontractor settlement proposals and the methods being used;
  - (g) arrangements for transfer of title and delivery to ATP of any material required by ATP;
  - (h) general principles and procedures to be followed in the protection, preservation, and disposition of the contractor's and subcontractors' termination inventories, including the preparation of termination inventory schedules;

- (i) contractor accounting practices;
- (j) form in which to submit settlement proposals;
- (k) accounting review of settlement proposals;
- (l) any requirement for interim financing in the nature of partial payments;
- (m) tentative time schedule for negotiation of the settlement, including submission by the contractor and subcontractors of settlement proposals, termination inventory schedules, and accounting information schedules;
- (n) actions taken by the contractor to minimize impact upon Employees affected adversely by the termination; and
- (o) obligation of the contractor to furnish accurate, complete, and current cost or pricing data when the amount of a termination settlement agreement, or a partial termination settlement agreement plus the estimate to complete the continued portion of the contract exceeds the threshold in Section 3- 502.

#### **Section 8-704.05 Cleanup of Construction Site**

In the case of terminated Construction contracts, the Contracting Officer shall direct action to ensure the cleanup of the site, protection of serviceable materials, removal of hazards, and other action necessary to leave a safe and healthful site.

#### **Section 8-704.06 Settlement of Subcontract Proposals**

- (1) A subcontractor has no contractual rights against ATP upon the termination of a prime contract. A subcontractor may have rights against the Prime Contractor intermediate subcontractor with whom it has contracted. Upon termination of a prime contract, the Prime Contract and each subcontractor are responsible for the prompt settlement of the settlement proposals of their immediate subcontractors.
- (2) Termination for convenience clauses provide that, after receipt of a termination notice, the Prime Contract shall (unless directed otherwise by the Contracting Officer) terminate all subcontracts to the extent that they relate to the performance of prime work terminated. Therefore, prime contractors should include a termination clause in their subcontracts for their own protection.
- (3) The failure of a Prime Contract to include an appropriate termination clause in any subcontract, or to exercise the clause rights, shall not:
  - (a) affect ATP's right to require the termination of the subcontract; or

- (b) increase the obligation of ATP beyond what it would have been if the subcontract had contained an appropriate clause.

#### **Section 8-704.07 Settlement Agreements**

- (1) When a termination settlement has been negotiated and all required reviews have been obtained, the contractor and the Contracting Officer shall execute a settlement agreement. The settlement shall cover (a) any setoffs that ATP has against the contractor that may be applied against the terminated contract and (b) all settlement proposals of subcontractors, except proposals that are specifically excepted from the agreement and reserved for separate settlement.
- (2) The Contracting Officer shall, in the settlement agreement:
  - (a) reserve any rights or demands of the parties that are excepted from the settlement;
  - (b) ensure that the wording of the reservation does not create any rights for the parties beyond those in existence before execution of the settlement agreement;
  - (c) mark each applicable settlement agreement with "This settlement agreement contains a reservation" and retain the contract file until the reservation is removed;
  - (d) ensure that sufficient funds are retained to cover complete settlement of the reserved items; and
  - (e) at the appropriate time, prepare a separate settlement of reserved items and include it in a separate settlement agreement.
- (3) Before execution of a settlement agreement, the Contracting Officer shall determine the accuracy of ATP property account for the terminated contract. If there is property for which the contractor cannot account, the Contracting Officer shall reserve in the settlement agreement the rights of ATP regarding that property or make an appropriate deduction from the amount otherwise due the contractor.
- (4) The Contracting Officer shall execute a no-cost settlement agreement if (a) the contractor has not incurred costs for the terminated portion of the contract or the contractor is willing to waive the costs incurred, and (b) no amounts are due ATP under the contract.
- (5) The Contracting Officer should attempt to settle in one agreement all rights and liabilities of the parties under the contract except those arising from any continued portion of the contract. Generally, the Contracting Officer shall not attempt to make partial settlements covering particular items of the prime contractor's settlement proposal. However, when

a Contracting Officer cannot promptly complete settlement under the terminated contract, a partial settlement may be entered into if (a) the issues on which agreement has been reached are clearly severable from other issues and (b) the partial settlement will not prejudice ATP or the contractor's interests in disposing of the unsettled part of the settlement proposal.

- (6) If the contractor and Contracting Officer cannot agree on a termination settlement, or if a settlement proposal is not submitted within the period required by the termination clause, the Contracting Officer shall issue a determination of the amount due consistent with the termination clause, including any cost principles incorporated by reference. Before issuing a determination of the amount due the contractor, the Contracting Officer shall give the contractor at least 15 days' notice by certified mail (return receipt requested) to submit written evidence, so as to reach the Contracting Officer on or before a stated date, substantiating the amount previously proposed. The contractor has the burden of establishing, by proof satisfactory to the Contracting Officer, the amount proposed. The contractor may submit vouchers, verified transcripts of books of account, affidavits, audit reports, and other documents as desired. The Contracting Officer may request the contractor to submit additional documents and data and may request appropriate accountings, investigations, and audits. The Contracting Officer may accept copies of documents and records without requiring original documents, unless there is a question of authenticity. The Contracting Officer may hold any conferences considered appropriate to confer with the contractor, obtain additional information from ATP personnel or from independent experts, or to consult persons who have submitted affidavits or reports.
- (7) After reviewing the information available, the Contracting Officer shall determine the amount due and shall transmit a copy of the determination to the contractor by certified mail (return receipt requested) or by any other method that provides evidence of receipt. The transmittal letter shall advise the contractor that the determination is a final decision from which the contractor may appeal under the Disputes Clause, except as shown in Section (9), below. The determination shall specify the amount due the contractor and will be supported by detailed schedules. The Contracting Officer shall explain each major item of disallowance. The Contracting Officer need not reconsider any other action relating to the terminated portion of the contract that was ratified or approved by the Contracting Officer or an- other contracting officer.
- (8) The Contracting Officer shall retain all written evidence and other data relied upon in making a determination, except that copies of original books of account need not be made. The Contracting Officer shall return books of account, together with other original papers and documents, to the contractor within a reasonable time.
- (9) The contractor may appeal, under the Disputes Clause, any settlement by determination, except when the contractor has failed to submit the settlement proposal within the time provided in the contract and failed to request an extension of time. The pendency of an appeal shall not affect the right of the Contracting Officer to settle the settlement

proposal or any part by negotiation with the contractor at any time before the appeal is decided.

- (10) The Contracting Officer shall, at the conclusion of negotiations, prepare a memorandum containing the principal elements of the settlement for inclusion in the termination case file. If the settlement was negotiated on the basis of individual items, the Contracting Officer shall specify the factors considered for each item. If the settlement was negotiated on an overall lump-sum basis, the Contracting Officer need not evaluate each item or group of items individually but shall support the total amount of the recommended settlement in reasonable detail. The memorandum shall include explanations of matters involving differences and doubtful questions settled by agreement and the factors considered.

#### **Section 8-704.08 Partial Payments**

- (1) If the contract authorizes partial payments on settlement proposals before settlement, a Prime Contract may request them at any time after submission of interim or final settlement proposals. ATP will process applications for partial payments promptly. A subcontractor shall submit its application through the Prime Contract which shall attach its own invoice and recommendations to the subcontractor's application. Partial payments to a subcontractor shall be made only through the Prime Contract and only after the Prime Contract has submitted its interim or final settlement proposal. Except for undelivered acceptable finished products, partial payments shall not be made for profit or fee claimed under the terminated portion of the contract. In exercising discretion on the extent of partial payments to be made, the Contracting Officer shall consider the diligence of the contractor in settling with subcontractors and in preparing its own settlement proposal.
- (2) Before approving any partial payment, the Contracting Officer shall obtain any desired accounting, engineering, or other specialized reviews of the data submitted in support of the contractor's settlement proposal. If the reviews and the Contracting Officer's examination of the data indicate that the requested partial payment is proper, reasonable payments may be authorized in the discretion of the Contracting Officer up to:
  - (a) 100% of the contract price, adjusted for undelivered acceptable items completed before the termination or later completed with the approval of the Contracting Officer;
  - (b) 100% of the amount of any subcontract settlement paid by the prime contractor, if the settlement was approved or ratified by the Contracting Officer;
  - (c) 90% of the direct cost of termination inventory, including costs of raw materials, purchased parts, supplies, and direct labor;
  - (d) 90% of other allowable costs (including settlement expense and manufacturing

and administrative indirect costs) allocable to the terminated portion of the contract and not included in subsections (a), (b), and (c), above; and

- (e) 100% of partial payments made to subcontractors under this section.
- (3) If any partial payment is made for completed end items or for costs of termination inventory, the Contracting Officer shall protect ATP's interest. This shall be done by obtaining title to the completed end items or termination inventory, or by the creation of a lien in favor of ATP paramount to all other liens, on the completed end items or termination inventory, or by other appropriate means.
- (4) The Contracting Officer shall deduct from the gross amount of any partial payment otherwise payable under subsection (2), above:
  - (a) all unliquidated balances of progress and advance payments (including interest) made to the contractor and which are allocable to the terminated portion of the contract; and
  - (b) the amounts of all credits arising from the purchase, retention, or sale of property, the costs of which are included in the application for payment.
- (5) The total amount of all partial payments shall not exceed the amount that will, in the opinion of the Contracting Officer, become due to the contractor because of the termination.
- (6) If the total of partial payments exceeds the amount finally determined due on the settlement proposal, the contractor shall repay the excess to ATP on demand, together with interest. However, interest will not be charged for any (a) excess payment attributable to a reduction in the settlement proposal because of retention or other disposition of termination inventory until 10 days after the date of the retention or disposition or a later date determined by the Contracting Officer, or (b) overpayment under cost-reimbursement research and development contracts without profit or fee if the overpayments are repaid to ATP within 30 days after demand.

#### **Section 8-704.09 Final Payment**

- (1) After execution of a settlement agreement, the contractor shall submit a voucher or invoice showing the amount agreed upon less any portion previously paid. The Contracting Officer shall attach a copy of the settlement agreement to the voucher or invoice and forward the documents for payment.
- (2) If the settlement is by determination and :
  - (a) there is no appeal within the allowed time, the contractor shall submit a voucher or invoice showing the amount determined due, less any portion previously paid;

or

- (b) there is an appeal, the contractor shall submit a voucher or invoice showing the amount finally determined due on the appeal, less any portion previously paid. Pending de-termination of any appeal, the contractor may submit vouchers or invoices for charges that are not directly involved with the portion being appealed, without prejudice to the rights of either party on the appeal.
- (3) In the case of construction contracts, before forwarding the final payment voucher, the Contracting Officer shall ascertain whether there are any outstanding labor violations. If so, the Contracting Officer shall determine the amount to be withheld from the final payment.
- (4) ATP shall not pay interest on the amount due under a settlement agreement or a settlement by determination. ATP may, however, pay interest on a successful contractor appeal from a Contracting Officer's determination under the Disputes Clause.

#### **Section 8-704.10 Cost Principles**

The cost principles and procedures in Chapter 7 shall be used in asserting, negotiating, or determining costs relevant to termination settlements under contracts.

#### **Section 8-705 Convenience Termination of Fixed-Price Contracts**

- (1) A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit and reasonable costs of settlement of the work terminated. Fair compensation is a matter of judgment and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The use of business judgment, as distinguished from strict accounting principles, should be the basis for a settlement.
- (2) The primary objective is to negotiate a settlement by agreement. The parties may agree upon a total amount to be paid the contractor without agreeing on or segregating the particular elements of costs or profit comprising this amount.
- (3) Cost and accounting data may provide guides, but are not rigid measures, for ascertaining fair compensation. In appropriate cases, costs may be estimated, differences compromised, and doubtful questions settled by agreement. Other types of data, criteria, or standards may furnish equally reliable guides to fair compensation. The amount of record keeping, reporting, and ac- counting related to the settlement of terminated contracts should be kept to a minimum compatible with the reasonable protection of the public interest.



**Section 8-705.01**     **Profit**

- (1) Subject to Section 8-705.02, the Contracting Officer shall allow profit on preparations made and work done by the contractor for the terminated portion of the contract but not on the settlement expenses. Anticipatory profits and consequential damages shall not be allowed. Profit for the contractor's efforts in settling subcontractor proposals shall not be based on the dollar amount of the subcontract settlement agreements, but the contractor's efforts will be considered in determining the overall rate of profit allowed the contractor. Profit shall not be allowed the contractor for material or services that, as of the effective date of termination, have not been delivered by a subcontractor, regardless of the percentage of completion. The Contracting Officer may use any reasonable method to arrive at a fair profit.
  
- (2) In negotiating or determining profit, factors to be considered include :
  - (a) extent and difficulty of the work done by the contractor as compared with the total work required by the contract (engineering estimates of the percentage of completion ordinarily should not be required but, if available, should be considered);
  - (b) engineering work, production scheduling, planning, technical study and supervision, and other necessary ser-vices;
  - (c) efficiency of the contractor, with particular regard to:
    - (i) attainment of quantity and quality production;
    - (ii) reduction of costs;
    - (iii) economic use of materials, facilities, and manpower; and
    - (iv) disposition of termination inventory;
  - (d) amount and source of capital and extent of risk assumed;
  - (e) inventive and developmental contributions and cooperation with ATP and other contractors in supplying technical assistance;
  - (f) character of the business, including the source and nature of materials and the complexity of manufacturing techniques;
  - (g) the rate of profit that the contractor would have earned had the contract been completed;

- (h) the rate of profit both parties contemplated at the time the contract was negotiated; and
  - (i) character and difficulty of subcontracting, including selection, placement, and management of subcontracts, and effort in negotiating settlements of terminated subcontracts.
- (3) When computing profit on the terminated portion of a Construction contract, the Contracting Officer shall :
- (a) comply with Sections (2)(a) and (b), above;
  - (b) allow profit on the prime contractor's settlements with construction for actual work in place at the jobsite; and
  - (c) exclude profit on the prime contractor's settlements with construction subcontractors for materials on hand and for preparations made to complete the work.

#### **Section 8-705.02 Adjustment for Loss**

In the negotiation or determination of any settlement, the Contracting Officer shall not allow profit if it appears that the contractor would have incurred a loss had the entire contract been completed. The Contracting Officer shall negotiate or determine the amount of loss and make an adjustment in the amount of settlement.

#### **Section 8-706 Termination for Default**

- (1) Termination for default is generally the exercise of ATP's contractual right to terminate a contract completely or partially because of the contractor's actual or anticipated failure to perform its contractual obligations.
- (2) If the contractor can establish, or it is otherwise determined, that the contractor was not in default or that the failure to perform is excusable (i.e., arose out of causes beyond the control and without the fault or negligence of the contractor) as further described in the Default Clause, the Default Clause provides that a termination for default will be considered to have been a termination for the convenience of ATP and the rights and obligations of the parties governed accordingly.
- (3) The Contracting Officer may, with the written consent of the contractor, reinstate the terminated contract by amending the notice of termination after a written determination is made that the supplies or services are still required and reinstatement is advantageous to ATP.

### **Section 8-706.01     ATP's Right**

Under fixed-price contracts, ATP has the right, subject to the notice requirements of the clause, to terminate the contract completely or partially for default if the contractor fails to (1) make delivery of the supplies or perform the services within the time specified in the contract, (2) perform any other provision of the contract, or (3) make progress and that failure endangers performance of the contract.

### **Section 8-706.02     Effect of Termination for Default**

- (1) Under a termination for default, ATP is not liable for the contractor's costs on undelivered work and is entitled to the repayment of advance and progress payments, if any, applicable to that work. ATP may elect, under the Default Clause, to require the contractor to transfer title and deliver to ATP completed supplies and manufacturing materials, as directed by the Contracting Officer.
- (2) The Contracting Officer shall not use the Default Clause as authority to acquire any completed supplies or manufacturing materials unless it has been ascertained that ATP does not already have title under some other provision of the contract. The Contracting Officer shall acquire manufacturing materials under the Default Clause for furnishing to another contractor only after considering the difficulties the other contractor may have in using the materials.
- (3) Subject to Section (4), below, ATP shall pay the contractor the contract price for any completed supplies and the amount agreed upon by the Contracting Officer and the contractor for any manufacturing materials acquired by ATP under the Default Clause.
- (4) ATP must be protected from overpayment that might result from failure to provide for ATP's potential liability to laborers and material Suppliers for lien rights outstanding against the completed supplies or materials after ATP has paid the contractor for them. To accomplish this, before paying for supplies or materials, the Contracting Officer shall take one or more of the following measures:
  - (a) ascertain whether the payment bonds, if any, furnished by the contractor are adequate to satisfy all lienors' claims or whether it is feasible to obtain similar bonds to cover outstanding liens;
  - (b) require the contractor to furnish appropriate statements from laborers and material Suppliers disclaiming any lien rights they may have to the supplies and materials;
  - (c) obtain appropriate agreement by ATP, the contractor, and lienors ensuring release of ATP from any potential liability to the contractor or lienors;
  - (d) withhold from the amount due for the supplies or materials any amount the

Contracting Officer determines necessary to protect ATP's interest, but only if the measures in subsections (4)(a), (b), and (c), above, cannot be accomplished or are considered inadequate; and

- (e) take other appropriate action considering the circumstances and the degree of the contractor's solvency.
- (5) The contractor is liable to ATP for any excess costs incurred in acquiring supplies and services similar to those terminated for default and for any other damages, whether or not repurchase is effected.

### **Section 8-706.03 Procedure for Default**

- (1) When a default termination is being considered, ATP shall decide which type of termination action to take (i.e., default, convenience, or no-cost cancellation) only after review by contracting and technical personnel and by legal counsel to ensure the propriety of the proposed action.
- (2) The Contracting Officer shall not issue a show cause notice or cure notice without the prior approval of legal counsel.
- (3) The Default Clause covers circumstances when the contractor has defaulted by failure to make delivery of the supplies or to perform the services within the specified time. In these situations, no notice of failure or of the possibility of termination for default is required to be sent to the contractor before the actual notice of termination. However, if ATP has taken any action that might be construed as a waiver of the contract delivery or performance date, the Contracting Officer shall send a notice to the contractor setting a new date for the contractor to make delivery or complete performance. The notice shall reserve ATP's rights under the Default Clause.
- (4) The Default Clause also covers situations when the contractor fails to perform some of the other provisions of the contract (such as not furnishing a required performance bond) or so fails to make progress as to endanger performance of the contract. If the termination is predicated upon this type of failure, the Contracting Officer shall give the contractor written notice specifying the failure and providing a period of 10 days (or longer period as necessary) in which to cure the failure. Upon expiration of the 10 days (or longer period), the Contracting Officer may issue a notice of termination for default unless it is determined that the failure to perform has been cured.
- (5) If termination for default appears appropriate, the Contracting Officer should, if practicable, notify the contract or in writing of the possibility of the termination. This notice shall call the contractor's attention to the contractual liabilities if the contract is terminated for default and request the contractor to show cause why the contract should not be terminated for default. The notice may further state that failure of the contractor

to present an explanation may be taken as an admission that no valid explanation exists. When appropriate, the notice may invite the contractor to discuss the matter at a conference.

- (a) When a termination for default appears imminent, the Contracting Officer may provide a written notification of that fact (not an actual notice of default) to the surety.
  - (b) If requested by the surety, and agreed to by the contractor and any assignees, arrangements may be made to have future checks mailed to the contractor in care of the surety. In this case, the contractor must forward a written request to the Contracting Officer specifically directing a change in address for mailing checks.
- (6) The Contracting Officer shall consider the following factors in determining whether to terminate a contract for default:
- (a) the terms of the contract and applicable laws and regulations;
  - (b) the specific failure of the contractor and the excuses for the failure;
  - (c) the availability of the supplies or services from other sources;
  - (d) the urgency of the need for the supplies or services and the period of time required to obtain them from other sources (as compared with the time delivery could be obtained from the delinquent contractor);
  - (e) the degree of essentiality of the contractor in ATP's acquisition program and the effect of a termination for default upon the contractor's capability as a Supplier under other contracts;
  - (f) the effect of a termination for default on the ability of the contractor to liquidate progress payments; and
  - (g) any other pertinent facts and circumstances.
- (7) If, after compliance with the procedures in subsection(6), above, the Contracting Officer determines that a termination for default is proper, the Contracting Officer shall issue a notice of termination stating :
- (a) the contract number and date;
  - (b) the acts or omissions constituting the default;
  - (c) that the contractor's right to proceed further under the contract (or a specified portion of the contract) is terminated;

- (d) that the supplies or services terminated may be purchased against the contractor's account and that the contractor will be held liable for any excess costs;
  - (e) if the Contracting Officer has determined that the failure to perform is not excusable, that the notice of termination constitutes such decision and that the contractor has the right to appeal such decision under the Disputes Clause;
  - (f) that ATP reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs; and
  - (g) that the notice constitutes a decision that the contractor is in default as specified and that the contractor has the right to appeal under the Disputes Clause.
- (8) If the Contracting Officer determines before issuing the termination notice that the failure to perform is excusable, the contract shall not be terminated for default. If termination is in ATP's interest, the Contracting Officer may terminate the contract for the convenience of ATP.
- (9) If the Contracting Officer has not been able to determine, before issuance of the notice of termination, whether the contractor's failure to perform is excusable, the Contracting Officer shall make a written decision on that point as soon as practicable after issuance of the notice of termination. The decision shall be delivered promptly to the contractor with a notification that the contractor has the right to appeal as specified in the Disputes Clause.

#### **Section 8-706.04 Procedure in Lieu of Termination for Default**

The following courses of action, among others, are available to the Contracting Officer in lieu of termination for default when in ATP's interest:

- (1) permit the contractor, the surety, or the guarantor to continue performance of the contract under a revised delivery schedule;
- (2) permit the contractor to continue performance of the contract by means of a subcontract or other business arrangement with an acceptable third party, provided the rights of ATP are adequately preserved; and
- (3) if the requirement for the supplies and services in the contract no longer exists and the contractor is not liable to ATP for damages, execute a no-cost termination settlement agreement.

#### **Section 8-706.05 Documentation of Termination**

When a contract is terminated, the Contracting Officer shall prepare a memorandum for the contract file explaining the reasons for the action taken

#### **Section 8-706.06 Repurchase Against Contractor's Account**

- (1) When the supplies or services are still required after termination, the Contracting Officer shall repurchase the same or similar supplies or services against the contractor's account as soon as practicable. The Contracting Officer shall repurchase at as reasonable a price as practicable, considering the quality and delivery requirements. The Contracting Officer may repurchase a quantity in excess of the undelivered quantity terminated for default when the excess quantity is needed, but excess cost may not be charged against the defaulting contractor for more than the undelivered quantity terminated for default (including variations in quantity permitted by the terminated contract). Generally, the Contracting Officer will make a decision whether or not to repurchase before issuing the termination notice.
- (2) If the repurchase is for a quantity not over the undelivered quantity terminated for default, the statutory requirements for competitive bidding are inapplicable. However, the Contracting Officer shall use competitive bidding procedures unless there is a good reason to negotiate. The Contracting Officer shall cite the Default Clause as ATP. If the repurchase is for a quantity over the undelivered quantity terminated for default, the Contracting Officer shall treat the entire quantity as a new acquisition.
- (3) If repurchase is made at a price over the price of the supplies or services terminated, the Contracting Officer shall, after completion and final payment of the repurchase contract, make a written demand on the contractor for the total amount of the excess, giving consideration to any increases or decreases in other costs such as transportation, discounts, etc.

#### **Section 8-706.07 Other Damages**

- (1) If a contract is terminated for default or if a course of action in lieu of termination for default is followed, the Contracting Officer shall promptly ascertain and make demand for any liquidated damages to which ATP is entitled under the contract. Under the contract clauses for liquidated damages, these damages are in addition to any excess repurchase costs.
- (2) If ATP has suffered any other ascertainable damages as a result of the contractor's default, the Contracting Officer shall, on the basis of legal advice, take appropriate action to assert ATP's demand for the damages.

#### **Section 8-706.08 Cost-Reimbursement Contracts**

- (1) The right to terminate a cost-reimbursement contract for default is provided for in the Termination for Default or for Convenience of ATP Clause. A 10-day notice to the contractor before termination for default is required by the clause.
- (2) Settlement of a cost-reimbursement contract terminated for default is subject to the same principles as when a contract is terminated for convenience, except that :
  - (a) the costs of preparing the contractor's settlement proposal are not allowable;
  - (b) the contractor is reimbursed the allowable costs, and an appropriate reduction is made in the total fee, if any; and
  - (c) the Contracting Officer shall use the procedures in Section 8-706.03(6) to the extent appropriate in considering the termination for default of a cost-reimbursement contract. However, a cost-reimbursement contract does not contain any provision for recovery of excess repurchase costs after termination for default.

#### **Section 8-706.09 Surety-Takeover Agreements**

- (1) The procedures in this section apply primarily, but not solely, to fixed-price construction contracts terminated for default.
- (2) Because of the surety's liability for damages resulting from the contractor's default, the surety has certain rights and interests in the completion of the contract work and application of any undisbursed funds. Accordingly, the Contracting Officer shall consider carefully proposals by the surety concerning completion of the work. The Contracting Officer shall take action on the basis of ATP's interest, including the possible effect of the action upon ATP's rights against the surety.
- (3) If the surety offers to complete the contract work, this should normally be permitted unless the Contracting Officer has reason to believe that the persons or firms proposed by the surety to complete the work are not competent and qualified and the interests of ATP would be substantially prejudiced.
- (4) Because of the possibility of conflicting demands for unpaid prior earnings (retained percentages and unpaid progress estimates) of the defaulting contractor, the surety may condition its offer of completion upon the execution by ATP of a "takeover" agreement fixing the surety's rights to payment from those funds. In that event, the Contracting Officer may (but not before the effective date of termination) enter into a written agreement with the surety. The Contracting Officer should consider including in the agreement both the surety and the defaulting contracting in order to eliminate any disagreement concerning the contractor's residual rights, including assertions to unpaid prior earnings.



- (5) The agreement shall provide for the surety to complete the work according to all the terms and conditions of the contract and for ATP to pay the surety the balance of the contract price unpaid at the time of default but not in excess of the surety's costs and expenses, in the manner provided by the contract subject to the following conditions:
- (a) any unpaid earnings of the defaulting contractor, including retained percentages and progress estimates for work accomplished before termination, shall be subject to debts due ATP by the contractor, except to the extent that such unpaid earnings may be required to permit payment to the completing surety of its actual costs and expenses incurred in the completion of the work, exclusive of its payments and obligations under the payment bond given in connection with the contract;
  - (b) the agreement shall not waive or release ATP's right to liquidated damages for delays in completion of the work, except to the extent that they are excusable under the contract;
  - (c) if the contract proceeds have been assigned to a financing institution, the surety may not be paid from unpaid earnings, unless the assignee consents to the payment in writing; and
  - (d) the surety shall not be paid any amount in excess of its total expenditures necessarily made in completing the work and discharging its liabilities under the payment bond of the defaulting contractor; furthermore, payments to the surety to reimburse it for discharging its liabilities under the payment bond of the defaulting contractor shall be only on ATP of :
    - (i) mutual agreement between ATP, the defaulting contractor, and the surety; or
    - (ii) order of a court of competent jurisdiction.

**Section 8-706.10 Completion by Another Contractor**

If the surety does not arrange for completion of the contract, the Contracting Officer normally will arrange for completion of the work by awarding a new contract based on the same plans and specifications. The new contract may be the result of competitive bidding or negotiation, as appropriate under the circumstances. The Contracting Officer shall exercise reasonable diligence to obtain the lowest price available for completion.

**Section 8-706.11 Liquidation of Liability**

The contract provides that the contractor and the surety are liable to ATP for resultant damages. The Contracting Officer shall use all retained percentages of progress payments previously made to the contractor and any progress payments due for work completed before the termination to



liquidate the contractor's and the surety's liability to ATP. If the retained and unpaid amounts are insufficient, the Contracting Officer shall take steps to recover the additional sum from the contractor and the surety.

## **CHAPTER 9 - SUPPLY MANAGEMENT**

### **Section 9-100      General Provisions**

### **Section 9-101      Definitions of Terms**

- (1) "Excess Supplies" means any supplies, other than expendable, supplies which have a remaining useful life but which are no longer required by ATP.
- (2) "Expendable Supplies" means all tangible supplies other than nonexpendable supplies.
- (3) "Nonexpendable Supplies" means all tangible supplies having an original acquisition cost of over \$100 per unit and a probable useful life of more than one year.
- (4) "Supplies" means, for purposes of this section, tangible personal property owned by ATP.
- (5) "Surplus Supplies" means any supplies, other than expendable supplies, no longer having any use to ATP. This includes obsolete supplies, scrap materials, and nonexpendable supplies that have completed their useful life cycle.

### **Section 9-102      Purpose**

Objectives of supply management include preventing waste, continuing utilization of supplies, and obtaining a fair return of value upon disposal of supplies. In order to achieve these objectives, sound inspection, testing, warehousing, and inventory practices are called for, and effective means of transferring and disposing of property must be employed.

### **Section 9-103      Inventory Management**

The Executive Director or their Designee shall have general supervision of all inventories of tangible personal property, whether warehoused or in use, belonging to ATP. Any warehouses and similar storage areas shall be inventoried at least annually.

### **Section 9-104      Warehousing and Storage**

The Executive Director or their shall exercise general supervision of any receiving, storage, and distribution facilities and services.

### **Section 9-200      Surplus Supplies**

### **Section 9-201      Disposition**

Surplus supplies shall be offered through competitive sealed bids, public auction, or posted prices. It is recognized, however, that some types and classes of items can be sold or disposed of

more readily and advantageously by other means, including barter. In such cases, and also where the nature of the supply or unusual circumstances call for its sale to be restricted or controlled, the Executive Director may employ such other means, including appraisal, provided a written determination is made that such procedure is advantageous to ATP. Only United States Postal Money Orders, certified checks, or cashiers' checks shall be accepted for sales of surplus property (except that cash or a personal check may be accepted for petty cash sales of less than \$100).

### **Section 9-202      Competitive Sealed Bidding**

- (1) When making sales by competitive sealed bidding, notice of the sale should be given, where practicable, at least 10 days before the date set for opening bids. Notice shall be given by mailing a Request for Sale Bids to prospective bidders, including those bidders on lists maintained for this purpose, and by making the Request for Sale Bids publicly available. Newspaper advertisement also may be used. The Request for Sale Bids shall list the supplies offered for sale, designate their location and how they may be inspected, and state the terms and conditions of sale and instructions to bidders including the place, date, and time set for bid opening. Bids shall be opened publicly.
- (2) Award shall be made in accordance with the provisions of the Request for Sale Bids to the highest responsive and responsible bidder; provided, that the price offered by such bidder is acceptable to the Contracting Officer. Where such price is not acceptable, the Contracting Officer may reject the bids in whole or in part and negotiate the sale; provided, that the negotiated sale price is higher than the highest responsive and responsible bidder's price, or such officer may resolicit bids.

### **Section 9-203      Auctions**

Supplies may be sold at auction. When appropriate, an experienced auctioneer should be used to cry the sale and assist in preparation of the sale. The solicitation to bidders should stipulate, at a minimum, all the terms and conditions of any sale; that a deposit may be required in order to participate in the bidding; that the purchaser must remove within a stated time all surplus supplies purchased; and that ATP retains the right to reject any and all bids.

### **Section 9-204      Posted Prices**

Surplus supplies may be sold at posted prices as determined by the Executive Director or their Designee when such prices are based on fair market value.

### **Section 9-205      Trade-In**

Surplus supplies may be traded-in only when the Procurement Director determines that the trade-in value is expected to exceed the value estimated to be obtained through the sale or other disposition of such supplies.



**Section 9-206      Proceeds**

Net proceeds from the disposition of excess or surplus supplies shall be credited to the appropriate account from which funds were originally used to acquire the supplies.