

**OFFICE OF PUBLIC EDUCATION FACILITIES MODERNIZATION****NOTICE OF EMERGENCY AND PROPOSED RULEMAKING**

The Director of the Office of Public Education Facilities Modernization (“OFM” or “Office”) gives notice of the adoption on an emergency basis of an amendment to Title 5 DCMR, by adding a new chapter 39, “Office of Public Education Facilities Modernization Procurement Rules.” The new chapter sets forth the procurement rules authorized by Section 702(b) of the Public Education Reform Amendment Act of 2007, effective June 12, 2007, D.C. Law 17-009 (the “Act”). This emergency rule was adopted on August 10, 2007, and became effective immediately on that date for the period from and after the effective date of the Act.

This emergency action is based on OFM’s need to undertake repairs to address life and safety issues at District of Columbia Public Schools.

The Director also gives notice of his intent to take final rulemaking action to adopt this amendment in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

Pursuant to section 702(b) of the Act, these proposed rules are also being submitted to the Council of the District of Columbia for review and approval. This rule will become effective upon Council approval, or forty-five (45) days after submission, if the Council has not disapproved the proposed rulemaking, and publication of the final rules in the *D.C. Register*. These emergency rules will expire upon the effective date of the final rules or within 120 days of the adoption of the emergency rules, whichever comes first.

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### **3900 GENERAL**

**3900.1** The Office is an agency within the executive branch of the District of Columbia government. In accordance with the Act, the Office is exempt from the requirements of the District of Columbia Procurement Practices Act of 1985, effective February 21, 1986 (D.C. Law 6-85; D.C. Official Code § 2-301.01 *et seq.*), and has the authority to issue and implement its own procurement rules. The Office's general mission is to ensure that the public education facilities in the District of Columbia are modernized in a timely and cost effective manner and consistent with the Facilities Master Plan referred to in Section 704 (6) of the Act.

**3900.2** The Director of the Office is authorized to enter into contracts on behalf of the Office and may delegate that authority in accordance with these rules.

**3900.3** These procurement rules are for the benefit of the Office, and are not intended to confer any rights or benefits on third parties. The principal purposes of these rules are to ensure that the Office's procurement activities:

- (a) are carried out in a fair and objective manner that promotes confidence in the Office's integrity; and
- (b) produce reasonable value and reasonable results for the Office, as determined by its Director.

**3900.4** These rules are intended to encourage participation by Local, Small and Disadvantaged Business Enterprises (LSDBEs), in accordance with the Small, Local, and Disadvantaged

Business Enterprise Development and Assistance Act of 2005, Title II, Subtitle N, of the Fiscal Year 2006 Budget Support Act of 2005, D.C. Law 16-33, effective October 20, 2005. The Office's goals include expanding and retaining disadvantaged businesses located within the District.

**3900.5** The Director may waive the applicability of any provisions in these rules that are not specifically required by statute if the Director finds in writing that:

- (a) such waiver is in the best interest of the Office;
- (b) such waiver is not inconsistent with fair, competitive, and transparent procurement practices; and
- (c) such waiver is technical in nature and would not alter the substantive business terms of a procurement after proposals have been received.

### **3901 APPLICABILITY**

**3901.1** These rules apply to the procurement of goods or services, including construction services, by the Office:

- (a) whether through purchase or lease; and
- (b) whether the goods or services are already in existence or must be developed.

A procurement of goods or services does not include any goods or services that the Office may acquire as a gift, on a pro bono basis, or pursuant to agreements with any agency of the District or federal governments.

**3901.2** These rules do not apply to:

- (a) the purchase or lease of real property by the Office;
- (b) developmental agreements awarded by the Office; or
- (c) the disposition of real or personal property by the Office.

In addition, these rules do not apply to retaining individuals to serve as on-site consultants for specific, time-limited assignments.

**3902 CONTRACTING OFFICIALS****3903 CHIEF CONTRACTING OFFICER**

**3903.1** The Director shall serve as the Office's Chief Contracting Officer ("CCO"). The CCO shall have overall responsibility for supervising the Office's procurement activities. The CCO shall have the authority to award any contract.

**3904 DELEGATION OF AUTHORITY TO CONTRACTING OFFICERS**

**3904.1** The CCO shall have the authority to delegate his or her contracting authority to employees of the Office, who shall be designated as Contracting Officers. Any such delegation shall be in writing, and shall specify any limits on a Contracting Officer's delegated authority (e.g., limits on the dollar value of contracts the individual is authorized to award). In no case can a Contracting Officer's authority exceed the CCO's authority.

**3904.2** In delegating his or her contracting authority, the CCO shall ensure that each delegated Contracting Officer has the experience, knowledge, and judgment necessary to fulfill the duties of a Contracting Officer, including a solid understanding of the Office's procurement rules. Subject to compliance with these rules, Contracting Officers have wide latitude to exercise business judgment in conducting procurements. Consequently, the ability to exercise that discretion wisely and responsibly is an important job qualification. In addition, the CCO shall ensure that Contracting Officers periodically receive training to strengthen and update their skills and knowledge concerning procurement matters.

**3905 AUTHORITY AND DUTIES OF CONTRACTING OFFICER**

**3905.1** Only the CCO or a Contracting Officer shall have the authority to award, modify, or terminate contracts; provided, however, that prior to terminating any contract, the Contracting Officer shall first obtain the approval of the CCO. As necessary or appropriate in exercising his or her authority, a Contracting Officer shall request and consider the advice of specialists in auditing, law, technical disciplines, and other relevant fields.

**3905.2** A Contracting Officer for a particular procurement shall be responsible for:

- (a) making any determination or findings that may be required in connection with that procurement;
- (b) ensuring that all statutory and regulatory requirements that apply to the procurement have been identified and observed;

- (c) ensuring that all necessary preconditions to contract award have been satisfied before the contract is awarded;
- (d) maintaining the contract file, which serves as the repository for all required documentation concerning the procurement and any resulting contracts; and
- (e) ensuring that all offerors participating in a procurement receive fair and impartial treatment.

### **3906 CONTRACTOR QUALIFICATION REQUIREMENTS**

**3906.1** To be eligible to receive a contract from the Office, a prospective contractor must satisfy two basic qualification requirements. Specifically, the prospective contractor must:

- (a) be responsible; and
- (b) not be disqualified on the basis of conflicts of interest (either personal or organizational) or related ethical concerns.

These issues are disclosed sequentially below.

### **3907 RESPONSIBILITY**

**3907.1** To receive a contract from the Office, a contractor must be “responsible.” This means that the contractor:

- (a) has (or can obtain) the financial, technical, and organizational skills and resources, and the facilities and equipment, necessary to perform the contract in accordance with its terms;
- (b) has a satisfactory performance record, and a satisfactory record of integrity and business ethics;
- (c) is not suspended, debarred, or otherwise ineligible to receive contracts from the District government or the federal Government;
- (d) meets any other qualification criteria that may be imposed by applicable laws or regulations; and
- (e) shall provide adequate evidence that it has paid and filed all applicable District of Columbia taxes and tax returns.

The Contracting Officer shall make a written determination if the contractor is found to be non-responsible. Depending on the level of formality of the contract and at the Contracting Officer’s discretion, the Contracting Officer may make a written determination if the contractor is found to be responsible.

**3907.2** In evaluating a prospective contractor's responsibility, a Contracting Officer may request information from the contractor, and may also consider information available from other sources. Where necessary, the Contracting Officer may also perform a "pre-award survey" involving interviews with contractor personnel or visits to the contractor's facilities. Information on the capabilities and suitability of proposed subcontractors also may be considered in evaluating responsibility.

### **3908 ORGANIZATIONAL CONFLICTS OF INTEREST; DISQUALIFICATION**

**3908.1** The Office intends to avoid even the appearance of conflict of interest or impropriety in connection with its procurement activities. Thus, even if a prospective contractor is responsible, the CCO has the discretion to disqualify the contractor (or to take other appropriate measures) based on conflicts of interest or other ethical considerations. Such concerns may authorize the Contracting Officer:

- (a) to disqualify a contractor at any point during a procurement;
- (b) to rescind or terminate a contract subsequent to contract award; or
- (c) to take other appropriate corrective measures, such as canceling a pending solicitation and initiating a new procurement; provided, however, that prior to taking any such action, the Contracting Officer shall first obtain the approval of the CCO.

Any determination by the CCO to take such corrective measures shall be made in writing and included in the contract file. The circumstances in which the need for such corrective measures may arise are described below.

**3908.2** The ethical considerations that may authorize disqualification or other corrective measures go beyond violations of any ethics and conflict of interest rules the Office may from time-to-time publish and the prospective contractor's ethics and conflict of interest rules, if any. The Contracting Officer may properly elect to adopt corrective measures whenever necessary to avoid the appearance of impropriety or otherwise eliminate doubts about the integrity and fairness of a procurement. For example, situations in which corrective measures might be warranted include (but are not limited to):

- (a) cases where a director or employee of the Office involved in a procurement had a relationship with a contractor that fell outside the Office's recusal rules, but nonetheless raised questions about the procurement's integrity;
- (b) cases where a prospective contractor received preferential treatment in relation to its competitors;

- (c) cases where a prospective contractor hired a former director or employee of the Office who was privy to non-public information about the procurement, and involved that individual in its proposal preparation efforts; or
- (d) cases where there is clear evidence suggesting collusive bidding or similar anti-competitive practices by prospective contractors.

**3908.3** "Organizational conflicts of interest" also may warrant disqualification or other corrective measures. Organizational conflict of interest means a situation in which a contractor:

- (a) may be unable to render impartial and objective assistance or advice to the Office; or
- (b) may have an unfair advantage over potential competitors.

Organizational conflicts of interests can arise in a variety of circumstances. For example, a contractor that develops the technical specifications for an item that will be the subject of a future procurement may have an incentive to develop specifications favoring its own products unless it is barred from participating in the future procurement. Another example is a case where a contractor performs services for the Office that require access to non-public information (e.g., proprietary data of other companies), and could therefore gain an unfair advantage over competitors in future procurements.

**3908.4** A number of measures may be appropriate for eliminating or mitigating organizational conflicts of interest, and the CCO has broad discretion to select the approach that is most suitable in any particular case. For example, a contract to assist the Office in developing requirements for a future procurement ordinarily should include a clause prohibiting the contractor from participating in the future procurement. A contract in which the contractor gains access to proprietary information on other companies (or non-public information on the Office's procurement plans) should include an appropriate clause that prevents the contractor from using such information in any manner that might give it an unfair advantage. In any particular case, the mechanism adopted to handle an organizational conflict should be designed to prevent:

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

## **3909 PROCUREMENT PLANNING AND PUBLICITY**

### **3910 MARKET RESEARCH**

**3910.1** Before issuing a solicitation or making a purchase, the Office must first:

- (a) estimate the likely cost of the proposed procurement and ensure that adequate funds are available; and
- (b) conduct appropriate market research.

**3910.2** Market research is designed primarily to familiarize the Office with the market for the goods or services it seeks to acquire, in order to develop an appropriate strategy for conducting a prompt and efficient procurement that promotes reasonable competition between qualified firms. The extent of market research will vary, depending on factors such as urgency, the size and complexity of the proposed procurement, and the Office's existing knowledge of the market based on its (or its key personnel's) past experience in procuring similar goods or services. Market research generally should focus on obtaining information such as the following, to the extent it is relevant to the particular procurement and not already known to the Office:

- (a) customary practices in the relevant market;
- (b) the prospective sources that may be able to supply the goods or services;
- (c) the opportunities for participation by firms that qualify as LSDBEs;
- (d) the benchmarks available to evaluate the likely cost of the procurement and the reasonableness of prices or costs proposed by prospective contractors; and
- (e) the requirements of any laws or regulations unique to the procurement.

**3910.3** In conducting market research, the Office may solicit information from prospective sources on matters such as their interest in the potential procurement, the characteristics and costs of their products or services, their customary practices, and their knowledge of the industry generally. Such information may be solicited by requesting interested parties to submit written information (e.g., by posting a notice on the Internet seeking information pertinent to the proposed procurement), through meetings or telephone contacts, or by distributing and seeking comments on a draft solicitation.

**3910.4** In addition to soliciting information from prospective contractors, the Office may also obtain information from a variety of other sources. For example, price information that can assist in estimating the likely cost of a procurement and in evaluating price reasonableness is frequently available from sources such as catalogs, internet sites, or records of past procurements.

## **3911 PREPARING SOLICITATIONS**

**3911.1** Following the conduct of market research, the Contracting Officer shall make a determination as to which procurement methodology specifically identified in these regulations is most beneficial to the Office. The Office will ordinarily prepare a solicitation requesting responses. In some cases, however, the process of issuing a

solicitation and awaiting the submission of responses is not necessary or appropriate. For example, if the Office is purchasing off-the-shelf commercial products and its market research efforts indicate that a particular product is the "best buy," the Contracting Officer can simply place an order for the product.

**3911.2** When the Office issues a solicitation, its length and contents will depend on factors such as the size of the procurement, the nature and complexity of the goods or services, the contracting procedure to be used, and the contract type. In general, however, a solicitation should clearly describe the Office's needs (e.g., by providing a statement of work outlining the type of services required, or information specifying product characteristics or capabilities) and its evaluation criteria.

**3911.3** In preparing a solicitation, the Office should seek to enhance competition by carefully scrutinizing and eliminating, to the extent possible, any unnecessary requirements that may restrict the number of prospective sources or the range of goods or services they can offer. Such provisions may include, for example, technical specifications that limit the competitive field, unnecessarily aggressive delivery schedules, or burdensome terms and conditions that might deter smaller companies from competing.

**3911.4** The Office may issue solicitations in paper form or electronically. The Office may also use oral solicitations where efficient and practical (e.g., where the procurement does not involve extensive specifications, detailed evaluation criteria, or numerous line items). The Office may cancel a solicitation and reject all bids or proposals received at any time before contract award when cancellation is in the Office's best interests.

## **3912 PUBLICIZING PROCUREMENT OPPORTUNITIES**

**3912.1** The Office may use a variety of methods to publicize a procurement. The specific method or methods used should be tailored to the particular procurement, taking into account factors such as the size of the procurement, the type of goods or services sought, the urgency associated with the requirement, and the most efficient means of disseminating information in the relevant market. The methods available to publicize procurement opportunities offered by the Office include print advertising, internet notices, developing "source lists" of qualified firms known to supply particular categories of goods or services, soliciting specific sources through written notices or telephone contacts, and holding pre-bid or pre-proposal conferences.

**3912.2** The Office shall use its best efforts to provide (either electronically or in a paper format) a copy of solicitations to LSDBEs of which the Office is aware that may be capable of providing some or all of the services or goods required by a solicitation.

**3912.3** In addition to publication or other method of publicizing the procurement opportunity described in §503.1, unless otherwise specified herein, the Office shall also compile a list of at least three vendors that the Office reasonably believes are qualified to provide the services or goods specified in a solicitation and shall provide those vendors with a copy of such solicitation. In the event the Office is unable to locate at least three potential

vendors, the Office shall provide the solicitation to as many vendors as it can reasonably identify.

### **3913 CONTRACT TYPES**

**3913.1** The type of contract awarded by the Office will generally depend on factors such as the particular goods or services to be acquired, whether the costs of the goods or services can be estimated in advance with reasonable accuracy, and the degree to which the precise nature and extent of the contract work is known at the time of award. A wide selection of contract types is available, which include:

- (a) fixed price contracts;
- (b) cost reimbursement contracts;
- (c) delivery order contracts; and
- (d) time-and-materials or labor hours contracts.

The sections below describe these contract types in greater detail. The Office may also award any alternative type of contract that will produce reasonable value in the context of a particular procurement. However, the Office may not award "cost-plus-percentage-of-cost" contracts.

### **3914 FIXED-PRICE CONTRACTS**

**3914.1** "Fixed price" contracts include several variants:

- (a) firm, fixed price contracts;
- (b) fixed price contracts with economic price adjustment; and
- (c) fixed price incentive contracts.

Unlike cost reimbursement contracts, any type of fixed price contract obligates the contractor to complete the contractually-specified work for a fixed price.

**3914.2** A firm fixed price contract provides for a price that is not subject to adjustment, except in the event of a change to the contract work.

**3914.3** A fixed price contract with economic price adjustment provides for an upward or downward adjustment in the stated contract price based on changes in certain benchmarks specifically identified in the contract (e.g., catalog prices, or the producer price index for a particular commodity), subject to a ceiling on upward adjustments.

**3914.4** A fixed price incentive contract generally provides for establishing a final price by applying a formula based on the relationship between the total cost actually incurred by the contractor and a total "target" cost, thus resulting in the parties sharing in the cost savings or increases associated with differences between the actual and target cost. These contracts also can include incentive formulas based on the contractor's schedule or technical performance.

### **3915 COST REIMBURSEMENT CONTRACTS**

**3915.1** Cost reimbursement contracts provide for the contractor to recover the reimbursable costs it incurs in contract performance, plus a fee (i.e., a profit). A "reimbursable" cost must be:

- (a) reasonable in nature and amount;
- (b) properly allocable to the contract;
- (c) determined in accordance with generally accepted accounting principles; and
- (d) not identified as nonreimbursable under the terms of the particular contract.

To ensure that the Office's payment obligations are not open-ended, a cost reimbursement contract must specify an estimated total cost that the contractor cannot exceed (except at its own risk) without the Contracting Officer's written approval. Because the contractor can cease performance once it reaches the estimated total cost (unless the Contracting Officer approves an increase), it is not obligated to complete the contract work unless it can do so within the not to exceed limit.

**3915.2** Cost reimbursement contracts can take three forms:

- (a) cost-plus-fixed-fee;
- (b) cost-plus-incentive-fee; and
- (c) cost-plus-award-fee.

The differences between these types of contracts relate to the manner in which the contractor's fee is determined.

**3915.3** A cost-plus-fixed-fee contract provides for a fee that is fixed at the contract's inception, and is not subject to adjustment unless the contract is modified to change the contract work.

**3915.4** A cost-plus-incentive-fee contract provides for a fee that generally is determined by applying a formula based on the relationship between the contractor's total reimbursable

cost and a total target cost, subject to a specified minimum and maximum. These contracts also can include incentive formulas based on the contractor's schedule or technical performance.

**3915.5** A cost-plus-award-fee contract provides for:

- (a) a base fee fixed at the contract's inception; and
- (b) an "award" fee that the contractor may earn (in whole or in part) during performance, which is designed to motivate superior performance.

The award fee is determined unilaterally by the Office, based on its judgment and evaluation of how well the contractor has performed in relation to the award fee criteria identified in the contract.

**3915.6** In appropriate circumstances, the Office may include a guaranteed maximum price ("GMP") in a cost reimbursement type contract. A GMP differs from a not-to-exceed amount in that a contractor is required to complete performance of the base scope of work required under the contract for an amount that does not exceed the GMP. Under such an approach, if the total cost exceeds the GMP, the contractor shall be required to complete performance of the base scope of work at its own cost and expense.

## **3916 BASIC ORDERING AGREEMENTS**

**3916.1** Under a basic ordering agreement (also known as task order contracts or term contracts), the contractor's performance obligations are triggered when the Office subsequently issues task orders pursuant to the contract. Basic ordering agreements include:

- (a) requirements contracts; and
- (b) indefinite quantities contracts.

**3916.2** A requirement contract provides the mechanism for the Office to order from the contractor all of its requirements for designated supplies or services during a specified period (subject to any maximum ordering limitation in the contract). This type of contract should only be used when the Office determines that it will provide superior economic benefits to an indefinite quantity contract as it locks the Office into one source of supply for the goods or services required under the basic ordering agreement. A requirements contract must be approved by the CCO in addition to the contracting officer.

**3916.3** An indefinite quantity contract provides for an indefinite quantity, within specified limits, of supplies or services to be furnished during a fixed period. Such a contract:

- (a) requires the Office to order and the contractor to deliver at least the stated minimum quantity of supplies or services; and

- (b) requires the contractor to deliver any additional quantities the Office may order during the contract period (subject to any maximum quantity limitations in the contract).

The Office may award a single indefinite quantity contract for particular goods or services, or may award multiple contracts and choose between the selected contractors in awarding subsequent delivery orders.

**3916.4** If an indefinite delivery contract is used, at the time the basic ordering agreements are awarded, the Office shall establish a procedure by which work will be awarded under the basic ordering agreements. Traditionally, one of two methods is used:

- (a) work can be assigned on a rotation basis (i.e., the first task order is given to contractor 1, the second task order to contractor 2, etc.); or
- (b) the Office may request task order proposals from two or more contractors holding an indefinite delivery contract.

The second of these approaches is preferred. If the second approach is used, each task order request shall specify: (i) the specific goods or services required; (ii) a delivery date; and (iii) such other information as the Office may reasonably request.

## **3917 TIME AND MATERIALS CONTRACTS AND LABOR HOURS CONTRACTS**

**3917.1** Time-and-materials contracts provide for acquiring supplies or services on the basis of:

- (a) direct labor hours, charged at fixed hourly rates that include overhead and profit; and
- (b) materials (which may be charged either at their actual cost or at fixed unit prices).

A labor hours contract is a time-and-materials contract that does not involve materials. Both types of contracts should specify a ceiling price.

## **3918 CONTRACTING PROCEDURES**

### **3919 CONTRACTING PROCEDURES GENERALLY**

**3919.1** Every procurement by the Office shall be conducted in accordance with competitive contracting procedures, suitable to the specific procurement, that produce reasonable value and reasonable results. The contracting procedures the Office may use include, but are not limited to, the procedures described below.

**3919.2** The Contracting Officer may award contracts on a "sole-source" basis only when:

- (a) the goods or services sought by the Office are available from only one responsible source;
- (b) circumstances beyond the Office's control require an immediate award; or
- (c) sole-sourcing is necessary to achieve the Office's goals for contracting with LSDBEs.

Prior to entering into any such sole-source contract, the CCO shall first certify that the requirements of this section have been satisfied. In any other case, the Office shall adopt a competitive procurement strategy in which it evaluates bids or proposals from any source that wishes to compete, or from a reasonable number of qualified sources.

### **3920 SEALED BIDDING**

**3920.1** The solicitation used to initiate a procurement conducted by sealed bidding is known as an Invitation for Bids ("IFB"). The Office shall allow prospective bidders a reasonable time to prepare and submit bids.

**3920.2** The evaluation factors used in sealed bid procurements are limited to price and price-related factors (including price evaluation preferences for LSDBEs). The IFB shall specify:

- (a) any information necessary to explain how the Office will evaluate price (e.g., whether option prices will be evaluated);
- (b) any price-related factors that will be evaluated and their relative importance in the overall evaluation scheme;
- (c) a description of the goods or services sought (including quantity requirements);
- (d) the contract delivery schedule;
- (e) a description of any special qualification requirements the contractor must satisfy;
- (f) instructions for submitting bids (including the deadline for bid submission, the method(s) for submitting bids, any representations or certifications bidders must submit, and any requirements for the submission of items such as bid samples, subcontracting plans, or payment or performance bond);
- (g) the period during which bids must remain open for acceptance; and
- (h) the contract's terms and conditions.

**3920.3** Any changes in the information set forth in an IFB must be made by an amendment to the IFB.

**3920.4** Bids shall be submitted by a method specifically permitted by the IFB (e.g., hand delivery, mailing, electronic transmission, or fax). A bid may be withdrawn or modified at any time before bid opening, by any of the methods permitted for submitting bids. A late bid (or late modification or withdrawal) shall not be considered, except that the Office may accept a late modification to an otherwise successful bid that makes the bid more favorable to the Office. A late bid is any bid received after the bid date, unless such delay is caused by the Office. The Contracting Officer shall prepare an abstract listing the bid prices, which shall be maintained in the contract file.

**3920.5** The contract shall be awarded to the qualified bidder whose bid is responsive to the IFB and is most advantageous to the Office, considering only price and the price-related evaluation factors identified in the IFB. A "responsive" bid must comply in all material respects with the IFB. Responsiveness involves matters that relate to the bid itself, as opposed to the responsibility or other qualifications of the bidder. In determining whether a bid is responsive, the Contracting Officer has the discretion to waive or permit correction of minor informalities or irregularities.

## **3921 COMPETITIVE NEGOTIATION**

**3921.1** The solicitation used to initiate a procurement conducted by competitive negotiation is known as a Request for Proposals ("RFP"). The Office shall establish a reasonable deadline for offerors' submission of initial proposals.

**3921.2** The evaluation criteria used in procurements conducted by competitive negotiation include price or cost (including, but not limited to, hourly rates for services and fixed fees for cost reimbursement contracts), along with any other factors appropriate to the particular procurement (e.g., the offeror's technical approach, past performance, or its status as a LSDBE or plans for subcontracting with such enterprises). The RFP may, if the Office deems it advisable, contain either (i) an estimate that generally describes the price range contemplated by the Office; or (ii) a funding limitation for the procurement.

**3921.3** The RFP shall specify all evaluation factors and their relative importance. The RFP should also include:

- (a) a description of the goods or services sought (including quantity or estimated quantity);
- (b) the contract delivery schedule (including any permitted variations in the delivery schedule);
- (c) a description of any special qualification requirements the contractor must satisfy;

- (d) instructions for submitting proposals; including the deadline for proposal submission, the method(s) for submitting proposals, the information to be provided in the proposal (including any requirements for past performance information or for subcontracting plans), and any representations or certifications the offeror must submit;
- (e) the period during which proposals must remain open for acceptance; and
- (f) the anticipated contract terms and conditions, and the extent to which they are negotiable.

**3921.4** Any changes in the information set forth in an RFP must be made by an amendment to the RFP.

**3921.5** Proposals shall be submitted by a method specifically permitted by the RFP. The Office shall evaluate proposals based solely on the evaluation criteria specified in the RFP. Where past performance is an evaluation factor, the Office is not limited to considering only the information from references listed by the offeror.

**3921.6** After initial proposals have been evaluated, the Contracting Officer may:

- (a) make an award based on initial proposals; or
- (b) establish a "competitive range" consisting of those proposals that remain under consideration (or a single proposal that remains under consideration), and initiate discussions with competitive range offerors. A competitive range shall include all proposals that, in the Contracting Officer's judgment (erring on the side of the offeror), could be awarded the procurement.

**3921.7** Discussions with offerors may be written (including electronic) or oral. The primary objective of discussions is to maximize the Office's ability to obtain the best value, based on the evaluation factors set forth in the RFP. The scope and extent of discussions are a matter of Contracting Officer judgment. At the conclusion of discussions, the Contracting Officer shall request all offerors that still remain under consideration to submit best and final offers by a common cut-off date.

**3921.8** The contract shall be awarded to the qualified offeror whose offer is most advantageous to the Office under the RFP's evaluation criteria. The Contracting Officer shall prepare documentation explaining the basis for the contract award decision, which shall be maintained in the contract file.

## **3922 SIMPLIFIED CONTRACTING PROCEDURES**

**3922.1** The basic purposes of simplified contracting procedures are to:

- (a) promote economy, efficiency, and innovation in contracting;
- (b) reduce administrative costs to the Office; and
- (c) avoid unnecessary burdens or complexities that could reduce competition, such as by deterring smaller contractors from participating in a procurement.

Simplified contracting procedures may be used only with contacts that have an estimated value equal to or less than \$100,000.

**3922.2** The Contracting Officer shall conduct simplified procurements in the manner that is most suitable, efficient, and economical based on the circumstances of each acquisition. As appropriate, the CCO may elect to use or adapt procedures that are part of the sealed bidding or competitive negotiation process. On any simplified procurement, the Contracting Officer shall:

- (a) promote competition to the extent practicable and efficient;
- (b) establish reasonable deadlines for the submission of responses to solicitations; and
- (c) evaluate quotations or offers in an impartial manner on the basis established in the solicitation.

However, with regard to any contract that has an estimated value of more the \$25,000 but which is procured through the simplified contracting procedures, the Office shall obtain written quotes from at least two (2) potential suppliers.

**3922.3** The Contracting Officer may solicit quotations orally in appropriate cases when doing so is practical and economical. When soliciting orally, the Contracting Officer may accept oral quotations or may instruct suppliers to respond in writing. When oral quotations are accepted, the Contracting Officer shall document such quotations in writing and include the documentation in the contract file.

**3922.4** Any oral solicitation shall provide a clear description of the Office's requirements (including the type of goods or services sought, quantities, and schedule) and the basis on which award will be made. The basis for award may be price or cost alone, or price/cost and other factors. Solicitations are not required to state the relative importance assigned to each evaluation factor. Written solicitations shall provide a complete statement of relevant information without being unnecessarily lengthy. A written solicitation should include the same information required in an oral solicitation, plus the following:

- (a) anticipated contract terms and conditions (and the extent to which they are negotiable);
- (b) applicable certifications or representations; and

(c) instructions for submitting responses.

**3922.5** The price/cost and other terms of the award shall be set forth in a written contract or purchase order. The Contracting Officer shall include a statement in the contract file briefly explaining the basis for the award decision.

### **3923 DC SUPPLY SCHEDULE; GSA SCHEDULES**

**3923.1** The Office may purchase goods and services (but not construction or any other type of contract awarded on a cost reimbursement basis) from the DC Supply Schedules or the GSA Schedule.

### **3924 SOLE-SOURCE CONTRACTING PROCEDURES**

**3924.1** Sole-source contracting procedures may be used only in situations referred to in section 701.2. The justification for using sole-source procedures shall be documented in the contract file. The solicitation and evaluation procedures used on a sole-source procurement shall be tailored to the specific acquisition, taking into account the justification for sole-sourcing.

**3924.2** The Office may use oral solicitations on sole-source procurements in appropriate cases when doing so is practical and economical. The price/cost and other terms of the award shall be set forth in a written contract or purchase order.

### **3925 CONTRACT ADMINISTRATION**

#### **3926 THE CONTRACTING OFFICER'S RESPONSIBILITY FOR CONTRACT ADMINISTRATION**

**3926.1** The Contracting Officer for a particular contract has overall responsibility for the contract's administration. Among other things, this requires the Contracting Officer:

- (a) to monitor whether goods or services are delivered or completed on schedule, and conform to contract requirements;
- (b) to ensure that any contractually required inspection or acceptance procedures are followed;
- (c) to monitor the contractor's compliance with any subcontracting requirements contained in the contract; and
- (d) to identify and attempt to resolve issues or problems that arise during contract performance.

**3926.2** The Contracting Officer is the only representative of the Office with the authority to take the following actions:

- (a) authorize contract payments;
- (b) exercise contract options;
- (c) terminate the contract; and
- (d) modify the contract.

Provided, however, that prior to terminating any such contract, the Contracting Officer shall first obtain the approval of the CCO.

**3926.3** No representative of the Office, including a Contracting Officer shall:

- (a) act in a manner that misleads a contractor regarding the limits of his or her authority; or
- (b) direct or encourage a contractor to perform work that has not been properly authorized.

### **3927 PAYMENT REQUESTS**

**3927.1** Requests for payment must be submitted in writing by the contractor. Contractor payment requests shall:

- (a) certify that the contractor is entitled to payment in the requested amount; and
- (b) include or attach any information necessary to demonstrate entitlement to the requested payment under the contract's terms.

Depending on the contract's payment provisions, this may involve, for example, a statement that specified work has been completed in a satisfactory manner, documentation showing that contract deliverables have been accepted by the Office, or information detailing the reimbursable costs incurred by the contractor. Payment shall not be made unless authorized by the Contracting Officer. A Contracting Officer's payment authorization shall not preclude the Office from seeking repayment (or pursuing other remedies) if it subsequently concludes that the contractor was overpaid.

**3927.2** In addition to the Contracting Officer's payment authorization, all payment requests must be certified and approved by the Office's Chief Financial Officer (or his or her designee) prior to making any payment.

### **3928 EXERCISING THE CONTRACT OPTIONS**

**3928.1** The Contracting Officer may exercise a contract option upon determining that:

- (a) funds are available;
- (b) the goods or services covered by the option fulfill an existing need; and
- (c) exercising the option is the most advantageous method of fulfilling the Office's need.

The determination shall be in writing and shall be included in the contract file. To exercise an option over \$100,000 the Contracting Officer must also obtain the approval of the CCO.

**3928.2** In addition to the approval of the CCO (if applicable), prior to exercising any option, the approval of the Office's Chief Financial Officer shall be obtained as to whether funds are available for the exercise of such option.

### **3929 CONTRACT MODIFICATIONS**

**3929.1** The Contracting Officer may modify a contract subject to these provisions; provided, however, that any modification in excess of \$100,000 shall require the approval of the CCO. Any such modification must be within the general scope of the original contract. Any requirement for extra work that goes beyond the contract's general scope shall be the subject of a new procurement.

**3929.2** A contract modification may be effected:

- (a) by a bilateral agreement executed by the Contracting Officer and an authorized representative of the contractor; or
- (b) by the Contracting Officer's issuance of a written change order, when the contract includes a "Changes" clause permitting the Office to make unilateral changes in the contract work. Under such a clause, the contractor is obligated to perform in accordance with a change order issued by the Contracting Officer, and the contract price is adjusted to reflect the increase or decrease in costs caused by the change.

### **3930 CONTRACT TERMINATION**

**3930.1** All contracts awarded by the Office shall include "Termination for Default" and "Termination for Convenience" clauses specifically defining the Office's termination rights.

**3930.2** When exercising the Office's rights under a termination clause in the contract, the Contracting Officer shall provide the contractor with a written notice specifying:

- (a) whether the termination is for default or for convenience;
- (b) the effective date of the termination;
- (c) the extent of the termination, if the termination is partial; and
- (d) any special instructions that apply to the termination (e.g., instructions concerning the disposition of contract inventory).

After terminating a contract for convenience, the Contracting Officer shall request a settlement proposal from the contractor, and shall attempt to negotiate a settlement that resolves all of the parties' rights and liabilities (except those arising from any portion of the contract still in effect). If the parties negotiate a settlement, the Contracting Officer shall prepare a memorandum describing the principal elements of the settlement for inclusion in the contract file.

### **3931 CONTRACT DOCUMENTATION**

**3931.1** The Contracting Officer is responsible for maintaining documentation regarding the contract and the procurement in the contract file. The contract file shall include:

- (a) the solicitation and any amendments;
- (b) the contract and any modifications;
- (c) any type of documentation that is specifically required to be maintained in the contract file by other sections of these rules; and
- (d) any other documentation that may be necessary to memorialize important decisions or events relating to the procurement or the contract.

**3931.2** The Contracting Officer shall endeavor to include with every solicitation the form of the contract that the contractor will be required to enter into. To the greatest extent possible, the Office should endeavor to provide clear, concise contract documents. Contracts which consist of the solicitation, the proposal and other documents attached together, but not integrated into a single contract document are discouraged.

### **3932 TRANSFER OF CONTRACTS**

**3932.1** Contracts or pending procurements held by the District of Columbia Public Schools may be assigned to the Office in accordance with the following provisions.

**3932.2** The CCO shall review any such proposed procurement or contract and determine whether it is in the best interest of the Office to accept the assignment of such procurement or contract or to terminate the procurement or contract.

**3932.3** In the event the Office determines it is in its best interest to accept the assignment of a contract or procurement, the Office shall have the authority to modify the contract or procurement so as to conform with best practices and the procedures employed by the Office on its own procurements.

### **3933 DISPUTES**

**3933.1** Each contract entered into by the Office shall include a disputes clause which sets forth the procedures by which disputes shall be resolved.

**3933.2** The disputes clause may, if the Contracting Officer determines it to be in the best interest of the Office, provide for the resolution of disputes through binding arbitration within or without the District of Columbia.

### **3934 PROTESTS**

**3934.1** All protests to the award of a contract by the Office shall be resolved in accordance with this section. Any such protest shall be first made to the Contracting Officer in writing. Any such protest shall include:

- (a) the name of the protestor;
- (b) the protestor's counsel or other representative;
- (c) a detailed description of the basis for the protest; and
- (d) the relief requested.

The Contracting Officer shall promptly issue a decision with regard to any such protest. If the Contracting Officer is other than the Director, the protestor may appeal the Contracting Officer's decision to the Director. Any such appeal shall be submitted to the Director within three (3) business day after the protestor receives the Contracting Officer's decision. The decision of the Director shall be the Office's final decision with regard to the protest.

**3934.2** Protests must be filed within the timeframes established hereby to be considered by the Office. Any protest that is not filed within such timelines will not be considered by the Office and the protestor shall be deemed to have waived the right to protest. Any protest which is based on the language or requirements of a solicitation or is otherwise based on facts which are apparent on the face of the solicitation shall be filed at least five (5) business days prior to the date proposals are due. Any protest that is not based on the language or requirements of a solicitation or otherwise based on facts which are apparent on the face of a solicitation must be submitted within five (5) business days of when the protestor know or should have known of the facts that serve the basis for the protest.

**3935 APPLICABLE LAWS**

**3935.1** The Office shall comply with the requirements of the First Source Employment Agreement of 1984, effective 29, 1984 (D.C. Law 5-93; D.C. Official Code § 2-219.01 *et seq.*), and the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33; D.C. Official Code § 2-218.01 *et seq.*)

Persons desiring to comment on these proposed rules should submit comments in writing to Allen Y. Lew, Director, Office of Public Education Facilities Modernization, 2400 East Capitol Street, SE, Washington, D.C. 20003 no later than thirty (30) days after the date of publication of this notice in the D.C. Register. Copies of these proposed rules may be obtained between 8:30 a.m. and 5:00 p.m. at the address stated above.

## DISTRICT DEPARTMENT OF TRANSPORTATION

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### NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

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The Director of the District Department of Transportation, pursuant to the authority of section 2 of the Capitol Hill Historic District Protection Emergency Act of 2007, effective August 2, 2007 (D.C. Act 17-112; \_\_ D.C.R. \_\_\_\_), and any substantially identical temporary or permanent legislation; Mayor's Order 2007-185 (August 9, 2007); Sections 3(b), 5(3), and 6 of the Department of Transportation Establishment Act of 2002, effective May 21, 2002 (D.C. Law 14-137, D.C. Official Code §§ 50-921.02(b), 50-921.04(3), and 50-921.06); Mayor's Order 2007-179 (March 6, 2007); and Sections 6(a)(1), 6(a)(6) and 6(b) of the District of Columbia Traffic Act, approved March 3, 1925 (43 Stat. 1121; D.C. Official Code § 50-2201.03(a)(1), (a)(6) and (b)), hereby gives notice of the adoption, on an emergency basis, of an amendment to Title 18, "Vehicle and Traffic Regulations," by adding three (3) new subsections to Chapter 40. The amendments prohibit commercial tour buses in the Capitol Hill Historic District except on certain arterial roads. The rulemaking does not apply to tour buses used for government purposes.

Emergency rulemaking action is necessary due to commercial tour buses parking and idling on narrow residential streets in the Capitol Hill Historic District, which has compromised mobility and accessibility for emergency vehicles and created a public health hazard.

This emergency rulemaking was adopted on August 9, 2007, and became effective immediately on that date. The emergency rulemaking will expire on December 7, 2007, or upon publication of a Notice of Final Rulemaking in the D.C. Register, whichever occurs first.

The Director also gives notice of the intent to take final rulemaking action to adopt the proposed rulemaking in not less than thirty (30) days from the date of publication of this notice in the D.C. Register.

Title 18 DCMR, Section 4025, **BUS RESTRICTIONS**, is amended to read as follows:

***By adding §§ 4025.4, 4025.5 and 4025.6 to read as follows:***

4025.4 No person shall operate a commercial tour bus in the Capitol Hill Historic District except upon the following roads:

- (a) Pennsylvania Ave., S.E. between 2<sup>nd</sup> St., S.E. and 13<sup>th</sup> St., S.E.;
- (b) Maryland Ave., N.E. between 2<sup>nd</sup> St., N.E. and 11<sup>th</sup> St., N.E.;
- (c) Massachusetts Ave., N.E. between 2<sup>nd</sup> St., N.E. and East Capitol St.;
- (d) Massachusetts Ave., S.E. between East Capitol St., and 14<sup>th</sup> St., S.E.; and
- (e) Independence Ave., S.E. between 2<sup>nd</sup> St., S.E. and 14<sup>th</sup> St., S.E.

- 4025.5 Buses used for government purposes and Washington Metropolitan Area Transit Authority buses shall be exempt from the provisions of Subsection 4025.4.
- 4025.6 For purposes of Subsection 4025.4, the phrase "commercial tour bus" means any motor vehicle, other than a taxicab, having a seating capacity of (8) or more passengers, exclusive of the driver, designed and used for the transportation of persons for compensation.

All persons interested in commenting on the subject matter of this proposed rulemaking action may file comments, in writing, with: Ken Laden, Associate Director, Transportation Policy and Planning Administration, District Department of Transportation, 2000 14th Street, N.W., 7th Floor, Washington, D.C. 20009. Comments must be received no later than thirty (30) days after the date of publication of this notice in the D.C. Register. Copies of this proposal may be obtained, at cost, by writing to the above address.

**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA  
NOTICE OF AMENDED EMERGENCY RULEMAKING**

**Z.C. Case No. 07-08**

**(Text Amendments – Temporary Ballpark Accessory Surface Parking Lots)**

**July 30, 2007**

The Zoning Commission for the District of Columbia, pursuant to the authority set forth in sections 1 and 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799; D.C. Official Code §§ 6-641.01 and 641.07) and the authority set forth in section 6(c) of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1206; D.C. Official Code § 2-505 (c)), hereby gives notice of the adoption, on an emergency basis, of amendments to §§ 601, 741, and 2110 of the Zoning Regulations (DCMR, Title 11).

These amendments modify provisions that the Commission adopted on an emergency basis on May 21, 2007. On that same date, the Commission authorized the publication of the proposed rules for a thirty-day period of public comment. A Notice of Proposed and Emergency Rulemaking was published in the *D.C. Register* on June 8, 2007 at 54 *DCR* 5633. The emergency rules permit temporary parking lots to serve patrons attending events at the ballpark authorized by Zoning Commission Order 06-22 and were taken on an emergency basis to ensure that there would be adequate off-street parking available by the time the ballpark opens.

On July 30, 2007, the Commission took final rulemaking action to adopt the proposed rules. The Commission adopted the proposed text, except that the Commission:

- Excluded the lots to be occupied by the future site of Canal Blocks Park from the properties eligible to serve as temporary ballpark parking lots;
- Eliminated the requirement for an approved traffic management plan for the Ballpark as a prerequisite to the issuance of any certificate of occupancy for the use, and instead required a DDOT approved traffic routing plan for each proposed lot; and
- Reduced the time that a lot must be reserved for the exclusive use of attendees at ballpark public events was from three hours to 1.5 hours before the event begins.

After taking final action, the Commission recognized that if it did not amend the emergency text adopted on May 21, 2007 to include the three changes described above, it would be possible for the temporary lots to be allowed in places and under circumstances that would not be consistent with the public welfare. The Commission, therefore, took emergency action to adopt the amendments set forth below.

The Zoning Commission adopted this amended emergency rule on July 30, 2007, and it became effective on that date. The emergency rule will expire on September 18, 2007, which is the 120<sup>th</sup> day after the Commission adopted the original emergency rule, or upon the publication of a Notice of Final Rulemaking in the *Register*, whichever occurs first.

NOTICE OF AMENDED EMERGENCY ACTION  
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Title 11 (DCMR) is amended as follows (additions to the existing text are **bold and underlined**, deletions are ~~struck through~~):

A. Chapter 6, MIXED USE (CR) DISTRICTS, § 601.1(dd), is amended to read as follows:

601.1 (dd) Notwithstanding § 602.1, temporary surface parking lot accessory to the Ballpark shall be permitted on Squares 660, 665, 700, 701, ~~767, 768, 769, or 882;~~ **and on Square 767, Lots 44 – 47; Square 768, Lots 19- 22; and Square 769, Lot 19 and those portions of Lots 18 and 20 within the CR District;** in accordance with § 2110. In the event that the cumulative parking limit established in § 2110.1 (a) is met, additional temporary surface parking spaces accessory to the Ballpark on Squares 660, 665, 700, 701, ~~767, 768, 769, or 882;~~ **and on Square 767, Lots 44 - 47, Square 768, Lots 19- 22, and Square 769, Lot 19, and those portions of Lots 18 and 20 within the CR District;** shall be permitted as a special exception if approved by the Board of Zoning Adjustment pursuant to § 2110.2.

B. Chapter 7, COMMERCIAL (C) DISTRICTS, § 741.5(d), is amended to read as follows:

741.5 (d) Temporary surface parking lot accessory to the Ballpark shall be permitted on Square 769, **Lot 21 and those portions of Lots 18 and 20 within the C-3-C District,** in accordance with § 2110.1 (a). In the event that the cumulative parking limit established in § 2110.1 (b) is met, additional temporary surface parking spaces accessory to the Ballpark on Square 769, **Lot 21 and those portions of Lots 18 and 20 within the C-3-C District,** shall be permitted as a special exception if approved by the Board of Zoning Adjustment pursuant to § 2110.2.

C. Chapter 21, OFF STREET PARKING REQUIREMENTS, §§ 2110.1 and 2110.3, are amended to read as follows:

2110.1 Permitted Use - Notwithstanding §§ 602.1 and 902.1 and not subject to any otherwise applicable proximity requirement, a temporary surface parking lot accessory to the Ballpark shall be permitted as a temporary use on Squares 660, 665, 700, 701, 707, 708, 708E, 708S, 744S, ~~767, 768, 769,~~ and 882; **and Square 767, Lots 44 – 47; Square 768, Lots 19 – 22; and Square 769, Lots 18 - 21** (“the subject squares”) in accordance with §§ 2110.3 through 2110.5 and the following provisions:

- (a) The cumulative total of all temporary surface parking spaces for which a valid Building Permit has been issued pursuant to this section shall not exceed 3,775 parking spaces.

## NOTICE OF AMENDED EMERGENCY ACTION

Z.C. CASE NO. 07-08

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- (b) Any certificate of occupancy issued pursuant to this subsection shall expire no later than April 1, 2013.
- (c) The application for a building permit for matter of right construction shall include a detailed accounting demonstrating that the circumstances described in § 2110.2 do not apply.
- (d) No certificates of occupancy for this use shall be issued until the District Department of Transportation has approved a traffic routing plan for the lot, which shall include the impact of other proposed lots if required by DDOT.
- (e) The traffic routing plan described in § 2110.1(d) shall not direct traffic through I St., SW, P St., SW, or 4<sup>th</sup> St., SW.

...

2110.3

Any parking lot authorized shall be available for exclusive use of attendees at any baseball game or other public event described in §1612.3 for a time period extending from one and a half (1.5) ~~3~~ hours prior to the scheduled start time of the event, to 3 hours after the event. At all other times, the parking lot may be used for:

- (a) Parking on a general basis for “non-commercial motor vehicles” as that term is defined by 18 DCMR § 13.12.3 (c), except vehicles equipped to serve as temporary or permanent living quarters; or
- (b) A seasonal or occasional market for produce, arts or crafts with non-permanent structures.