



STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

Department of Administration
DIVISION OF LEGAL SERVICES
One Capitol Hill, 4th Floor
Providence, RI 02908-5890

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July 29, 2014

VIA FIRST CLASS MAIL AND ELECTRONIC MAIL:

Luly E. Massaro
Commission Clerk
Rhode Island Public Utilities Commission
89 Jefferson Boulevard
Warwick, Rhode Island 02888

RE: Commission's Fourth Set of Data Request Directed to Rhode Island Office of Energy Resources (July 25, 2014) – Docket 4288

Dear Ms. Massaro:

Enclosed for filing on behalf of the Rhode Island Distributed Generation Board ("Board") is an original and ten (10) copies responding to the Commission's Fourth Set of Data Requests Directed to Rhode Island Office of Energy Resources (July 25, 2014) – Docket 4288

Electronic copies of the filing were sent to all persons named on the attached Service List.

Thank you for your assistance.

Sincerely,

Daniel W. Majcher, Esq.

DWM/njr

Enclosure

c. Docket 4288 Service List

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: RI OFFICE OF ENERGY RESOURCES'
BUDGET REQUEST TO PERFORM CEILING PRICE
SERVICES FOR THE 2015 RENEWABLE ENERGY
GROWTH PROGRAM

DOCKET NO. 4288

RESPONSE TO COMMISSION'S FOURTH SET OF DATA REQUEST DIRECTED
TO R.I. OFFICE OF ENERGY RESOURCES

(July 25, 2014)

1. True or False. A written agreement for the performance of the 2013 ceiling price services bearing the signatures of an agent/employee of Sustainable Energy Associates and an authorized agent of the State of Rhode Island does not exist.

RESPONSE: True. There is no written agreement bearing both signatures of Sustainable Energy Associates and the State for the development of the 2011 through 2014 ceiling prices. In accordance with State of Rhode Island Procurement Regulation ("Procurement Regulation") Section 8.4, the Purchase Order, which is signed by the State Purchasing Agent, is the document that formalizes the purchase transaction with the vendor. Further, in accordance with Procurement Regulation 8.2.1.1, the Purchase Order represents the "primary contractual instrument of the State."

As previously stated, Purchase Order #3340541, by reference, incorporates the State's General Conditions of Purchase.

2. Referring to Comm 2-1, Purchase Order 3340541 identifies the Buyer as C McGurn and the Vendor as #39006. Identify the Buyer and Vendor of Purchase Order 3340541 by providing his or her full name, employer and title.

RESPONSE: The Buyer's name is Cheryl McGurn and her title is Buyer II. Ms. McGurn is employed by the State of Rhode Island at the Division of Purchases, Department of Administration.

Vendor #39006 is the identification number used in the State's financial management system (RIFANS) for "Robert C. Grace, DBA Sustainable Energy Advantage LLC."

3. According to Comm 2-1, Purchase Order 3340541 is a multi-year contract (page III of IV) with an effective period of July 26, 2013 through September 26, 2014. This

contract automatically terminates on September 26, 2014 unless formally amended by mutual agreement of the State and Vendor. Please confirm whether this contract has been extended or terminated. Please confirm by providing copies of records, agreements or other written documentation.

RESPONSE: The agreement was not extended or terminated and will expire at the end of the effective period, September 26, 2014. Although the agreement remains in effect, the primary services to establish the ceiling prices for the 2014 program year were completed at the time the vendor assisted with the Public Utilities Commission (“PUC”) hearing and the PUC approved the ceiling price recommendations. SEA has not provided any additional services since that time. The reason for the extended effective period is because of the uncertainty regarding potential activity that may occur during the 2014 program year, including renewable energy federal incentives established by legislation, which would result in adjustments to the approved ceiling prices during the program year.

4. From what source did OER withdraw the funds to pay its consultant for ceiling price services during years 2011 through 2013.

RESPONSE: Regional Greenhouse Gas Initiative and federal funds were used to pay the consultant between years 2011 and 2014.

5. In Comm 2-1, the Board states that a new purchase order similar to Purchase Order 3340541 will be issued for the 2015 ceiling price services. Purchase Order 3340541 contains a non-assignment clause prohibiting assignment of rights or responsibility except by express written permission of the State Purchasing Agent. Since the Board indicated in Comm 1-1 that National Grid will pay for the consultant to perform the 2015 ceiling price services, please provide a copy of any records, agreements or written documentation authorizing such assignment of responsibility if/when it is available.

RESPONSE: As stated in the response to Comm 1-1, the funding will come from National Grid. However, the Office of Energy Resources (“OER”) has yet to determine how the payment process under the new statute will be effectuated. One option is that OER will make payment directly to the selected vendor, but will receive reimbursement through a separate, independent transaction from National Grid, so no assignment would appear to be necessary.

Another option would be for National Grid to make a third-party payment directly to the vendor after the invoice is approved by the State. The “non-

assignment clause” attached to Purchase Order #3340541 and the assignment provision in Section 2(d) State’s General Conditions applies only to the vendor; in the case of the prior agreement, to Robert C. Grace DBA Sustainable Energy Advantage LLC. While the vendor requires written approval from the State Purchasing Agent in order to assign its rights and responsibilities, the State may assign its rights and responsibilities as necessary without any approval from the vendor. Therefore, having National Grid provide payment directly to the vendor through a third-party payment arrangement is another viable option. Assuming approval of the budget, if a third-party payment process is elected and the parties into a third-party payment agreement, the OER will provide the agreement to the PUC.

**STATE OF RHODE ISLAND
PROCUREMENT REGULATIONS**

APPENDIX A – GENERAL CONDITIONS OF PURCHASE



Amended regulations adopted June 20, 2011

Division of Purchases
Rhode Island Department of Administration
One Capitol Hill, Second Floor
Providence, Rhode Island 02908

Tel: (401) 574-8100

RECEIVED

(Handwritten initials)

OCT 11 2011

RI SECRETARY OF STATE
ADMINISTRATIVE RECORDS

The following amended State of Rhode Island Procurement Regulations were adopted by me, as Director of the State of Rhode Island Department of Administration, on the _____ day of June 2011.

Richard A. Licht, Director
State of Rhode Island
Department of Administration
One Capitol Hill
Providence, Rhode Island 02908

Date of Public Notice: May 5, 2011
Date of Public Hearing: June 8, 2011
End of Comment Period: June 8, 2011

GENERAL CONDITIONS OF PURCHASE

All State Purchase Orders, Contracts, Solicitations, Delivery Orders and Service Requests shall incorporate and be subject to the provisions of Title 37 Chapter 2 of the General Laws of the State of Rhode Island, the Regulations adopted pursuant thereto, all other applicable provisions of the Rhode Island General Laws, specific requirements described in the Request or Contract, and the following General Conditions of Purchase:

1. GENERAL - All purchase orders, contracts, solicitations, delivery orders, and service requests are for specified goods and services, in accordance with express terms and conditions of purchase, as defined herein. For the purposes of this document, the terms "bidder" and "contractor" refer to any individual, firm, corporation, or other entity presenting a proposal indicating a desire to enter into contracts with the State, or with whom a contract is executed by the State's Purchasing Agent, and the term "contractor" shall have the same meaning as "vendor".

2. ENTIRE AGREEMENT - The State's Purchase Order, or other State contract endorsed by the State Office of Purchases, shall constitute the entire and exclusive agreement between the State and any contractor receiving an award. In the event any conflict between the bidder's standard terms of sale, these conditions or more specific provisions contained in the solicitation shall govern. All communication between the State and any contractor pertaining to any award or contract shall be accomplished in writing.

- **a.** Each proposal will be received with the understanding that the acceptance, in writing, by contract or Purchase Order by the Purchasing Agent of the offer to do work or to furnish any or all the materials, equipment, supplies or services described therein shall constitute a contract between the bidder and the State. This shall bind the bidder on his part to furnish and deliver at the prices and in accordance with the conditions of said accepted proposal and detailed specifications and the State on its part to order from such contractor (except in case of emergency) and to pay for at the agreed prices, all materials, equipment, supplies or services specified and delivered. A contract shall be deemed executory only to the extent of funds available for payment of the amounts shown on Purchase Orders issued by the State to the contractors.

- b.** No alterations or variations of the terms of the contract shall be valid or binding upon the State unless submitted in writing and accepted by the Purchasing Agent. All orders and changes thereof must emanate from the Office of Purchases: no oral agreement or arrangement made by a contractor with an agency or employee will be considered to be binding on the Purchasing Agent, and may be disregarded.

- c.** Contracts will remain in force for the contract period specified or until all articles or services ordered before date of termination shall have been

satisfactorily delivered or rendered and accepted and thereafter until all terms and conditions have been met, unless

1. terminated prior to expiration date by satisfactory delivery against orders of entire quantities, or
2. extended upon written authorization of the Purchasing Agent and accepted by the contractor, to permit ordering of the unordered balances or additional quantities at the contract price and in accordance with the contract terms, or
3. canceled by the State in accordance with other provisions stated herein.

• **d.** It is mutually understood and agreed that the contractor shall not assign, transfer, convey, sublet or otherwise dispose of this contract or his right, title or interest therein, or his power to execute such contract, to any other person, company or corporation, without the previous consent, in writing, of the Purchasing Agent.

e. If, subsequent to the submission of an offer or issuance of a purchase order or execution of a contract, the bidder or contractor shall merge with or be acquired by another entity, the contract may be terminated, except as a corporate resolution prepared by the contractor and the new entity ratifying acceptance of the original bid or contract terms, condition, and pricing is submitted to the Office of Purchases, and expressly accepted.

f. The contractor or bidder further warrants by submission of an offer or acceptance of a purchase order or other contract that he has no knowledge at the time of such action of any outstanding and delinquent or otherwise unsettled debt owed by him to the State, and agrees that later discovery by the Purchasing Agent that this warranty was given in spite of such knowledge, except where the matter is pending in hearing or from any appeal therefrom, shall form reasonable grounds for termination of the contract.

3. SUBCONTRACTS - No subcontracts or collateral agreements shall be permitted, except with the State's express consent. Upon request, contractors must submit to the Office of Purchases a list of all subcontractors to be employed in the performance of any Purchase Order or other contract arising from this Request.

4. RELATIONSHIP OF PARTIES - The contractor or bidder warrants, by submission of an offer or acceptance of a purchase order or other contract, that he is not an employee, agent, or servant of the State, and that he is fully qualified and capable in all material regards to provide the specified goods and services. Nothing herein shall be construed as creating any contractual relationship or obligation between the State and any sub-bidder, subcontractor, supplier, or employee of the contractor or offeror.

5. COSTS OF PREPARATION - All costs associated with the preparation, development, or submission of bids or other offers will be borne by the offeror. The State will not reimburse any offeror for such costs.

6. SPECIFIED QUANTITY REQUIREMENT - Except where expressly specified to the contrary, all solicitations and contracts are predicated on a specified quantity of goods or services, or for a specified level of funding.

- **a.** The State reserves the right to modify the quantity, scope of service, or funding of any contract, with no penalty or charge, by written notice to the contractor, except where alternate terms have been expressly made a part of contract.

- b.** The State shall not accept quantities in excess of the specified quantity except where the item is normally sold by weight (where sold by weight, the State will not accept quantities greater than ten per cent [10%] of the specified quantity), or where the Request or Contract provides for awards for other than exact quantities.

- c.** Purchase Orders or other contracts may be increased in quantity or extended in term without subsequent solicit with the mutual consent of the contractor and the State, where determined by the Purchasing Agent to be in the State's best interest.

7. TERM AND RENEWAL - Where offers have been requested or contracts awarded for terms exceeding periods of twelve (12) months, it is mutually understood and agreed that the State's commitment is limited to a base term not to exceed twelve (12) months, subject to renewal annually at the State's sole option for successive terms as otherwise described, except where expressly specified to the contrary. Purchase orders appearing to commit to obligations of funding or terms of performance may be executed for administrative convenience, but are otherwise subject to this provision, and in such cases the State's renewal shall be deemed to be automatic, conditional on the continued availability of appropriated funds for the purpose, except as written notice of the State's intent not to renew is served.

8. DELIVERY - Delivery must be made as ordered and in accordance with the proposal. If delivery qualifications do not appear on the bidder's proposal, it will be interpreted to mean that goods are in stock and that shipment will be made within seven (7) calendar days. The decision of the Purchasing Agent, as to reasonable compliance with the delivery terms, shall be final. Burden of proof of delay in receipt of order shall rest with the contractor. No delivery charges shall be added to invoices except when authorized on the Purchase Order.

9. FOREIGN CORPORATIONS - In accordance with Title 7 Chapter 1.1 of the General Laws of Rhode Island, no foreign corporation shall have the right to transact business in this state until it shall have procured a certificate of authority so to do from the Secretary of State.

10. PRICING - All pricing offered or extended to the State is considered to be firm and fixed unless expressly provided for to the contrary. All prices shall be quoted F.O.B. Destination with freight costs included in the unit cost to be paid by the State, except, where the Request or Contract permits, offers reflecting F.O.B. Shipping Point will be considered, and freight costs may then be prepaid and added to the invoice.

11. COLLUSION - Bidder or contractor warrants that he has not, directly or indirectly, entered into any agree participated in any collusion or otherwise taken any action in restraint of full competitive bidding. In special circumstances, an executed affidavit will be required as a part of the bid.

12. PROHIBITION AGAINST CONTINGENT FEES AND GRATUITIES - Bidder or contractor warrants that he has not paid, and agrees not to pay, any bonus, commission, fee, or gratuity to any employee or official of the State for the purpose of obtaining any contract or award issued by the State. Bidder or contractor further warrants that no commission or other payment has been or will be received from or paid to any third party contingent on the award of any contract by the State, except as shall have been expressly communicated to the State Purchasing Agent in writing prior to acceptance of the contract or award in question. Subsequent discovery by the State of non-compliance with these provisions shall constitute sufficient cause for immediate termination of all outstanding contracts and suspension or debarment of the bidder(s) or contractor(s) involved.

13. AWARDS - Awards will be made with reasonable promptness and by written notice to the successful bidder (only); bids are considered to be irrevocable for a period of sixty (60) days following the bid opening unless expressly provided for to the contrary in the Request, and may not be withdrawn during this period without the express permission of the Purchasing Agent.

- **a.** Awards shall be made to the bidder(s) whose offer(s) constitutes the lowest responsive price offer (or lowest responsive price offer on an evaluated basis) for the item(s) in question or for the Request as a whole, at the option of the State. The State reserves the right to determine those offers which are responsive to the Request, or which otherwise serve its best interests.

- b.** The State reserves the right, before making award, to initiate investigations as to whether or not the materials, equipment, supplies, qualifications or facilities offered by the bidder meet the requirements set forth in the proposal and specification, and are ample and sufficient to insure the proper performance of the contract in the event of award. If upon such examination it is found that the conditions of the proposal are not complied with or that articles or equipment proposed to be furnished do not meet the requirements called for, or that the qualifications or facilities are not satisfactory, the State may reject such a bid. It is distinctly understood, however, that nothing in the foregoing shall mean or imply that it is obligatory upon the State to make any examinations before awarding a contract; and it is further understood that if such examination is made, it in no

way relieves the contractor from fulfilling all requirements and conditions of the contract.

c. Qualified or conditional offers which impose limitations of the bidder's liability or modify the requirements of the bid, offers for alternate specifications, or which are made subject to different terms and conditions than those specified by the State may, at the option of the State, be

1. Rejected as being non-responsive, or
2. set aside in favor of the State's terms and conditions (with the consent of the bidder), or
3. accepted, where the State Purchasing Agent determines that such acceptance best serves the interests of the State.

• Acceptance or rejection of alternate or counter-offers by the State shall not constitute a precedent which shall be considered to be binding on successive solicitations or procurements.

d. Bids submitted in pencil, or which do not bear an original signature, in ink, by an owner or authorized agent thereof, will not be accepted.

e. Bids must be extended in the unit of measure specified in the Request. In the event of any discrepancy between unit prices and their extensions, the unit price will govern.

f. The Purchasing Agent reserves the right to determine the responsibility of any bidder for a particular procurement.

g. The Purchasing Agent reserves the right to reject any and all bids in whole or in part, to waive technical defects, irregularities, and omissions, and to give consideration to past performance of the offerors where, in his judgment the best interests of the State will be served by so doing.

h. The Purchasing Agent reserves the right to make awards by items, group of items or on the total low bid for all the items specified as indicated in the detailed specification, unless the bidder specifically indicates otherwise in his bid.

i. Preference may be given to bids on products raised or manufactured in the State, other things being equal.

j. The impact of discounted payment terms shall not be considered in evaluating responses to any Request.

k. The Purchasing Agent reserves the right to act in the State's best interests regarding awards caused by clerical errors by the Office of Purchases.

14. SUSPENSION AND DEBARMENT - The Purchasing Agent may suspend or debar any vendor or potential bidder, for good cause shown:

• a. A debarment or suspension against a part of a corporate entity constitutes debarment or suspension of all of its divisions and all other organizational elements, except where the action has been specifically limited in scope and application, and may include all known corporate affiliates of a contractor, when such offense or act occurred in connection with the affiliate's performance of duties for or on behalf of the contractor, or with the knowledge, approval, or acquiescence of the contractor or one or more of its principals or directors (or where the contractor otherwise participated in, knew of, or had reason to know of the acts).

b. The fraudulent, criminal or other serious improper conduct of any officer, director, shareholder, partner, employee, or any other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval or acquiescence. The contractor's acceptance of benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

c. A vendor or contractor who knowingly engages as a subcontractor for a contract awarded by the State to a vendor or contractor then under a ruling of suspension or debarment by the State shall be subject to disallowance of cost, annulment or termination of award, issuance of a stop work order, or debarment or suspension, as may be judged to be appropriate by the State Purchasing Agent.

15. PUBLIC RECORDS - Contractors and bidders are advised that all documents, correspondence, and other submissions to the Office of Purchases may be accessible as public records, pursuant to Title 38, Chapter 2 of the General Laws, absent specific notice that portions of such submittals may contain confidential or proprietary information, such that public access to those items should be withheld, and except as otherwise provided for pursuant to RIGL 37-2-18 (a)-(h) "Competitive Sealed Bidding".

16. PRODUCT EVALUATION - In all specifications, the words "or equal" are understood after each article when manufacturer's name or catalog are referenced. If bidding on items other than those specified, the bidder must, in every instance, give the trade designation of the article, manufacturer's name and detailed specifications of the item the bidder proposes to furnish; otherwise, the bid will be construed as submitted on the identical commodity described in the detailed specifications. The Purchasing Agent reserves the right to determine whether or not the item submitted is the approved equal the detailed specifications.

- **a.** Any objections to specifications must be filed by a bidder, in writing, with the Purchasing Agent at least 96 hours before the time of bid opening to enable the Office of Purchases to properly investigate the objections.

- b.** All standards are minimum standards except as otherwise provided for in the Request or Contract.

- c.** Samples must be submitted to the Office of Purchases in accordance with the terms of the proposals and detailed specifications. Samples must be furnished free of charge and must be accompanied by descriptive memorandum invoices indicating whether or not the bidder desires their return and specifying the address to which they are to be returned (at the bidder's risk and expense), provided they have not been used or made useless by tests; and absent instructions, the samples shall be considered to be abandoned. Award samples may be held for comparison with deliveries.

- d.** All samples submitted are subject to test by any laboratory the State Purchasing Agent may designate.

17. PRODUCT ACCEPTANCE - All merchandise offered or otherwise provided shall be new, of prime manufacture, and of first quality unless otherwise specified by the State. The State reserves the right to reject all nonconforming goods, and to cause their return for credit or replacement, at the State's option. Contract deliverables specified for procurements of services shall be construed to be work products, and subject to the provisions of this section.

- **a.** Failure by the State to discover latent defect(s) or concealed damage or non-conformance shall not foreclose the State's right to subsequently reject the goods in question.

- b.** Formal or informal acceptance by the State of non-conforming goods shall not constitute a precedent for successive receipts or procurements.

- c.** Where the contractor fails to promptly cure the defect or replace the goods, the State reserves the right to cancel the Purchase Order, contract with a different contractor, and to invoice the original contractor for any differential in price over the original contract price.

- d.** When materials, equipment or supplies are rejected, the same must be removed by the contractor from the premises of the State Agency within forty-eight (48) hours of notification. Rejected items left longer than two days will be regarded as abandoned and the State shall have the right to dispose of them as its own property.

18. PRODUCT WARRANTIES - All product or service warranties normally offered by the contractor or bidder shall accrue to the State's benefit, in addition to any special

requirements which may be imposed by the State. Every unit delivered must be guaranteed against faulty material and workmanship for a period of one year unless otherwise specified, and the State may, in the event of failure, order its replacement, repair, or return for full credit, at its sole option.

19. PAYMENT - Unless otherwise provided for by the Request or Contract, payment shall not be made until delivery has been made, or services performed, in full, and accepted. Payment shall not be due prior to thirty (30) working days following the latest of completion, acceptance, or the rendering of a properly submitted invoice.

- **a.** Payment terms other than the foregoing may be rejected as being non-responsive..

- b.** No partial shipments will be accepted, unless provided for by the Request or Contract.

- c.** Where a question of quality is involved, payment in whole or part against which to charge back any adjustment required, shall be withheld at the direction of the Purchasing Agent. In the event a cash discount is stipulated, the withholding of payments, as herein described, will not deprive the State from taking such discount.

- d.** Payments for used portion of inferior delivery will be made by the State on an adjusted price basis.

- e.** Payments on contracts under architectural or engineering supervision must be accompanied by a Certificate of Payment and Statement of Account signed by the architect or engineer and submitted to the Agency involved for approval.

20. THIRD PARTY PAYMENTS - The State recognizes no assigned or collateral rights to any purchase agreement except as may be expressly provided for in the bid or contract documents, and will not accede to any request for third party or joint payment(s), except as provided for in specific orders by a court of competent jurisdiction, or by express written permission of the Purchasing Agent. Where an offer is contingent upon such payment(s), the offeror is obligated to serve affirmative notice in his bid submission.

21. SET-OFF AGAINST PAYMENTS - Payments due the contractor shall be subject to reduction by the State Controller equal to the amount of unpaid and delinquent state taxes (or other just debt owed to the State), except where notice of delinquency has not been served or while the matter is pending in hearing or from any appeal therefrom.

22. CLAIMS - Any claim against a contractor may be deducted by the State from any money due him in the same or other transactions. If no deduction is made in such fashion, the contractor shall pay the State the amount of such claim on demand. Submission of a voucher and payment, thereof, by the State shall not preclude the Purchasing Agent from

demanding a price adjustment in any case when the commodity delivered is later found to deviate from the specifications and proposal.

- a. The Purchasing Agent may assess dollar damages against a vendor or contractor determined to be non-performing or otherwise in default of their contractual obligations equal to the cost of remedy incurred by the State, and make payment of such damages a condition for consideration for any subsequent award. Failure by the vendor or contractor to pay such damages shall constitute just cause for disqualification and rejection, suspension, or debarment.

23. STATE CONTROLLER'S CERTIFICATION OF FUNDING - Certification as to the availability of funds to support the procurement for the current fiscal year ending June 30th only. Where delivery or service requirements extend beyond the end of the current fiscal year, such extensions are subject to both the availability of appropriated funds and a determination of continued need.

24. UNUSED BALANCES - Unless otherwise specified, all unused Blanket Order quantities and/or unexpended funds shall be automatically canceled on the expiration of the specified term. Similarly, for orders encompassing more than one State fiscal year, unexpended balances of funding allotted for an individual fiscal year may be liquidated at the close of that fiscal year, at the State's sole option.

25. MINORITY BUSINESS ENTERPRISES - Pursuant to the provisions of Title 37 Chapter 14.1 of the General Laws, the State reserves the right to apply additional consideration to offers, and to direct awards to bidders other than the responsive bid representing the lowest price where:

- a. the offer is fully responsive to the terms and conditions of the Request, and
- b. the price offer is determined to be within a competitive range (not to exceed 5% higher than the lowest responsive price offer) for the product or service, and
- c. the firm making the offer has been certified by the R.I. Department of Economic Development to be a small business concern meeting the criteria established to be considered a Minority Business Enterprise. Ten per cent [10%] of the dollar value of the work performed against contracts for construction exceeding \$5,000 shall be performed by Minority Business Enterprises where it has been determined that subcontract opportunities exist, and where certified Minority Business Enterprises are available. A contractor may count towards its MBE, DBE, or WBE goals 60% of its expenditures for materials and supplies required under a contract and obtained from an MBE, DBE, or WBE regular dealer, and 100% of such expenditures when obtained from an MBE, DBE, or WBE manufacturer. Awards of this type shall be subject to approval, by the Director of Administration, of a Subcontracting Plan submitted by the bidder receiving the award.

26. PREVAILING WAGE REQUIREMENT - In accordance with Title 37 Chapter 13 of the General Laws of Rhode Island, payment of the general prevailing rate of per diem wages and the general prevailing rate for regular, overtime and other working conditions existing in the locality for each craft, mechanic, teamster, or type of workman needed to execute this work is a requirement for both contractors and subcontractors for all public works.

27. EQUAL OPPORTUNITY COMPLIANCE, HANDICAPPED ACCESS AND AFFIRMATIVE ACTION - Contractors of the State are required to demonstrate the same commitment to equal opportunity as prevails under federal contracts controlled by Federal Executive Orders 11246, 11625, 11375 and 11830, and Title 28 Chapter 5.1 of the General Laws of Rhode Island. Affirmative action plans shall be submitted by the contractor for review by the State Equal Opportunity Office. A contractor's failure to abide by the rules, regulations, contract terms and compliance reporting provisions as established shall be grounds for forfeiture and penalties as shall be established, including but not limited to suspension.

28. DRUG-FREE WORKPLACE REQUIREMENT - In accordance with Executive Order No. 91-14, Contractors who do business with the State and their employees shall abide by the State's drug-free workplace policy and the contractor shall so attest by signing a certificate of compliance.

29. GOODS PRODUCED IN THE REPUBLIC OF SOUTH AFRICA - In accordance with Chapters 35-10-12 and 37-2-57 of the General Laws, goods which are known to be wholly produced in the Republic of South Africa may not be accepted for any procurement the State of Rhode Island; the offeror attests by his submission of a bid or offer, or acceptance of a purchase order or other contract, that these prohibitions do not apply to material or goods which form the basis for his offer or contract.

30. TAXES - The State of Rhode Island is exempt from payment of excise, transportation and sales tax imposed by the Federal or State Government. These taxes should not be included in the proposal price. Exemption Certificates will be furnished upon request.

31. INSURANCE - All construction contractors, independent tradesmen, or firms providing any type of maintenance, repair, or other type of service to be performed on state premises, buildings, or grounds are required to purchase and maintain coverage with a company or companies licensed to do business in the state as follows:

- a. Comprehensive General Liability Insurance -
 - 1) Bodily Injury \$1,000,000 each occurrence
 - \$1,000,000 annual aggregate
 - 2) Property Damage \$500,000 each occurrence
- \$500,000 annual aggregate
 - Independent Contractors
 - Contractual - including construction hold harmless and other types of contracts or agreements in effect for insured operations

- Completed Operations
- Personal Injury (with employee exclusion deleted)
- b. Automobile Liability Insurance -
- Combined Single Limit \$1,000,000 each occurrence
 - Bodily Injury
 - Property Damage, and in addition non-owned and/or hired vehicles and equipment
- c. Workers' Compensation Insurance -
- Coverage B \$100,000

The Purchasing Agent reserves the right to consider and accept alternate forms and plans of insurance or to require additional or more extensive coverage for any individual requirement. Successful bidders shall provide certificates of coverage, reflecting the State of Rhode Island as an additional insured, to the Office of Purchases, forty-eight (48) hours prior to the commencement of work, as a condition of award. Failure to comply with this provision shall result in rejection of the offeror's bid.

32. BID SURETY - When requested, a bidder must furnish a Bid Bond or Certified Check for 5% of his bid, or for the stated amount shown in the solicitation. Bid Bonds must be executed by a reliable Surety Company authorized to do business in the State of Rhode Island. Failure to provide Bid Surety with bid may be cause for rejection of bid. The Bid Surety of any three bidders in contention will be held until an award has been made according to the specifications of each proposal. All others will be returned by mail within 48 hours following the bid opening. Upon award of a contract, the remaining sureties will be returned by mail unless instructed to do otherwise.

33. PERFORMANCE AND LABOR AND PAYMENT BONDS - A performance bond and labor and payment bond of up to 100% of an award may be required by the Purchasing Agent. Bonds must meet the following requirements:

- a. Corporation: The Bond must be signed by an official of the corporation above his official title and the corporate seal must be affixed over his signature.
- b. Firm or Partnership: The Bond must be signed by all of the partners and must indicate that they are "Doing Business As (name of firm)."
- c. Individual: The Bond must be signed by the individual owning the business and indicate "Owner."
- d. The Surety Company executing the Bond must be licensed to do business in the State of Rhode Island or Bond must be countersigned by a company so licensed.
- e. The Bond must be signed by an official of the Surety Company and the corporate seal must be affixed over his signature.
- f. Signatures of two witnesses for both the principal and the Surety must appear on the Bond.
- g. A Power of Attorney for the official signing of the Bond for the Surety Company must be submitted with the Bond.

34. DEFAULT AND CANCELLATION - A contract may be canceled or annulled at the contractor's expense upon non-performance of contract, or breach, by the contractor,

of any of his obligations. Failure of contractor to cure such non-performance or breach within ten working days after the receipt of notice, shall be sufficient cause for the cancellation of the contract in question, the cancellation of all outstanding contracts or sub-contracts held by the contractor, and the suspension or debarment of the contractor from future procurements.

- **a.** Failure of a contractor to deliver or perform within the time specified, or within reasonable time as interpreted by the Purchasing Agent or failure to make replacement of rejected articles, when so requested, immediately or as directed by the Purchasing Agent, will cause the Purchasing Agent to purchase in the open market to replace those rejected or not delivered. The Purchasing Agent reserves the right to authorize immediate purchase in the open market against rejections on any contract when necessary. On all such purchases, the contractor, or his surety, agrees to promptly reimburse the State for excess costs occasioned by such default. Should the cost be less, the contractor shall have no claim to the difference.

- b.** A contractor who fails to commence within the time specified or complete an award made for repairs, alterations, construction, or any other service will be considered in default of contract. The Purchasing Agent may contract for completion of the work with another contractor and seek recourse from the defaulting contractor or his surety.

- c.** If contractor consistently fails to deliver quantities or otherwise perform as specified, the Purchasing Agent reserves the right to cancel the contract and purchase the balance in the open market at the contractor's expense.

35. INDEMNITY - The contractor guarantees:

- **a.** To save the State, its agents and employees, harmless from any liability imposed upon the State arising from the negligence, either active or passive, of the contractor, as well as for the use of any copyrighted or non-copyrighted composition, secret process, patented or unpatented invention, article or appliance furnished or used in the performance of the contract of which the contractor is not the patentee, assignee or licensee.

- b.** To pay for all permits, licenses and fees and give all notices and comply with all laws, ordinances, rules and regulations of the city or town in which the installation is to be made and of the State of Rhode Island.

- c.** That the equipment offered is standard new equipment, latest model of regular stock product with all parts regularly used with the type of equipment offered; also, that no attachment or part has been substituted or applied contrary to manufacturer's recommendations and standard practice.

36. CONTRACTOR'S OBLIGATIONS - In addition to the specific requirements of the contract, construction and building repair contractors bear the following standard responsibilities:

- **a.** To furnish adequate protection from damage for all work and to repair damages of any kind, for which he or his workmen are responsible, to the building or equipment, to his own work, or to the work of other contractors;

- b. To clear and remove all debris and rubbish resulting from his work from time to time, as directed or required, a completion of the work leave the premises in a neat unobstructed condition, broom clean, and in satisfactory order and repair;
- c. To store equipment, supplies, and material at the site only upon approval by the State, and at his own risk;
- d. To perform all work so as to cause the least inconvenience to the State, and with proper consideration for the rights of other contractors and workmen;
- e. To acquaint themselves with conditions to be found at the site, and to assume responsibility for the appropriate dispatching of equipment and supervision of his employees during the conduct of the work; and
- f. To ensure that his employees are instructed with respect to special regulations, policies, and procedures in effect for any State facility or site, and that they comply with such rules.

37. FORCE MAJEURE - All orders shall be filled by the contractor with reasonable promptness, but the contractor shall not be held responsible for any losses resulting if the fulfillment of the terms of the contract shall be delayed or prevented by wars, acts of public enemies, strikes, fires, floods, acts of God, or for any other acts not within the control of the contractor and which by the exercise of reasonable diligence, the contractor is unable to prevent.

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(14) OCT 11 2011

RI SECRETARY OF STATE
ADMINISTRATIVE RECORDS

**STATE OF RHODE ISLAND
PROCUREMENT REGULATIONS**

SECTION 8 - CONTRACTS



Adopted December 2011

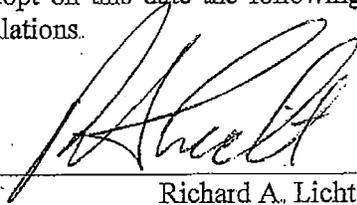
Division of Purchases
Rhode Island Department of Administration
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(K) DEC 29 2011

RI SECRETARY OF STATE
ADMINISTRATIVE RECORDS

In accordance with the provisions of Chapter 37-2 and Chapter 42-35 of the General Laws of Rhode Island of 1956, as amended, I hereby adopt on this date the following amendments to Section Eight of the Procurement Rules and Regulations.



Richard A. Licht, Director
State of Rhode Island
Department of Administration
One Capitol Hill
Providence, Rhode Island 02908

12/29/11

DATE

Date of Public Notice: November 8, 2011
Date of Public Hearing: December 8, 2011
End of Comment Period: December 8, 2011

SECTION 8 - CONTRACTS

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SECTION 8 - CONTRACTS

8.1 DEFINITIONS

8.1.1 [37-2-7(7)] "Change order" shall mean a written authorization signed by the purchasing agent directing or allowing the contractor to proceed with changes, alterations, or modifications to the terms, conditions, or scope of work on a previously awarded contract. *Cf.* R.I. Gen. Laws § 37-2-7 (2)

8.1.2 [37-2-7(5)] "Contract" shall mean all types of agreements, including grants and orders, for the purchase or disposal of supplies, services, construction, or any other items. It shall include awards, contracts of a fixed price, cost, cost-plus-a-fixed-fee, or incentive type; contracts providing for the issuance of job or task orders, leases, letter contracts, purchase orders and construction management contracts. It also includes supplemental agreements with respect to any of the foregoing. With respect to the procurement regulations set forth herein, "contract" shall not apply to labor contracts with employees of state agencies.

8.1.3 [37-2-7(6)] "Contract Modification" shall mean any written alteration in the specifications, delivery point, rate of delivery, contract period, price, quantity, or other contract provisions of any existing contract, whether accomplished by unilateral action in accordance with a contract provision, or by mutual action of the parties to the contract. It shall include bilateral actions, such as change orders, administrative changes, notices of termination, and notices of the exercise of a contract option.

8.1.4 "Contract Addendum" shall mean an alteration in the terms and/or scope of an agreement accomplished by mutual action of the parties, permissible under emergency purchases, construction work, sole source procurement, and otherwise where competition is not required.

8.1.5 [37-2-7(7)] "Contractor" shall mean any person having a contract with a governmental body.

8.1.6 An "independent contractor" shall mean a person (individual or firm) who, in various degrees and/or combinations:

- is available to the general public on a regular and consistent basis; and
- is free to work when and for whom he/she pleases; and
- is employed by more than one person or company at a time; and
- makes a significant investment in facilities not typically maintained by an employee; and
- can realize a profit or loss as a result of providing services or products.

8.1.7 "Cost-reimbursement contract" shall mean a contract under which the state reimburses the contractor for those contract costs, within a stated ceiling, which are allowable and allocable in accordance with cost principles established by the Chief Purchasing Officer herein, and a fixed fee.

8.1.8 "Prime contractor" shall mean a contractor who engages subcontractors in the course of satisfying the requirements of fulfilling a contract.

8.1.9 In accordance with Chapter 37-13-1 "Public works contract" shall mean a contract for grading, clearing, demolition, improvement, completion, repair, alteration or construction of any public road or any bridge, or portion thereof, or any public building or portion thereof, or any heavy constructions, or any public works projects of any nature or kind whatsoever.

8.1.10 "Punitive Termination" shall mean termination at the discretion of the state for failure of the contractor to perform with no liability on the part of the state.

8.1.11 "Renegotiation" shall mean deliberation, discussion, or conference to change or amend the terms of an existing agreement.

8.1.12 "Subcontractor" shall mean any person undertaking part of the work under the terms of the contract, by virtue of an agreement with the prime contractor, who, prior to such undertaking, receives in writing the consent and approval of the state.

8.1.13 [37-2-7(7)] "Supplemental Agreement" shall mean any contract modification which is accomplished by the mutual action of the parties.

8.1.14 "Vendor" shall be defined as a person or entity who sells or supplies goods, services and or real estate for consideration.

8.2 FUNDAMENTAL REQUIREMENTS AND PRINCIPLES FOR STATE CONTRACTS

A contract shall mean a promise, or a set of promises, for breach of which the law gives a remedy, and the performance of which the law recognizes as a duty.

8.2.1 [37-2-54(3)] No purchase or contract shall be binding on the state or any agency thereof unless approved by the Department [of Administration] or made under general regulations which the Chief Purchasing Officer may prescribe.

8.2.1.1 The terms and conditions of a valid Purchase Order and its supplements, as issued by the Office of Purchases and signed by the Purchasing agent or his designee, shall constitute the primary contractual instrument of the state.

8.2.1.1.1 Unless specifically established by law, regulation or procedures published by the Chief Purchasing Officer, no other instrument shall constitute a state purchasing contract.

8.2.1.1.2 Oral Agreements - Any alleged oral agreement or arrangements made by a bidder or contractor with any agency or an employee of the Office of Purchases may be disregarded and shall not be binding on the state.

8.2.1.2 "Purchasing Contract Authority" shall mean the authority to act on behalf of the state to commit funds, enter into binding agreements or contracts, dispose of state property, or in any other manner control procurement or obligate the State.

8.2.1.2.1 No state agency official shall have the right (capacity) to exercise purchasing contract authority through written or oral agreements or contracts or, in any other way, financially or otherwise obligate the State without the express written consent of the Chief Purchasing Officer.

8.2.1.2.2 No state agency may place orders or negotiate with suppliers or potential suppliers without the participation or express approval of the Chief Purchasing Officer.

8.2.2 [37-2-13(4)] No state purchasing regulation shall change in any way a contract commitment by the state nor of a contractor to the state which was in existence on the effective date of the regulation.

8.2.3 [37-2-13(5)] The provisions of state purchasing regulations shall be considered to be incorporated by operation of law in all state contracts.

8.2.4 [37-2-13(6)] Contract provisions and contracts entered into in violation of state purchasing regulations shall be void "ab initio" [from inception].

8.2.5 Supplemental Principles of Law - Obligation of Good Faith.

8.2.5.1 [37-2-3(1)] Unless displaced by the particular provisions of this chapter [37-2], the principles of law and equity, including the uniform commercial code, the law merchant, and the law of contracts, including, but not limited to, agency, fraud, misrepresentation, duress, coercion, mistake, and bankruptcy, shall supplement these provisions.

8.2.5.2 [37-2-3(2)] Every contract or duty under this chapter shall impose upon both parts the obligation of good faith in its performance and/or enforcement. "Good faith" shall mean honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.

8.2.6 In accordance with Chapter 37-2-9(p), contractors must comply with state and federal Equal Opportunity requirements for all contracts for supplies and services exceeding ten thousand dollars (\$10,000). Failure to comply will be considered a

substantial breach of contract subject to penalties prescribed in regulations issued and administered by the State Equal Opportunity Office and set forth herein.

8.2.7 [37-2-41] Contractor's Bonds. - The provisions of chapter 37-12 of the general laws shall apply to all construction contracts awarded under this chapter.

8.2.7.1 "Performance Bond" shall mean a contract of guaranty executed subsequent to award by a successful bidder to protect the state from loss due to contractor inability to complete a contract.

8.2.7.2 Chapter 37-12 requires that every person awarded a public works contract shall furnish to the state good and sufficient surety (performance bond) not less than fifty percent (50%) and not more than one hundred percent (100%) of the contract price conditioned that the contractor, principal in said bond, the person's executors, administrators or successors, shall keep and perform the covenants, conditions and agreements in the contract. However, provided that good cause is shown, the Director of the Department of Administration may waive the requirements for contracts not in excess of fifty thousand dollars (\$50,000).

8.2.7.3 In accordance with Chapter 37-13-14 a contractor's performance bond required for contracts exceeding one thousand dollars (\$1000) under 37-12 must be furnished by a surety company authorized to do business in the state.

8.3 GENERAL CHARACTERISTICS OF STATE CONTRACTS

8.3.1 General Terms and Conditions - The Office of Purchases shall develop and make available to potential suppliers and state officials a document stating the general terms and conditions applicable to all quotations and state purchasing contracts. The General Terms and Conditions shall (1) be referenced and made a part of all solicitations for proposals and quotations; all state purchase orders, contracts, and letters of authorization; and bidder registration documentation and (2) provide notice to bidders that contract award may be subject to the bidder signing an affirmation (certification) regarding certain legal requirements or restrictions relating to foreign corporations, disadvantaged business enterprises, labor rates, local product preference, etc., as required by the Purchasing Agent.

8.3.2 When a contract has been entered into between the state and another party, neither party shall have the legal right to add new terms or conditions without the consent of the other, unless the contract so specifies.

8.3.3 All contract pricing shall be firm and fixed unless contract language provides for reconsideration.

8.3.4 Issuance of purchase orders shall not be made on the basis of "advise pricing" (or "pricing to be determined") agreements. All commitments shall be on the basis of

estimated prices with a "not to exceed" maximum authorization when firm, fixed pricing agreements are not possible.

8.3.5 Changes in scope, price, and length of contract period shall require contract amendments which are specified in writing.

8.3.5.1 Unanticipated changes may be considered with the express consent of both parties.

8.3.5.2 The issuance of a Purchase Change Order in accordance with the provisions of the contract and other requirements specified herein shall be considered a binding contract.

8.3.6 Termination - As appropriate, state contracts shall include clauses which address special conditions/procedures for termination of contract not contained in the state's General Terms and Conditions; e.g., provisions for penalties or forfeitures for contract noncompliance may be included; a convenience termination clause which permits the state to terminate, at its own discretion, the performance of work in whole or in part, and to make a settlement of the vendor's claims in accordance with appropriate regulations and applicable contractual conditions.

8.3.7 Mutual Agreement - The agreement shall consist of an offer by one party, called the offeror, and an acceptance by the other party, called the state.

8.3.7.1 When a purchase order is issued which does not differ from the bid submitted by an offeror, mutuality shall be assumed.

8.3.7.2 In accordance with the General Terms and Conditions which notify offerors that the Purchasing Agent reserves the right to make partial bid awards, mutuality shall be assumed when a purchase order does not differ from the elements of a bid submitted by an offeror.

8.3.7.3 Any offer, whether in response to a solicitation for proposals or bids, or made without a solicitation, which is accepted in the form of an order made by the Purchasing Agent, or a state official with purchasing authority delegated by the Purchasing Agent, shall be considered a binding contract.

8.3.8 Consideration - Although consideration to support a contract may assume other forms, generally it shall mean the agreement to pay a sum of money for the delivery of the desired item or services rendered. It shall not be essential that the consideration be of a substantial consequence, but shall have some value. Compensation shall be specified and shall include but not be limited to: (a) terms of payment for partial delivery or completion; (b) unit of cost (hourly rate, per report rate), if appropriate; (c) frequency/conditions for payment - weekly, monthly, upon completion of percentage of work, etc.; and (d) retainage, when appropriate.

8.3.9 Capacity of Parties - The contracting parties shall have the legal authority to enter into contracts.

8.3.10 Competence of Parties - The contracting parties shall be of legal age and of sound mind.

8.3.11 Length of contract period shall be specified.

8.3.12 A state official (or position) from whom the contractor shall obtain direction shall be named and/or a format for written authorization to deliver (e.g., request for delivery form for master pricing agreement) shall be specified.

8.3.13 Public Works/Construction Contracts shall provide for the following additional considerations:

8.3.13.1 Certificates of insurance to protect the general public or state property from injury or loss arising from actions or inaction of the contractor during the progress of a contract.

8.3.13.2 Each contractor shall be responsible for providing satisfactory evidence of complete coverage of all insurances, permits, and licenses required by state, city or town statutes, ordinances, and/or regulations.

8.4 THE PURCHASE ORDER CONTRACT

8.4.1 "Purchase Order" shall mean a document issued by the Purchasing Agent to formalize a purchase transaction with a vendor. The purchase order shall contain statements as to the quantity, description, and price of the goods or services ordered, applicable terms as to payment, discounts, date of performance, transportation, and other factors or suitable references pertinent to the purchase and execution by the vendor. Purchase orders shall include blanket orders, master pricing agreements, and utility purchase orders.

8.4.2 The entire agreement with the vendor shall, at all times, reside solely in the purchase order and its referenced supplements.

8.4.3 Purchase Order Supplements shall consist of all of the following documents:

- The state's General Terms and Conditions;
- The state's request for quotations or proposals, including specifications;
- The contractor's offer which is responsive to the solicitation; and/or
- As appropriate, additional contract provisions, as necessary.

8.5 MULTI-YEAR CONTRACTS

8.5.1 [37-2-33(1)] Unless otherwise provided in the statute making appropriations therefore, multi-year contracts for supplies and services may be entered into for periods not extending beyond the end of the biennium in which the contract was made, if funds for the first fiscal year of the contemplated contract are available at the time of contracting. Payment and performance obligations for succeeding fiscal years shall be subject to the availability of funds therefore.

8.5.1.1 "Biennium" shall mean a period of time equal to two fiscal years.

8.5.1.2 "Fiscal year" shall mean a period of time beginning on the first day of July in one calendar year and ending on the last day of June of the subsequent calendar year.

8.5.1.3 Multi-year contracts which extend beyond a biennium shall be permitted provided that:

8.5.1.3.1 funds for the first year of the biennium have been appropriated; and

8.5.1.3.2 contracts shall contain a standard clause which states that implementation of the contract beyond the first fiscal year shall be subject to the availability of funds; and

8.5.1.3.3 a written justification is placed in the purchase order file or the category of procurement has by regulation or policy been identified by the Chief Purchasing Officer as appropriate for multi-year contracting, e.g., property leases.

8.5.1.4 Multi-year contracts shall specify the annual costs and total value of each contract.

8.5.2 [37-2-33(2)] Prior to the utilization of a contract as described in subsection 37-2-33(1), it shall be determined in writing by the Chief Purchasing Officer:

(a) That estimated requirements cover the period of the contract and are reasonably firm and continuing; and

(b) That such contract will serve the best interests of the state by encouraging effective competition or otherwise promoting economics in state procurement.

8.5.2.1 The Chief Purchasing Officer may delegate to the Purchasing Agent all or a portion of the responsibility and authority to make such determinations.

8.5.3 In accordance with [37-2-33(3)] when funds are not appropriated or otherwise made available to support continuation of performance in a subsequent year of a [multi-year] contract, the contract for such subsequent year may be cancelled and the contractor shall be reimbursed for the reasonable value of nonrecurring costs incurred but not amortized

in the price of the supplies or services delivered under the contract. The cost of cancellation may be paid from:

- (a) Appropriations currently available for performance of the contract; or
- (b) Appropriations currently available for procurement of similar supplies or services and not otherwise obligated; or
- (c) Appropriations made specifically for the payment of such cancellation costs.

8.5.4 Multi-year contracts shall be appropriate purchasing instruments for transactions for which the nature of the goods and services will remain relatively stable over time; and for which potential changes in price can be predicted and agreed to in advance, including provisions for mandated escalation requirements, such as:

8.5.4.1 Lease and lease-purchase agreements for equipment, real property, and facilities;

8.5.4.2 Maintenance and repair of specialized equipment;

8.5.4.3 Special licensing agreements (computer, communication);

8.5.4.4 Special services for which the contract award is based on a request for proposals, such as residential treatment programs;

8.5.4.5 Supplemental services, the approval of which is based upon the recommendation of the State Architectural, Engineering and Consultant Selection Committee and selection by the Chief Purchasing Officer; and

8.5.4.6 Any other contractual relationship where it has been determined in writing by the Chief Purchasing Officer that a long-term agreement shall be the most cost effective method of procurement.

8.5.5 User agencies shall specify on requisitions and shall submit justification whether multi-year contracts should be considered by the Purchasing Agent for the supply or service requisitioned.

8.6 LETTER OF AUTHORIZATION

If the Chief Purchasing Officer determines in writing that it is essential that the vendor be given a binding commitment so that work can be commenced immediately and that negotiation of a definitive contract cannot be accomplished in sufficient time, the Purchasing Agent may issue a Letter of Authorization.

8.6.1 A Letter of Authorization (LA) shall mean a written instrument binding only when signed by the Purchasing Agent, which authorizes immediate commencement of delivery of supplies or the performance of services, as set forth within the LA.

8.6.2 Such instrument shall:

8.6.2.1 Represent a preliminary authorization subject to the subsequent issuance of a Purchase Order.

8.6.2.2 Be superseded by a definitive contract at the earliest practicable date not later than the greater the expiration of 180 days from the date of the LA or delivery of 40% of the contract.

8.6.2.3 Be specifically negotiated and address the following contractual requirements that:

- the vendor will proceed immediately with performance of the LA, including procurement of necessary materials; and
- specifies the extent and method of payments in the event of termination for the convenience of the state or for default; and
- the vendor is not authorized to expend monies or incur obligations in excess of the maximum liability of the state as set forth in the LA;
- specifies the type of definitive contract contemplated; and
- as many definitive contract provisions as possible; and
- requires the vendor to provide such price and cost information as may reasonably be required by the state; and
- the vendor and the state enter into negotiations promptly and in good faith to reach agreement and execute a definitive contract.

8.7 CHANGES TO PURCHASE ORDERS

8.7.1 All agreements and changes to scope of work, price, or other terms shall be incorporated into purchase orders via "change order" documents incorporating contract amendments.

8.7.2 Change Orders issued by the Office of Purchases shall be the only binding documents which may create a change in a purchase order.

8.7.3 Personnel shall not commit the state to technical/contractual changes to purchase orders without first securing all necessary approvals.

8.7.4 All discussions of potential changes (oral or written) may be disclaimed as not being binding on the supplier or the state until formally incorporated in the purchase order.

8.7.5 In general, change orders shall be issued by the Office of Purchases following receipt of quotations and discussions of price and delivery with the supplier. If circumstances preclude immediate issuance of a formal change order, interim direction to the supplier may be made via a letter of authorization signed by the Purchasing Agent.

8.7.6 Any request for retroactive approval of a change order valued at less than one hundred thousand dollars (\$100,000) must be submitted to and approved by the Purchasing Agent. Any request for retroactive approval of a change order valued at more than one hundred thousand dollars (\$100,000) must be submitted to and approved by the Chief Purchasing Officer.

8.8 TERMINATION AND CANCELLATION OF CONTRACT

8.8.1 If required bidder certifications are determined to be invalid, the Purchasing Agent shall declare the purchase order void.

8.8.2 Notice of termination by either party shall be submitted in writing to the other party in accordance with the termination clause of the contract.

8.8.3 Cancellation of a Contract by the State

8.8.3.1 Cancellations of Purchase Order Contracts or Master Pricing Agreements shall require the signature of the Purchasing Agent or his designee.

8.8.3.2 A contract may be cancelled or annulled at the contractor's expense upon determination by the Purchasing agent that a condition of nonperformance exists.

8.8.3.3 "Nonperformance" shall mean lack of compliance with the contract specifications and/or terms and conditions.

8.8.3.4 Cancellation by the Purchasing Agent for nonperformance shall be subject to the following rules:

8.8.3.4.1 A formal complaint of nonperformance or unsatisfactory performance shall be submitted by an authorized state official to the Purchasing Agent. Such complaint shall provide a description of and justification for the complaint.

8.8.3.4.2 The Purchasing Agent shall direct the complaint to the Standards and Inspection Unit (SIU) of the Office of Purchases

8.8.3.4.3 The SIU inspector, in conjunction with the Office of Purchases official (buyer) responsible for the contract, shall be authorized to attempt to resolve the problem to the satisfaction of the user agency.

8.8.3.4.4 The inspector and buyer shall report in writing to the Purchasing Agent whether the problem requires formal action, and if the problem has not been resolved, the Purchasing Agent shall notify the contractor in writing that he/she is not in compliance with the contract. Such notice of nonperformance shall: (1) specify the nature of the complaint, (2) direct the contractor to take corrective action, (3) direct the contractor to respond in writing to the notice of nonperformance within a specified time period, and (4) notify the contractor that failure to respond as directed may result in cancellation of the order.

8.8.3.5 If a contractor fails to take corrective action and/or respond to a notice of nonperformance, the Purchasing Agent may issue a change order canceling the contract.

8.8.3.6 If, after reviewing the contractor's response, the Purchasing Agent determines that the contractor is not out of compliance with the contract requirements, he shall so notify the user agency and the contractor in writing, providing a rationale for his decision.

8.8.3.7 If the Purchasing Agent determines that valid extenuating circumstances out of the control of the contractor have prevented compliance with the contract requirements, he shall so inform the user agency and may amend the contract to provide for a reasonable opportunity for the vendor to perform the contract, if necessary.

8.8.3.8 If the Purchasing Agent believes that a contractor's action or lack thereof presents a clear and immediate danger to the public interest, he may request in writing that the Chief Purchasing Officer authorize immediate termination of the contractual relationship.

8.8.3.9 Copies of all communications with a contractor regarding nonperformance shall be sent to the contractor's bonding company, power of attorney and the Department of Administration legal counsel.

8.8.3.10 If the Purchasing Agent determines that a contractor is unwilling or unable to perform a contract, he shall:

8.8.3.10.1 direct the contractor's bonding company to assume responsibility for the performance of the contract if a performance bond has been issued; and

8.8.3.10.2 so notify the user agency and contractor; and

8.8.3.10.3 notify the contractor whether he/she has been temporarily suspended or permanently debarred from the state Bidders List and shall be responsible for any costs incurred by the state in the completion of the contract.

8.9 TYPES OF PURCHASE ORDER CONTRACTS

8.9.1 Fixed Price (FP)

8.9.1.1 The Firm Fixed Price (FFP) contract shall mean one which provides for a price which is not subject to any adjustment by reason of the seller's cost experience in the performance of the contract. This type of contract should be used when the price is based on credible cost data for the completion of the order.

8.9.1.2 The Fixed Price with Economic Price Adjustment (FP W/EPA) contract shall mean one which provides for the upward or downward revision of the stated price upon the occurrence of certain economic conditions which are specifically defined in the contract. These conditions are limited to those beyond the control of the seller.

8.9.1.3 A Fixed Price Redeterminable (FPR) contract shall mean one which permits reconsideration of price at a stated time after contract initiation when the only supplier capable of performing a job cannot quote a fixed price with full assurance that it will be fair and reasonable.

8.9.1.4 The Fixed Price Incentive (FPI) contract shall mean one which provides for the adjustment of profit (fee) and price according to a sharing arrangement based on the relationship which final negotiated total cost bears to the negotiated target cost.

8.9.2 Cost Reimbursement

8.9.2.1 A Cost No Fee (CNF) contract shall mean one under which the seller receives no fee.

8.9.2.2 A Cost Sharing (CS) contract shall mean one under which the seller not only receives no fee but is reimbursed for only an agreed upon portion of its allowable costs.

8.9.2.3 A Cost Plus Fixed Fee (CPFF) contract shall mean one which provides for the payment of a fixed fee to the seller. The fixed fee negotiated does not vary with actual cost, but may be adjusted as a result of any subsequent changes in the work or service to be performed under the purchase order.

8.9.2.4 A Cost Plus Incentive Fee (CPIF) contract shall mean one which provides for a fee which is adjusted by formula in accordance with the relationship which total allowable costs bear to target costs, a target fee, a minimum and maximum fee, and a fee adjustment formula. Upon completion of the order, the fee is determined in accordance with the established formula as an incentive for performance efficiency; however, there is no ceiling price specified and the seller is under no obligation to complete the order once the funds obligated have been exhausted.

8.9.2.5 A Cost Plus Percentage of Cost (CPPC) contract shall mean one which provides for a fee which is adjusted by percentage formula in accordance with the relationship to

total cost. The percentage formula may be fixed, but fee paid may be adjusted as a result of any subsequent changes in the work or service to be performed under the purchase order.

8.9.2.6 A Time and Materials (T/M) contract shall mean one which provides for the purchase of supplies or services on the basis of (1) direct labor hours at specified fixed hourly rates (which rates include direct and indirect labor, overhead and profit) and (2) material at cost. Material handling costs may be included to the extent they are clearly excluded from any factor of the charge computed against direct labor hours (L/H).

8.9.3 A To Be Determined (TBD) contract shall mean one which enables the buyer and the seller to enter into a relationship with no predetermined terms at the initiation of the contract.

8.9.4 A Blanket Order shall mean an arrangement under which a purchaser contracts with a vendor to provide the purchaser's requirements for an item(s) or a service, on an as-required and often over-the-counter basis. Such an arrangement sets a limit on the period of time it is valid and the maximum amount of money which may be spent at one time or within a specified period. (Usually, but not always, the funds for agency blanket orders will be encumbered.)

8.9.4.1 A Pricing Agreement (PA) shall mean a special blanket order which establishes the terms and conditions under which a specific item or a specific category of items in an indefinite quantity, are to be purchased for a specific period of time, usually one year.

8.9.4.2 A Master Pricing Agreement (MPA) shall mean a pricing agreement which has been established on behalf of more than one entity. (Usually, funds for MPA contracts are not encumbered.)

8.9.4.3 A "Term Contract" shall be synonymous with an MPA contract.

8.10 PRINCIPLES FOR SELECTION OF TYPE OF PURCHASE ORDER CONTRACT

The selection of the appropriate type of contract is a matter which requires the exercise of judgment in order to obtain fair and reasonable prices in accordance with the circumstances of the procurement.

8.10.1 In determining the type of contract to be used, consideration shall be given but shall not be limited to such factors as:

- Type and complexity of the item or scope of work to be performed;
- Urgency of the requirement;
- Prospective period of contract performance;

- Degree of competition present;
- Extent of completion of baseline and detail design; which in turn may influence other considerations as the adequacy and firmness of specifications, and the availability of relevant historical pricing data and prior experience;
- Availability of comparative price data, or lack of firm market prices or wage levels;
- Prior experience with the supplier;
- Extent and nature of subcontracting contemplated;
- Assumption of business risk;
- Vendor's technical capability and financial responsibility;
- Administrative costs;
- Adequacy of the vendor's accounting system; and
- Other concurrent contracts.

8.10.2 [37-2-32] Approval of Accounting System. - Except with respect to firm fixed price contracts, no contract type shall be used unless it has been determined in writing that 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 that the contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles.

8.10.2.1 The firm fixed price contract shall be used in applications and under limitations hereinafter set forth, unless the use of another type of contract is more appropriate.

8.10.3 [37-2-31] Subject to the limitations on entering into cost plus percentage of cost and cost reimbursement contracts set forth herein, any type of contract which will promote the best interests of the state may be used.

8.10.4 Cost Reimbursement Contracts.

8.10.4.1 [37-2-29] The Cost Plus a Percentage of Cost (CPPC) contract is prohibited.

8.10.4.2 [37-2-30(1)] No contract providing for the reimbursement of the contractor's cost plus a fixed fee (cost reimbursement) may be made through negotiation or in sole source or emergency procurements unless it is determined in writing by the Chief Purchasing Officer that such contract is likely to be less costly to the state than any other

type of contract, or that it is impracticable to obtain supplies or service of the kind or quality required except under such a contract.

8.10.4.3 [37-2-30(2)] Each contractor under a cost reimbursement type contract shall obtain consent from the Chief Purchasing Officer, as provided for in the contract, before entering into:

(a) a cost reimbursement subcontract; or

(b) any other type of subcontract involving more than ten thousand (\$10,000) or ten percent (10%) of the estimated cost of the prime contract[whichever is greater].

8.10.4.4 [37-2-30(3)] All cost reimbursement contracts shall contain a provision that only costs recognized as allowable, in accordance with cost principles set forth in regulations issued by the Chief Purchasing Officer will be reimbursed.

8.10.5 When a FP W/EPA contract is employed, provisions shall be included for downward adjustment of the contract price in those instances where the prices or rates may be expected to fall below the base price agreed to by contract.

8.10.5.1 Types of economic adjustments shall include but shall not be limited to:

8.10.5.1.1 Price Adjustment - a modification of the base purchase order price on the basis of increases or decreases in published or established prices of specific items.

8.10.5.1.2 Labor and Material Adjustment - a modification of the contract base price on the basis of increases or decreases of wage rates, specific material costs, or both, using agreed upon standards or indices.

8.10.5.2 This type of contract may be appropriate where valid doubt exists as to the predictability of economic conditions which will exist during a multi-year contract period. Price adjustment provisions shall not be used to provide protection to contractors against contingencies which arise from inaccurate estimates of the quantities of labor or materials required for completion of a contract.

8.10.6 When FPR contracts are employed the basis for adjustments shall be established when the contract is negotiated and a cost baseline shall be established.

8.10.6.1 The following data shall be secured from each source before placing a re-determinable order: number of estimated hours and method used in arriving at hours; direct labor rates per hour; material cost, including both quantities and unit prices; overhead rates (categorized by element); profit, any other data deemed pertinent for analysis of the prices quoted.

8.10.6.2 The establishment of a re-determinable type of contract shall require the written authorization of the Chief Purchasing Officer. Upon analysis conducted jointly by the

user agency and the Purchasing Agent, a request and justification for considering re-determinable pricing provisions shall be submitted in writing by the Purchasing Agent to the Chief Purchasing Officer.

8.10.7 When FPI contracts are employed:

8.10.7.1 There shall be an initially negotiated firm target cost, a target profit, a price ceiling and a final profit and price adjustment formula. After completion, a final cost shall be negotiated and a final price established in accordance with the predetermined formula.

8.10.7.2 The circumstances must be such that targets are reasonably free of contingencies and provided that a fair and reasonable incentive formula can be established at the time of initial contract negotiation and the contract is of sufficient duration to permit achievement of substantial cost reductions.

8.10.7.3 The same supplier cost data shall be required as for a re-determination contract.

8.10.8 A CNF contract may be used for research and development work – particularly with nonprofit organizations and educational institutions.

8.10.9 A CS contract is suitable for:

8.10.9.1 Jointly sponsored research and development with educational institutions or other nonprofit organizations or

8.10.9.2 Other research and development work where the results of the contract may have commercial benefit to the seller.

8.10.10 A CPFF contract is suitable when:

8.10.10.1 The scope and nature of work cannot be definitely specified.

8.10.10.2 Definite specifications exist but the seller lacks a valid basis for estimating costs because the supplies called for are not items regularly manufactured, or the services called for have not been previously performed, or partial experience will not reveal a proper pricing basis for the remainder of the contract.

8.10.10.3 Specifications are not complete or major changes substantially affecting the scope of production or construction work are expected.

8.10.10.4 Work is to be performed in a state-owned facility with the use of state-owned equipment, materials, or personnel.

8.10.11 A T/M contract shall include the establishment of a cost limitation which the seller may not exceed (except at his/her own risk). A T/M contract shall be used only in situations when:

8.10.11.1 It is not possible at the time of placing the order to estimate the extent of the work or to anticipate final costs with any reasonable degree of accuracy such as: (1) engineering and design services, (2) certain repair, maintenance or overhaul work, (3) emergencies.

8.10.11.2 Provision is made for appropriate surveillance by state personnel during performance.

8.10.12 L/H contracts based solely on labor hours shall be considered a subcategory of T/M contracts, subject to the same restrictions as the T/M contract and shall be used only after the Purchasing Agent has determined that no other type of contract is suitable for meeting the needs of the requisitioner.

8.10.13 Employment of TBD contracts shall be prohibited.

8.10.14 Considerations for use of a MPA contract:

8.10.14.1 The MPA shall specifically state the term and probable volume consideration of the agreement.

8.10.14.2 The seller shall be authorized to ship to the state only those items specified by a delivery request (on a form to be provided) issued under the authority of the Master Pricing Agreement. The state is obligated for payment only to the extent of the specific quantities set forth in the delivery request or for express considerations applicable to the contract itself.

8.10.14.3 The specific category of items to be purchased may be listed in a catalog prepared specifically for the agreement, a catalog of items offered for sale by a supplier, a national catalog published by a catalog publishing firm, or such other lists of items as may, from time to time, be determined as being a legally sufficient description of the item or items being purchased.

8.11 SELECTION OF METHODS OF CONSTRUCTION CONTRACTING MANAGEMENT

8.11.1 Construction Contract Management. The intent of Rule 8.11 is to specifically identify alternative methods of management of construction and the criteria to be used in selecting such methods. In addition, the intent of this Rule is to clarify that the method of source selection used to award a state contract for a particular construction project shall continue to be governed by all the applicable provisions of chapter 2 of title 37, entitled "State Purchases", also referred to as the "State Purchases Act". These provisions include but are

not limited to sections 37-2-17 "Methods of source selection"; 37-2-18 "Competitive sealed bidding"; 37-2-19 "Competitive negotiation"; 37-2-20 "Negotiations after unsuccessful competitive sealed bidding"; 37-2-21 "Noncompetitive procurements"; 37-2-22 "Small purchases" and 37-2-59 "Professional services – Architectural, engineering, and consultant services – Committee". Provided, however, the provisions of Rules 8.11.3 and 8.11.4 shall not apply to road, bridge and heavy construction projects which are funded in whole or in part by federal funds.

8.11.2 Road, Bridge and Heavy Construction Projects. The provisions of Rules 8.11.3 and 8.11.4 shall not apply to road, bridge and heavy construction projects that are managed by the Rhode Island Department of Transportation and are funded in whole or in part by federal funds. Road, bridge and heavy construction projects are subject to the methods of management of construction contracting, including the criteria for selecting such methods, that are set forth in applicable federal law, including but not limited to 23 U.S.C. 112(b)(i) as amended, and regulations promulgated there under.

8.11.3 Construction Contract Management Methods and Criteria. For all other construction projects not included in Rule 8.11.2, the methods below, along with the criteria for each method, are the alternative methods of construction contract management deemed feasible by the Chief Purchasing Officer. The methods below are not mutually exclusive and may be combined on a project.

8.11.3.1 General Contractor Method. The general contractor method is typified by one business, acting as a general contractor, contracting with the State to timely complete an entire construction project in accordance with drawings and specifications provided by the State. Generally the drawings and specifications are prepared by an architectural or engineering firm under contract with the State. Further, while the general contractor may take responsibility for successful completion of the project, much of the work may be performed by specialty contractors with whom the general contractor has entered into subcontracts.

The general contractor method is the generally preferred method of construction work. It may be selected for a project only when it is determined in writing by the Chief Purchasing Officer that the following criteria will be met:

- (a) the project requires timely completion of the construction work in accordance with drawings and/or specifications provided by the State and/or the State's agent.
- (b) the project work may be performed by specialty sub-

contractors under the control and supervision of a general contractor.

- (c) the project does not require direct supervision or coordination between the contractor and project engineering/design professionals other than as normally performed by State employees.
- (d) the construction project is estimated to cost in excess of ten thousand dollars (\$10,000).
- (e) sufficient time exists to complete the design, bid the project and construct the work by the desired occupancy date.

8.11.3.2 Multiple Prime Contractors. Under the multiple prime contractor method, the State or its agent contracts directly with any number of contractors, often representing different trades, to complete portions of the project in accordance with the State's drawings and specifications. The State and/or its agent shall have primary responsibility for successful completion of the entire project.

The multiple prime contractor method may be selected for a project only when it is determined in writing by the Chief Purchasing Officer that the following criteria will be met:

- (a) the State or its agent is able to coordinate job site activities of any number of contractors and/or subcontractors with varying areas of construction expertise to complete portions of the project in accordance with the State's drawings and specifications, and the State or its agent will contract directly with such contractors and/or subcontractors.
- (b) the State and/or its agent is able to assume primary responsibility for successful completion of the entire project.
- (c) the construction project is for the rehabilitation or renovation of a building or buildings.
- (d) the contract(s) for the rehabilitation or renovation of any building(s) in the aggregate are estimated to cost less than two million dollars (\$2,000,000).

8.11.3.3 Design-Build. In a design-build project, a person or firm contracts directly with the State to meet the State's requirements as described

in a set of design or engineering specifications, bridging documents, or scope of work. Final design and construction are both the responsibility of the design-build contractor. This method can include projects where the design-build contractor supplies the site as part of the design-build package.

The design-build method may be selected for a project only when it is determined in writing by the Chief Purchasing Officer that the following criteria will be met:

- (a) the State does not have the ability to prepare the requisite design or engineering specifications, bridging documents, or scope of work.
- (b) the State cannot manage or supervise the work of specialty trade contractors and it is not in the State's best interest to contract directly with such specialty contractors.
- (c) the State determines that it is in its best interest for a design-build firm to assume responsibility for both final design and construction of the project.
- (d) due to time constraints and the need to complete the project on an expedited basis, it is in the State's best interest to select a design-build contractor rather than a general contractor for the project.
- (e) construction work on the project has an estimated cost equal to or greater than two-million five-hundred thousand dollars (\$2,500,000).
- (f) the State desires to have a single firm responsible for both design and construction.

8.11.3.4 Construction Manager At Risk. The terms "Construction Manager at Risk", "construction management at-risk services," "construction management at-risk delivery method" shall all be limited to that certain construction method defined by R. I. Gen. Laws § 37-2-7 (30). The terms "construction manager at-risk" and "construction management at-risk firm" shall be limited as defined by R.I Gen. Laws § 37-2-7 (31).

The construction manager at risk method of construction management may be selected for a project only when it is determined in writing by the Chief Purchasing Officer that all criteria mandated by R.I. Gen. Laws § 37-2-27.2, 27.3, and 27.4,

as amended have been met.

8.11.3.5 "Owner's Program Manager" shall be limited to that certain construction method defined by R.I. Gen. Laws § 37-2-7 (32), as amended.

The Owner's Program Manager method may be selected for a project only when it is determined in writing by the Chief Purchasing Officer that the following criteria will be met:

- (a) the State does not have the ability to prepare the requisite design or engineering specifications, bridging documents, or scope of work;
- (b) the State cannot manage or supervise the work of specialty trade contractors and will not contract directly with such specialty trade contractors;
- (c) it is in the State's best interest to retain a program manager to supervise and or monitor the activities of a general contractor; and/or
- (d) it is in the State's best interest to retain a program manager to supervise and or monitor the engineering and architectural services for a project;
- (e) the construction project has an estimated cost equal to or greater than ten thousand dollars (\$10,000).

8.11.4 Construction Contract Management Selection Information. In addition to criteria set-forth in Rule 8.11.3, the following information for a particular project shall be submitted to the Chief Purchasing Officer under Rule 8.11.5:

- 8.11.4.1 when the project must be completed or ready for occupancy or use;
- 8.11.4.2 the specific nature of the project and its specialized needs, e.g. housing, offices, laboratories, and specialized construction;
- 8.11.4.3 the extent to which the requirements of the procuring agency and the ways in which said requirements are to be met are known;
- 8.11.4.4 the location of the project;
- 8.11.4.5 the size, scope, complexity, and economics of the project;

- 8.11.4.6 the amount and type of financing available for the project, including whether the budget is fixed and the source of funding, e.g., general or special appropriation, federal assistance moneys, general obligation bonds or revenue bonds;
- 8.11.4.7 the availability, qualification, and experience of State personnel to be assigned to the project and how much time the State personnel can devote to the project;
- 8.11.4.8 the availability, experience and qualifications of outside consultants and contractors to complete the project under the various methods being considered;
- 8.11.4.9 the method of source selection under the State Purchases Act that will be used to award a contract to a vendor for this particular project.

8.11.5 Documentation of Selection Determination. Using and including the information in Rule 8.11.4, the purchasing agent or purchasing agency responsible for carrying out the construction project shall set forth in writing to the Chief Purchasing Officer the facts that led to the selection of a particular method of construction contract management pursuant to the criteria set forth in Rule 8.11.2 or 8.11.3 and the information required in Rule 8.11.4. The Chief Purchasing Officer shall include in the contract file a written statement setting forth the facts that led to the selection of a particular method of management of construction in each instance. The Chief Purchasing Officer's written statement may adopt, in whole or in part, any written statements provided by the purchasing agent or the purchasing agency.

8.11.6 Protest. Any actual or prospective bidder, offeror, or contractor, who is aggrieved in connection with the solicitation, selection, or award of a method of construction management contract, may file a bid protest with the Chief Purchasing Officer pursuant to R.I. Gen Laws § 37-2-52 using the procedures required by Section 1.6 of these Procurement Regulations.

8.12 CONTRACT ADMINISTRATION

Subsequent to the award of any contract for goods or services and continuously over the life of any contract, each agency shall determine and verify that service(s) provided or goods received match exactly all contract specifications as to kind, quality, quantity, or frequency and price. Each Agency shall document in detail all deviation(s) and submit formal complaint(s) to the Office of Purchases for follow up action.

8.12.1 Attestation and approval of payment vouchers by duly authorized agents of the agency shall constitute acceptable evidence of such verification.

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