

COLORADO HIGH-PERFORMANCE TRANSPORTATION ENTERPRISE
Procurement Policies and Guidelines ("Policy")

1. Introduction

- 1.1 This Policy is intended to provide a holistic policy and practical guidelines for the identification, procurement, and evaluation process to be utilized by the Colorado High-Performance Transportation Enterprise, doing business as the Colorado Transportation Investment Office ("Enterprise") in connection with its goods and services, the pursuit of public-private partnerships, and other innovative and efficient means of completing surface transportation infrastructure projects per the provisions of Section 43-4-806, Colorado Revised Statutes, as amended. The Enterprise recognizes that each project will have its unique characteristics and goals and that tailored approaches to assessing and implementing projects will be required for the Enterprise's program to be successful. The Enterprise intends to retain the flexibility to modify or deviate from these Guidelines as it sees fit and in the interest of the Enterprise and the State.
- 1.2 This Policy may be revised from time to time, and such revisions will be promptly posted on the Enterprise's website. Those performing work or relying on this Policy assume all risks related to any revisions. The Enterprise will not be liable for any damages sustained by anyone based on a modification or failure to modify the Guidelines. In addition, the Enterprise, at its sole discretion, may waive or deviate from some or all of these Guidelines where it deems such waiver(s) or deviation to be in the best interest of the Enterprise. In no event shall any such waiver or deviation result in any liability for the Enterprise, the State, or any other party.
- 1.3 The Enterprise may procure or engage the services of consultants to provide planning, study, and advice for Solicitations, as defined herein, and other procurement projects. The consultants may include program management, financial, legal, technical, communications, community engagement, or other services needed by the Enterprise for Solicitations. If any consultant is hired, the consultant would report to the Director or designee and would be used to provide direction on selected Solicitations.

2. Procurement Sub-Committee

- 2.1 It shall be the policy of the Enterprise's Board to establish a Procurement Subcommittee as an advisory committee for the Enterprise that reviews and provides recommendations for Solicitations with an estimated dollar value of \$[], or that intends to deviate from this Policy. The Subcommittee shall review a report regarding the anticipated procurement method, evaluation criteria, timeline, and contracting method and provide recommendations for the Enterprise before the advertisement of the Solicitation. The Enterprise may incorporate any recommendations made by the Subcommittee, but it is not required. The appointment of the subcommittee will be voted on by the Board annually.

3. Written Determinations

- 3.1 Preparation and Execution. Where this Policy requires a written determination, the Director may delegate responsibility for preparing such written determination.
- 3.2 Content. Each written determination shall set out sufficient facts, circumstances, and reasoning to substantiate the specific determination which is made.
- 3.3 Supporting Information. The Director may require other state personnel, including technical personnel and appropriate personnel within the Enterprise, to furnish, in an accurate and adequate fashion, any information pertinent to the determination.

3.4 Retention. Each written determination shall be filed in the Solicitation or contract file to which it applies and shall be retained as part of such file for so long as the file is required to be maintained.

4. Interpretation

4.1 Definitions. The following definitions are provided to assist in the understanding of this Policy and may be modified in any Solicitation Documents or Agreements issued by the Enterprise:

- (a) "Acceptable Response" means an offer submitted by any person in response to a Solicitation issued by the Enterprise that is in compliance with the solicitation terms and conditions and within the requirements of the plans and specifications described and required therein.
- (b) "Adequate Competition" exists if a Solicitation has been conducted and at least two responsible and responsive offerors have independently competed to provide the Enterprise's needed product or services. If the foregoing conditions are met, price competition shall be presumed to be "adequate" unless the Director determines, in writing that such competition is not adequate.
- (c) "Agreement" means a binding document or series of documents between the Enterprise and a Person outlining the basis to plan, finance, design, engineer, construct, install, acquire, operate, and maintain (or any combination of these activities) an Eligible Project.
- (d) "Alternate Response" means an offer submitted by any person in response to a Solicitation issued by the Enterprise that is in essential compliance with the solicitation terms and conditions but which may offer an alternative that does not significantly deviate from the required specifications contained in the Solicitation. The Director is responsible for determining whether an alternate response is acceptable.
- (e) "CDOT" means, the Colorado Department of Transportation created in C.R.S. § 24-1-128.7, as amended.
- (f) "Colorado Labor" means the same definition as used in C.R.S. § 8-17-101 (2) (a), as amended.
- (g) Colorado Procurement Code means the series of statutes codified and found at C.R.S. § 24-101-101 et seq., as amended.
- (h) "Competitive Negotiation" means the process of discussion and issue resolution between an Enterprise official and a prospective vendor in order to arrange for the providing of a product or service needed by the Enterprise. If more than one vendor is available for such negotiation, the needs of the Enterprise must be clearly defined in advance of any negotiations, via a specification that details fully the Enterprise's intended procurement.
- (i) "Consortium" means two or more Persons acting together in response to a Solicitation.
- (j) "Cost of Ownership Life Cycle Analysis" means an accounting of the estimated total cost of ownership, including but not limited to: initial costs, operational costs, longevity, stranded utility costs, and service and disposal costs, along with an

assessment of life-cycle environmental, health and energy impacts resulting from new material extraction, transportation, manufacturing, use, and disposal.

- (k) "Eligible Project" means any surface transportation infrastructure project as defined in C.R.S. § 43-4-803 (23), as amended.
- (l) "Environmentally Preferable Products" means products or services that have a lesser or reduced adverse effect on human health and the environment when compared with competing products or services that serve the same purpose. The product or service comparison may consider such factors as the availability of any raw materials used in the product or service being purchased and the availability, use, production, safe operation, maintenance, packaging, distribution, disposal, or recyclability of the product or service being purchased.
- (m) "Nationally Recognized Third-party Certification Entity" means a voluntary, multiple criteria-based program that awards a certification after independently reviewing the product or service on its cost of ownership and life cycle and meets criteria for overall environmental preferability and product function characteristics. The Colorado Energy Office or any successor office maintains a listing of eligible entities.
- (n) "Non-Resident Respondent" shall have the same meaning as "Non-Resident Bidder" in C.R.S. § 8-19-102 (1).
- (o) "Project Participant" means any Respondent, Person, or Consortium who or which enters into an Agreement with the Enterprise.
- (p) "Public Works Project" shall have the same definition as "Public Project" as defined in C.R.S. § 8-19- 102 (2).
- (q) "Resident Respondent" shall have the same definition as "Resident Bidder" in C.R.S. § 8-19-102 (3).
- (r) "Respondent" Means a Person or Consortium who responds to or seeks to enter into an Agreement with the Enterprise in response to a Solicitation. Solicitation Documents.
- (s) "Responsible Respondent" means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.
- (t) "Sealed" means that the Bid, Proposal, Quote, or Best Value Bid must be submitted in a manner that:
 - (i) Ensures that the contents of the bid, proposal, or best value bid cannot be opened or viewed before the formal bid opening without leaving evidence that the document has been opened or viewed; and
 - (ii) Ensures that the document cannot be changed, once received by the State, without leaving evidence that the document has been changed: and
 - (iii) Bears a physical or electronic signature evincing an intent by the bidder or offeror to be bound. An electronic signature must comply with the definitions and requirements set forth in the Government Electronic Transactions Act, C.R.S. § 24-71.1-101 et seq. and its implementing rules, as amended; and

- (iv) Records, manually or electronically, the date and time the bid, proposal, or best value bid is received by the state and that cannot be altered without leaving evidence of the alteration.
- (u) “Solicitation” Means any official procurement issued by the Enterprise in connection with an Eligible project , including but not limited to the following:
 - (i) Invitation to Bid (ITB) – a comprehensive solicitation document describing a project in detail, including submission requirements, deadlines, project scope, duration, minimum qualifications, mandatory service standards, and required warranties, allowing potential respondents to submit a firm bid.
 - (ii) Request for Expressions of Interest (REOI) – a solicitation document used to stimulate and assess market interest in an undefined project or to solicit innovative proposals for the delivery of services.
 - (iii) Request for Information (RFI) – a solicitation document requesting potential respondents provide industry information about goods, services, or projects. The Enterprise may solicit proposals in connection with an Eligible Project when it determines either that, based on its findings and evaluations, a procurement for such Eligible Project is in the best interest of the State or that, based on an Unsolicited Proposal Policy, a procurement for such Eligible Project is in the best interest of the State.
 - (iv) Requests For Qualifications – a solicitation document requesting potential respondents detail their background, experience, financial stability, and any other relevant information necessary to evaluate their ability to provide specific goods or services.
 - (v) Requests for Quotes (RFQ) – a solicitation document requesting potential respondents provide price quotes to provide certain tasks or fulfill certain orders.
 - (vi) Request for Proposals (RFP) – a solicitation document requesting proposals from potential respondents for a defined project.
- (v) “Solicitation Documents” means any documents issued as part of a Solicitation.
- (w) “Substitute Response” means an offer submitted by any person in response to a Solicitation that is not in substantive compliance with the terms and conditions and specifications of the Solicitation as issued. A substitute bid, by this definition, would generally be considered non-responsive to the requirements of the Solicitation and would serve the sole purpose of advising the soliciting agency that a different specification could be used to provide the desired or similar product or service. The soliciting agency would be responsible for determining whether the substitute language would be justification for canceling the bid and re-soliciting.
- (x) “State” means the State of Colorado.
- (y) “Unsolicited Proposal” means a submittal by a potential Project Participant under the Colorado Transportation Investment Office’s [DATE] policy concerning an Eligible Project which the Enterprise has not initiated.

4.2 In this Policy

- (a) **Accounting Principles.** Unless otherwise specified, where the character or amount of any asset or liability, item of revenue, or expense is required to be determined, or any consolidation or other accounting computation is required to be made, that determination or calculation will be made per the generally accepted accounting principles defined by the professional accounting industry in effect in the United States ("GAAP").
- (b) **Currency.** Unless otherwise specified, all dollar amounts expressed in this agreement refer to the United States of America's Dollar currency.
- (c) **"Including."** Where this Policy uses the word "including," it means "including without limitation," and where it uses the word "includes," it means "includes without limitation."
- (d) **"Knowledge."** Where any representation, warranty, or other statements in this Policy, or in any other document entered into or delivered under this Policy, is expressed by a party to be "to its knowledge" or is otherwise expressed to be limited in scope to facts or matters known to the party or of which the party is aware, it means:
 - (i) The then-current, actual knowledge of the directors and officers of that party; and
 - (ii) The knowledge that would or should have come to the attention of any of them had they investigated the facts related to that statement and made reasonable inquiries of other individuals reasonably likely to have knowledge of facts related to that statement.
- (e) **Statutes, etc.** Unless specified otherwise, any reference in this Policy to a statute includes the rules, regulations, and policies made under that statute and any provision that amends, supplements, supersedes, or replaces that statute or those rules or policies.
- (f) **Number and Gender.** Unless the context requires otherwise, words importing the singular number include the plural and vice versa; words importing gender include all genders.
- (g) **Headings.** The headings used in this Policy and its division into sections, schedules, exhibits, appendices, and other subdivisions do not affect its interpretation.
- (h) **Internal References.** References in this Policy to sections and other subdivisions are to those parts of this agreement.
- (i) **Construction of Terms.** Any rule of legal interpretation to the effect that any ambiguity is to be resolved by the Director.
- (j) **Conflict of Terms.** If there is any inconsistency between the terms of this Policy and those in any schedules, exhibits, or appendices to this Policy, the terms of this Policy prevail.
- (k) **General Powers.** Under this Policy, the Enterprise is free to exercise its discretion in such matters as it considers necessary or expedient in the light of all circumstances prevailing at the time the Enterprise considers relevant.

5. **Unsolicited Proposals**

- 5.1 It shall be the policy of The Enterprise to consider and evaluate an Unsolicited Proposal or decline to do so by following the provisions outlined in [Appendix A](#) (Unsolicited Proposal Policy), as amended and incorporated herein by reference.

6. **Solicitations**

- 6.1 It shall be the policy of the Enterprise, in connection with any Solicitation, to issue such Solicitation Documents as it determines may be appropriate under the circumstances, based on the complexity, timing, and novelty of the Eligible Project. The Solicitation Documents may include such terms and requirements as are determined by the Enterprise to be appropriate and may request submission of such information, including financial and technical information, as the Enterprise determines to be necessary or useful in evaluating any bid, quote, offer, qualifications, or proposal and the viability of the relevant Eligible Project.
- 6.2 The Enterprise may conduct any Solicitation in successive stages, in order to sharpen and filter the quality of respondents and responses at each stage, by applying criteria as set forth in the Solicitation Documents.
- 6.3 Prior to issuing any Solicitation Documents, the Enterprise may request information in relation to an Eligible Project and take such other preliminary steps as it may deem appropriate to engage with potential Respondents, including but not limited to, conducting meetings with industry participants in order to inform the industry of the opportunity and to hear industry suggestions (“Business Development Activities”) which may, in the Enterprise’s sole discretion, be incorporated into the Solicitation Documents. However, the Enterprise shall, to a reasonably practicable extent, segregate staff participating in any Business Development Activities from evaluation of resulting responses to Solicitation Documents.
- 6.4 To encourage competition, provide transparency and ensure the nondiscriminatory treatment of potential respondents, the Enterprise shall, except in certain circumstances as outlined in Section 6.7 below and as determined in the Enterprise’s best interest by the Director, provide public notices in connection with its Solicitations by such means and in such forms as shall be appropriate under the circumstances, including the publication of the applicable Solicitation Documents. Such public notices may precede or be accompanied by the applicable Solicitation Documents and may include an estimated timetable relating to the Solicitation and evaluation process if available.
- 6.5 The Enterprise may consider requests for further information relating to the Solicitation Documents as may be reasonably requested by Respondents. All requests for information should be made through official channels, in writing (i.e., the Solicitation email inbox). If the Enterprise determines it appropriate under the circumstances to provide such further information, it will supply such information to all potential Respondents, with such formalities as the Solicitation Documents, provided that the request for such information is received in sufficient time to enable the Enterprise to supply it.
- 6.6 If a Respondent consists of or includes a Consortium, the Respondent may rely on the capacities of the members of the Consortium in responding to and complying with the requirements outlined in the Solicitation Documents regardless of whether or not the members of the Consortium have entered into a legal relationship for purposes of submitting a response. If the Enterprise awards an Agreement to a Consortium, it may, in

the Director's sole discretion, require the Consortium to form a legal entity before entering into, or as a term of, the Agreement.

6.7 The Enterprise, in the sole discretion of the Director, may elect not to provide a public notice in connection with the Solicitation of work or services relating to an Eligible Project in certain circumstances, including the following:

- (a) when, for technical, artistic, or design reasons, or for reasons connected with the protection of patent or other intellectual property rights, an Agreement may be awarded only to a particular Respondent;
- (b) when for reasons of extreme urgency brought about by events unforeseeable or outside of the reasonable control of the Enterprise, there is insufficient time to provide for the step of issuing a public notice;
- (c) when for continuity purposes, it is in the Enterprise's best interest to allow a Project Participant who has an existing Agreement with the Enterprise to carry out additional work or to provide additional services:
 - (i) which were not initially included in the project or in the original Agreement but which, through unforeseen circumstances, have become necessary; and
 - (ii) which cannot for technical or economic reasons be carried out or provided separately from those under the original Agreement without major inconvenience or additional cost to the Enterprise; and
- (d) when the Enterprise wants a Project Participant which has entered into an Agreement with the Enterprise to carry out new work or to provide new services which are a repetition of the work or services provided under the original Agreement and which are under the project for the purpose of which the first Agreement was entered.
- (e) when, the Director, with the concurrence of the Procurement Subcommittee, otherwise determines it is in the best interest of the Enterprise not to issue public notice for a Solicitation.

6.8 As may be further provided in the Solicitation Documents, any material submitted by respondents and requested to be treated as proprietary or confidential will be identified and treated in accordance with the relevant procedures set forth in the Solicitation Documents. The Enterprise shall require respondents to submit legal justification, per State or federal law, with any request for material submitted in response to a Solicitation Document to be treated as proprietary or confidential. After a final determination is made by the Enterprise in connection with a Solicitation, all material submitted by respondents identified as proprietary or confidential will be returned or destroyed at the Respondent's selection. In the event a request is made before the return or destruction of materials, per applicable law, the Enterprise will make public all responsive materials, except material treated as proprietary or confidential.

6.9 The evaluation of Solicitations may be made by an evaluation committee selected by the Director to evaluate the merits of all responses received on the Director's behalf. The specific evaluation criteria to be utilized by the committee and any weighting of such criteria, are within the sole discretion of the Director. All evaluation criteria and assigned weights will be specified in the Solicitation Documents. Failure of a Respondent to provide in its response any information requested by the Solicitation Documents will result in

submission of a non-responsive response and may result in disqualification.

- 6.10 During the evaluation process, meetings may be scheduled with Respondents, either individually or as a group, to the extent the committee determines that additional information or clarification is needed to assist in the evaluation process. The recommendations of the committee will be forwarded to the Director of the Enterprise for a final determination with confirmation by the Board, unless authority is delegated to the Director per the enabling statute and/or by laws.
- 6.11 The Enterprise reserves the right to reject any and all responses received or to cancel the Solicitation, if, based on the sole discretion of the Director, it is in the best interest of the Enterprise or the State to do so. The Enterprise may reject any response received if the Respondent, any member of a Consortium acting as a Respondent or any Person who has powers of representation, decision, or control of the Respondent or any member of a Consortium acting as the Respondent is ineligible to contract with the State, CDOT, or the Enterprise under applicable provisions of federal or state law or under any rules or regulations applicable to the State, CDOT, or the Enterprise.
- 6.12 The Enterprise will not be liable for any costs incurred by Respondents prior to the execution of an Agreement or other contract. All costs to prepare and submit responses to Solicitation Documents shall be borne solely by the Respondent. Nothing in Paragraph 6.12 will prevent the Enterprise, in its sole discretion, from offering stipends and/or cancellation payments to Respondents on such terms as may be determined by the Enterprise and expressly identified in the Solicitation Documents.
- 6.13 The award in connection with a Solicitation will be made to the Respondent whose response is determined to be the most advantageous to the Enterprise, and shall be subject to negotiation and execution of an acceptable Agreement between the Enterprise and Respondent.
- 6.14 At the Director's discretion, the Enterprise may issue Solicitation Documents that comply with the Colorado Procurement Code (CRS § 24-103-101, et al.). If the Director determines that a solicitation will comply with the State Procurement Code, the following shall occur to the extent that they have not already occurred following the Enterprise's process for Solicited Proposals outlined above:
- (a) Prior to a solicitation being advertised, a representative of the Enterprise shall meet with CDOT's Purchasing Director to discuss the Solicitation and process, to discuss all written determinations that must be made under the State Procurement Code and the development of the official file;
 - (b) CDOT's Purchasing Director may determine "competitive sealed proposals" is the most advantageous and practical procurement method for the Enterprise to solicit proposals, and if this determination is made, Colorado Procurement Rule R-24-103-203 shall be followed;
 - (c) The Solicitation will be advertised for a minimum of thirty (30) days unless CDOT's Purchasing Director determines a shorter time is warranted;
 - (d) If CDOT's Purchasing Director, pursuant to Colorado Procurement Rule R-24-102-202.5-.2, determines that the Colorado Bid Information and Distribution System (BID) is not likely to yield adequate competition, the Solicitation will be advertised on the Enterprise's website and not on BIDS;
 - (e) The Solicitation shall state the evaluation factors;

- (f) If a Solicitation warrants it, a shortlist will be created and individuals or firms will be given a minimum of seven (7) business days to prepare for an interview, per the Colorado Procurement Code and Procurement Rules;
- (g) Awards shall be made to the responsible Respondent whose response is determined to be the most advantageous to the Enterprise, taking into consideration the price and the evaluation factors outlined in the Solicitation Documents. No other factors or criteria shall be used in the evaluation.

7. Selection and Contract Formation

7.1 Invitation for Bids

- (a) Policy. It shall be the policy of the Enterprise to purchase standard quantifiable products, commodities, services, and construction in a manner that affords Respondents a fair and equal opportunity to compete through Invitations for Bids (IFBs).
- (b) Specifications. The Enterprise shall issue product, supply, service, or construction specifications that are not unduly restrictive. Brand name specifications, brand name or equal specifications, or qualified products shall only be used in accordance with the provisions of the State of Colorado Procurement Rules R-24-104-202, -01, -02.
 - (i) The Enterprise may utilize life cycle costing and/or value analysis in determining the lowest Responsible Respondent. In bids where life cycle costing or value analysis is to be used, the specifications shall indicate the procedure and valutive factors to be considered.
 - (ii) When appropriate, specifications issued and/or used by the federal government, other public procurement units or professional organizations may be referenced by the Enterprise. Respondents may be required to certify that these standardized specifications have been met.
- (c) Solicitation Time. Except as provided under emergency procedures, the minimum time for the bid opening date shall be not less than fourteen (14) calendar days after posting the Solicitation. When special requirements or conditions exist, the Director may lengthen or shorten the bid time, but in no case shall the time cycle be shortened to reduce competition. Solicitation periods of less than fourteen (14) calendar days shall be documented by the Director as to why a reduced bid period was required.

7.2 Request for Expressions of Interest

- (a) Policy. It shall be the policy of the Enterprise to procure innovative and/or novel financial or commercial products or services in a manner that affords Respondents an opportunity to introduce new and novel delivery methods and financing instruments, through Requests for Expressions of Interest (REOI).
- (b) Specifications. The Enterprise shall issue specifications that generally describe the objectives of the procurement, general minimum qualifications for those expressing interest, and any applicable completion timelines.
- (c) Solicitation Time. Except as provided under emergency procedures, the minimum time an REOI must remain open for responses shall be fourteen (14) calendar days

after posting the Solicitation. When special requirements or conditions exist, the Director may lengthen or shorten the bid time, but in no case shall the time cycle be shortened to reduce competition. Solicitation periods of less than fourteen (14) calendar days shall be documented by the Director as to why a reduced bid period was required.

7.3 Request for Information

- (a) Policy. It shall be the policy of the Enterprise to solicit market-based feedback and research on potential projects and opportunities in a manner that provides Respondents with a fair and equal opportunity to provide feedback, through Requests for Information (RFI).
- (b) Specifications. The Enterprise shall provide specific questions that identify the type of information it seeks.
- (c) Solicitation Time. RFIs shall not be subject to any minimum open time.

7.4 Request for Qualifications

- (a) Policy. It shall be the policy of the Enterprise to procure quality intensive services or highly specialized products in a manner that sets a base standard for Respondents but does not arbitrarily diminish competition.
- (b) Specifications. The Enterprise shall issue product or service specifications that tie directly into the minimum qualifications identified in the Solicitation Documents. Specifications should identify any applicable licenses, certifications, or certificates required to execute the specifications.

8. Pre-Solicitation Conferences

- 8.1 Pre-Solicitation conferences may be conducted to explain the procurement requirements. They shall be announced to all prospective respondents known to have received the Solicitation Documents. The conference should be held long enough after the Solicitation Documents have been issued, to allow respondents to become familiar with it, but with adequate time before the respond date to allow respondent's consideration of the conference results in preparing their responses. Nothing stated at the Pre-Solicitation conference shall be an official response of the Enterprise or change the Solicitation Documents unless such change is made by written amendment to the Solicitation Documents, posted on the Enterprise's website.

9. Amendments to Solicitations

- 9.1 Amendments to Solicitations shall be identified as such and may require the respondent acknowledge receipt of all amendments issued. The amendment shall reference the portions of the Solicitation Documents it amends. Amendments shall be posted with sufficient time to allow prospective respondents to consider them in preparing their responses. If the time set for opening will not permit such preparation prior to opening, such time may be increased in the amendment.

10. Withdrawal of Response

- 10.1 Withdrawal Before Opening. Any response to a Solicitation may be withdrawn from the Enterprise before the time specified for opening.
- 10.2 Withdrawal after Opening but Before Award. The Director may allow a response to be

withdrawn after opening but before award provided:

- (a) the respondent provides evidentiary proof that clearly and convincingly demonstrates that a mistake was made in the costs or other material matter provided; or
- (b) the mistake is clearly evident on the face of the response; and
- (c) it is found to be (by the Director) unconscionable not to allow the response to be withdrawn.

10.3 Procedure. Responses may be withdrawn by written notice received in the office the Enterprise prior to the time set for opening. A telegraphic withdrawal received by telephone from the telegraph company, before opening, will be effective if the telegraph company confirms the message by sending a copy of the telegram showing that the message was received at such office before opening.

11. **Telephone Responses.**

11.1 Telephone responses from respondents will not be accepted unless the Director makes a written determination that market conditions are of such nature that it is in the best interest of the Enterprise to solicit telephone responses.

11.2 Comment: An example of when the Director may approve telephone responses is in the procurement of petroleum fuels where the market price may change on a daily basis.

12. **Electronic Responses.**

12.1 Responses may be submitted electronically when: The terms of the Solicitation expressly permit electronic submission.

13. **Timeliness of Responses.**

13.1 Responses received after the opening time shall not be opened, but shall be non-responsive and rejected. The following exceptions are permitted by the Director:

13.2 If before a specified opening time and date, the mail, either directly by the post office or by internal distribution system, has not been delivered, any response received by the next day delivery may be accepted if it is reasonable to believe the response was in the delivery process which was not completed prior to the opening time and date. All Solicitations utilizing this exception must so state in the terms and conditions of the Solicitation Documents.

13.3 In the event of a labor unrest (strike, work slow down, etc.) which may affect mail delivery, the Director is authorized to develop and issue emergency procedures.

13.4 In any other situation that is beyond the control of the Enterprise or the Respondent, the Director shall rule on the acceptability of the response. However, under no circumstances shall a late response be accepted if the response was still within the control of the Respondent at the time the opening actually occurred.

13.5 In those situations where the late response was not in the control of the Respondent at the time of opening, the Director shall not accept the late response unless he/she further finds that extraordinary circumstances exist. The responsibility for ensuring that the response is received on time rests solely with the Respondent, and the reasonably foreseeable problems inherent in the delivery of responses (e.g. slow messengers, slow mail service,

weather, bad directions, mechanical failures, traffic, etc.) are not extraordinary circumstances permitting acceptance of late responses.

14. Receipt, Opening, and Recording.

14.1 Receipt. Upon receipt, each response and/or modification shall be time-stamped by machine or by hand and shall be stored in a secure place until the opening time. Responses and modifications shall not be opened upon receipt, except that unidentified responses and/or modifications may be opened for identification purposes. An Enterprise employee will immediately reseal the response and/or modification and attest in writing that the employee has not revealed the contents of the response before the opening time.

14.2 Opening and Recording. All openings shall be open to the public and/or interested parties. Responses and/or modifications shall be opened, in the presence of one or more witnesses, as soon as possible after the time, and at the place, designated in the Solicitation Documents. The name of each Respondent (unless otherwise provided in the Solicitation Documents), and other information deemed appropriate by the Director shall be read aloud and recorded at the time of opening.

(a) Reading of all prices may not be reasonable or desired (e.g., in the case of lengthy or complex Solicitations). The decision not to read all prices shall be made by the Director and shall be stated in the Solicitation Documents.

(b) The name of each Respondent, delivery, names(s) of witness(es) and other relevant information shall be entered into the record and the record shall be available for public inspection. After award, copies of pricing information not read aloud at the opening shall be made reasonably available for inspection, if requested. Other information related to a response, or a Respondent's responsiveness, may be withheld from inspection in accordance with Colorado Law.

(c) After award, all Solicitation Documents and responses remaining in the possession of the Enterprise shall be open to public inspection except to the extent disclosure or inspection would violate Colorado Law or the Confidential Data section set forth below. Protect Material accompanying the response shall be readily separable from the response in order to facilitate public inspection of the nonconfidential portion of the response.

15. Confidential Data.

15.1 The Enterprise shall not determine the validity of any written requests for nondisclosure of trade secrets and other proprietary data per any State or Federal Law. If Respondents wish to mark any documents or information as confidential or exempt from public disclosure, they must provide a redacted and unredacted copy of their response before the opening date. The redacted copy must include a specific description of all information marked as confidential, its location in the response, and the legal justification supporting such treatment. After award of the Solicitation, the unredacted copy will be destroyed or returned to the Respondent (at the Respondent's choice and expense), and the redacted copy with justifications will be maintained for the Enterprise's records. In the event of a request for the redacted information, the Enterprise, in its sole discretion, may apply to the Denver District Court, per the Colorado Open Records Act, to seek a determination of whether the redacted information is protected from disclosure. Respondents will be required to intervene in any such action and indemnify the Enterprise.

(a) After award, the bids shall be open to public inspection subject to any continued

prohibition on the disclosure of confidential data.

16. **Mistakes in Responses**

16.1 Confirmation of Response. When it appears from a review of a response that a mistake has been made, the Enterprise will request the Respondent confirm the response. Situations in which confirmation should be requested include obvious, apparent errors on the face of the response or a response is unreasonably divergent from other responses submitted. If the Respondent alleges mistake, the response may be withdrawn if the conditions set forth in this section are met, provided that no correction or withdrawal of responses shall be allowed after award.

16.2 Minor Informalities. Minor informalities are matters of form rather than substance evident from the Solicitation Document, or insignificant mistakes that can be waived or corrected without prejudice to other Respondents; that is, the effect is negligible. The Director may waive such informalities or allow the Respondent to correct them depending on which is in the best interest of the Enterprise. Examples include the failure of a bidder to:

- (a) return the number of signed responses required by the Solicitation Documents;
- (b) sign the response, but only if the unsigned response is accompanied by other material indicating the Respondent's intent to be bound;
- (c) acknowledge receipt of an amendment to the response, but only if:
 - (i) It is clear from the response that the Respondent received the amendment and intended to be bound by its terms; or
 - (ii) the amendment involved had a negligible effect on price, quantity, quality, or delivery.

16.3 Mistakes Where Intended Correct Response Is Evident. If the mistake and the intended correct response are clearly evident on the face of the response, the response shall be corrected to the intended correct response and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of the response are typographical errors, errors in extending unit prices and transposition errors.

16.4 Mistakes Where Intended Correct Bid Is Not Evident. A Respondent may be permitted to withdraw a response if the Respondent submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made.

16.5 Determinations Required. Any decision to permit or deny correction or withdrawal of a response under this section shall be supported by a written determination prepared by the Director or their designee.

17. **Retention of Determinations**

17.1 Each written determination shall be filed in the Solicitation or contract file to which it applies, and shall be retained as part of such file for so long as the file is required to be maintained, per CTIO's policy.

18. **Evaluation and Award.**

18.1 It is the Policy of the Enterprise that all responsive responses shall be evaluated against the specifications and/or evaluation criteria identified in the Solicitation Documents.

- (a) For example, the following factors may be considered in evaluating any response: proposed delivery date of products or services; discounts; warranties (type and length); future availability; results of product testing; local service; cost of maintenance agreements; future trade-in value or availability of repurchase agreement; availability of training courses; financial terms if not a cash purchase; space limitations; esthetics; adaptability to environment; cost of operation (if any); safety and health features relating to codes, regulations, or policies.
- 18.2 Product Acceptability. The Solicitation Documents may require the submission of samples, descriptive literature, technical data, functional demonstrations, or other material necessary to determine product acceptability. Responses received that do not contain the required submission data or demonstrations, are nonresponsive. The Solicitation Documents may also provide for accomplishing any of the following prior to award:
- (a) inspection or testing of a product prior to award for such characteristics as function, quality or workmanship;
 - (b) examination of such elements as appearance, finish, taste, or feel; or
 - (c) other examinations to determine whether it conforms with other specifications.
 - (d) The acceptability evaluation is not conducted for the purpose of determining whether one Respondent's item is superior to another but only to determine whether an offering will meet the Enterprise's needs as set forth in the Solicitation Documents. Any offering which does not meet the acceptability requirements shall be nonresponsive.
- 18.3 Determination of Lowest Respondent. Where a Solicitation uses the IFB method, following determination of product acceptability, bids shall be evaluated to determine which Respondent offers the lowest cost to the Enterprise in accordance with specifications. They may be evaluated in accordance with value analysis or life cycle cost formulas. If such formulas are to be used, they shall be objectively measurable and shall be set forth in the IFB. Such evaluation factors need not be precise predictors of actual future costs, but to the extent possible they shall:
- (a) be reasonable estimates based upon information the State has available concerning future use; and
 - (b) treat all bids equitably.
- 18.4 Restrictions. Where a Solicitation uses the IFB method, a contract may not be awarded to a Respondent submitting a higher quality item than that designated in the Solicitation Documents unless such Respondent is also the lowest bidder as determined by value analysis or life cycle cost formulas as permitted in this section.
- 18.5 Environmentally Preferable Products. The provisions of C.R.S. § 24-103-207.5, as amended, which require a preference for environmentally preferable products apply to the award of contracts under this Policy. The purchasing preference applies to products and services that have a lesser or reduced adverse effect on human health and the environment than comparable competing products. When the conditions of C.R.S. § 24-103-207.5 subsections (3) (a) through (f) have been met, the Enterprise shall award IFBs for environmentally preferable products or services that cost no more than five percent (5%) more than the lowest bid. However, the Enterprise may award the contract to a Respondent who offers environmentally preferable products and services which exceed the lowest bid by more than five percent (5%) percent if a cost of ownership life-cycle analysis establishes

that long term savings to the Enterprise will result. In addition, the Enterprise must ensure that the purchase can be accommodated within its existing budget.

19. **Disposition of Surety.**

19.1 If a response is withdrawn in accordance with this Policy, any surety shall be returned to the Respondent in a timely manner.

20. **Multi-Step Solicitations.**

20.1 Definition. Multi-step solicitations are two-phase or three-phase Solicitation processes. A two-phase Solicitation process consists of a technical, qualification, or information-based first phase, composed of one or more steps in which Respondents submit technical offers, qualifications, or services/product information to be evaluated by the Enterprise. A second phase requests bids or proposals from those Respondents whose technical offers, qualifications, or service/product information are determined to be acceptable during the first phase and, therefore, their price bids or proposals will be opened and considered. Alternatively, a three-phase Solicitation process consists of an informational phase, used by the Enterprise to collect market based data before crafting an official Solicitation process, a second phase requiring qualification or technical based information from Respondents, and a third phase, requiring Respondents to submit pricing or other service based offers to the Enterprise.

20.2 Conditions for Use. The multi-step solicitation method may be used at the Director's discretion.

21. **Records.**

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

22. **Public Notice.**

22.1 Distribution. Notice of Solicitation under this Policy will be advertised according to the provisions below.

(a) A Notice shall be posted:

- (i) at least seven (7) days before the day of the deadline for submission of a solicitation response; and
- (ii) on the main website for CTIO; or
- (iii) on a state website that is owned, managed by, or provided under contract with, the division for posting a public procurement notice.

(b) The Enterprise may reduce the seven (7) day period described in Subsection (a), if the Director makes a Written Determination:

- (i) a shorter time is needed; and
- (ii) determines that competition from multiple sources may be obtained within the shorter period of time.

(c) It is the responsibility of a person seeking information provided by a notice published under this section to seek out, find, and respond to the notice.

- (i) As a courtesy and in order to promote competition, the Enterprise may provide, but is not required to provide, individual notice to potential Respondents.

22.2 The Notice of the Solicitation Documents shall include the following information and statements:

- (a) date, time and location of opening;
- (b) project number, name and location;
- (c) project time of completion;
- (d) location where Solicitation Documents maybe obtained;
- (e) deposit required, if any, for a complete set of Contract Documents;
- (f) "Preference shall be given to Colorado resident Respondents and for Colorado labor as provided by law."
- (g) "The rate of wages to be paid for all laborers and mechanics shall be in accordance with the applicable Davis-Bacon rates of wages for the project. Such rates will be specified in the General Documents."
- (h) any other appropriate information.

23. Written Determinations.

23.1 Written determinations required by this Policy shall be made by the Director or their designee.

23.2 The Director may determine by category of supply, product, service, or other items that it is either not practicable or not advantageous to the Enterprise to procure specified types of supplies, products, services, or other items through a competitive Solicitation. Procurements of the specified types of supplies, products, services, or other items may then be made by any method authorized under this Policy. Such determination may be modified or revoked at any time, and such determination should be reviewed for current applicability from time to time.

23.3 When Competition Is "Not Practicable"

- (a) Competition is not practicable where the nature of the procurement prevents participation by at least three (3) Respondents, or award to the lowest responsive bid, lowest responsive quote, most qualified Respondent, or best value proposal, who agrees to perform without condition or reservation per the description, delivery or performance schedule, and all other terms and conditions of the Solicitation Documents. Factors to be considered in determining whether competition is not practicable to include, but are not limited to:
 - (i) whether the contract needs to be other than a fixed-price type;
 - (ii) whether it may be necessary to conduct oral or written discussions with Respondents concerning technical, financial, or other commercially sensitive aspects of their responses;
 - (iii) whether it may be necessary to allow respondents the opportunity to revise

their responses;

- (iv) whether it may be necessary to base an award on a comparative evaluation without a definitive scope differing in price, quality, and contractual factors in order to determine the most advantageous offering to the Enterprise; and
- (v) whether the primary considerations in determining award may be factors other than price alone.

23.4 When Competition Is “Not Advantageous”.

- (a) A determination may be made to use alternative procurement structures if it is determined that it is not advantageous to the Enterprise, even though practicable, to use competitive sealed bidding or proposals. Competitive sealed bidding or proposals may be practicable, that is reasonably possible, but not necessarily advantageous, that is, in the Enterprise's best interest. Factors to be considered in determining whether competitive sealed bidding is not advantageous include:
 - (i) if prior procurements indicate alternative procurement structures may result in more beneficial contracts for the Enterprise; and
 - (ii) whether the elements listed in the specifications are desirable rather than necessary in conducting a procurement.

24. **Dollar Thresholds for, and Content of, Alternative Procurement Structures.**

- 24.1 The Alternative Procurement Structures identified in this Policy may be issued (promulgated) by the Director under the delegated purchasing authority of the Enterprise from the State Division of Purchasing for requirements that are estimated to exceed the small purchase threshold in the State Procurement Rules.
- 24.2 Form of Responses. The manner and format in which responses are to be submitted to the Enterprise, including any forms for that purpose, shall be as set forth in the Solicitation Documents Request.

25. **Respondent Inquiries.**

- 25.1 In cases where an alternative procurement method raises questions or concerns from potential respondents or may require interpretation, all known participating respondents must be allowed to ask questions and to receive answers or clarifications. This may be accomplished through a pre-submittal conference, via a formal inquiry period, or a combination of options. If any of these options is anticipated, the Solicitation Documents shall state and list appropriate dates, times, and locations.
 - (a) Pre-submittal conferences may be mandatory or optional. However, if such meetings result in any material changes to the scope of work or otherwise affect the manner or form of response, all known potential respondents must be notified in writing of any such change.
 - (b) Similarly, if responses to inquiries result in any material changes to the scope of work or otherwise affect the manner or form of response, all known potential offerors must be notified in writing of any such change.
 - (c) When such written notice is given, respondents must be afforded a reasonable amount of time to review these materials, to contemplate any practical consequences, and to consider the content for inclusion in their responses.

26. **Response Preparation Time.**

26.1 Response preparation time for Solicitations shall be set to provide Respondents a minimum of thirty (30) calendar days to prepare and submit their responses. However, when special requirements or conditions exist, the Director may shorten this time, but in no case shall the time be shortened in order to reduce competition. The Director shall document why the reduced time period was necessary.

27. **Evaluation of Alternative Procurement Methods.**

27.1 Evaluation Factors in the Solicitation Documents. The Solicitation Documents shall state all of the evaluation factors, including price, where applicable. Evaluation of responses shall be based on the evaluation factors set forth in the Solicitation Documents. Numerical rating systems may be used. Factors not specified in Solicitation Documents shall not be considered.

27.2 Veterans' Preference. The relative weight assigned to a criterion, as to the extent and quality of any preference for veterans of military service given by Respondent in the hiring of Respondent's employees shall not exceed five percent (5%).

28. **Minority Business Enterprises.**

28.1 When an alternative procurement method is used to procure commodities or services, and past discrimination against minority businesses can be shown, the Solicitation Documents shall contain an evaluation criterion, in addition to other appropriate criteria, evaluating the extent of MBE participation offered. Disparity or predicate studies accepted by other public entities may be used as evidence establishing past discrimination in the geographical area of the study for the goods or services involved.

28.2 The goal established in each procurement for MBE participation, against which the extent of participation shall be measured, and the weight assigned to the criterion which considers the extent of Respondent's MBE participation, shall be determined on a case-by-case basis, but in no event shall the weight assigned to such criterion exceed the lesser of a goal established as a result of the disparity study relied upon as evidence of past discrimination, or the seventeen percent (17%) goal established by the Governor's Executive Order D005587.

(a) In establishing the goal and the weight of the criterion which considers such goal, consideration shall be given to:

(i) the extent to which subcontracting, or the use of suppliers, is permitted by the Solicitation or is possible in the response to the Solicitation; and

(ii) the extent to which Minority Business enterprises exist in the particular marketplace and industry to provide the specific goods or services sought by the Enterprise in the Solicitation; and

(iii) the extent to which the Enterprise is exceeding, on an annual aggregate basis, the goals of the Executive Order at the time the Solicitation is prepared.

29. **Women's Business Enterprises.**

29.1 When an alternative procurement method is utilized for commodities or services, and past discrimination against women's businesses can be shown, the Solicitation shall contain an

evaluation criterion, in addition to price and other appropriate criteria, evaluating the extent of WBE participation offered in the response. Disparity or predicate studies accepted by other public entities may be used as evidence establishing past discrimination in the geographical area of the study for the goods or services involved.

29.2 The goal for WBE participation established in each procurement against which the extent of participation shall be measured, and the weight assigned to the criterion that considers the extent of Respondent's WBE participation, shall be determined on a case-by-case basis, but in no event shall such criterion exceed the goal established as a result of the disparity findings relied upon as directed by the Governor's Executive Order D0005-94.

- (a) In establishing the goal, and the weight of the criterion that considers such goal, consideration shall be given to:
 - (i) the extent to which subcontracting, or the use of suppliers, is permitted by the Solicitation or is possible in the response to the Solicitation; and
 - (ii) the extent to which Women's Business Enterprises exist in the particular marketplace and industry to provide the specific goods or services sought by the Enterprise in the Solicitation; and
 - (iii) the extent to which actual WBE participation in the agency's contracts, resulting from Solicitations, issued during the current year have exceeded the goals set in those same Solicitations, on an aggregate basis.

30. **Tie Responses.**

30.1 In all Solicitations for services, procured by alternative procurement methods, any tie between Respondents shall be broken by awarding the contract to the Respondent utilizing the greatest quantitative (numerical) preference for veterans in hiring employees.

31. **Classifying Responses.**

31.1 For the purpose of conducting discussion with Respondents, responses shall be initially classified as: (1) acceptable; (2) potentially acceptable, that is, reasonable susceptible of being made acceptable; or (3) unacceptable.

31.2 Discussions with Respondents after Opening.

- (a) Purpose of Discussion. Discussions may be held to:
 - (i) promote understanding of the Enterprise's requirements and the Respondent's proposal; and
 - (ii) facilitate arriving at a contract that will be most advantageous to the State taking into consideration price and the other evaluation factors set forth in the Request for Proposals.
- (b) Conduct. Respondents shall be accorded fair and equal treatment in discussion and revision of their responses. After responses have been opened, discussions may be held with those Respondents determined to be most responsive. Discussions may be held to clarify requirements and to make adjustments in services to be performed and in costs and/or prices. Auction techniques and/or disclosure of any information derived from competing responses are prohibited. Any changes to the response, technical or costs, shall be submitted/confirmed in writing by the Respondent(s).

32. **Award.**

32.1 Awards shall be made to the responsive Respondent whose response is determined to be most advantageous to the Enterprise based on the evaluation factors set forth in the Solicitation. The evaluation committee established to evaluate responses shall make such determination subject to final approval by the Director, with the advice and consent of the Board.

33. **Small Purchases.**

33.1 Small purchases as used in this Policy, shall mean goods and services purchases costing less than one hundred fifty thousand dollars (\$150,000) and construction projects costing less than one hundred fifty thousand dollars (\$150,000). Small purchases may be procured in accordance with the dollar limits and procedures established by this Policy. Procurements shall not be artificially divided so as to constitute small purchases under this section. Small purchases are subject to the requirement that prices paid be fair and reasonable in accordance with C.R.S. § 24-30-202 (2).

34. **Purchase Orders.**

34.1 The use of Purchase Orders shall be governed by the Fiscal Rules of the State.

35. **Competition Not Required.**

35.1 The Enterprise may purchase supplies or services up to a limit of fifty thousand dollars (\$50,000) without benefit of competition. Items on a mandatory price agreement issued by the Division of Purchasing should be secured from the appropriate vendor, unless exempted by the Director.

35.2 It shall be the policy of the Enterprise to maximize the opportunities for minority-owned and women-owned business enterprises to receive orders that are issued when competition is not required.

35.3 The Director shall use professional judgment to ensure that the Enterprise is receiving maximum value in all non-competitive procurements.

35.4 The Enterprise may procure construction up to fifty thousand dollars (\$50,000) without benefit of competition.

35.5 In the event of any abuse, the Board shall have the authority to revoke any procurement and require its reletting competitively.

36. **Documented Quotes.**

36.1 For goods and services procurements, neither the Solicitation nor the response constitutes an "offer"; therefore, "responsiveness" at the time of receipt is not an absolute criterion. The Enterprise may determine whether or not a response is acceptable and may compare the relative value of competing responses, not solely the price. "Acceptable," for purposes of this section, means that the product or service will meet the Enterprise's needs and that the price is fair and reasonable. The purchase order/commitment voucher constitutes an offer. The Respondent may accept by performance, unless the purchase order/commitment voucher expressly requires acceptance by written acknowledgment.

36.2 For construction projects, the Respondent's response constitutes an "offer" and is binding if accepted by the Enterprise.

- 36.3 The choice of Respondent for goods and services must be based on which acceptable response is most advantageous to the Enterprise, price/cost being the primary consideration. The basis for the selection must be documented and will be final and conclusive unless determined to be arbitrary, capricious, or contrary to law. For construction projects, the award must be made to the low acceptable quote, except when the award is for products only that are for inclusion in construction projects and the products are specifically identified and a valid environmentally preferable product preference exists pursuant to C.R.S. § 24-103-207.5. The provisions of C.R.S. § 24-103-207.5 which require a preference for environmentally preferable products, apply to the award of contracts under this section. The purchasing preference applies to products and services that have a lesser or reduced adverse effect on human health and the environment than comparable competing products. When the conditions of C.R.S. § 24-103-207.5 CRS subsections (3) (a) through (f) have been met, the Enterprise will award bids for environmentally preferable products or services that cost no more than five percent (5%) more than the lowest bid. However, the Enterprise may award the contract to a bidder who offers environmentally preferable products and services which exceed the lowest bid by more than five percent (5%) if a cost of ownership life-cycle analysis establishes that long term savings to the state will result. In addition, the Director, or their designee, must ensure that the purchase can be accommodated within an agency's existing budget.
- 36.4 Requests for Quotes must remain posted for at least three (3) working days unless the Director determines in writing that a lesser time is required in order to meet an immediate Enterprise need.
- 36.5 The Director may authorize negotiation with any Respondent to clarify its quote or to effect modifications that will: make the quote acceptable (including curing a defective bond) or make the quote more advantageous to the Enterprise. However, in the negotiation process, the terms of one Respondent's quote shall not be revealed to a competing Respondent, and quotes may be kept confidential until a commitment voucher is issued.
- 36.6 Procurement of services greater than \$10,000 must be reviewed by the Director to determine that prices or rates are fair and reasonable.
- 36.7 Bonding and retainage requirements set forth in C.R.S. § 38-26-106, § 24-105-201 et seq. and § 24-91- 103 (1) and rules promulgated thereunder are not affected by this Policy. Failure to provide a bid bond if required but not cured makes a quote unacceptable. It shall be the Enterprise's policy to seek legal advice when bid bonds have been required and the quote terms are modified after receipt.
37. **Sole Source Procurements.**
- 37.1 **Conditions for Use.** A sole source procurement is justified when there is only one good or service that can reasonably meet the Enterprise's need and/or there is only one vendor who can provide a good or service meeting the Enterprise's need. A requirement for a particular proprietary item (i.e., a brand name specification) does not justify a sole source procurement if there is more than one potential Respondent who can provide the item. The following are examples of circumstances which could justify a sole source procurement:
- (a) where the compatibility of equipment, accessories, or replacement parts is the paramount consideration;
 - (b) where a sole supplier's item is needed for trial use or testing;
 - (c) where public utility services are to be procured;

- (d) where a supplier has exclusive intellectual property or other paternal rights preventing competition; or
 - (e) where, the Director, with the concurrence of the Procurement Subcommittee, otherwise determines it is in the best interest of the Enterprise.
- 37.2 The Director, or their designee shall make a written determination that a procurement is sole source, setting forth the reasons. In cases of reasonable doubt, competition should be solicited.
- 37.3 Exemptions. Sole source determinations are not required under circumstances outlined in C.R.S. § 24- 101- 105, as amended.
- 37.4 Negotiation. When a sole source procurement is authorized, the Procurement Officer shall conduct negotiations, as appropriate, as to price, delivery, and terms.
38. **Emergency Solicitations.**
- 38.1 Definition of Emergency Conditions. An emergency condition is a situation which creates a threat to public health, welfare, or safety such as may arise by reason of floods, epidemics, riots, equipment failures, or such other reason as may be proclaimed by the using agency and approved by the Director. The existence of such condition creates an immediate and serious need for supplies, services, or construction that cannot be met through normal procurement methods and the lack of which would seriously threaten:
- (a) the functioning of Enterprise, or its assets;
 - (b) the preservation or protection of property; or
 - (c) the health or safety of any person or persons.
- 38.2 Scope of Emergency Procurements. Emergency procurements shall be limited only to a quantity of those supplies, services, or construction items necessary to meet the emergency.
- 38.3 Authority to Make Emergency Procurements. The Enterprise may make emergency procurements when an emergency condition arises and the need cannot be met through normal procurement methods, provided that whenever practical, approval by the Director shall be obtained prior to the procurement. In the event an emergency arises after normal working hours, staff will notify the Director on the next working day.
- 38.4 Source Selection Methods.
- (a) General. The procedure used by the shall be selected to assure that the required supplies, services, or construction items are procured in time to meet the emergency. Given this constraint, such competition as is practicable shall be obtained.
 - (b) Determination Required. The Director or their designee shall make a written determination stating the basis for an emergency procurement and for the selection of the particular contractor.
39. **Competitive Reverse Auctions.**

- (a) Contracts for goods and services may be awarded by competitive reverse auctions if the Director determines that adequate competition can be achieved and that the process is likely to result in better pricing.
- (b) Competitive reverse auction means a computer aided bidding process through which a pre-established group of Respondents may post bids for a defined period of time and may change their bids as desired during the bidding period.
- (c) The intent to conduct a competitive reverse auction shall be published for a period of not less than fourteen (14) days. The notice shall include all terms, conditions, and specifications and shall tell interested Respondents how to participate in the process.
- (d) All Responsible Respondents willing to accept the terms and conditions of the procurement and to meet the specifications of the bid shall be eligible to participate. The Enterprise may conduct a preliminary process to determine Respondent responsibility and to ensure the Respondent's responsiveness to terms and specifications.
- (e) During the bidding process, the participating Respondents shall be identified only by a letter, number, or other symbol to protect their identities; each bid price and the letter, number, or symbol designation of the vendor shall be posted for all bidding vendors immediately upon receipt.
- (f) The contract shall be awarded to the low responsible bidder whose bid meets the requirements and specifications.

40. **Competitive Negotiation**

40.1 Contracts may be awarded by competitive negotiation.

- (a) If the Director determines that time does not permit re-solicitation, a contract may be awarded by competitive negotiation after an unsuccessful procurement process.
 - (i) A competitive sealed bid or competitive sealed proposal process is unsuccessful if (1) all offers received are unreasonable or uncompetitive, (2) the low bid exceeds available funds, as certified in writing by the appropriate fiscal officer, (3) the Solicitation has been properly cancelled, or (4) the number of responsive offers is not adequate to ensure adequate price competition.
- (b) The competitive negotiation process shall include all Respondents who responded to the Solicitation or any rebid and may include other capable of fulfilling the Enterprise's needs.
- (c) The Director, or their designee, may set reasonable times and locations for participation in the competitive negotiation, reflecting the fact that time constraints are the basis for the competitive negotiation process.

40.2 Each Respondent with whom the Enterprise negotiates shall be given a fair and equal chance to compete. Negotiations shall be conducted separately and independently with each Respondent, and in no case shall the terms of any Respondent's offer be communicated to any other person until an intent to award notice has been issued. Any change in requirements shall be communicated to all Respondents.

- (a) A vendor may be eliminated from the process upon a determination that its offer is not reasonably susceptible of being selected for award.
- 40.3 Award shall be made to the Respondent whose offer is most advantageous to the Enterprise. The Director shall make a written determination that identifies the nature of the discussions with each Respondent and stating why the selected offer is the most advantageous to the Enterprise.
41. **Cancellation of Solicitations: Rejection of Responses.**
- 41.1 Policy. Solicitations should only be issued when there is a valid procurement need. Solicitations should not be issued to obtain estimates or to “test the water.” A Solicitation is to be cancelled only when there are cogent and compelling reasons to believe that the cancellation of the Solicitation is in the Enterprise's best interest.
- 41.2 Notice. Each Solicitation issued by the Enterprise shall contain language stating that the Solicitations may be cancelled as provided in this Policy.
- 41.3 Rejection of all Responses
- (a) Prior to Opening. Prior to opening of responses, a Solicitation may be cancelled in whole or in part when the Director, determines in writing that such action is in the Enterprise's best interest for reasons including but not limited to:
 - (i) the Enterprise no longer requires the supplies, services, or construction.
 - (ii) the Enterprise no longer can reasonably expect to fund the procurement; or
 - (iii) proposed amendments to the Solicitation would be of such magnitude that a new Solicitation is desirable.
 - (b) Notice. When a Solicitation is cancelled prior to opening, notice of cancellation shall be sent to all entities receiving the Solicitation. The notice of cancellation shall:
 - (i) identify the Solicitation;
 - (ii) explain the reason for cancellation; and
 - (iii) where appropriate, explain that an opportunity will be given to compete on any re-solicitation or any future procurements of similar supplies, services, or construction.
 - (c) After Opening. After opening but prior to award, any or all responses may be rejected in whole or in part when the Director, determines in writing that such action is in the Enterprise's best interest for reasons including but not limited to:
 - (i) the supplies, services, or construction being procured are no longer required;
 - (ii) ambiguous or otherwise inadequate specifications were part of the Solicitation;
 - (iii) the Solicitation did not provide for consideration of all factors of significance to the Enterprise;
 - (iv) prices exceed available funds and it would not be appropriate to adjust

quantities or qualities to come within available funds;

- (v) all otherwise acceptable responses received are at clearly unreasonable prices; or
 - (vi) there is reason to believe that the responses may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith.
- (d) A notice of rejection should be sent to all businesses that submitted responses.
 - (e) Documentation. The reasons for cancellation or rejection shall be made a part of the procurement file and shall be available for public inspection.
 - (f) Disposition. When responses are rejected, or a Solicitation cancelled after bids or proposals are received, the responses which have been opened shall be retained in the procurement file, or if unopened, returned to the Respondents upon request, or otherwise disposed of.

42. Responsibility of Respondents

42.1 Standards. Factors to be considered in determining whether the standard of responsibility has been met include whether a prospective contractor or vendor has:

- (a) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them necessary to indicate the capability to meet all contractual requirements;
- (b) a satisfactory record of performance;
- (c) a satisfactory record of integrity;
- (d) qualified legally to contract with the State; and
- (e) supplied all necessary information in connection with the inquiry concerning responsibility.

42.2 Information Pertaining to Responsibility. The Respondents shall supply information requested by the Enterprise concerning the responsibility of such Respondent. If such Respondent fails to supply the requested information, the Enterprise shall base the determination of responsibility upon any available information or may find the Respondent non-responsible if such failure is unreasonable.

42.3 Ability to Meet Standards. The Respondent may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request:

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

42.4 Written Determination of Non-responsibility Required

- (a) If a Respondent who otherwise would have been awarded a contract is found non-responsible, a written determination of non-responsibility setting forth the basis of

the finding shall be prepared by the Director. A copy of the determination shall be sent promptly to the non-responsible Respondent. The final determination shall be made part of the procurement file.

43. Types of Contracts.

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

43.2 Multi-Year Contracts

- (a) To the extent allowable under the State's fiscal rules, the Enterprise may enter into multi-year contracts for supplies or services subject to funding availability. Contracts for periods in excess of five years shall not be executed without written permission of the Director and concurrence of the Board.
- (b) Specifications for multi-year contracts shall contain conditions of renewal or extension, if any. Methods used to determine any price escalation/de-escalation shall be part of the original specifications and made a part of the contract. Contracts shall only be renewed or extended if funds are available for the new contract period.

44. Bonds.

44.1 Security. It shall be the policy of the Enterprise, before issuance of any solicitation, to determine if a security for each procurement is necessary to protect the best interest of the Enterprise. Any Security required shall be set to protect the interests of the Enterprise during the evaluation period prior to contract execution. Where required, a Security shall be submitted by all Respondents as a guarantee that the response will be maintained in full force and effect for a period of not less than sixty (60) days after opening or as specified in the Solicitation.

44.2 Acceptable Bid Security.

- (a) Acceptable bid security shall be limited to:
 - (i) a one-time bid bond underwritten by a company licensed to issue bid bonds in the State of Colorado, and in the form prescribed in C.R.S. § 24-105-203; or
 - (ii) a bank cashier's check made payable to the Treasurer of the State of Colorado; or
 - (iii) a bank certified check made payable to the Treasurer of the State of Colorado.

44.3 Exceptions

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

44.4 Bond Forms and Copies. Performance bonds, labor and material payment bonds, and bid bonds shall be executed on forms as prescribed by the State of Colorado.

45. Remedies

45.1 Filing of Protest

- (a) Subject of Protest. Protestors, within five (5) business days from a Written Determination, may file a protest of the Written Determination, including but not limited to specifications, award, or disclosure of information marked confidential in the offer.
- (b) Form. The written protest shall include, as a minimum, the following:
 - (i) the name and address of the protestor;
 - (ii) appropriate identification of the procurement or awarded contract;
 - (iii) a statement of the reasons for the protest; and
 - (iv) any available exhibits, evidence, or documents substantiating the protest.

45.2 Requested Information.

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

45.3 Decision

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

45.4 Stay of Procurement During Protest

- (a) A stay of a contract for Competitive Solicitations is in effect until any protest is resolved pursuant to C.R.S. § 24- 109-102. (See CRS § 24-103-203 (7)).

45.5 Entitlement to Costs. Successful protestors shall only be entitled to their reasonable bid preparation costs. No other costs, fees, or damages shall be allowed.

46. **Suspension.**

46.1 Initiation. After consultation with the Attorney General, and where practicable, the contractor or potential contractor who is to be suspended, the Director may issue a written determination to suspend a person from consideration of contracts pending an investigation to determine whether cause exists for debarment. A notice of suspension, including a copy of the determination, shall be sent to the suspended contractor or prospective contractor. Such notice shall:

- (a) state that the suspension will be for the period necessary to complete an investigation into possible debarment, as limited in C.R.S. § 24-109-105 of the Colorado Procurement Code;
- (b) inform the suspended person that bids or proposals will not be solicited from him or her and, if received, will not be considered during the period of suspension; and

- (c) inform the contractor or prospective contractor of his or her right to appeal administratively or judicially in accordance with Article 109 (Remedies) of the Colorado Procurement Code.
- 46.2 Effect of Decision. A contractor or prospective contractor is suspended upon issuance of the notice of suspension; the suspension shall remain in effect during any appeals.
47. **Debarment.**
- 47.1 Initiation. Following completion of the investigation to determine whether a contractor or prospective contractor has engaged in activities which are a cause for debarment, and after consultation with the Attorney General, the Director may debar a contractor or prospective contractor. A written notice of debarment shall be sent by certified mail, return receipt requested. The notice shall inform the debarred person of his or her right to appeal the decision administratively or judicially in accordance with Article 109 (Remedies) of the Colorado Procurement Code.
- 47.2 Effect of Debarment Decision. A debarment decision will take effect thirty (30) days after the contractor or prospective contractor receives notice of the decision unless an appeal is filed during that time. After the debarment decision takes effect, the person shall remain debarred unless a court, the Director, or the person who issued the debarment decision orders otherwise or until the debarment period specified in the decision expires.
- 47.3 Lists of Debarred and Suspended Persons. The Director shall maintain a current list of all debarred and suspended persons and shall send such lists and updates of it to the State Purchasing Department.
48. **Appeals.**
- 48.1 Appeal to the Executive Director. Protestors shall have the same right of appeal as stated in C.R.S. § 24-109-201 and Colorado Procurement Code, Rule 24-109-201, as amended; and follow the same rules of procedure as stated in C.R.S. § 24-109-202 and Colorado Procurement Code, Rule 24-109-202, as amended.
- 48.2 Filing of Appeals.
- (a) When to file. Appeals of decisions of the Director shall be submitted in writing to the Executive Director within ten (10) working days of the date a decision is mailed or within twenty (20) working days of a decision regarding a suspension, debarment, or contract controversy. Appeals received after the prescribed time periods shall not be considered.
 - (b) Form. The written appeal shall include copies of all documents and evidence previously submitted to the Director, any additional relevant information, and the decision rendered by the Director.
 - (c) Content. The appeal shall be limited to the issues raised in the original protest. However, the appeal may include new evidence or additional information related to those issues or issues related to the conduct of the protest process.
- 48.3 Additional Information
- (a) The Executive Director may request that the parties submit any additional information necessary to make a decision on the appeal. If any party fails to submit requested information within the time period set by the Executive Director, the

appeal may be considered without such information.

48.4 Hearing by the Executive Director

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

48.5 Decision by the Executive Director.

- (a) The Executive Director, or their designee, shall issue a final decision on the issue. Copies of the decision shall inform the Respondent of his or her rights to judicial appeals under Article 109 (Remedies) of the Colorado Procurement Code. However, if an action concerning the protest, suspension, or debarment has been commenced in court, the Executive Director shall not act on the matter, but shall refer it to the Attorney General.
- (b) Appeals to District Court. The rights of the Respondent and time limitations to appeal final decision of the Executive Director shall be resolved in accordance with C.R.S. §§ 24-109-206 and 24-109-206, as amended.

49. Solicitations and Awards in Violation of the Law.

49.1 Definitions.

- (a) An “unauthorized purchase” is any situation where a purchase has occurred or a purchase commitment has been made to a vendor to obtain goods or services, and:
 - (i) the requesting agency has not followed established applicable purchasing statutes and rules, or
 - (ii) a purchase or commitment to purchase is made by a person(s) who is not so authorized.
 - (b) “Ratification” is the act of the using agency's purchasing director, after review of all facts involved in an unauthorized purchase, sanctioning the unauthorized purchase.
 - (c) “Responsible individual(s)” is the person(s) who has made an unauthorized purchase.
- 49.2 Remedies Prior to an Award. Remedies for Solicitations and Awards in violation of the law shall be resolved in accordance with C.R.S. §§ 24-109-402 and 24-109-403, as amended.
- 49.3 Authority of the Director.
- (a) The Director is authorized, after review and consideration of all facts involved in an unauthorized purchase, to decide whether to ratify an unauthorized purchase.
- 49.4 Factors to be Considered in Ratification of an Unauthorized Purchase.
- (a) The Director, or their designee, shall consider all factors related to the procurement including, but not limited to, the following in making a decision whether or not to ratify an unauthorized purchase:
 - (i) the facts and circumstances giving rise to the need for the good or service, including the responsible individual's explanation as to why established procedures were not followed, and any lack of information or training on the part of the responsible individual;
 - (ii) indications of intent to deliberately evade established purchasing procedures;
 - (iii) whether the purchase, if it had been made according to established procedures, would have been reasonable (prudent) and appropriate;
 - (iv) the extent to which any competition was obtained;
 - (v) whether this is the first occurrence, or a repeat instance, by the responsible individual;
 - (vi) whether appropriate written assurances and safeguards have been established to preclude a subsequent unauthorized procurement; and
 - (vii) indications as to whether either the agency or vendor has acted fraudulently or in bad faith.
 - (b) A decision to ratify an unauthorized purchase shall weigh the above noted factors as they apply to the express goals of State Procurement Code, CRS 24-101-102, and in particular fairness to any vendor who has acted fairly and in good faith.

49.5 Authorized Ratification.

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

49.6 Denial.

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

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

50. **Cooperative Purchasing.**

- (a) The Director or their designee may approve the purchase of goods or services in accordance with C.R.S. § 24-110-201(2), if he finds that such purchase is in the best interests of the Enterprise, after considering:
 - (i) the competitiveness of pricing under the contract; and
 - (ii) the efficiencies and cost savings of using the contract, beyond the savings and administrative convenience achieved; and
- (b) The Director or their designee may approve a single purchase, make a conditional approval, or approve participation in an on-going program with the external procurement activity or the local public procurement unit. Participation in an on-going program must be for a specific period of time, not to exceed two (2) years.

51. **Preferences in Awarding Contracts.**

51.1 Minority-owned and Women-owned Business Enterprises

- (a) It is the policy of this Enterprise that all procurements shall make a special effort to solicit and encourage minority-owned and women-owned business participation for contracts and awards. All procurements must implement the spirit and direction offered by present or future executive orders relating to this subject. The Enterprise, to the greatest extent possible without sacrificing adequate competition, must ensure active participation by minority-owned and women-owned business enterprises.

51.2 Preferences

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