



Procurement Policy and Procedures

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1. GENERAL PROVISIONS

1.1 Introduction to Austin Transit Partnership

Austin Transit Partnership ("**ATP**") is a local government corporation created by the City of Austin ("**City**") and the Capital Metro Transportation Authority ("**CapMetro**") pursuant to Chapter 431, Texas Transportation Code, to aid and act on behalf of the City and CapMetro to accomplish a governmental purpose by serving as the independent entity responsible for the implementation of Project Connect.

1.2 Purpose of this Policy

This ATP Procurement Policy and Procedures (this "**Policy**") is for the benefit of ATP only and does not confer any rights on actual or potential Offerors, Contractors, or any other person, except as expressly provided in Chapter 6 (Administrative Remedies, Audit and Organizational Conflicts of Interest). ATP has developed this Policy to support and promote best practices in the procurement of goods and services and to comply with Applicable Law, including the expectations and requirements of the Federal Transit Authority ("**FTA**") for written procurement policies and procedures, and in furtherance of its Procurement priorities and goals, including the following:

(a) Innovation and Industry Best Practices

ATP seeks to take an innovative and creative approach to Procurement that incorporates and improves upon transit industry best practices and successful transit delivery models. ATP seeks to establish and follow procurement methods and practices that promote competition.

(b) Commitment to Transparency and Integrity

ATP seeks to ensure that its Solicitations foster full and open competition, seek quality and Best Value, maintain integrity and accountability, and promote the goal of creating opportunities. Appropriate efforts will be used to develop and implement planning, procedures and practices that promote these commitments to transparency and integrity.

(c) Non-Discrimination

Discrimination based on religion, sex, race, color, ethnic or national origin, sexual orientation, gender identity, age, or disability will not be tolerated, and all aspects

of ATP Procurement will be undertaken in a non-discriminatory manner. All ATP employees, officers and board members ("**ATP Persons**") should operate in a manner that provides and promotes equal opportunity without regard to any protected status and in conformity with Applicable Law prohibiting discrimination.

(d) **Maximizing Participation of Disadvantaged and Small Business Enterprises**

ATP has committed to developing and implementing a Disadvantaged Business Enterprise ("**DBE**") Program to meet and comply with Federal Requirements to ensure that maximum opportunities are available for women, minority, and small businesses, including veteran-owned businesses, to participate.

(e) **Equity**

In addition to ATP's expectation to provide opportunities for DBEs, ATP is led by the guiding principle of equity. ATP proactively seeks to build and foster the capacity for competitive skills in those historically underutilized businesses to participate in comparable procurement and service contracts.

(f) **Use of Available Procurement Options**

ATP may employ all procurement contracting methods to the fullest extent permitted by Applicable Law and Federal Requirements. ATP seeks to select the Procurement method appropriate to the property, services, construction or other work being procured, that encourages full and open competition to the extent possible (except where a noncompetitive procurement is permitted and appropriate as described in this Policy), that enables ATP to procure the property, services, construction or other work in a timely and cost efficient manner and that aligns with industry best practice.

(g) **Maximizing Public Funds**

ATP intends to provide efficiency and effectiveness in Procurement activities, exercise good stewardship of public funds and maximize, to the fullest extent possible, the purchasing value of those public funds.

1.3 **Applicable Law**

(a) **General**

ATP is a political subdivision of the State, and is subject to certain State laws applicable to the procurement of goods and services. This Policy is intended to

comply with Applicable Law, and is designed to ensure ongoing compliance with Applicable Law, while also promoting flexibility and efficiency. This Policy encourages ATP staff to consult with ATP's general counsel when conducting Procurement. In the event of an irreconcilable conflict between this Policy and Applicable Law (including, if applicable, the Federal Requirements), Applicable Law will control.

(b) **Federally Funded Procurements**

For Federally Funded Procurements, ATP will comply with the applicable sections of 2 C.F.R. Part 200 (as adopted by the U.S. Department of Transportation in 2 C.F.R. Part 1201), the terms of any applicable FTA funding agreement, FTA Circular 4220.1F, and other applicable federal statutory and regulatory requirements, in each case as in effect on the applicable date ("**Federal Requirements**"). In particular, ATP will ensure compliance with the standards and requirements identified in 2 C.F.R. Part 200.318 through Part 200.326.

(c) **Purchasing and Vendor Services**

ATP is not a municipality and is therefore not subject to the competitive purchasing requirements applicable to municipalities set forth in Chapter 252, Texas Local Government Code. Nevertheless, ATP will endeavour to obtain competitive pricing using its own competitive purchasing processes as contemplated in this Policy.

(d) **Professional Services under Chapter 2254**

ATP is a "governmental entity" within the meaning of Chapter 2254, Texas Government Code ("**Chapter 2254**"), governing the procurement and selection of professional services and consulting services, as such terms are defined in Chapter 2254. Unless otherwise exempt under Chapter 2254, all contracts for such professional services will be procured in compliance with Chapter 2254. Contracts for such professional services are awarded on the basis of demonstrated competence and qualifications to perform the services, and for a fair and reasonable price.

(e) **Construction Services**

ATP is subject to the same Procurement requirements as the City for the procurement of construction services for public works, except as otherwise exempted under Section 431.110, Texas Transportation Code. ATP will procure contracts for construction services using the delivery methodologies described in

Chapter 2269, Texas Government Code, unless otherwise permitted under Applicable Law.

(f) **Other Services**

For Procurements of other services, ATP shall be entitled to utilize any approach permitted under Applicable Law.

(g) **Alternative Delivery Methods**

To the fullest extent permitted by Applicable Law, ATP shall be entitled to utilize procurement methods which utilize (i) a collaborative/progressive delivery method (including but not limited to construction manager at-risk, construction manager/general contractor, and progressive design-build) and/or (ii) a combination of design, construction, financing, operation, and maintenance services for public improvements through alternative delivery methods including public-private partnerships. ATP should consult with ATP's general counsel to determine the availability of such delivery methods under Applicable Law.

(h) **Prompt Payment for Goods and Services**

It is ATP's policy to comply with the requirements of Chapter 2251, Texas Government Code governing the prompt payment of vendors for goods and services.

1.4 Policy Deviations and Permanent Changes

- (a) The Executive Director may approve deviations from this Policy with respect to an individual Procurement, subject to compliance with Applicable Law and any applicable Federal Requirements.
- (b) No permanent substantive change shall be made to this Policy without the express approval of the Board.
- (c) The Procurement Director may authorize clerical updates and clarifications to this Policy (e.g., style changes, typographical, punctuation, and transposition errors).

1.5 Application of this Policy

- (a) Unless the context otherwise requires, this Policy shall apply to every expenditure of public funds irrespective of their source, including federal assistance monies, by ATP under any Contract, except that this Policy shall not apply to:

- (i) grants;
 - (ii) employment contracts;
 - (iii) real estate contracts;
 - (iv) intergovernmental agreements, including cooperative purchasing agreements and other contracts between ATP and other public agencies under Chapter 791, Texas Government Code, as amended; or
 - (v) any transaction for, or related to, the borrowing of money by ATP permitted under the State law.
- (b) Nothing in this Policy shall prevent ATP from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement.
- (c) This Policy is intended to apply to both locally funded and Federally Funded Procurements, except to the extent indicated in this Policy.

1.6 **Standards of Conduct**

- (a) ATP conducts all Procurements based on the following ethical principles. The Procurement Department will:
- (i) practice integrity, transparency, and accountability in order to merit the respect and inspire the confidence of the organization and the public being served;
 - (ii) comply with legal and other obligations;
 - (iii) treat Offerors equally and fairly;
 - (iv) not tolerate personal aggrandizement or personal profit obtained through misuse of public or personal relationships;
 - (v) identify situations where a conflict of interest may be involved;
 - (vi) keep ATP informed through appropriate channels; and
 - (vii) uphold the dignity and worth of the services rendered by the organization and the societal responsibilities assumed as a trusted public servant.
- (b) All ATP Persons and all committee members, representatives, consultants, vendors, contractors, volunteers, outside agencies doing business with employees

and/or any other parties with a business relationship with ATP that are involved in a Procurement, an award or administration of Third Party Contracts must comply with the obligations in this Policy (including Section 6.8 (ATP Conflicts of Interest)) and the ATP Ethics Policy. In the event of a conflict between documents, the policy that is more restrictive on the ATP Person shall govern.

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

1.7 **Public Access to Procurement Information**

- (a) ATP recognizes the importance of maintaining the confidentiality of Contractor information to the fullest extent permitted by Applicable Law, while also balancing interests of integrity and transparency. ATP representatives will abide by the ATP Ethics Policy as it relates to maintaining confidentiality. In addition, the Board, ATP staff, and ATP representatives shall use confidential information received through a Procurement solely for the purposes outlined in the Solicitation. This Policy is not intended to prevent disclosure where disclosure is required by Applicable Law; including, without limitation, pursuant to the Texas Public Information Act.
- (b) Solicitations may contain a provision requiring all Offers to identify any information believed to be exempt from disclosure as trade secrets or commercial or financial information, provided that blanket designations will not be acceptable and that any such identification of information will not be determinative of any issue relating to the application of, or treatment of, such information or materials, under Applicable Law.

1.8 **Reporting to the Board**

The Executive Director or their Designee will provide regular updates to the Board regarding Procurement activities.

1.9 **Ensuring Necessary and Non-Duplicative Purchases**

ATP shall endeavor to acquire only property and services that are necessary and non-duplicative. To determine its reasonably expected Procurement needs, ATP shall carry out long-range Procurement planning to identify the Procurement requirements of ATP.

1.10 **General Provisions and Interpretation**

- (a) **Severability**

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

(b) **Prior Policies Superseded**

All prior policies and resolutions of ATP which are inconsistent with this Policy are superseded by this Policy. No part of this Policy shall be deemed to be impliedly repealed or modified by subsequent action of ATP if such construction reasonably can be avoided.

(c) **Dissemination of this Policy**

Private firms, individuals, and others may obtain copies of this Policy from the Procurement Department or on the ATP website.

(d) **Written Determinations**

(i) Where this Policy requires a written determination, the person responsible for making the determination may delegate its preparation, but the responsibility for and the execution of the determination itself shall not be delegated unless expressly permitted.

(ii) Any failure of ATP to make any written determination required by this Policy will not affect the validity of any action taken in relation to any other party.

(iii) Written determinations shall set out sufficient facts, circumstances, and reasoning as will substantiate the specific determinations made.

(iv) The Executive Director or their Designee is authorized to prescribe methods and operational procedures to be used in preparing written determinations.

(v) Written determinations shall be filed in the appropriate Procurement File, shall be retained as part of such file for so long as the file is required to be maintained, and (except as otherwise provided by Applicable Law) shall be open to public inspection.

(e) **Definitions**

The defined terms in this Policy shall have the meanings set forth in Chapter 7 (Definitions) whenever they appear in this Policy unless the context in which they are used clearly requires a different meaning or a different definition is prescribed for a particular section or provision or under Applicable Law or Federal Requirements.

2. PROCUREMENT AUTHORITY AND OFFICIALS

2.1 General Procurement Authority

- (a) The authorization to enter into Contracts, Contract Modifications, or other commitments on behalf of ATP will be conferred only by resolution of the Board providing general authorizations to enter into contracts or authority for specific contracts or types of contracts. Any provision in this Policy describing the methods and procedure for Procurement and designating ATP representatives for Procurement actions shall be subject to any such authorization from the Board to award a Contract.
- (b) No Contract, Contract Modification, or other commitment shall be made on behalf of ATP unless it is made in writing and executed by a representative of ATP acting within the scope of the representative's designated authority. ATP will not be bound by unauthorized Procurement actions.
- (c) No person shall be authorized or permitted to commence work for or on behalf of ATP in contemplation of a contract prior to the execution of a written contract and issuance of a notice to proceed by ATP.
- (d) Contracts, Contract Modifications, or other commitments made on behalf of ATP by ATP Persons acting outside the scope of their designated authority may be ratified by the Executive Director if the Executive Director determines in writing that such action is in ATP's best interest.

2.2 Board Authority

- (a) The Board is empowered under State law to exercise its powers by resolution, including to make Contracts, incur liabilities, borrow money, and issue notes, bonds and other obligations.
- (b) The Board may delegate authority to the Executive Director or other officers or agents of ATP to purchase certain property, services, or construction, within budgeted amounts approved by the Board.

2.3 Executive Director Authority

- (a) **Execution of Agreements**

- (i) The Executive Director or their Designee is authorized to execute agreements in amounts less than any threshold amounts approved by the Board.
- (ii) The Executive Director shall seek the prior approval of the Board for any agreement exceeding any threshold amounts approved by the Board.
- (iii) Any Contract Modification above the threshold amount approved by the Board will require subsequent Board approval.

(b) Appointment of Contracting Officers

The selection, appointment, and termination of appointments of Contracting Officers shall be made only by the Executive Director. In selecting Contracting Officers, the Executive Director shall consider public contract experience, training, education, judgment, character, and ethics.

(c) Procurement Authority

- (i) The Executive Director or their Designee shall be responsible for the Procurement of property, services, and construction in accordance with this Policy.
- (ii) The Executive Director or their Designee may:
 - (A) adopt operational guidance and/or prepare template Procurement documents consistent with this Policy pertaining to the execution of Procurement duties;
 - (B) approve and execute all Purchase Requisitions within their level of authority;
 - (C) advertise and/or issue Solicitation documents;
 - (D) approve and enter into purchase orders and Contracts within their level of authority;
 - (E) determine whether a supply item or group of supply items shall be included as a part of, or procured separately from, any Contract for construction;
 - (F) approve and enter into a Contract Modification (including the settlement of a contract claim) that did not originally require the

Board's approval so long as the Contract Modification (either individually or in combination with other Contract Modifications) does not increase the Contract amount or yearly contract amount above the level of authority given to the Executive Director;

- (G) approve and enter into a Contract Modification (including the settlement of a contract claim) that originally required the Board's approval so long as the Contract Modification, as combined in amount with other non-Board-approved Contract Modifications does not exceed the level of authority given to the Executive Director; and
- (H) approve the authorization or execution of Contract Modifications that do not exceed the level of authority given to the Executive Director.

(d) Delegations

- (i) The Executive Director's delegations of authority shall be in writing and shall specify:
 - (A) the activity or function authorized;
 - (B) any limits or restrictions on the exercise of the delegation; and
 - (C) the duration of the delegation.
- (ii) Any authority delegated by the Executive Director may be revoked at any time and without prior approval of the Board.
- (iii) Authority conferred on the Executive Director in this Policy with respect to the following matters shall not be delegated:
 - (A) appointment of Contracting Officers under Section 2.3(b) (Appointment of Contracting Officers);
 - (B) deviations from this Policy under Section 1.4 (Policy Deviations and Permanent Change);
 - (C) stay of Procurements during Protests under Section 6.3(c) (Stay of Procurements); and
 - (D) authority to debar or suspend under Section 6.4(b) (Authority to Debar or Suspend).

3. PROCUREMENT SELECTION AND PROCEDURES

3.1 Procurement Method Selection

- (a) ATP will determine which Procurement method to use for any Procurement based on the considerations in this Chapter 3. Selecting the appropriate Procurement method is dependent on a number of factors, including price, value, competition, scope, timing, and legal requirements. To the extent required by Applicable Law, or at the recommendation of the Procurement Department, certain Procurements may require that the Board or the Executive Director approve selection of the appropriate Procurement method.
- (b) ATP may select the lowest Responsible Offeror or the Offeror who provides the goods or services at the Best Value to ATP in accordance with Applicable Law.

3.2 General Procurement Requirements

(a) Determination of Terms and Conditions

(i) General

The Procurement Department and ATP's general counsel will determine the terms and conditions of Solicitations and Contracts, subject to the terms of this Policy and Applicable Law (including, for Federally Funded Procurements, Section 1.3(b) (Federally Funded Procurements) and the Federal Requirements).

(ii) Determination of Terms and Conditions for Federally Funded Procurements

The following apply to the determination of terms and conditions of Solicitations and Contracts for Federally Funded Procurements:

- (A) ATP shall include required federal certifications (e.g., TVM, Lobbying, Buy America, if applicable) in its Solicitations and will require signed certifications from Offerors;
- (B) the Procurement Department shall include all applicable federal clauses. Such clauses shall include the applicable provisions described in Appendix II to 2 C.F.R. Part 200 and any other provisions

required under Applicable Law (including the Federal Requirements). Incorporation of a clause by reference is permitted; however a general reference to FTA guidelines or clauses is not sufficient to incorporate a clause. ATP shall include Davis Bacon wage determinations in applicable construction Solicitations; and

- (C) any federally funded Contract must be a sound and complete agreement and must include remedies for breach of contract (e.g., liquidated damages) and provisions covering termination for cause and convenience.

(b) Invitation for Bids/Request for Proposals

Any Invitation for Bids or Request for Proposals shall include, without limitation, the following:

- (i) instructions and information to Offerors concerning the Offer submission requirements, including the time and date set for receipt of Offers, the address or electronic portal for delivery, and the maximum time for Offer acceptance by ATP;
- (ii) the purchase description or scope of services and, if applicable, evaluation factors and their relative importance; and
- (iii) the Contract terms and conditions, including warranty and bonding or other security requirements, as applicable.

(c) Offer Preparation Time

Offer preparation time is the period between the date of distribution of the Solicitation and the Offer Submission Date. Offer preparation time shall be set to provide Offerors with sufficient time to prepare their Offers.

(d) Bonds

- (i) Bid, performance and payment bonds or other security may be required for supply Contracts, service Contracts, or construction Contracts to comply with Applicable Law, Federal Requirements (for Federally Funded Procurements) or, where not defined by Applicable Law or Federal Requirements, as the Procurement Department deems advisable to protect the interest of ATP. Any such requirements must be set forth in the

Solicitation. Bid or performance bonds should not be used as a substitute for a determination of Offeror's responsibility.

- (ii) Section 2253, Texas Government Code sets forth the payment and performance bonding requirements applicable to construction Contracts for public works.

(e) **Public Notice**

ATP recognizes the need for appropriate publicity and advertisement of Procurement opportunities. Any Procurement shall be, as deemed appropriate by the Procurement Department:

- (i) advertised in accordance with Applicable Law and in a manner appropriate for the relevant Procurement; and
- (ii) distributed to an adequate number of Offerors for the purpose of securing competition.

(f) **Bidders Lists**

ATP reserves the right to maintain a bidders list.

(g) **Pre-Bid/Proposal Conferences**

- (i) ATP may conduct pre-bid/proposal conferences to further explain or clarify the Procurement requirements. ATP shall announce any pre-bid/proposal conference in a manner appropriate for the relevant Solicitation.
- (ii) Nothing stated at a pre-bid/proposal conference shall change the Solicitation documents unless a change is made by written amendment as provided in Section 3.2(h) (Amendments to Solicitation).

(h) **Amendments to Solicitation**

- (i) If amendments are made to a Solicitation, then the Procurement Department must ensure proper publication and notice of such changes.
- (ii) Amendments may be used, without limitation, to:
 - (A) make any changes in the Solicitation, such as changes to quantity, the purchase description or scope of services, delivery schedules, and opening dates;

- (B) correct defects or ambiguities; or
 - (C) furnish to other Offerors information given to one Offeror if such information will assist the other Offerors in submitting Offers or if the lack of such information would prejudice the other Offerors.
- (iii) Amendments shall require that the Offeror acknowledge receipt of all amendments issued.

3.3 **Methods of Procurement**

(a) **Locally Funded Procurements**

- (i) ATP may determine, at its discretion, to purchase goods or services solely using local funds for which it will not seek federal funding reimbursement.
- (ii) ATP will determine which Procurement method, if any, to use for any locally funded Procurements, in accordance with Applicable Law.
- (iii) The Procurement Department will develop the appropriate procedures and guidelines for handling locally funded Procurements in accordance with Applicable Law.

(b) **Federally Funded Micro-Purchases**

(i) **Applicability**

- (A) Federally funded micro purchases, including delivery charges, may be accomplished without securing competitive quotations if the prices are considered to be fair and reasonable. The federal micro-purchase threshold and procedures are set out in 41 U.S.C. § 1902.
- (B) Dividing a Procurement requirement with the intent of avoiding the federal micro purchase threshold, competition requirement, or other dollar thresholds is considered bid-splitting and is prohibited by the Federal Requirements.

(ii) **Procedures**

- (A) ATP shall distribute micro-purchases equitably among qualified suppliers. Micro-purchases made under the Purchasing Card Program are not excluded from the need for rotation.

- (B) The Contracting Officer shall prepare a written determination that the price is fair and reasonable for documentation in the Procurement File.

(c) **Federally Funded Small Purchases**

(i) **Applicability**

- (A) Small purchase procedures may be used for the Federally Funded Procurements of property, services, or construction valued at more than the federal micro purchase threshold, but less than the Simplified Acquisition Threshold.
- (B) Dividing a Procurement requirement with the intent of avoiding the Simplified Acquisition Threshold, competition requirement, or other dollar thresholds is considered bid-splitting and is prohibited by the Federal Requirements.
- (C) Elements of the competitive sealed bidding and competitive sealed proposal procedures may be applied in addition to the procedures under this Section 3.3(c) if determined by ATP to be in its best interest.

(ii) **Procedures**

- (A) ATP shall obtain price or rate quotations from an adequate number of qualified sources. Written or oral quotations received in response to a Solicitation shall be documented in the Procurement File.
- (B) Where practical, no less than three businesses shall be solicited to submit quotations. Award shall be made to the business offering the lowest acceptable quotation.
- (C) Small purchases may be accomplished without securing competitive quotations if the prices quoted are considered by ATP to be fair and reasonable. Such purchases shall be distributed equitably among qualified businesses. When practical, a quotation shall be solicited from other than the previous supplier prior to placing a repeat order.

(iii) **Small Purchases of Professional Services**

- (A) If it is expected that professional services can be procured for less than the applicable threshold, the methods specified in this Section

3.3(c)(iii) may be used for the Procurement of professional services instead of the procedure specified in Section 3.3(d) (Professional Services).

- (B) Before contacting any Person to perform the required services, ATP may examine any current statements of qualifications on file with ATP and contact the most competent and qualified firm and attempt to negotiate a Contract for the required services at a fair and reasonable price. If no current statements of qualifications are on file or the statements on file are inadequate to determine the most competent and qualified firm, responses shall be solicited in accordance with Section 3.3(d) (Professional Services).
- (C) With respect to federally funded contracts, nothing in this Section 3.3(c)(iii) shall be deemed to permit ATP to procure architectural engineering services by any means except qualifications-based procurement procedures in accordance with the Federal Requirements.

(d) **Professional Services**

(i) **Applicability**

- (A) Under Chapter 2254, ATP may not select a professional services provider (including architect-engineer services) or award a contract for the services on the basis of competitive bids.
- (B) Except as authorized under Section 3.3(c)(iii) (Small Purchases of Professional Services), Section 3.3(e) (Emergency Procurements) or Section 3.3(h) (Noncompetitive Procurement), the selection procedures set out in Section 3.3(d) shall be used for all Procurements of professional services.
- (C) For the purposes of this Section 3.3(d) and Section 3.3(c)(iii) (Small Purchases of Professional Services), "professional services" means professional services as defined in Chapter 2254.

(ii) **Procedures**

- (A) When seeking professional services, ATP shall solicit vendors based upon their competence and qualifications, and not based on pricing. ATP will solicit services through a formal RFQ Solicitation.
- (B) Vendors shall be evaluated based upon their demonstrated competence and qualifications to perform the services being sought, such as the following:
 - (aa) the plan for performing the required services;
 - (bb) ability to perform the services as reflected by technical training and education, general experience, specific experience in providing the required services, and the qualifications and abilities of personnel proposed to be assigned to perform the services;
 - (cc) the personnel, equipment, and facilities to perform the services currently available or demonstrated to be made available at the time of contracting; and
 - (dd) a record of past performance of similar work.

The relative importance of these and other factors will vary according to the types of services being procured.

- (C) Vendors shall be ranked based upon their qualifications and experience relative to the services being sought, in accordance with the criteria established in the Solicitation. After ranking respondents, ATP must attempt to negotiate a fair and reasonable price for the services. If a fair and reasonable price cannot be negotiated, ATP may end negotiations and go on to the next qualified respondent. The Procurement Department may rely upon the judgment of the Contracting Officer for purposes of determining whether a price for services is fair and reasonable.
- (D) When professional services are needed on a recurring basis, ATP may actively solicit persons engaged in providing such services to submit annual statements of qualifications in a prescribed format.
- (E) When contracting for architectural and engineering services, geographic location may be a selection criterion provided its

application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the Contract.

(e) **Emergency Procurements**

(i) **General Authority**

Subject to Section 2.1 (General Procurement Authority) and notwithstanding any other provision of this Policy, the Executive Director or their Designee may make or authorize others to make Procurements in emergency conditions for which the public exigency will not permit the delay incident to competition.

(ii) **Definition of Emergency Conditions**

An emergency condition is a situation which creates a threat to public health, welfare, or safety such as may arise by reason of accidents, fires, floods, riots, or equipment failures. The existence of such condition creates an immediate and serious need for property, services, or construction that cannot be met through normal Procurement methods and the lack of which would seriously threaten:

- (A) the functioning of ATP's operations;
- (B) the preservation or protection of property; or
- (C) the health or safety of any person.

(iii) **Scope of Emergency Procurements**

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

(iv) **Selection of Emergency Procurement Method**

- (A) The procedure used shall be selected to ensure that the required property, services, or construction items are procured in time to meet the emergency. Given this constraint, such competition as is practicable shall be obtained.
- (B) Competitive Procurement is unsuccessful when Offers received are unreasonable, noncompetitive, or exceed available funds as certified by the appropriate fiscal officer, and time or other circumstances will

not permit the delay required to resolicit Offers. If emergency conditions exist after an unsuccessful attempt to use competitive Procurement methods, an emergency Procurement may be made.

(v) **Determination and Record of Emergency Procurements**

The Contracting Officer or the Procurement Director shall make a written determination stating the basis for an emergency Procurement and for the selection of the particular Contractor. A record of each emergency Procurement shall be made as soon as practicable.

(f) **Competitive Sealed Bids**

(i) **Competitive Sealed Bidding**

(A) **Applicability**

Under the competitive sealed bidding method, selection is based on price and discussions or changes to the Bid after the Offer Submission Date are not permitted. ATP will determine in writing whether competitive sealed bidding is appropriate on a Procurement-by-Procurement basis taking into account the relevant circumstances including, but not limited to, whether: (i) a precise specification could be available, (ii) two or more Responsible Bidders are willing to compete, (iii) the Procurement generally lends itself to a firm fixed-price contract, (iv) selection can be made on the basis of price, and (v) discussions are not expected to be necessary.

(B) **Procedures**

(aa) If the Procurement Department determines to use competitive sealed bidding for a Procurement, ATP will use a formal competitive sealed bid process in a manner consistent with Applicable Law.

(bb) The Invitation for Bids shall be prepared in accordance with Section 3.2(b) (Invitation for Bids/Request for Proposals) and shall include a form for the Bidder to insert the Bid price, sign and submit along with any other necessary submissions. The evaluation criteria may include criteria to determine acceptability (such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose) and the Bid

price (such as discounts, transportation costs, and total or life-cycle costs). Where specified in the Invitation for Bids, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which Bid is lowest.

(C) Product or Service Acceptability

- (aa) The Invitation for Bids for competitive sealed bidding shall set forth any evaluation criterion to be used in determining product or service acceptability. It may require the submission of bid samples, descriptive literature, technical data, or other material.
- (bb) The Invitation for Bids may also provide for accomplishing any of the following prior to award:
 - (a) inspection or testing of a product prior to award for such characteristics as quality or workmanship;
 - (b) examination of such elements as appearance, finish, taste, or feel; or
 - (c) other examinations to determine whether it conforms with any other purchase description or scope of services requirements.
- (cc) The Invitation for Bids shall state that bid samples or descriptive literature should not be submitted unless expressly requested and that, regardless of any attempt by a bidder to condition the bid, unsolicited bid samples or descriptive literature which are submitted at the bidder's risk will not be examined or tested and will not be deemed to vary any of the provisions of the Invitation for Bids.

(ii) Multi-Step Competitive Sealed Bidding

(A) Applicability

- (aa) Multi-step competitive sealed bidding is a two-phase Procurement process consisting of:

- (a) submittal of an unpriced technical offer for evaluation by ATP ("**Step 1**"); and
 - (b) submittal of price bids by bidders whose technical offers are determined by ATP to be acceptable for consideration ("**Step 2**").
- (bb) Multi-step competitive sealed bidding may be used when it is not practical to prepare a definitive purchase description or scope of services which will be suitable to permit an award based on price, including when it is beneficial for ATP:
- (a) to invite and evaluate technical offers to determine their acceptability to fulfill the purchase description or scope of services requirements prior to soliciting priced Bids;
 - (b) to conduct discussions or obtain supplemental information, permit amendments of technical offers, or amend the purchase description or scope of services prior to soliciting priced Bids; and
 - (c) to award the Contract to the lowest Responsive and Responsible Bidder.
- (B) **Procedures**
- (aa) If the Procurement Department determines to use multi-step competitive sealed bidding for a Procurement, ATP will use a formal multi-step competitive sealed bid process in a manner consistent with Applicable Law.
 - (bb) The Invitation for Bids shall be prepared in accordance with Section 3.2(b) (Invitation for Bids/Request for Proposals) and shall include:
 - (a) directions for submitting technical offers and priced bids separately;
 - (b) an explanation that priced bids will be considered only from those Bidders whose technical offers are found acceptable in Step 1;

- (c) the criteria to be used in the evaluation of the technical offers and the relative importance of each criterion; and
- (d) an explanation that ATP, to the extent ATP finds necessary, may conduct discussions regarding the technical offers.

(g) Competitive Sealed Proposals

(i) Applicability

- (A) When ATP determines in writing that the use of competitive sealed bidding is either not practicable, or not advantageous to ATP, the competitive sealed proposals Procurement method may be used.
- (B) A Request for Proposal allows ATP to consider a variety of factors in addition to price to select the Contractor who provides the Best Value to ATP. Factors for evaluation may include, but are not limited to: experience/reputation; quality of goods or services; price; achievement of DBE contracting goals; safety record; proposed personnel; financial capability; and other relevant factors.
- (C) Multi-step competitive sealed proposals (RFQ/RFP) may be used when beneficial to ATP and permitted under Applicable Law.

(ii) Procedures

(A) Request for Proposals

The Request for Proposals shall be prepared in accordance with Section 3.2(b) (Invitation for Bids/Request for Proposals) and shall also include:

- (aa) a statement that discussions may be conducted with Proposers who submit Proposals and that such Proposals may be accepted without such discussions;
- (bb) a statement of when and how price proposals should be submitted; and
- (cc) evaluation factors, including price, and their relative importance.

(B) **Form of Proposal**

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

(h) **Noncompetitive Procurement**

(i) **Applicability**

A Contract for goods or services may be awarded without competition when the Procurement Department determines in writing that the conditions for use set forth in Section 3.3(h)(ii) (Conditions for Use) have been satisfied.

(ii) **Conditions for Use**

Subject to Section 3.3(h)(iii) (Lack of Advance Planning or Availability of Funds), ATP may use a noncompetitive procurement when the Procurement is inappropriate for competitive sealed bids, competitive sealed proposals, micro purchase procedures under Section 3.3(b) (Federally Funded Micro-Purchases), or small purchase procedures under Section 3.3(c) (Federally Funded Small Purchases), and at least one of the following conditions is present:

- (A) the Contract is for services or supplies for which there is only one Responsible source, and no other supplies or services will satisfy the relevant requirements. Examples include but are not limited to:
 - (aa) only one Offer is received and an appropriate determination has been made under Section 4.1(f) (Only One Offer Received);
 - (bb) the Contractor provides a unique or innovative concept or capability not available from any other source;
 - (cc) patent or data rights restrictions preclude competition;
 - (dd) in the case of follow-on Contracts for highly specialized equipment and associated major components, it would otherwise result in substantial duplication of costs or unacceptable delays; or

- (ee) any other circumstances described in the Federal Requirements.
- (B) ATP has such an unusual and urgent need for the property or services that it would be seriously injured if it were not permitted to limit the Procurement;
- (C) when the public exigency or emergency will not permit any delay resulting from a competitive Procurement for the property or services;
- (D) with some exceptions, when FTA awards a grant agreement or enters into a cooperative agreement with a team, consortium, joint venture, or partnership, the grant agreement or cooperative agreement may constitute approval of those arrangements;
- (E) FTA authorizes procurement by noncompetitive proposals in all of the circumstances authorized by Part 6.3, FAR, including in one or more of the following circumstances:
 - (aa) to comply with Department of Transportation appropriations laws that include specific statutory requirements, with the result that only a single contractor can perform certain project work;
 - (bb) to maintain a facility, producer, manufacturer, or other supplier available to provide supplies or services in the event of a national emergency or to achieve industrial mobilization;
 - (cc) to acquire the services of an expert or neutral person for any current or anticipated Protest, dispute, claim or litigation;
 - (dd) when the disclosure of ATP's needs would compromise national security;
 - (ee) when ATP determines that full and open competition in connection with a particular acquisition is not in the public interest;
 - (ff) any other circumstances described in the Federal Requirements;

(F) for locally funded Procurements, an exemption listed in Section 252.022, Texas Local Government Code, or Sections 451.111 or 431.110, Texas Transportation Code is applicable to a Procurement (in which case ATP may award the Contract on the basis of demonstrated competence and qualifications to perform the services for a fair and reasonable price); and

(G) the Procurement is in any other category permitted by Applicable Law.

(iii) **Lack of Advance Planning or Availability of Funds**

Contracting without providing for full and open competition shall not be justified on the basis of (i) lack of advance planning by ATP; or (ii) concerns related to the availability of funds.

(iv) **Procedures**

(A) When less than full and open competition is available to ATP, ATP will:

(aa) solicit Offers from as many Offerors as ATP deems practicable under the circumstances;

(bb) justify its decision in writing adequately in the light of the standards of this Section 3.3(h);

(cc) prepare or obtain a cost analysis verifying the proposed cost data, the projections of the data, and the evaluation of the costs and profits; and

(dd) if FTA so requests, submit the proposed Procurement to FTA for pre-award review.

(B) ATP shall conduct negotiations, as appropriate, as to price, delivery, and terms.

(C) A written record of noncompetitive Procurements shall be maintained in the Procurement File.

(i) **Other Procurement Methods**

(i) **Incremental Award**

(A) **Applicability**

An incremental award is an award of portions of a definite quantity requirement to more than one Contractor. Each portion is for a definite quantity, and the sum of the portions is the total definite quantity required. An incremental award may be used only when awards to more than one Offeror for different amounts of the same item are necessary to obtain the total quantity for the required delivery.

(B) Procedures

(aa) If an incremental award is anticipated prior to issuing a Solicitation, ATP shall reserve the right to make such an award, and the criteria for award shall be stated in the Solicitation.

(bb) The Contracting Officer shall make a written determination setting forth the reasons for the incremental award, and the determination shall be documented in the Procurement File.

(ii) Multiple Award

(A) Applicability

A multiple award is an award of an indefinite quantity contract for one or more similar supplies or services to more than one Offeror when ATP is obligated to order all of its actual requirements for the specified supplies or services from those Contractors. A multiple award may be made when award to two or more Offerors for similar products is necessary for adequate delivery, service, or product compatibility.

(B) Procedures

(aa) If a multiple award is anticipated prior to issuing a Solicitation, ATP shall reserve the right to make such an award, and the criteria for award shall be stated in the Solicitation.

(bb) The Contracting Officer shall make a written determination setting forth the reasons for a multiple award, and the determination shall be documented in the Procurement File.

(iii) Other Procurement Sources

(A) General

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

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

(B) GSA Schedule Requirements

- (aa) The GSA schedule does not require vendors to comply with FTA's Buy America regulations, and it may include manufactured products that are not eligible for reimbursement of FTA funds. In these cases, ATP must ensure that all Buy America certifications or waivers are received before awarding a Contract.
- (bb) When using the GSA schedule to acquire property or services, ATP can fulfill the requirement for full and open competition by seeking offers from at least three vendors. ATP must still determine that any purchase from the GSA schedule is a fair and reasonable price.

(C) Acquisition Through Assigned Contract Rights (Piggybacking)

- (aa) ATP may acquire contract rights through assignment by another entity, in which case ATP shall ensure that the assignment complies with all Federal Requirements, including:
 - (a) the underlying contract complies with FTA requirements prohibiting excessive options;
 - (b) if applicable, the underlying contract includes an assignment clause that allows the assignment of quantities and provides that those quantities are permitted to be purchased under the original contract terms;
 - (c) ATP documents that the price of the contract rights being assigned is fair and reasonable at the time of the assignment (no price analysis is required if ATP can confirm that a price analysis was properly prepared for the original contract);
 - (d) no Cardinal Changes are made;
 - (e) domestic content meets the applicable requirements; and
 - (f) it obtains a complete Procurement File for the underlying Procurement from the assigning agency.

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

3.4 Unsolicited Offers

- (a) ATP may enter into a Contract based on an Unsolicited Offer when authorized by Applicable Law. Receipt of an Unsolicited Offer does not, by itself, justify Contract award without providing for full and open competition.
- (b) Unless the Unsolicited Offer offers a proprietary concept that is essential to Contract performance, ATP will seek competition. To satisfy the requirement for full and open competition, ATP will take the following actions before entering into a Contract resulting from an Unsolicited Offer:
 - (i) publicize its receipt of the Unsolicited Offer;
 - (ii) publicize an adequate description of the property or services offered without improperly disclosing proprietary information or disclosing the originality of thought or innovativeness of the property or services sought;
 - (iii) publicize its interest in acquiring the property or services described in the Unsolicited Offer;
 - (iv) provide an adequate opportunity for interested parties to comment or submit competing Proposals; and
 - (v) publicize its intention to award a Contract based on the Unsolicited Offer or another Proposal submitted in response to the publication.

If it is impossible to describe the property or services offered without revealing proprietary information or disclosing the originality of thought or innovativeness of the property or services sought, ATP may make an award to the Offeror under Section 3.3(h) (Noncompetitive Procurement). A noncompetitive award may not be based solely on the unique capability of the Offeror to provide the specific property or services proposed.

3.5 Procurement File

- (a) ATP will prepare and maintain adequate and readily accessible project performance and financial records, covering Procurement transactions as well as other aspects of project implementation.
- (b) ATP will maintain these records for three years after final payment and all other pending matters are closed.
- (c) ATP will prepare, maintain, and distribute the following documents, as necessary, written records detailing the history of each Procurement, as follows:

- (i) rationale for the method of Procurement ATP used for each contract, including a noncompetitive Procurement justification for any acquisition that does not qualify as competitive;
 - (ii) the reasons for selecting the contract type ATP used (fixed price, cost reimbursement, and so forth);
 - (iii) ATP's reasons for Contractor selection or rejection including a written Responsibility determination; and
 - (iv) justification for the Contract cost or price.
- (d) The extent of documentation should be reasonable. Documents included in a procurement history should be commensurate with the size and complexity of the Procurement itself. These written records will vary greatly for different Procurements.
- (e) 49 U.S.C. § 5325(g) provides FTA and U.S. Department of Transportation officials, the U.S. Comptroller General, or any of their representatives, access to and the right to examine and inspect all records, documents, and papers, including contracts, related to any FTA project financed with federal assistance authorized by 49 U.S.C. § 53.

4. OFFER SUBMISSION, EVALUATION, COST OR PRICING DATA, AND AWARD

4.1 Offer Submission

(a) Timelines of Submission

- (i) Offers must be submitted in accordance with the requirements set forth in the Solicitation. Any Offer that is materially late will be rejected, unless the delay is caused internally by ATP's mishandling of mail delivery or an ATP technological issue.
- (ii) Any late Offer shall be documented in the Procurement File.

(b) Modification or Withdrawal

- (i) Any Offer may be amended or withdrawn by any method authorized by the Solicitation prior to the Offer Submission Date. To be effective, any notice of the amendment or withdrawal must be received by the Contracting Officer in the manner designated in the Solicitation or in the absence of instruction by written notice to the Contracting Officer.
- (ii) Any modification or withdrawal of Offers shall be documented in the Procurement File.

(c) Mistakes and Minor Irregularities

- (i) After Offer submission, ATP may allow the Offeror an opportunity to cure any deficiency resulting from a minor informality or irregularity, or waive the deficiency in its reasonable discretion in the best interest of ATP if permitted by Applicable Law. A minor informality or irregularity is merely a matter of form and not of substance. It can also pertain to an immaterial defect in an Offer or a variation of an Offer from the exact Solicitation requirements that could be corrected or waived without being prejudicial to other Offerors (i.e., the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired).
- (ii) There is no authority to permit correction of an Offer that is non-Responsive.

- (iii) When an Offer is corrected or a waiver is granted, or correction or waiver is denied, the Contracting Officer shall prepare a written determination for documentation in the Procurement File.

(d) Receipt and Opening of Offers

- (i) Bids and Bid modifications shall be opened publicly, in the presence of one or more witnesses, at the time, date, and place designated in the Invitation for Bids. The name of each Bidder, the Bid price, and such other information as is deemed appropriate by ATP will be read aloud or otherwise made available.
- (ii) Proposals shall not be opened publicly but shall be opened in the presence of two or more ATP representatives. Proposals and Proposal modifications shall be shown only to ATP Persons, consultants, advisors, or other persons having a legitimate interest in them.

(e) Extension of Time for Offer Acceptance

After receipt of Offers, ATP may request Offerors to extend the time during which ATP may accept their Offers. The reasons for requesting the extension shall be documented in the Procurement File.

(f) Only One Offer Received

- (i) If only one Responsive Offer is received in response to a Solicitation, the Procurement Department shall determine if competition was adequate. This should include a review of the Specifications for undue restrictiveness and might include a survey of potential sources that chose not to submit an Offer. Competition will be considered adequate when the reasons for few Offers were caused by conditions beyond ATP's control. Such determination shall be documented in the Procurement File.
- (ii) If the competition is determined adequate, then ATP may make an award to the single Offeror in accordance with the procedures in Section 3.3(h)(iv) (Procedures).
- (iii) If the competition is not determined adequate, then ATP may reject the Offer under Section 4.10 (Cancellation of Solicitations; Rejection of Offers) and ATP may resolicit Offers; or cancel the relevant Procurement.

4.2 Responsiveness

(a) Application

A determination of Responsiveness or non-Responsiveness shall be governed by this Section 4.2.

(b) Standards of Responsiveness

- (i) To be considered for award, an Offer must be Responsive to the Solicitation.
- (ii) To be Responsive, an Offer must meet, without any material deviation, the expressed requirements of a Solicitation, and in particular:
 - (A) with respect to a Bid, must be fully compliant with and not materially deviating from the terms, conditions, and specifications set forth in an Invitation for Bids; and
 - (B) with respect to a Proposal, must be materially compliant with a Request for Proposals (or must be capable of being made compliant through discussions).
- (iii) The Contracting Officer must notify an Offeror if its Offer has been determined to be non-Responsive to the Solicitation.

4.3 Responsibility

(a) Application

A determination of Responsibility or non-Responsibility shall be governed by this Section 4.3.

(b) Standards of Responsibility

- (i) An Offeror must demonstrate affirmatively its Responsibility, including (when necessary) that of its proposed subcontractors.
- (ii) Factors to be considered in determining whether the standard of Responsibility has been met may include whether an Offeror has:
 - (A) the appropriate financial, material, equipment, facility, technical, and personnel resources and expertise, or the ability to obtain them, to indicate its capability to meet all Contractual requirements;

- (B) a satisfactory record of past and current performance, including quality or timeliness of delivery;
- (C) a satisfactory record of integrity;
- (D) legal qualifications to contract with ATP, including applicable licensing;
- (E) supplied all necessary information in connection with the inquiry concerning responsibility;
- (F) an acceptable safety record in accordance with Section 252.0435, Texas Local Government Code; and
- (G) complied with all Applicable Law regarding nondiscrimination and equal opportunity.

(iii) The Offeror shall supply information requested by the Contracting Officer concerning Responsibility. If the Offeror fails to supply the requested information, the Contracting Officer shall base the determination of Responsibility upon any available information or may find the Offeror non-Responsible if such failure is unreasonable.

(c) **Demonstration of Ability to Meet Standards**

The Offeror may demonstrate that the standard of Responsibility has been met by submitting upon request:

- (i) evidence that the Offeror possesses the appropriate financial, material, equipment, facility, technical, and personnel resources and expertise;
- (ii) acceptable plans to subcontract for such financial, material, equipment, facility, technical, and personnel resources and expertise; or
- (iii) a documented commitment from, or explicit arrangement (which will be in existence at the time of award) with, a satisfactory source to provide such financial, material, equipment, facility, technical, and personnel resources and expertise.

(d) **Pre-Award Surveys**

When the information available to the Contracting Officer is insufficient to make a determination regarding Responsibility, a pre-award survey of the Offeror's business and facilities may be conducted. A pre-award survey may cover one or

more areas, including technical ability, production capacity, facilities, equipment, quality control, accounting system, financial capability, and record of performance on other contracts.

(e) **Responsibility Determination**

Before awarding a Contract, ATP must be satisfied that the Offeror is Responsible and document this determination in writing. If an Offeror who otherwise would have been awarded a Contract is found non-Responsible, the Contracting Officer shall prepare a written determination of non-Responsibility setting forth the basis of the finding and shall notify the non-Responsible Offeror indicating that ATP has determined it to be non-Responsible and stating the reason(s) for the determination. The final determination shall be documented in the Procurement File.

4.4 **Selection of Competitive Sealed Bids**

(a) **Selection**

Competitive sealed bids shall be selected based on the requirements set forth in the Invitation for Bids. Factors not specified in the Invitation for Bids shall not be considered.

(b) **Evaluation of Product Acceptability**

The evaluation of any product or service acceptability submittal under Section 3.3(f)(i)(C) (Product or Service Acceptability) is not conducted for the purpose of determining whether one Bidder's item is superior to another but only to determine that a Bidder's offering is acceptable as set forth in the Invitation for Bids. Any Bidder's offering which does not meet the acceptability requirements shall be rejected as non-Responsive.

(c) **Lowest bid**

Following determination of product or service acceptability as set forth in Section 4.3(b) (Standards of Responsibility) (if any is required), Bids will be evaluated to determine which Bidder offers the lowest cost to ATP in accordance with the evaluation criteria set forth in the Invitation for Bids.

(d) **Low Tie Bids**

- (i) In the case of competitive sealed bid Solicitations, if two or more Responsible Bidders submit the lowest Responsive Bid, then the award shall be made to the earliest Bid received, according to ATP records and good faith judgment.
- (ii) Records shall be made of all Invitation for Bids in relation to which low tie bids are received showing at least the following information:
 - (A) the identification number of the Invitation for Bids;
 - (B) the property, service, or construction item; and
 - (C) a listing of all Bidders and prices submitted.
- (iii) A copy of each such record shall be documented in the Procurement File.

4.5 Evaluation of Multi-Step Competitive Sealed Bids

- (a) After receipt of technical offers, amendments to the Invitation for Bids shall be distributed only to Bidders who submitted technical offers, and they shall be permitted to submit new technical offers or to amend those submitted. If, in the opinion of ATP, a contemplated amendment will significantly change the nature of the Procurement, the Invitation for Bids shall be cancelled in accordance with Section 4.10 (Cancellation of Solicitations; Rejection of Offers) and a new Invitation for Bids issued.
- (b) The technical offers shall be evaluated based on the criteria set forth in the Invitation for Bids. Factors not specified in the Invitation for Bids shall not be considered.
- (c) ATP will determine if there are sufficient acceptable technical offers to ensure effective price competition in Step 2. If there are not sufficient acceptable technical offers, ATP shall (i) issue an amendment to the Invitation for Bids; or (ii) engage in technical discussions. If there are sufficient acceptable technical offers, ATP may initiate Step 2 of the multi-step competitive sealed bidding process without technical discussions.
- (d) ATP may conduct discussions with any Bidder who submits an acceptable or potentially acceptable technical offer. Discussions shall be conducted in accordance with Section 4.6(b)(ii) (Discussions). Once discussions have begun, any Bidder that has been invited to discussions may submit supplemental information amending its technical offer (and any price proposal previously submitted) at any

time until the closing date established by ATP. Such submission may be made at the request of ATP or upon the Bidder's own initiative.

- (e) When ATP determines a Bidder's technical offer to be unacceptable, such Bidder shall be notified and shall not be afforded an additional opportunity to supplement its technical offer.
- (f) Upon the completion of Step 1, ATP shall: (i) open the priced bids; or (ii) if priced bids have not been submitted, technical discussions have been held, or amendments to the Invitation for Bids have been issued, invite each acceptable bidder to submit a priced bid.
- (g) Step 2 shall be conducted in accordance with the procedures applicable to competitive sealed bid Procurements. No additional public notice of the invitation to submit priced bids is required.

4.6 **Evaluation of Competitive Sealed Proposals**

(a) **Evaluation**

Competitive sealed proposals shall be evaluated based on the evaluation criteria set forth in the Request for Proposals. Criteria not specified in the Request for Proposals shall not be considered.

(b) **Discussions**

- (i) ATP may conduct discussions with Proposers. The purpose of such discussions shall be to:
 - (A) promote understanding of ATP's requirements and the Proposals; and
 - (B) facilitate arriving at a Contract that will be most advantageous to ATP taking into consideration price and the other evaluation factors set forth in the Request for Proposals.
- (ii) Proposers shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of Proposals. ATP should establish procedures and schedules for conducting discussions. If during discussions there is a need for any substantial clarification of or change in the Request for Proposals, the Request for Proposals shall be amended to incorporate

such clarification or change. Any substantial oral clarification of a Proposal shall be reduced to writing by the Proposer.

(c) **Best and Final Offers**

- (i) ATP shall establish a common date and time for the submission of best and final offers, if applicable. Subject to Section 4.6(c)(ii), best and final offers shall be submitted only once and no discussion of or changes to the best and final offers shall be allowed prior to award.
- (ii) The Executive Director or their Designee may make a written determination that it is in ATP's best interest to conduct additional discussions or change ATP's requirements and require another submission of best and final offers.

(d) **Evaluation of Multi-Step Competitive Sealed Proposals**

If ATP uses a multi-step competitive sealed proposal process, ATP may use responses to a Request for Qualifications to evaluate the qualifications of the Proposers.

4.7 Evaluation of Professional Services Responses

(a) **Evaluation**

Professional services responses shall be evaluated based on the evaluation criteria set forth in the Request for Qualifications.

(b) **Discussions**

- (i) ATP shall evaluate all responses submitted and may conduct discussions with any respondent. The purposes of such discussions shall be to:
 - (A) determine in greater detail such respondent's competence and qualifications; and
 - (B) explore with the respondent the scope and nature of the required services, the respondent's proposed method of performance, and the relative utility of alternative methods of approach.
- (ii) Discussions shall not disclose any information derived from responses submitted by other respondents, and ATP shall not disclose any information contained in any responses until after award of the proposed Contract has been made.

- (iii) Responses may be modified or withdrawn at any time prior to the conclusion of discussions.

(c) **Selection of the Best Qualified Respondents**

After conclusion of validation of qualifications, evaluation, and discussions, ATP shall select, in the order of their respective ranking, any number of respondents whose proposals to provide the required services have received the highest evaluation scores.

(d) **Negotiation and Award of Contract for Professional Services**

- (i) ATP shall negotiate a Contract with the highest evaluated respondent for the required services at compensation determined by ATP to be fair and reasonable.
- (ii) Contract negotiations shall be directed toward:
 - (A) making certain that the respondent has a clear understanding of the scope of the work, specifically the essential requirements involved in providing the required services;
 - (B) determining that the respondent will make available the necessary personnel and facilities to perform the services within the required time; and
 - (C) agreeing upon fair and reasonable compensation, taking into account the estimated value of the required services and the scope, complexity, and nature of such services.
- (iii) If compensation, Contract requirements, and Contract documents can be agreed upon with the highest evaluated respondent, the Contract shall be awarded to that respondent.
- (iv) If compensation, Contract requirements, or Contract documents cannot be agreed upon with the highest evaluated respondent, a written record stating the reasons for the failure to agree shall be documented in the Procurement File, and the Contracting Officer shall advise such respondent of the termination of negotiations, which shall be confirmed by written notice.

- (v) Upon failure to negotiate a Contract with the highest evaluated respondent, ATP may enter into negotiations with the next highest evaluated respondent. If compensation, Contract requirements, and Contract documents can be agreed upon, then the Contract shall be awarded to that respondent. If negotiations again fail, negotiations shall be terminated as provided in Section 4.7(d)(iv) and commenced with the next highest evaluated respondent.
- (vi) Written notice of award shall be documented in the Procurement File.
- (vii) If ATP is unable to negotiate a Contract with any of the respondents initially selected, responses may be resolicited or additional respondents may be selected based on original, acceptable submissions in the order of their respective evaluation ranking and negotiations may continue in accordance with Section 4.7(d)(iv) and 4.7(d)(v) until an agreement is reached and the Contract awarded.

(e) **Memorandum of Evaluation and Negotiation**

At the conclusion of negotiations resulting in the award of the Contract, the Contracting Officer shall prepare a memorandum setting forth the bases of award for documentation in the Procurement File.

4.8 **Cost or Pricing Data**

(a) **Cost or Pricing Data**

(i) **Applicability**

The provisions in this Section 4.8(a) apply to the extent required by Applicable Law (including the Federal Requirements, if applicable).

(ii) **Requirement for Cost or Pricing Analysis**

ATP must perform a cost or price analysis in connection with every Procurement action (including Contract Modifications) exceeding the applicable Simplified Acquisition Threshold, after receiving Offers and before awarding a Contract. The method and degree of analysis is dependent on the facts surrounding the particular Procurement.

(b) **Independent Cost Estimate**

- (i) The independent cost estimate is a tool to assist in determining the reasonableness of the Offer being evaluated and to assist in performing the cost or price analysis. ATP will use the ICE as the starting point for conducting a cost or price analysis. It is required for all Procurements exceeding the Simplified Acquisition Threshold. An ICE must be completed prior to receipt of Offers and is required for Procurement actions such as Contract Modifications and Change Orders. It can range from a simple budgetary estimate to a complex estimate based on inspection of the product itself and review of items like drawings, specifications, and information from previous procurements. The word "independent" means that the estimate is prepared without the influence of persons who have a financial interest in, or will be considered for, the resulting award. It does not imply that it is performed by someone other than ATP.
 - (ii) The ICE is especially critical whenever there is no price competition or where offerors are submitting price proposals for goods or services that are not exactly comparable (e.g., for procurements of high-technology items or professional services). It is also useful in competitive procurements to alert ATP when all competitors are submitting unreasonably high or low-cost proposals.
- (c) **Applicability of Cost and Price Analysis**
- (i) A price analysis (i.e., using catalog, market prices, or comparison of Offerors) is used to determine if a Contract or Contract Modification price is reasonable following a determination that competition was adequate. It involves an evaluation of the prices for the same or similar items or services. A price analysis is a more simplified process and is normally used when two or more Responsive and Responsible Offers have been received.
 - (ii) ATP will conduct a cost analysis for every Procurement action when a price analysis will not provide sufficient information to determine reasonableness of the Contract cost or Contract Modification. Generally, a cost analysis must be performed for: (1) Procurements which require that Offerors submit detailed elements of direct and indirect costs; (2) Procurements where adequate price competition is lacking; and/or (3) noncompetitive Procurements, unless price reasonableness can be established based on market prices. Obtaining cost elements for noncompetitive pricing of manufactured items can be difficult or impossible since many vendors may

feel this information is proprietary. In these cases, ATP should prepare a price analysis to determine if the price is fair and reasonable.

(d) Evaluations of Cost or Pricing Data

- (i) Evaluations of cost or pricing data may include comparisons of costs and prices of an Offeror's based on any independent price and cost estimates by ATP, or if permitted under Applicable Law, the cost estimates of other Offerors. They also shall include consideration of whether such costs are reasonable and allocable.
- (ii) Cost analysis includes the appropriate verification of cost or pricing data and the use of this data to evaluate:
 - (A) specific elements of costs;
 - (B) the necessity for certain costs;
 - (C) the reasonableness of amounts estimated for the necessary costs;
 - (D) the reasonableness of allowances for contingencies;
 - (E) the basis used for allocation of indirect costs;
 - (F) the appropriateness of allocations of particular indirect costs to the proposed contract; and
 - (G) the reasonableness of the total cost or price.

(e) Negotiation of Profit

For each Contract in which there is no price competition and in all cases where a cost analysis is performed, ATP will negotiate profit as a separate element of the price. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the Contractor, the Contractor's investment, the amount of subcontracting, the quality of the Contractor's record of past performance, and industry profit rates in the surrounding geographical area for similar work. An Offeror's profit should be separately negotiated and not based on a flat percentage of estimated Contract costs.

(f) Estimated costs

As applicable under the Federal Requirements, costs or prices based on estimated costs for contracts are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for ATP under 2 C.F.R. Part 200 Subpart E or ATP's own cost principles that comply with the federal cost principles.

(g) Submission of Cost or Pricing Data and Certification

- (i) When cost or pricing data are required, they shall be submitted to the Contracting Officer at any reasonable time and in any reasonable manner prescribed by the Contracting Officer. When the Contracting Officer requires the Offeror or Contractor to submit cost or pricing data, such data shall either be actually submitted or specifically identified in writing.
- (ii) The Offeror or Contractor is required to keep such submission current until the negotiations are concluded, unless otherwise directed by the Contracting Officer.
- (iii) The Offeror or Contractor shall certify, as soon as practicable after agreement is reached on price, that the cost or pricing data submitted are accurate, complete, and current as of a mutually determined date prior to reaching agreement.

(h) Certificate of Current Cost or Pricing Data

- (i) When cost or pricing data must be certified, a certificate provided by the Contracting Officer shall be included in the Procurement File along with any award documentation required under this Policy. The Offeror or Contractor shall be required to submit the certificate as soon as practicable after agreement is reached on the Contract price or adjustment.
- (ii) Whenever it is anticipated that a Certificate of Current Cost or Pricing Data may be required, notice of this requirement shall be included in the Solicitation. If such a certificate is required, the contract shall include a clause giving ATP a contract right to a reduction in the price as provided in Section 4.8(i) (Defective Cost or Pricing Data).
- (iii) The exercise of an option at the price established in the initial negotiation in which certified cost or pricing were used does not require recertification or further submission of data.

(i) **Defective Cost or Pricing Data**

- (i) If certified cost or pricing data subsequently are found to have been inaccurate, incomplete, or noncurrent as of the date stated in the certificate, ATP is entitled to an adjustment of the Contract price, including profit or fee, to exclude any significant sum by which the price, including profit or fee, was increased because of the defective data. Judgmental errors made in good faith concerning the estimated portions of future costs or projections do not constitute defective data. It is presumed that overstated cost or pricing data increased the contract price in the amount of the overstatement plus related overhead and profit or fee. Therefore, unless there is a clear indication that the defective data were not used or relied upon, the price should be reduced in such amount. In establishing that the defective data caused an increase in the Contract price, ATP is not expected to reconstruct the negotiation by speculating as to what would have been the mental attitudes of the negotiating parties if the correct data had been submitted at the time of agreement on price.
- (ii) In determining the amount of a downward adjustment, the Contractor shall be entitled to an offsetting adjustment for any understated cost or pricing data submitted in support of price negotiations for the same pricing action up to the amount of ATP's claim for overstated cost or pricing data arising out of the same pricing action.

4.9 **Award**

(a) **Award of Competitive Sealed Bids**

A firm fixed price contract shall be awarded with reasonable promptness by written notice to the lowest Responsible and Responsive Bidder whose Bid meets the requirements and criteria set forth in the Invitation for Bids.

(b) **Award of Competitive Sealed Proposals**

- (i) The Contract shall be awarded by written notice to the Responsible and Responsive Offeror whose Proposal is determined by ATP in writing to be the best overall value and most advantageous to ATP taking into consideration the evaluation factors set forth in the Request for Proposals.
- (ii) When requested by an unsuccessful Offeror, ATP will provide a debriefing following Contract award utilizing the evaluation matrix, documentation of

scoring process, and the narrative appraisal describing the strengths and weaknesses as basis for the debriefing discussion. ATP may elect to conduct the debriefing in writing only or virtually or in person. When a DBE or other small or minority business requests a debriefing, the DEI Director may be invited to participate in the debriefing.

4.10 **Cancellation of Solicitations; Rejection of Offers**

(a) **Policy on Issuing Solicitations**

Solicitations should be issued only when there is a valid Procurement need, unless the Solicitation states that it is for informational purposes only. Preparing and distributing a Solicitation requires the expenditure of ATP's time and funds. Businesses likewise incur expense in examining and responding to Solicitations. Therefore, although issuance of a Solicitation does not compel award of a Contract, a Solicitation is to be cancelled only when there are cogent and compelling reasons to believe that the cancellation of the Solicitation is in ATP's best interest.

(b) **Notice**

Each Solicitation issued by ATP shall state that ATP reserves its right to cancel the Procurement or reject Offers as provided in this Section 4.10.

(c) **Cancellation Prior to Offer Submission Date**

(i) Prior to the Offer Submission Date, a Procurement may be cancelled in whole or in part when ATP determines in writing that such action is in its best interest for reasons including, but not limited to:

(A) ATP no longer requires the property, services, or construction;

(B) ATP no longer can reasonably expect to fund the Contract; or

(C) proposed amendments to the Solicitation would be of such magnitude that a new Procurement is desirable.

(ii) Notice of cancellation shall be distributed in a manner appropriate for the relevant Procurement.

(d) **Cancellation After Offer Submission Date**

(i) After the Offer Submission Date, all Offers may be rejected in whole or in part when ATP determines in writing that there is a sound, documented

business reason and such action is in ATP's best interest for reasons including, but not limited to:

- (A) the construction, property, or services being procured are no longer required;
- (B) ambiguous or otherwise inadequate specifications were part of the Solicitation;
- (C) the Solicitation did not provide for consideration of all factors of significance to ATP;
- (D) prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
- (E) all otherwise acceptable Offers received are at clearly unreasonable prices;
- (F) there is reason to believe that the Offers may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith; or
- (G) no Responsive Offer has been received.

(ii) Notice of rejection shall be sent to all businesses that submitted Offers.

4.11 Rejection of Individual Offers

- (a) This Section 4.11 applies to rejections of individual Offers in whole or in part. Each Solicitation issued by ATP shall reserve ATP's right to reject any Offer in whole or in part where there is a sound, documented business reason and it is in the best interest of ATP as provided in this Section 4.11.
- (b) For competitive sealed bidding, reasons for rejecting a Bid include, but are not limited to, the following:
 - (i) the Bidder is not a Responsible Bidder as determined under Section 4.3 (Responsibility); or
 - (ii) the Bid is not Responsive.
- (c) For competitive sealed proposals, unless the Solicitation states otherwise, Proposals need not be unconditionally accepted without alteration or correction,

and ATP's stated requirements may be revised or clarified after Proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a Proposal. Reasons for rejecting Proposals include, but are not limited to, the following:

- (i) the Proposer is not a Responsible Proposer as determined under Section 4.3 (Responsibility);
 - (ii) the Proposal ultimately (after any opportunity has passed for altering or clarifying the Proposal) fails to meet the announced requirements of ATP in some material respect;
 - (iii) the Proposal is not Responsive;
 - (iv) the proposed price is clearly unreasonable; or
 - (v) the Proposal is materially unbalanced so that there is a risk that evaluation under the stated criteria may not result in award of a Contract that will be most advantageous to ATP.
- (d) Upon request, unsuccessful Offerors shall be advised of the reasons for the rejection of their Offers.

5. CONTRACTING

5.1 Contract Performance

(a) Performance Review

- (i) Each Contractor should expect regular and customary inquiries from ATP regarding Contract performance. These inquiries may include the following:
 - (A) timely execution of core Contract responsibilities;
 - (B) costs and expenses consistent with the identified costs for contract;
 - (C) quality of the work and product presented to ATP;
 - (D) satisfaction of the Contract goals for small business and diversity participation;
 - (E) compliance with prevailing wage requirements;
 - (F) safety procedures and completion;
 - (G) compliance with specific Contract obligations;
 - (H) timely payment to subcontractors; and
 - (I) adherence to governmental rules and regulations.
- (ii) The objective of the performance review is to confirm Contract compliance. ATP will record clear failures by the Contractor to meet any core Contract obligations as listed above and efforts to afford opportunities for the contractor to satisfy those obligations.

(b) Contract Modifications and Change Orders

- (i) Any material change to the Contract cost/fee, scope of work, duration or any other element of the Contract will necessitate a Contract Modification. The form and content of all Contract Modifications must be approved in advance by ATP's general counsel.
- (ii) For competitively procured Contracts, Change Orders are permissible only if the change is considered within or materially consistent with the scope of

work of the original Solicitation and does not constitute a significant change from the original purpose of the work. For competitively bid Contracts, if a significant change in scope or purpose of work results from the change, ATP must issue a new Solicitation. No Change Order may be made without proper authorization.

5.2 **Types of Contracts**

The selection of an appropriate contract type depends on various factors, including the nature of the property, services, or construction to be procured, the uncertainties which may be involved in contract performance, and the extent to which ATP or the contractor is to assume the risk of the cost of performance of the contract. Contract types differ in the degree of responsibility assumed by the contractor. ATP shall, before choosing a contract type, review all relevant factors, including relevant legal authority and Applicable Law, and the elements of the Procurement which directly affect the cost, time, risk, and profit incentives bearing on the performance. The solicitation documents will state the type of contract that will be awarded. ATP will determine which type of contract is most appropriate on a procurement-by-procurement basis and state the reasons for the selection in the Procurement File.

Certain general requirements relating to specific types of contract are set out below.

(a) **Cost-Plus-a-Percentage-of-Cost Contracting**

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

(b) **Time and Materials Contracts**

Time and materials Contracts provide an agreed basis for payment for the actual cost of materials supplied and direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit. Such Contracts shall, to the extent possible, contain a stated ceiling or an estimate that shall not be exceeded without prior approval by ATP (except at the Contractor's own risk) and shall be entered into only after ATP determines in writing that:

- (i) ATP representatives have been assigned to closely monitor the performance of the work; and
- (ii) in the circumstances, it would not be suitable to use any other type of Contract to obtain needed property, services, or construction in the time required and at the lowest cost or price to ATP.

(c) **Option Provisions**

- (i) ATP may elect to include an option for renewal, extension, or purchase in a Contract in accordance with Applicable Law, including the Federal Requirements. When a Contract will contain an option, notice of the option provision shall be included in the Solicitation. ATP shall document in the Procurement File a justification for including any options.
- (ii) If an option is included, the option quantities and periods included in the Solicitation must generally be evaluated unless ATP determines that evaluation is not in its best interest. Any such determination must be documented in the Procurement File. Any evaluation of options should be documented in the Procurement File and should be part of the cost or price analysis undertaken by ATP for the overall Procurement.
- (iii) If an option is included for the Procurement of bus or rail rolling stock or replacement parts, the period of that option must comply with the Federal Requirements, if applicable.
- (iv) Documentation awarding the Contract should indicate that the award is for the base contract and the identified options.
- (v) Before exercising any option, ATP should consider whether a competitive Procurement is practical and would be more advantageous to ATP than renewal, extension or purchase of the existing Contract. Exercise of an option is at ATP's discretion only is not subject to agreement or acceptance by the Contractor.

5.3 **Specifications**

(a) **Purpose and Policies**

- (i) The purpose of a specification is to serve as a basis for obtaining a property, service, or construction item adequate and suitable for ATP's needs in a

cost-effective manner taking into account, to the extent practicable, the costs of ownership and operation as well as initial acquisition costs.

- (ii) It is a requirement of Applicable Law and this Policy that specifications permit full and open competition consistent with this purpose. Specifications shall be drafted to clearly describe ATP's requirements. The Federal Requirements prohibit use of exclusionary, discriminatory or unreasonably restrictive specifications or specifications that otherwise violate the Federal Requirements.
- (iii) Specifications shall, to the extent practicable, emphasize functional or performance criteria including the range of acceptable characteristics or minimum acceptable standards, while limiting design or other detailed physical descriptions to those necessary to meet the needs of ATP.
- (iv) It is the general policy of ATP to procure standard Commercial Items whenever practicable. In developing specifications, accepted commercial standards shall be used and unique requirements shall be avoided, to the extent practicable. If the Executive Director or their Designee makes a determination that the items or services to be purchased qualify as Commercial Items, the Procurement shall be fully and openly competed, whenever practicable.
- (v) All specifications shall be written in such a manner as to describe the requirements to be met, without having the effect of exclusively requiring a proprietary supply, service, or construction item, or Procurement from a noncompetitive Procurement, unless no other manner of description will suffice. In that event, a written determination shall be made that it is not practicable to use a less restrictive specification.

(b) Authority to Prepare Specifications

The Executive Director or their Designee shall be responsible for preparing, approving, revising, and maintaining all specifications used by ATP for Procurements. Specifications should be completed a sufficient time in advance of selection and implementation of the appropriate Procurement method under this Policy. When it is in the best interest of ATP, a Contract may be entered into to prepare specifications for ATP's use in the Procurement of goods or services, as long as such Contract would not result in an organizational conflict of interest as described in this Policy and the ATP Ethics Policy. In an emergency under Section

3.3(e) (Emergency Procurements), any necessary specifications may be utilized without regard to this Section 5.3.

(c) **Procedures for the Development of Specifications**

A specification may provide alternate descriptions of goods or services or include a range of acceptable characteristics where two or more design, functional, or performance criteria will satisfactorily meet ATP's requirements. Specifications should not include any Solicitation or contract term or condition such as a requirement for time or place of bid opening, time of delivery, payment, liquidated damages, or qualification of bidders.

(d) **Brand Names**

(i) A Brand Name Specification may be used if ATP makes a written determination that only the identified Brand Name item will satisfy ATP's needs. If a Brand Name Specification is used, ATP shall seek to solicit sources from which the Brand Name item can be obtained to achieve a practicable degree of competition. If a Brand Name Specification results in a restraint on competition (e.g., a single offeror), the terms of Section 3.3(h) (Noncompetitive Procurement) will apply.

(ii) A Brand Name or Equal Specification may be used if ATP makes a written determination that:

(A) no specification for a common or general use item or Public Transportation List is available;

(B) time does not permit the preparation of another form of specification which does not include a Brand Name Specification;

(C) a Brand Name or Equal Specification is suitable for the Procurement due to the nature of the product or the nature of ATP's requirements;

(D) it is impractical or uneconomical to write a clear and accurate description of the technical requirements of the property or services to be acquired; or

(E) use of a Brand Name or Equal Specification is in ATP's best interest.

(iii) If a Brand Name or Equal Specification is used:

- (A) ATP shall seek to designate as many different brands as is practicable as "or equal" references;
- (B) the Solicitation shall state that substantially equivalent products to those designated will be considered for award;
- (C) the Brand Name or Equal Specification shall include a description of the particular design, functional, or performance characteristics required to meet ATP's needs; and
- (D) the Solicitation shall state that the use of a Brand Name is for the purpose of describing the standard of quality, performance, and characteristics desired and is not intended to limit or restrict competition.

(e) **Public Transportation Lists**

A Public Transportation List may be developed when testing or examining property or construction items prior to issuance of the Solicitation would best satisfy ATP's requirements. When developing a Public Transportation List, a representative group of potential suppliers shall be solicited in writing to submit products for testing or examination to determine acceptability for inclusion on a Public Transportation List. Any potential supplier, even if not solicited, may offer its products for consideration. Inclusion on a Public Transportation List shall be based on results of tests or examinations conducted in accordance with prior published requirements. Except as otherwise provided by Applicable Law, trade secrets, test data, and similar information provided by the supplier will be kept confidential when requested in writing by the supplier. Test results used in formulating Public Transportation Lists may be made public.

(f) **Specifications Prepared by Others**

The requirements of this Section 5.3 shall apply to all specifications prepared by ATP Persons and by those who are not ATP Persons including, but not limited to, those prepared by consultants, architects, engineers, designers, and other draftsmen of specifications for public contracts. Contracts for the preparation of specifications by those who are not ATP Persons shall require the specification writer to adhere to such requirements.

6. ADMINISTRATIVE REMEDIES, AUDIT AND ORGANIZATIONAL CONFLICTS OF INTEREST

6.1 Administrative Remedies

- (a) ATP, as a local government corporation created under Chapter 431, Texas Transportation Code, operates on a fiscal year budget. A person's or entity's participation in an ATP Procurement Related Matter requires ATP to use a portion of its limited resources to administer, analyse, evaluate, respond, or otherwise handle such participation.
- (b) ATP seeks to foster public confidence in the integrity of its handling of ATP Procurement Related Matters by providing a fair and impartial resolution of Controversies in an expeditious and cost-efficient manner.
- (c) Pursuant to the authority granted under State law (including but not limited to Section 22.051, Texas Business Organizations; Sections 431.006, 431.062 and 431.108, Texas Transportation Code; Section 271.154, Texas Local Government Code; and Chapter 171, Texas Civil Practice and Remedies Code) this Chapter 6 provides for mandatory administrative remedies for all ATP Procurement Related Matters.
- (d) Specifically, by participating in an ATP Procurement Related Matter, the person or entity agrees that any claim they may have or could have against ATP (including its directors, officers, and employees) arising out of or in connection with an ATP Procurement Related Matter shall be resolved exclusively by the administrative remedies stated in this Chapter 6 and further waives any and all right to seek judicial relief (which includes but is not limited to seeking relief based in equity, contract, tort, common law, or any other basis), for any claim, prior to completing all conditions precedent under this Chapter 6.

6.2 Required Provision for Solicitations and Contracts

This Section 6.2 sets forth a standard contract clause that may be used in Solicitations, Contracts entered into by ATP and required associated written (tangible or electronic) external communications. The clause in this Section 6.2 may be modified, as applicable.

Administrative Remedies. Pursuant to the authority granted ATP under State law and in consideration of ATP's use of its limited resources to administer, analyze, evaluate, respond, or otherwise handle this submission, by submitting this document to ATP the filer agrees that any claim it has or may have against ATP (including its directors, officers, and employees) arising out of or in connection with an ATP current, prior, or post procurement related matter (which includes but is not limited to administration, bid submission, bid acceptance, bid handling, bid rejection, evaluations, complaints, debarments, determinations, disputes, payments, pre-bid conferences, Protests, Solicitations, suspensions, and terminations) (hereinafter "**ATP Procurement Related Matter**") shall be resolved exclusively by the administrative remedies which are established by ATP as stated in Chapter 6 (Administrative Remedies, Audit and Organizational Conflicts of Interest) of the ATP Procurement Policy, and which are expressly incorporated herein by reference as if fully set forth. **ACCORDINGLY, BY EXECUTING AND SUBMITTING THIS DOCUMENT, THE FILER HEREBY AGREES TO WAIVE ANY AND ALL RIGHT TO SEEK JUDICIAL RELIEF (WHICH INCLUDES RELIEF SOUGHT BASED IN EQUITY, CONTRACT, TORT, COMMON LAW, OR ANY OTHER BASIS), FOR ANY CLAIM, PRIOR TO COMPLETING ALL CONDITIONS PRECEDENT FOR ADMINISTRATIVE REMEDIES AS STATED IN ATP PROCUREMENT POLICY CHAPTER 6 (ADMINISTRATIVE REMEDIES AUDIT AND ORGANIZATIONAL CONFLICTS OF INTEREST). FURTHER, THE FILER AGREES TO WAIVE ANY CLAIM IT HAS OR MAY HAVE AGAINST ATP (INCLUDING ITS DIRECTORS, OFFICERS, AND EMPLOYEES) ARISING OUT OF OR IN CONNECTION WITH THE ADMINISTRATION, EVALUATION, OR RECOMMENDATION OF ANY BID; WAIVER OF ANY REQUIREMENTS UNDER ANY BID OR CONTRACT DOCUMENTS; OR IN CONNECTION WITH AN ATP PROCUREMENT RELATED MATTER.**

6.3 Protests of Solicitations and Awards

(a) Limited Right to Protest

The right to Protest is limited to a person who has participated in an ATP Procurement Related Matter. The Executive Director or their Designee may, in their sole discretion, allow an Interested Party to file a Protest provided said Interested Party has agreed in writing (on an approved ATP form) that by filing the Protest, it agrees that any claim it has or may have against ATP (including its directors, officers, and employees) arising out of or in connection with an ATP Procurement Related Matter shall be resolved exclusively by the administrative remedies stated in this Chapter 6. A Protest must be signed and submitted as a written document (i.e., in tangible form, not electronic or digital).

(b) **Filing of Protest**

- (i) Protests shall be made in writing to the Procurement Director and shall be filed in duplicate no later than 90 Days after the Protester knew or should have known of the alleged claim or complaint. Protests that do not comply with this requirement are considered improper and untimely. However, in an effort to resolve matters efficiently and effectively, it is recommended that Protests be filed within 10 Days. A Protest is considered filed when received by the Procurement Director. An untimely Protest shall not be considered. Absent a showing of fraud or misrepresentation, a Protester filing an untimely Protest waives its right to contest the subject ATP Procurement Related Matter. The timeliness of a Protest filing is a question of fact and a determination by the Procurement Director that a Protest was timely or untimely filed shall be final and binding as provided in Section 6.3(h) (Finality of Decision).
- (ii) Protesters may file a Protest on any phase of the Procurement or award including, but not limited to, specifications preparation, Solicitation, award, or disclosure of information marked confidential in the Offer.
- (iii) To expedite handling of Protests, all Protests must comply with the following requirements, which shall be strictly enforced:
 - (A) the envelope containing the Protest must be labeled "Protest";
 - (B) the Protestor's name, business address, phone number, email, and the Protester's preferred method for receiving notice and communications from ATP;
 - (C) a statement of facts showing the timeliness of the Protest, including but not limited specific dates as to when the circumstances that gave rise to the Protest occurred;
 - (D) appropriate identification of the ATP Procurement Related Matter and, if a Contract has been awarded, its number;
 - (E) a detailed statement of reasons for the Protest with specific references to relevant and applicable sections of this Policy or Contract sections; and

(F) supporting exhibits, or documents to substantiate any claims ("**Supporting Evidence**"). If a portion of the Supporting Evidence is not available at the time of filing the Protest, then the Protester shall provide a description of the unavailable Supporting Evidence expected to be filed along with a sworn statement of good cause setting forth the reasons the Supporting Evidence is unavailable. The Protester shall provide the unavailable Supporting Evidence no later than 30 days after filing the Protest. The Procurement Director may, in its sole discretion, allow the Protester additional time to provide the unavailable Supporting Evidence if it was sufficiently described in the Protest and good cause is shown.

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

(c) **Stay of Procurements**

Maintaining its commitments with its stakeholders (i.e., service area residents, business and community leaders, elected and appointed officials, funding agencies, etc.) is of paramount importance and a substantial interest to ATP. Accordingly, as a necessity of protecting this substantial interest, it is critical that Procurements be progressed in a timely manner. Accordingly, the filing of a Protest does not automatically stay or delay any Procurement action scheduled to be taken by ATP, including but not limited to the award of Contracts. Notwithstanding, in the absence of a voluntary stay by the Procurement Director, a Protester may file a "request for stay" with the Executive Director or their Designee, with copy sent to the Procurement Director, to stay a relevant ATP Procurement Related Matter at any time before the resolution of the Protest. The Executive Director shall issue a written determination as to whether the request for stay should be granted or denied within 10 days of the filing of the request. The Executive Director may grant the request for stay only upon a finding that the stay will not harm the substantial interests of ATP.

(d) **Availability of Information**

ATP shall, upon written request to the Procurement Director, make available to the Protester information that is relevant to the basis of the Protest except where information is proprietary, confidential, or otherwise permitted or required to be withheld by Applicable Law. The decision of the Procurement Director or their Designee as to whether and the extent to which the requested information is relevant shall be final. Participants in the Protest process who wish to keep the information they submit confidential must specifically label and/or identify such information within documents submitted and indicate on the front page of each document that it contains confidential information. To the full extent allowed by Applicable Law and this Policy, this written request for confidentiality of information shall be honored.

(e) **Protest Decision**

- (i) A decision on a Protest shall be made by the Executive Director or their Designee as expeditiously as possible after receiving all relevant, requested information. If a Protest is sustained, the available remedies, at the sole discretion of ATP, include, but are not limited to, amendment to the Solicitation, re-Procurement, cancellation of the Procurement, and termination of the Contract.
- (ii) In addition to any other relief, a recommendation may be made by the Executive Director to the Board that the Protester be awarded the reasonable costs incurred in connection with the Procurement, including Offer preparation costs other than attorney's fees, when a Protest is sustained and the Protester should have been, but was not, awarded the Contract under the Procurement. Such recommendations shall confer no rights on the Protester and shall not be binding on ATP.

(f) **Request for Reconsideration**

- (i) Reconsideration of a decision of the Procurement Director may be requested only by a person who has substantially participated in the Protest. Only one reconsideration request will be allowed per Protest regardless of how many persons participated. Those who did not file the request for

reconsideration may file statements in support or in opposition to the reconsideration.

- (ii) Any request for reconsideration shall state that it is a "request for reconsideration" and must be filed with the Executive Director or their Designee, with notice sent to all other Protesters, not later than five calendar days after notice of the Protest decision is sent to the other Protesters using their preferred method of communication. The request for reconsideration shall contain a detailed statement of the factual and legal grounds for challenging fact findings or identify any legal errors in the ruling upon which reversal or modification should be deemed warranted. A request for reconsideration shall be acted upon as expeditiously as possible. The Executive Director or their Designee may uphold the previous decision or reopen the case.

(g) **Appeal of Decision**

Protesters may appeal administratively any Protest decision to the Board within 10 Days after notice of the decision is sent to the Protester. A failure to timely appeal a decision within such 10 Day period waives any and all right to appeal.

(h) **Finality of Decision**

A decision by the Board on a Protest shall be final and binding unless fraudulent, a request for reconsideration is timely filed, or the decision is timely appealed administratively to the Board within 10 Days after notice of the decision is sent to the Protester using its preferred method of communication.

(i) **Federal Reporting Requirements**

(i) **Notification**

ATP will notify the FTA, and will keep the FTA informed of status, of Protests as required under the Federal Requirements.

(ii) **Access to Information**

ATP will disclose information about a Protest to FTA upon request. FTA may require ATP to provide copies of a particular Protest, and any or all related supporting documents, as FTA may determine necessary.

6.4 **Debarment or Suspension**

(a) **Scope of Coverage**

This Section 6.4 applies to all debarments or suspensions of persons from consideration for award of Contracts imposed by the Executive Director.

(b) **Authority to Debar or Suspend**

(i) After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Executive Director shall have authority to debar a person for cause from consideration for award of Contracts. The debarment shall not be for a period of more than three years. The Executive Director shall have authority to suspend a person from consideration for award of Contracts if there is probable cause for debarment. The suspension shall not be for a period exceeding three months.

(ii) The causes for debarment or suspension may include the following:

(A) conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;

(B) conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a contractor;

(C) conviction under state or federal antitrust statutes arising out of the submission of Offers;

(D) violation of contract provisions, as set forth below, of a character which is regarded by the Executive Director or their Designee to be so serious as to justify debarment action:

(aa) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or

(bb) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more ATP contracts; provided, that failure to perform or unsatisfactory performance caused by acts beyond the control of the

contractor shall not be considered to be a basis for debarment;
and

- (E) any other cause specified in the Procurement documents or that the Executive Director determines to be so serious and compelling as to affect responsibility as a contractor with ATP, including debarment by another government entity.

(c) **Suspension**

- (i) Upon written determination by the Executive Director or their Designee that probable cause exists for debarment as set forth in Section 6.4(b) (Authority to Debar or Suspend), a contractor or prospective contractor shall be suspended. A notice of suspension, including a copy of such determination, shall be sent to the suspended contractor or prospective contractor. Such notice shall state that:
 - (A) the suspension is for the period it takes to complete an investigation into possible debarment including any appeals of a debarment decision but not for a period in excess of three months;
 - (B) Offers will not be solicited from the suspended person, and, if they are received, they will not be considered during the period of suspension; and
 - (C) if a hearing has not been held, the suspended person may request a hearing in accordance with this Policy.
- (ii) A contractor or prospective contractor is suspended upon issuance of the notice of suspension. The suspension shall remain in effect during any appeals. The suspension may be ended by the Executive Director or their Designee or the Board but, otherwise, shall only be ended when the suspension has been in effect for three months or a debarment decision takes effect.

(d) **Initiation of Debarment Action**

Written notice of the proposed debarment action shall be sent to the contractor or prospective contractor. This notice shall:

- (i) state that debarment is being considered;

- (ii) set forth the reasons for the action;
- (iii) state that, if the contractor or prospective contractor so requests, a hearing will be held, provided such request is received by the Executive Director or their Designee within 10 Days after the contractor or prospective contractor receives notice of the proposed action; and
- (iv) state that the contractor or prospective contractor may be represented by counsel.

(e) **Request for Hearing**

A contractor or prospective contractor that has been notified of a proposed debarment action may request in writing that a hearing be held. Such request must be received by the Executive Director or their Designee within 10 Days of receipt of notice of the proposed action. If no request is received within the 10-day period, a final determination may be made as set forth in Section (i)6.4(i) (Debarment Decision).

(f) **Notice of Hearing**

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

(g) **Authority of Hearing Officer**

The hearing officer, in the conduct of the hearing, has the authority to:

- (i) hold informal conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding either by consent of the parties or upon such officer's own motion;
- (ii) require the parties to state their positions with respect to the various issues in the proceeding;

- (iii) require the parties to produce for examination those relevant witnesses and documents under their control;
 - (iv) rule on motions and other procedural items on matters pending before such officer;
 - (v) regulate the course of the hearing and conduct of participants in the hearing;
 - (vi) receive, rule on, exclude or limit evidence, and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;
 - (vii) fix time limits for submission of written documents in matters before such officer;
 - (viii) impose appropriate sanctions against any party or person failing to obey an order under these procedures, which sanctions may include:
 - (A) refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
 - (B) excluding all testimony of an unresponsive or evasive witness; and
 - (C) expelling any party or person from further participation in the hearing; and
 - (ix) take official notice of any material fact not appearing in evidence in the record, if such fact is among the traditional matters of judicial notice.
- (h) **Hearings**
- (i) Hearings shall be as informal as may be reasonable and appropriate under the circumstances and in accordance with applicable due process requirements. ATP may be represented in hearings by legal counsel. The weight to be attached to evidence presented in any particular form will be within the discretion of the hearing officer. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The hearing officer may require evidence in addition to that offered by the parties.

- (ii) A hearing may be recorded but need not be transcribed except at the request and expense of the person making such request. A record of those present, identification of any written evidence presented, copies of all written statements, and a summary of the hearing shall be sufficient record.
- (iii) Opening statements may be made unless a party waives this right.
- (iv) Witnesses shall testify under oath or affirmation. All witnesses may be cross-examined.
- (v) If the contractor or prospective contractor that is the subject of the hearing does not appear on time at a scheduled hearing, all claims and issues raised are abandoned, unless good cause for such failure to timely appear is shown.

(i) **Debarment Decision**

The hearing officer shall prepare a written determination recommending a course of action. Such determination shall be given to the Executive Director or their Designee. Copies shall also be sent to the contractor or prospective contractor that was the subject of the debarment proceeding. The contractor or prospective contractor shall have 10 Days to file comments upon the hearing officer's determination. The Executive Director or their Designee may request oral argument. The Executive Director or their Designee shall issue a final decision. Both the hearing officer's determination and the final decision shall recite the evidence relied upon. When debarment is recommended or ordered, the length of the debarment (not to exceed two years), the reasons for such action, and to what extent affiliates are affected shall be set forth. In addition, the final determination shall inform the debarred person of their rights to administrative review of the debarment decision under this Policy. If the contractor or prospective contractor fails to timely appeal administratively any debarment decision to the Board within seven Days after notice of the decision is issued, then the debarment decision becomes final and binding.

(j) **Effect of Debarment Decision**

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

(k) **Appeal of Decision**

A contractor may appeal administratively any debarment decision to the Board within seven Days after notice of the decision is issued. A contractor's failure to timely appeal a decision within such seven day period waives any and all right to appeal.

6.5 Contract Disputes Procedures

(a) Scope of Coverage

- (i) Appropriate contractual provisions relating to disputes procedures shall be included in ATP contracts. In the absence of any such contractual provisions, this Section 6.5 contains the procedures for resolving contract disputes unless otherwise determined by the Procurement Director or ATP's general counsel or their Designee. It is ATP's policy to try to resolve all Controversies by mutual agreement if possible. In appropriate circumstances, informal discussions between the parties can aid in the resolution of differences by mutual agreements and are encouraged. To streamline and expedite the claim resolution process, ATP may, at ATP's discretion, develop and use standard claim resolution procedures ("**SCR**P"). The SCR_P may, at ATP's discretion, be further refined to account for the unique nature of a claim into custom claim resolution procedures.
- (ii) Unless otherwise determined by the Procurement Director or ATP's general counsel or their Designee, this Section 6.5 is intended to be applicable to Controversies. This includes, without limitation, Controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification, reformation, or rescission.

(b) Delegation of ATP

- (i) Except as stated in Section 6.5(b)(ii), the authority to settle and resolve Controversies is reserved to the Executive Director or their Designee.
- (ii) The Procurement Director or Contracting Officer shall have the authority to settle or resolve Controversies involving claims up to but not exceeding \$50,000. For settlement or resolution of Controversies in excess of \$50,000, the Contracting Officer, with agreement of the Procurement Director, shall prepare a recommended decision for the Executive Director or their Designee.

(c) Contracting Officer's Decision

- (i) When a Controversy cannot be resolved by mutual agreement, the Contracting Officer or their Designee shall, after written request by the Contractor for a final decision, promptly issue a written decision. Before issuing a final decision, the Contracting Officer or their Designee shall:
 - (A) review the facts pertinent to the Controversy;
 - (B) secure any necessary assistance from legal, fiscal, and other advisors; and
 - (C) obtain the decision of the Executive Director or their Designee as described in 6.5(b) (Delegation of ATP).

- (ii) The Contracting Officer or their Designee immediately shall furnish a copy of the decision to the Contractor and include in the decision:
 - (A) a description of the Controversy;
 - (B) a reference to pertinent contract provisions;
 - (C) a statement of the factual areas of agreement or disagreement;
 - (D) a statement of the Contracting Officer's decision, with supporting rationale; and
 - (E) a section substantially similar to the following:

"This is the final decision of the Contracting Officer or their Designee. This decision may be appealed to the Board of Directors of ATP. If you decide to make such an appeal, you must deliver or otherwise furnish written notice of appeal to the Board on or before the 30th calendar day from the date of decision issuance. A copy of the notice of appeal shall be furnished to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference the decision from which the appeal is being taken, and identify the contract involved."

- (iii) If the Contracting Officer or their Designee does not issue a written decision within 120 days after written request by the Contractor for a final decision, or within such longer period as may be agreed upon by the parties, then the Contractor may proceed as if an adverse decision had been issued.

(d) **Claims by ATP**

All controversies involving claims asserted by ATP against a Contractor which cannot be resolved by mutual agreement shall be the subject of a decision by the Executive Director or their Designee.

6.6 **Administrative Appeals**

(a) **Scope of Coverage**

This Section 6.6 provides for the administrative appeal to the Board or its duly authorized representative.

(b) **Authorized Representative**

The Board may designate a duly authorized representative to decide administrative appeals fairly and impartially pursuant to this Section 6.6 and according to the facts, this Policy, Contract provisions, and Applicable Law. Such authorized representative may be an administrative judge, a hearing officer, or an administrative board of appeals.

(c) **Hearings**

Any person appealing a decision administratively under this Chapter 6 shall be entitled to a hearing in accordance with this Section 6.6(c). All proceedings in an administrative appeal shall be de novo, except for prior determinations of the timeliness of the filing of a document: the timeliness of a filing is a question of fact and a prior determination that a document was timely or untimely filed shall be final and binding as provided in Section 6.3(h) (Finality of Decision). The Board or its duly authorized representative shall have all authority of a hearing officer under Section 6.4(g) (Authority of Hearing Officer). If not previously established by the Board, the duly authorized representative shall prescribe hearing procedures appropriate under the circumstances and in accordance with applicable due process requirements. All hearings will be electronically recorded but shall not be transcribed. Any party to the hearing, at that party's expense, may request that a licensed, certified court reporter transcribe the recorded hearing. If transcribed, any other party to the hearing may, at their expense, purchase a copy of the hearing transcription from the court reporter. A licensed notary public shall administer oaths. Witnesses shall testify under oath or affirmation.

(d) **Finality of Decision**

The decision of the Board or its duly authorized representative in an administrative appeal shall be final and binding as to questions of fact unless determined by a court of competent jurisdiction in Travis County, Texas to have been fraudulent or arbitrary and capricious. The decision of the Board or its duly authorized representative shall not be final as to questions of law. No action challenging such decision shall be brought more than one year from the date of the issuance of the decision.

6.7 Audits

(a) Authority to Audit

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

(b) Cost or Pricing Data Audit

The Executive Director or their Designee may require an audit of cost or pricing data that has been submitted under Section 4.8(g) (Submission of Cost or Pricing Data and Certification). An audit should be required when, with respect to the Contractor, prospective Contractor, subcontractor, or prospective subcontractor, there is:

- (i) a question as to the adequacy of accounting policies or cost systems;
- (ii) a substantial change in the methods or levels of operation;
- (iii) previous unfavorable experience indicating doubtful reliability of estimating, accounting, or purchasing methods;
- (iv) a lack of cost experience due to the Procurement of a new supply or service;
or
- (v) other evidence that an audit is in ATP's best interests.

(c) Cost or Pricing Data Audit Report

When an audit is required under Section 6.7(b) (Cost or Pricing Data Audit), the auditor shall submit a written report to the Contracting Officer by an agreed-upon

date. The report should contain the following with respect to the contractor, prospective Contractor, subcontractor, or prospective subcontractor:

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

(d) **Contract Audit**

- (i) Books and records may be audited under a Contract for which price is based on costs or is subject to adjustment based on costs, or in which auditing would be appropriate to ensure satisfactory performance (such as a time and materials Contract), or to ensure compliance with the requirements to submit current, accurate, and complete cost or pricing data.
- (ii) A Contract audit may be warranted when a question arises in connection with:
 - (A) the financial condition, integrity, and reliability of the Contractor or subcontractor;
 - (B) any prior audit experience;
 - (C) the adequacy of the Contractor's or subcontractor's accounting system;
 - (D) the number or nature of invoices or reimbursement vouchers submitted by the Contractor or subcontractor for payment;
 - (E) the use of federal funding;

- (F) the fluctuation of market prices affecting the Contract;
- (G) adequacy of cost or pricing data; or
- (H) any other circumstance when the Contracting Officer finds that such an audit is in ATP's best interests.

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

(e) **Contract Audit Report**

Where a Contract audit is required under Section 6.7(d) (Contract Audit), the auditor shall submit a written report to the Contracting Officer by an agreed upon date. The scope of the report will depend on the scope of the audit ordered. However, the report should contain specific reference to the terms of the Contract to which the audited data relate and a statement of the degree to which the auditor believes the audited data evidence compliance with those terms.

(f) **Retention of Books and Records**

- (i) Any Contractor who receives a Contract, Change Order, or Contract Modification for which cost or pricing data are required under Section 6.7(b) (Cost or Pricing Data Audit) shall be required to maintain such books and records that relate to such cost or pricing data for three years from the date of final payment under the Contract, or such other time period specified in the Contract or required by Applicable Law.
- (ii) Contracts shall require that books and records relating to a Contract with ATP, including subcontracts, shall be maintained:
 - (A) by a Contractor, for three years from the date of final payment under the prime Contract; and
 - (B) by a subcontractor, for three years from the date of final payment under the subcontract, or such other time period specified as determined by the Contracting Officer or required by Applicable Law.

6.8 **ATP Conflicts of Interest**

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

- (i) No ATP Person shall participate in the deliberation, evaluation, selection, award, or administration of any Contract if they have a real or apparent conflict of interest as described in the ATP Ethics Policy.
- (ii) If any ATP Person recuses himself or herself from a Procurement action or administration of a Contract on the basis of a real or apparent conflict of interest, ATP shall document the recusal in the Procurement File.

(b) Contact with Vendors and Contractors

All ATP Persons shall avoid any conduct that may give the impression that a person can improperly influence official acts or actions by ATP. ATP Persons shall avoid compromising or culpable acts, including any action that gives the appearance of improper influence or personal conflict of interest. In addition to complying with the ATP Ethics Policy, ATP Persons must also comply with the requirements below to ensure that Procurement actions are and appear to be proper.

(c) Contacts Prior to Issuance of a Solicitation

- (i) ATP may make informational and market-research Contacts with prospective Contractors prior to the issuance of a Solicitation, which may include a request for information process. Such contacts are a valuable source of data and information to ATP and must be guided by the exercise of good judgment.
- (ii) In making any such contracts, ATP Persons must avoid:
 - (A) making promises of a future Contract;
 - (B) making requests for substantial complimentary goods or services, which may create the impression of an obligation on the part of ATP; and
 - (C) subject to Section 6.8(c)(iii), testing, viewing, sampling, etc. the product or services of a single vendor or contractor.
- (iii) If any ATP Person determines it is necessary to test, view, sample, etc., a product or service, the ATP Person must coordinate the contact with the Procurement Department. The ATP Person may be required to obtain a form or agreement that will protect ATP and the prospective vendor or Contractor.

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

- (i) ATP shall require all contacts with Contractors that relate to a Procurement that is in the Solicitation, evaluation, negotiation, or pre-award phase to be conducted only through the Procurement Department (or such other persons designated by the Procurement Department in the relevant Solicitation documents). The Procurement Department may direct technical questions (e.g., whether an item is considered an "approved equivalent") to the Project Manager for evaluation, DBE and other small minority business questions to the DEI Office and other questions to the relevant departments, consultants or advisors. All oral and written communications with ATP regarding the Procurement action shall be exclusively with, or on the subjects and with the persons approved by, the persons identified by the Procurement Department. Discussions with any other person not specified could result in disclosure of proprietary or other competitive sensitive information or otherwise create the appearance of impropriety or unfair competition and thereby compromise the integrity of ATP's Procurement system.
- (ii) ATP will include in all Solicitations information to caution prospective Offerors that until the Procurement is either awarded or cancelled, they may have contact regarding the Procurement only with the contact person identified in the Solicitation. Discussions or communications regarding the Procurement with any other personnel associated in any capacity with ATP, its consultants, contractors or the Board, are strictly prohibited, unless otherwise approved in writing by the Contracting Officer. Any violation of this restriction may result in the disqualification of the Offeror from further participation in the Procurement, and from award of any Contract or subcontract under the Procurement.

(e) **Prohibitions Regarding Gifts, Gratuities or Favors**

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

(f) **Discipline for Violations**

In accordance with the ATP Ethics Policy, ATP may take disciplinary actions against any ATP Person or any Contractors, subcontractors, or their agents for a violation of the standards of conduct in Section 1.6 (Standards of Conduct), this Section 6.8,

or the ATP Ethics Policy. Any actions taken by a third party (including the federal government) against the applicable ATP Person or other person shall not impact ATP's right to take such action.

6.9 Contractor Organizational Conflicts of Interest

(a) General

- (i) An organizational conflicts of interest ("OCI") may arise where, because of other activities or relationships with other persons, a person is potentially unable to render impartial assistance or advice to ATP; the person's objectivity in performing the Contract is or might be otherwise impaired; or a person has an unfair competitive advantage. Contracting Officers have the responsibility to avoid, neutralize, or mitigate potential conflicts of interest to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a Contractor's objectivity.
- (ii) ATP will examine each individual contracting situation on the basis of its particular facts and the nature of the proposed contract. Contracting Officers are required to examine each potential conflict and exercise common sense, good judgment, and sound discretion when assessing whether a significant potential OCI exists and then developing an appropriate way to resolve it.
- (iii) There are three areas of concern examined in order to avoid, neutralize, or mitigate OCI:

(A) Unequal Access to Information

If during the performance under a previous or current contract or task order for ATP a firm has access to non-public information and that information could provide them a competitive advantage in a later competition for a follow-on contract, their performance may create an OCI e.g., an OCI may exist if a firm involved in the development or validation of ATP's independent cost estimate (i.e., non-public information) and subsequently competes for the Contract for which the ICE was developed.

(B) Biased Ground Rules

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

(C) **Lack of Impartiality or Impaired Objectivity**

When the firm is unable, or potentially unable, to provide impartial and objective assistance or advice to ATP due to other activities, relationships, contracts, or circumstances, an OCI may exist (e.g., if a firm's work under one ATP contract/task entails it evaluating itself either through an assessment of performance under another contract/task or through an evaluation of Proposals). This could lead to impaired objectivity, where the firm's ability to render impartial advice to ATP could appear to be undermined by its relationship with the entity whose work product is being evaluated.

- (iv) In order to ensure objective Contractor performance and eliminate unfair competitive advantage, Contractors that develop or draft specifications, requirements, statements of work, or Invitations for Bids or Requests for Proposals must be excluded from competing for such Procurements.

(b) **Waiver**

The Executive Director or their Designee may waive any general rule or procedure of this Section 6.9 by determining that its application in a particular situation would not be in ATP's interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the Executive Director or their Designee.

(c) **Contracting Officer's Responsibilities**

- (i) Using the general rules, procedures, and examples in this Chapter 6, the Contracting Officer shall analyze planned Procurements in order to:
- (A) identify and evaluate potential OCI as early in the Procurement process as possible; and

- (B) avoid, neutralize, or mitigate significant potential conflicts before Contract award.
 - (ii) The Contracting Officer should obtain the advice of ATP's general counsel and the assistance of appropriate technical specialists in evaluating potential conflicts.
 - (iii) Before issuing a Solicitation for a contract that may involve a significant potential conflict, the Contracting Officer shall recommend to the Executive Director or their Designee a course of action for resolving the conflict.
 - (iv) In fulfilling their responsibilities for identifying and resolving potential conflicts, the Contracting Officer should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation. The Contracting Officer's judgment need be formally documented only when a substantive issue concerning potential OCI exists.
- (d) **Procedures**
- (i) If the Contracting Officer initially decides that a particular Procurement involves a potential or actual OCI, the Contracting Officer shall, before issuing the Solicitation, submit to the Executive Director or their Designee for approval, a written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict.
 - (ii) The Executive Director or their Designee shall:
 - (A) review the Contracting Officer's analysis and recommended course of action;
 - (B) consider the benefits and detriments to ATP and prospective contractors; and
 - (C) approve, modify, or reject the recommendation in writing.
 - (iii) The Contracting Officer shall:
 - (A) consider additional information provided by prospective contractors in response to the Solicitation or during negotiations; and

- (B) before awarding the Contract, resolve the potential conflict in a manner consistent with the approval or other direction by the Executive Director or their Designee.

7. DEFINITIONS

"**Applicable Law**" means any federal, state, or local statute, law, regulation, ordinance, rule, standard, judgment, order, executive order, decree, directive, guideline, policy requirement, or other governmental restriction or any similar form of decision of or determination by, or any interpretation or administration of any of the foregoing by, any court or government entity, which is applicable to this Policy, whether taking effect before or after the effective date of this Policy. An Applicable Law, when cited in this Policy, shall be as amended unless provided to the contrary. Applicable Law excludes governmental approvals, customs, duties, and tariffs.

"**ATP**" is defined in Section 1.1 (Introduction to Austin Transit Partnership).

"**ATP Ethics Policy**" means the Austin Transit Partnership's Ethics, Conflicts and Nondisclosure Policy, as may be updated from time to time.

"**ATP Persons**" is defined in Section 1.2(c) (Non-Discrimination).

"**ATP Procurement Related Matter**" means an ATP current, prior, or post procurement related matter, including but not limited to administration, bid submission, bid acceptance, bid handling, bid rejection, evaluations, complaints, debarments, determinations, disputes, payments, pre-bid conferences, Protests, Solicitations, suspensions, and terminations.

"**Best Value**" describes a competitive Procurement process in which ATP reserves the right to select the most advantageous offer by evaluating and comparing factors in addition to cost or price such that ATP may acquire technical superiority even if it must pay a premium price. A "**premium**" is the difference between the price of the lowest priced proposal and the one that ATP believes offers the Best Value. The term "**Best Value**" also means the expected outcome of an acquisition that, in ATP's estimation, provides the greatest overall benefit in response to its material requirements. To achieve Best Value in the context of acquisitions for public transportation purposes, the evaluation factors for a specific Procurement should reflect the subject matter and the elements that are most important to ATP. While FTA does not mandate any specific evaluation factors, ATP must disclose those factors in its Solicitation. Evaluation factors may include, but are not limited to, technical design, technical approach, length of delivery schedules, quality of proposed personnel, past performance, and management plan. Additional Best Value considerations are found in Section 252.043, Texas Local

Government Code. This definition is intended neither to limit nor to dictate qualitative measures ATP may employ, except that those qualitative measures must support the purposes of the Federal Public Transportation Program.

"Bid" means any offer submitted in competitive sealed bidding, in Step 2 of multi-step competitive sealed bidding, or in small purchases under Section 3.3(c) (Federally Funded Small Purchases) if no changes in offers are allowed after submission.

"Bidder" means a Person who responds to an Invitation for Bids by submitting a Bid.

"Board" means the Board of Directors (Executive Committee) of ATP.

"Brand Name or Equal Specification" means a Brand Name Specification which provides for the submission of equivalent products.

"Brand Name Specification" means a specification limited to one or more items by manufacturers' names or catalogue numbers.

"CapMetro" is defined in Section 1.1 (Introduction to Austin Transit Partnership).

"Cardinal Change" means a major deviation from the original purpose of the work or the intended method of achievement, or a revision of Contract work so extensive, significant, or cumulative that, in effect, the Contractor is required to perform very different work from that described in the original Contract.

"Change Order" means a written, unilateral order signed by the Contracting Officer directing the applicable Contractor to make changes, as authorized under the terms of the applicable Contract.

"Chapter 2254" is defined in Section 1.3(d) (Professional Services).

"City" is defined in Section 1.1 (Introduction to Austin Transit Partnership).

"Commercial Item" shall have the meaning given in the Federal Acquisition Regulation or FAR.

"Contract" means any type of agreement entered into by ATP, regardless of what it may be called, for the Procurement, services, or construction or other work.

"Contracting Officer" means any person (or a duly appointed successor) authorized to enter into and administer contracts and amendments on behalf of ATP and make written determinations.

"Contract Modification" means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any Contract, whether under a Change Order or a bilateral agreement, as authorized under the terms of the applicable Contract.

"Contractor" means any person who has entered into a Contract with ATP.

"Controversy" means a controversy between ATP and a Contractor arising under, or by virtue of, a Contract between them, including the full spectrum of disagreements from pricing of routine Contract changes to claims of breach of Contract.

"Days" means calendar days. In computing any period of time prescribed by this Policy, the day of the event from which the designated period of time begins to run shall not be included, but the last day shall be included unless it is a Saturday, Sunday, or Federal or State holiday, in which event the period shall run to the end of the next business day.

"DBE" is defined in Section 1.2(d) (Maximizing Participation of Disadvantaged and Small Business Enterprises).

"Designee" means a duly authorized representative of a person having specific authority or holding a superior position.

"Executive Director" is the person appointed by the Board to be the chief operating officer of ATP.

"Federally Funded Procurements" means a Procurement for a Contract which is anticipated to utilize federal funding.

"Federal Requirements" is defined in Section 1.3(b) (Federally Funded Procurements).

"FTA" is defined in Section 1.2 (Purpose of this Policy).

"ICE" is defined in Section 4.8(b) (Independent Cost Estimate).

"Interested Party" means a person or entity who has not participated in any ATP Procurement Related Matter.

"Invitation for Bids" or **"IFB"** means all documents, whether attached or incorporated by reference, utilized for soliciting competitive sealed Bids.

"OCI" is defined in Section 6.9 (Contractor Organizational Conflicts of Interest).

"Offer" means a response (including a Bid or a Proposal) to a Solicitation (including an Invitation for Bids, a Request for Qualifications or a Request for Proposals) that, if accepted, would bind the Offeror to perform according to the terms specified in the Solicitation or otherwise responds to the Solicitation.

"Offeror" means a Person (including a Bidder or Proposer, as applicable) who responds to a Solicitation by submitting an Offer.

"Offer Submission Date" means the date set for opening of Bids or receipt of Proposals.

"Person" means any individual, firm, corporation, LLC, LLP, joint venture, voluntary association, partnership, trust or public or private organization, other legal entity or a combination thereof.

"Policy" is defined in Section 1.2 (Purpose of this Policy).

"Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring any property (except real property), services, or construction. It also includes all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection and Solicitation of sources, preparation and award of contract, and all phases of contract administration.

"Procurement Department" means the office responsible for the acquisition of supplies, services, and construction in support of ATP's business.

"Procurement Director" means the primary ATP employee designated by the Executive Director to implement this Policy.

"Procurement File" means the documentation contained in a Procurement file that details the history of the Procurement through award of the contract. It includes, at a minimum, the items described in Section 3.5 (Procurement File).

"Proposal" means any Offer submitted in response to a Solicitation, other than a Bid.

"Proposer" means a Person who responds to a Request for Proposal by submitting a Proposal.

"Protest" means a properly filed claim or complaint that there has been a violation of law or the Procurement Policy in connection with an ATP Procurement Related Matter.

"Protester" means a person who has participated in an ATP Procurement Related Matter or an Interested Party that has been permitted to lodge a Protest under Section 6.3(b)

(Filing of Protest) and has agreed that any claim it has or may have against ATP (including its directors, officers, and employees) arising out of or in connection with an ATP Procurement Related Matter shall be resolved exclusively by the administrative remedies stated in Chapter 6 (Administrative Remedies, Audit and Organizational Conflicts of Interest).

"Public Transportation List" means an approved list of property, services, or construction items described by model or catalogue numbers, which, prior to competitive Solicitation, ATP has determined will meet the applicable specification requirements.

"Purchase Requisition" means a document used to request that a Contract is entered into by ATP for a specific need, and may include, but is not limited to, the description of the requested item, delivery schedule, transportation data, criteria for evaluation, suggested sources of supply, and information supplied for the making of any written determination required by this Policy.

"Request for Proposals" or **"RFP"** means all documents, whether attached or incorporated by reference, utilized for soliciting Proposals.

"Request for Qualifications" or **"RFQ"** means all documents, whether attached or incorporated by reference, utilized for requesting responses relating to the qualifications and competence of a respondent.

"Responsible" means determined to be "Responsible" in accordance with Section 4.3 (Responsibility).

"Responsive" means determined to be "Responsive" in accordance with Section 4.2 (Responsiveness).

"SCRIP" is defined in Section 6.5(a)(i) (Scope of Coverage).

"Simplified Acquisition Threshold" means the dollar amount below which a non-federal entity may purchase property or services using small purchase methods. Non-federal entities adopt small purchase procedures in order to expedite the purchase of items costing less than the Simplified Acquisition Threshold. The Simplified Acquisition Threshold is set by the Federal Acquisition Regulation at 48 C.F.R. Part 2.1 and in accordance with 41 U.S.C. § 1908.

"Solicitation" means an Invitation for Bids, a Request for Qualifications, a Request for Proposals, a request for quotations or any other document issued by ATP for the purpose of soliciting Offers to perform a Contract or otherwise solicit responses.

"State" means the state of Texas.

"Step 1" is defined in Section 3.3(f)(ii)(A)(aa)(a) (Multi-Step Competitive Sealed Bidding).

"Step 2" is defined in Section 3.3(f)(ii)(A)(aa)(b) (Multi-Step Competitive Sealed Bidding).

"Supporting Evidence" is defined in Section 6.3(b)(iii)(F) (Filing of Protest).

"Texas Public Information Act" means Chapter 552, Texas Government Code, as amended.

"Third Party Contract" refers to ATP's contract with a vendor or contractor, including Procurement by purchase order or purchase by credit card, which is financed with federal assistance awarded by FTA.

"Unsolicited Offer" means an Offer that is: innovative and unique, independently originated and developed by the Offeror, prepared without ATP's supervision, endorsement, direction, or direct involvement, sufficiently detailed that its benefits in support of ATP's mission and responsibilities are apparent, not an advance proposal for property or services that ATP could acquire through competitive methods, and not an offer responding to ATP's previously published expression of need or request for proposals.