

INDEX

<u>Paragraph</u>		<u>Page</u>
<u>ARTICLE 1 GENERAL PROVISIONS</u>		
§ 41-2501.	Applicability	1-1
§ 41-2502.	Determinations	1-6
R2-7-101.	Written determinations	1-6
§ 41-2503.	Definitions	1-6
R2-7-102.	Definitions	1-11
§ 41-2504.	Supplementary general principles of law applicable.....	1-12
R2-7-103.	Time and place of market price.....	1-13
R2-7-104.	Confidential information.....	1-13
R2-7-105.	State employee or official use of contracts prohibited	1-14
<u>ARTICLE 2 PROCUREMENT ORGANIZATION</u>		
§ 41-2511.	Authority of the director	2-1
§ 41-2512.	Delegation of authority by the director	2-1
R2-7-201.	Delegation of procurement authority.....	2-1
R2-7-202.	Delegation of authority for procurements not exceeding an aggregate amount of \$10,000.....	2-2
§ 41-2513.	Authority to contract for certain services	2-2
§ 41-2514.	State procurement rules	2-3
§ 41-2515.	Collection of data concerning public procurement	2-3
§ 41-2516.	Procurement advisory groups	2-4
R2-7-203.	Procurement advisory groups	2-4
<u>ARTICLE 3 SOURCE SELECTION AND CONTRACT FORMATION</u>		
§ 41-2531.	Definitions	3-1
R2-7-301.	Definitions	3-3
R2-7-302.	General provisions	3-5
R2-7-303.	Extension of offer acceptance period	3-5
R2-7-304.	Purchase requests.....	3-5
R2-7-305.	Assignment of rights and duties	3-6
R2-7-306.	Change of name.....	3-6
R2-7-307.	Installment purchases	3-6
R2-7-308.	Multiple-source contracting	3-6
R2-7-309.	Purchase of items separately from construction contract	3-7
R2-7-310.	Contract change orders and amendments	3-7
R2-7-311.	Arizona state contracts.....	3-7
§ 41-2532.	Method of source selection	3-8
§ 41-2533.	Competitive sealed bidding.....	3-8
R2-7-312.	Prospective vendors lists.....	3-10
R2-7-313.	Invitation for bids	3-10
R2-7-314.	Pre-bid conferences	3-12
R2-7-315.	Amendments to invitations for bids	3-12
R2-7-316.	Pre-opening modification or withdrawal of bids	3-12
R2-7-317.	Late bids, late withdrawals, and late modifications	3-13
R2-7-318.	Receipt, opening, and recording of bids	3-13
R2-7-319.	Mistakes in bids	3-14
R2-7-320.	Bid evaluation and award	3-15
R2-7-321.	Only one bid received	3-16
R2-7-322.	Multi-step sealed bidding.....	3-16
R2-7-323.	Phase one of multi-step sealed bidding	3-17

<u>Paragraph</u>	<u>Page</u>
R2-7-324.	Phase two of multi-step sealed bidding..... 3-18
§ 41-2534.	Competitive sealed proposals 3-19
R2-7-325.	Competitive sealed proposals 3-20
R2-7-326.	Request for proposals 3-21
R2-7-327.	Pre-proposal conferences 3-22
R2-7-328.	Late proposals, late modifications or late withdrawals..... 3-22
R2-7-329.	Receipt of proposals 3-22
R2-7-330.	Evaluation of proposals 3-23
R2-7-331.	Discussions with individual offerors 3-23
R2-7-332.	Best and final offers 3-23
R2-7-333.	Mistakes in proposals..... 3-24
R2-7-334.	Contract award 3-24
§ 41-2535.	Procurements not exceeding an aggregate amount of twenty-five thousand dollars; exception for construction services contracts; simplified construction procurement program 3-24
R2-7-335.	Small business set-aside..... 3-26
R2-7-336.	Procurements not exceeding an aggregate amount of \$25,000 3-27
R2-7-337.	Other procurements not exceeding an aggregate amount of \$10,000..... 3-30
§ 41-2536.	Sole source procurement 3-30
R2-7-338.	Sole source procurement 3-30
§ 41-2537.	Emergency procurements 3-31
R2-7-339.	Emergency procurements 3-31
R2-7-340.	Emergency procurement procedure 3-32
§ 41-2538.	Competitive selection procedures for certain professional services 3-33
R2-7-341.	Competitive selection procedures for services of clergy, physicians, dentists, legal counsel or certified public accountants..... 3-34
R2-7-342.	Statement of qualifications 3-34
R2-7-343.	Request for proposals 3-34
R2-7-344.	Receipt of proposals 3-35
R2-7-345.	Evaluation of proposals 3-35
R2-7-346.	Discussions With individual offerors 3-35
R2-7-347.	Evaluation and contract award where price is an evaluation factor 3-35
R2-7-348.	Selection and contract award where price is not an evaluation factor..... 3-35
R2-7-349.	Annual report..... 3-36
§ 41-2539.	Cancellation of invitation for bids or requests for proposals..... 3-36
R2-7-350.	Cancellation of solicitations; rejection of bids or proposals 3-36
R2-7-351.	Cancellation of solicitation before the date and time for receipt of bids and proposals 3-37
R2-7-352.	Cancellation of solicitation after receipt of bids or proposals 3-37
R2-7-353.	Rejection of individual bids or proposals 3-38
§ 41-2540.	Responsibility of bidders and offerors 3-38
R2-7-354.	Responsibility of bidders and offerors 3-39
§ 41-2541.	Prequalification of contractors 3-39
R2-7-355.	Prequalification 3-40
§ 41-2542.	Bid and contract security 3-40
R2-7-356.	Bid and performance bonds for material or service contracts 3-40
§ 41-2543.	Cost or pricing data..... 3-41
R2-7-357.	Submission of cost or pricing data..... 3-42
R2-7-358.	Certification of current cost or pricing data..... 3-42
R2-7-359.	Refusal to submit cost or pricing data..... 3-43
R2-7-360.	Defective cost or pricing data..... 3-43
R2-7-361.	Price or cost analysis 3-44
§ 41-2544.	Types of contracts 3-44
R2-7-362.	Authority to use contract types 3-44

<u>Paragraph</u>		<u>Page</u>
R2-7-363.	Fixed-price contracts.....	3-44
R2-7-364.	Lease and lease-purchase contracts.....	3-45
R2-7-365.	Cost-reimbursement and cost incentive contracts	3-45
R2-7-366.	Time and materials contracts and labor hour contracts.....	3-46
R2-7-367.	Option provisions	3-46
§ 41-2545.	Approval of accounting system	3-46
R2-7-368.	Approval of accounting system	3-46
§ 41-2546.	Multi-term contracts	3-47
§ 41-2547.	Right to inspect plant	3-47
§ 41-2548.	Right to audit records	3-48
§ 41-2549.	Reporting of anti-competitive practices.....	3-48
R2-7-369.	Anti-competitive practices among bidders or offerors.....	3-48
§ 41-2550.	Retention of procurement records	3-48
§ 41-2551.	Record of procurement actions	3-49
R2-7-370.	Record of procurement actions	3-49
§ 41-2552.	Change order.....	3-49
§ 41-2553.	Procurement of information systems and telecommunication systems.....	3-49
§ 41-2554.	Procurement of earth moving, material handling, road maintenance and construction equipment; definitions	3-51
§ 41-2555.	Request for information.....	3-53
§ 41-2556.	Demonstration projects	3-54
§ 41-2557.	Unsolicited proposals.....	3-54
§ 41-2558.	General services administration contracts	3-54
§ 41-2559.	Public-private partnership contracts	3-55

ARTICLE 4 SPECIFICATIONS

§ 41-2561.	Definitions	4-1
R2-7-401.	Definitions	4-1
§ 41-2562.	Duties of the director	4-2
R2-7-402.	Preparation of specifications	4-2
R2-7-403.	Content of specifications	4-2
R2-7-404.	Types of specifications	4-3
R2-7-405.	Confidentiality.....	4-5
§ 41-2563.	Exempted services	4-6
R2-7-406.	[Reserved]	4-6
§ 41-2564.	Relationship with using agencies	4-6
R2-7-407.	Using agency advice and assistance.....	4-6
R2-7-408.	Preparation and utilization of specifications or plans by using agencies	4-6
§ 41-2565.	Maximum practicable competition	4-7
R2-7-409.	Requirements of non-restrictiveness	4-7
§ 41-2566.	Specifications prepared by architects and engineers	4-7
R2-7-410.	Preparation of specifications or plans by persons other than state personnel	4-8
R2-7-411.	Conflict of interest	4-8
§ 41-2567.	Specifications for energy consumptive materials.....	4-8
§ 41-2568.	Specifications for recycled materials	4-9

ARTICLE 5 PROCUREMENT OF CONSTRUCTION AND SPECIFIED PROFESSIONAL SERVICES

§ 41-2571.	Definition.....	5-1
R2-7-501.	Definitions	5-1
§ 41-2572.	Construction by state employees; construction by inmates of public institution	5-1
R2-7-502.	Coordination with the department	5-1

<u>Paragraph</u>		<u>Page</u>
§ 41-2573.	Bid security	5-2
R2-7-503.	Bid security	5-3
§ 41-2574.	Contract performance and payment bonds	5-4
R2-7-504.	Performance and payment bonds	5-7
§ 41-2575.	Repealed	5-7
R2-7-505.	Bond forms.....	5-7
§ 41-2576.	Contract payment retention; partial payment	5-7
R2-7-506.	The form of substitute security	5-9
R2-7-507.	Conditions for use of substitute security	5-9
§ 41-2577.	Progress payments.....	5-10
R2-7-508.	Repealed	5-12
§ 41-2578.	Procurement of specified professional services	5-12
R2-7-509.	Procurement of specified professional services	5-24
R2-7-510.	Public notice of specified professional services	5-24
R2-7-511.	Specified professional services selection committee	5-25
R2-7-512.	Cancellation or rejection of the solicitation	5-26
R2-7-513.	Selection committee evaluation	5-26
R2-7-514.	Single negotiated fee method of award.....	5-26
R2-7-515.	Multiple fee proposal method of award	5-28
§ 41-2579.	Project delivery methods for design and construction services: report	5-28

ARTICLE 6 CONTRACT CLAUSES

§ 41-2585.	Contract clauses	6-1
R2-7-601.	Standard terms and conditions	6-1
§ 41-2586.	Indemnity agreements in construction and architect-engineer contracts void; definitions	6-1

ARTICLE 7 COST PRINCIPLES

§ 41-2591.	Cost principles regulations.....	7-1
R2-7-701.	Cost principles	7-1

ARTICLE 8 MATERIALS MANAGEMENT

§ 41-2601.	Definitions	8-1
R2-7-801.	Transferred	8-1
§ 41-2602.	Material management regulations	8-1
R2-7-802.	Transferred	8-2
R2-7-803.	Transferred	8-2
R2-7-804.	Transferred	8-2
R2-7-805.	Transferred	8-2
§ 41-2603.	Federal surplus material program.....	8-2
R2-7-806.	Transferred	8-2
§ 41-2604.	Authority for transfer of material	8-2
R2-7-807.	Transferred	8-2
§ 41-2605.	Fees and charges	8-2
R2-7-808.	Transferred	8-3
§ 41-2606.	Surplus materials revolving funds.....	8-3
R2-7-809.	Transferred	8-3
§ 41-2607.	Allocation of proceeds from sales, transfers or disposal of surplus materials.....	8-3
R2-7-810.	Transferred	8-3

ARTICLE 9 LEGAL AND CONTRACTUAL REMEDIES

§ 41-2611. Rules of procedure 9-1

§ 41-2612. Subject of rules 9-1

§ 41-2613. Debarment and suspension of contractors 9-1

§ 41-2614. Judicial review 9-3

§ 41-2615. Exclusive remedy 9-3

§ 41-2616. Violation; classification; liability; enforcement authority 9-3

§ 41-2617. Contracts for procurement of construction; delay; recovery of damages by contractor 9-4

R2-7-901. Definitions 9-5

R2-7-902. Resolution of bid protests 9-5

R2-7-903. Filing of a protest 9-6

R2-7-904. Time for filing protests 9-6

R2-7-905. Stay of procurements during the protest 9-7

R2-7-906. Confidential information 9-8

R2-7-907. Decision by the procurement officer 9-8

R2-7-908. Remedies 9-8

R2-7-909. Appeals to the director 9-9

R2-7-910. Notice of appeal 9-10

R2-7-911. Stay of procurement during appeal 9-10

R2-7-912. Agency report 9-10

R2-7-913. Dismissal before hearing 9-11

R2-7-914. Hearing 9-12

R2-7-915. Remedies 9-12

R2-7-916. Contract claims 9-12

R2-7-917. Procurement officer's decision 9-12

R2-7-918. Issuance of a timely decision 9-13

R2-7-919. Appeals and reports to the director 9-13

R2-7-920. Controversies involving state claims against a contractor 9-14

R2-7-921. Hearing 9-14

R2-7-922. Authority to debar or suspend 9-14

R2-7-923. Initiation of debarment 9-14

R2-7-924. Period of debarment 9-15

R2-7-925. Notice 9-15

R2-7-926. Notice to affiliates 9-15

R2-7-927. Imputed knowledge 9-15

R2-7-928. Reinstatement 9-16

R2-7-929. Limited participation 9-16

R2-7-930. Suspension 9-16

R2-7-931. Period and scope of suspension 9-17

R2-7-932. Notice, hearing, determination and appeal 9-17

R2-7-933. Master list 9-17

R2-7-934. Hearing procedures 9-18

R2-7-935. Recommendation by the hearing officer 9-19

R2-7-936. Final decision by the director 9-20

R2-7-937. Rehearing of director's decision 9-20

ARTICLE 10 INTERGOVERNMENTAL PROCUREMENT

§ 41-2631. Definitions 10-1

R2-7-1001. Definition 10-1

R2-7-1002. Applicability 10-1

R2-7-1003. Intergovernmental procurement agreements approval 10-2

§ 41-2632. Cooperative purchasing authorized 10-2

<u>Paragraph</u>	<u>Page</u>
R2-7-1004.	Cooperative state purchasing agreement in form of a state requirements contract 10-3
R2-7-1005.	Informational and technical services 10-3
§ 41-2633.	Use of payments received by a supplying public procurement unit 10-4
§ 41-2634.	Public procurement units in compliance with chapter requirements 10-4
§ 41-2635.	Contract Controversies..... 10-4
§ 41-2636.	Procurement from Arizona industries for the blind and Arizona correctional industries 10-4
R2-7-1006.	Establishment of the committee 10-6
R2-7-1007.	Evaluation of materials and services 10-6
R2-7-1008.	Contract awards by the committee 10-7
R2-7-1009.	Procurement of other AIB or ACI materials or services by state governmental units..... 10-8
§ 41-2637.	Compliance with federal requirements..... 10-8

ARTICLE 11 REPEALED

ARTICLE 12 STATE AGENCY RECYCLING MATERIALS PROCUREMENT PROGRAM

§ 41-2661.	State agency office paper recycling..... 12-1
§ 41-2662.	State agency purchase of recycled materials 12-1

Article 1

**CHAPTER 23
ARIZONA PROCUREMENT CODE**

ARTICLE 1

GENERAL PROVISIONS

§ 41-2501. Applicability

- A. This chapter applies only to procurements initiated after January 1, 1985 unless the parties agree to its application to procurements initiated before that date.
- B. This chapter applies to every expenditure of public monies, including federal assistance monies except as otherwise specified in § 41-2637, by this state, acting through a state governmental unit as defined in this chapter, under any contract, except that this chapter does not apply to either grants as defined in this chapter, or contracts between this state and its political subdivisions or other governments, except as provided in chapter 24 of this title and in article 10 of this chapter. This chapter also applies to the disposal of state materials. Nothing in this chapter or in rules adopted under this chapter shall prevent any state governmental unit or political subdivision from complying with the terms and conditions of any grant, gift, bequest or cooperative agreement.
- C. All political subdivisions and other local public agencies of this state may adopt all or any part of this chapter and the rules adopted pursuant to this chapter.
- D. The Arizona board of regents, the legislative and judicial branches of state government and the state compensation fund are not subject to the provisions of this chapter except as prescribed in subsection E of this section.
- E. The Arizona board of regents and the judicial branch shall adopt rules prescribing procurement policies and procedures for themselves and institutions under their jurisdiction. The rules must be substantially equivalent to the policies and procedures prescribed in this chapter.
- F. The Arizona state lottery commission is exempt from the provisions of this chapter for procurement relating to the design and operation of the lottery or purchase of lottery equipment, tickets and related materials. The executive director of the Arizona state

Article 1

- lottery commission shall adopt rules substantially equivalent to the policies and procedures in this chapter for procurement relating to the design and operation of the lottery or purchase of lottery equipment, tickets or related materials. All other procurement shall be as prescribed by this chapter.
- G. The Arizona health care cost containment system administration is exempt from the provisions of this chapter for provider contracts pursuant to § 36- 2904, subsection A and contracts for goods and services including program contractor contracts pursuant to title 36, chapter 29, articles 2 and 3. All other procurement, including contracts for the statewide administrator of the program pursuant to § 36-2903, subsection C, shall be as prescribed by this chapter.
- H. Arizona industries for the blind is exempt from the provisions of this chapter for purchases of finished goods from members of national industries for the blind and for purchases of raw materials for use in the manufacture of products for sale pursuant to § 41-1972. All other procurement shall be as prescribed by this chapter.
- I. Arizona correctional industries is exempt from the provisions of this chapter for purchases of raw materials, components and supplies that are used in the manufacture or production of goods or services for sale entered into pursuant to § 41-1622. All other procurement shall be as prescribed by this chapter.
- J. The state transportation board and the director of the department of transportation are exempt from the provisions of this chapter other than § 41- 2586 for the procurement of construction or reconstruction, including engineering services, of transportation facilities or highway facilities.
- K. The Arizona highways magazine is exempt from the provisions of this chapter for contracts for the production, promotion, distribution and sale of the magazine and related products and for contracts for sole source creative works entered into pursuant to § 28-7314, subsection A, paragraph 5. All other procurement shall be as prescribed by this chapter.
- L. The secretary of state is exempt from the provisions of this chapter for contracts entered

Article 1

- into pursuant to § 41-1012 to publish and sell the administrative code. All other procurement shall be as prescribed by this chapter.
- M. The provisions of this chapter are not applicable to contracts for professional witnesses if the purpose of such contracts is to provide for professional services or testimony relating to an existing or probable judicial proceeding in which this state is or may become a party or to contract for special investigative services for law enforcement purposes.
- N. The head of any state governmental unit, in relation to any contract exempted by this section from the provisions of this chapter, has the same authority to adopt rules, procedures or policies as is delegated to the director pursuant to this chapter.
- O. Agreements negotiated by legal counsel representing this state in settlement of litigation or threatened litigation are exempt from the provisions of this chapter.
- P. The provisions of this chapter are not applicable to contracts entered into by the department of economic security with a provider licensed or certified by an agency of this state to provide child day care services or with a provider of family foster care pursuant to § 8-503 or 36-554, to contracts entered into with area agencies on aging created pursuant to the older Americans act of 1965 (P.L. 89-73; 79 Stat. 218; 42 United States Code § 3001 through 3058ee) or to contracts for services pursuant to title 36, chapter 29, article 2.
- Q. The department of health services may not require that persons with whom it contracts follow the provisions of this chapter for the purposes of subcontracts entered into for the provision of the following:
- 1) Mental health services pursuant to § 36-189, subsection B.
 - 2) Services for the seriously mentally ill pursuant to title 36, chapter 5, article 10.
 - 3) Drug and alcohol services pursuant to § 36-141.
 - 4) Domestic violence services pursuant to title 36, chapter 30, article 1.
- R. The department of health services is exempt from the provisions of this chapter for contracts for services of physicians at the Arizona state hospital.

Article 1

- S. Contracts for goods and services approved by the fund manager of the public safety personnel retirement system are exempt from the provisions of this chapter.
- T. The Arizona department of agriculture is exempt from this chapter with respect to contracts for private labor and equipment to effect cotton or cotton stubble plow-up pursuant to rules adopted under title 3, chapter 2, article 1. On or before September 1 each year the director of the Arizona department of agriculture shall establish and announce costs for each acre of cotton or cotton stubble to be abated by private contractors.
- U. The Arizona state parks board is exempt from the provisions of this chapter for purchases of guest supplies and items for resale such as food, linens, gift items, sundries, furniture, china, glassware and utensils for the facilities located in the Tonto natural bridge state park.
- V. The Arizona state parks board is exempt from the provisions of this chapter for the purchase, production, promotion, distribution and sale of publications, souvenirs and sundry items obtained and produced for resale .
- W. The Arizona state schools for the deaf and the blind are exempt from the provisions of this chapter when purchasing products through a cooperative that is organized and operates in accordance with state law if such products are not available on a statewide contract and are related to the operation of the schools or are products for which special discounts are offered for educational institutions.
- X. Expenditures of monies in the morale, welfare and recreational fund established by § 26-153 are exempt from the provisions of this chapter.
- Y. The state department of corrections is exempt from the provisions of this chapter for purchases of food commodities to be used in the preparation of meals for inmates. All other procurement shall be as prescribed by this chapter.
- Z. Notwithstanding § 41-2534, the director of the state department of corrections may contract with local medical providers in counties with a population of less than four hundred thousand persons according to the most recent United States decennial census

Article 1

for the following purposes:

- 1) To acquire hospital and professional medical services for inmates who are incarcerated in state department of corrections facilities that are located in those counties.
 - 2) To ensure the availability of emergency medical services to inmates in all counties by contracting with the closest medical facility that offers emergency treatment and stabilization.
- AA. The department of environmental quality is exempt from the provisions of this chapter for contracting for procurements relating to the water quality assurance revolving fund program established pursuant to title 49, chapter 2, article 5. The department shall engage in a source selection process that is similar to the procedures prescribed by this chapter. The department may contract for remedial actions with a single selection process. The exclusive remedy for disputes or claims relating to contracting pursuant to this subsection is as prescribed by article 9 of this chapter and the rules adopted pursuant to that article. All other procurement by the department shall be as prescribed by this chapter.
- BB. The motor vehicle division of the department of transportation is exempt from the provisions of this chapter for third party authorizations pursuant to title 28, chapter 13, only if all of the following conditions exist:
- 1) The division does not pay any public monies to an authorized third party.
 - 2) Exclusivity is not granted to an authorized third party.
 - 3) The director has complied with the requirements prescribed in title 28, chapter 13 in selecting an authorized third party.
- CC. This section does not exempt third party authorizations pursuant to title 28, chapter 13 from any other applicable law.
- DD. The state forester is exempt from the provisions of this chapter for purchases and contracts relating to wild land fire suppression and pre-positioning equipment resources and for other activities aw. related to combating wild land fires and other unplanned risk

Article 1

activities, including fire, flood, earthquake, wind and hazardous material responses. All other procurement by the state forester shall be as prescribed by this chapter.

§ 41-2502. Determinations

Written determinations required by this chapter shall be retained in the appropriate official records file of the director.

R2-7-101. Written Determinations

- (a) Each written determination shall specify the facts and law necessary to support the determination.
- (b) The appropriate official records file of the director is designated to be the applicable

§ 41-2503. Definitions

In this chapter, unless the context otherwise requires:

1. "Architect services" means those professional architect services that are within the scope of architectural practice as provided in Title 32. Chapter 1.
2. "Business" means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture or other private legal entity.
3. "Change order" means a written order which is signed by a procurement officer and which directs the contractor to make changes that the changes clause of the contract authorizes the procurement officer to order.
4. "Construction":
 - (a) Means the process of building, altering, repairing, improving or demolishing any public structure or building, or other public improvements of any kind to any public real property.
 - (b) Does not include the routine operation, routine repair or routine maintenance of existing FACILITIES, structures, buildings or real property.

Article 1

5. "Construction-Manager-at-Risk" means a project delivery method in which:
 - (a) There is a separate contract for design services and a separate contract for construction services.
 - (b) The contract for construction services may be entered into at the same time as the contract for design services or at a later time.
 - (c) Design and construction of the project may be in sequential phases or concurrent phases.
 - (d) Finance Services, Maintenance Services, Operations Services, Preconstruction Services and other related services may be included.
6. "Construction Services" Means either of the following for Construction-Manager-at-Risk, Design-Build and Job-Order-Contracting Project Delivery Methods:
 - (a) Construction, excluding services, through the Construction-Manager-at-Risk or Job-Order-Contracting Project Delivery Methods.
 - (b) A Combination of construction and, as elected by the purchasing agency, one or more related services, such as Finance Services, Maintenance Services, Operation Services, Design Services and Preconstruction Services, as those services are authorized in the definitions of Construction-Manager-at-Risk, Design-Build or Job-Order-Contracting in this section.
7. "Contract" means all types of state agreements, regardless of what they may be called, for the procurement of materials, services or construction or the disposal of materials.
8. "Contract modification" means any written alteration in the terms and conditions of any contract accomplished by mutual action of the parties to the contract.
9. "Contractor" means any person who has a contract with a state governmental unit.
10. "Data" means documented information, regardless of form or characteristic.
11. "Department" means the department of administration.
12. "Design-Bid-Build" means a project delivery method in which:
 - (a) There is a sequential award of two separate contracts.
 - (b) The first contract is for design services.

Article 1

- (c) The second contract is for construction.
 - (d) Design and construction of the project are in sequential phases.
 - (e) Finance Services, Maintenance Services and Operation Services are not included.
13. "Design-Build" means a project delivery method in which:
- (a) There is a single contract for Design Services and Construction Services.
 - (b) Design and Construction of the project may be in sequential phases or concurrent phases.
 - (c) Finance Services, Maintenance Services, Operation Services, Design Services, Preconstruction Services and other related services may be included.
14. "Design Requirements":
- (a) Means at a minimum the Purchasing Agency's written description of the project or services to be procured, including:
 - (I) The required Features, Functions, Characteristics, Qualities and Properties.
 - (II) The Anticipated Schedule, including start, duration and completion.
 - (III) The estimated budgets applicable to the specific procurement for design and construction and, if applicable, for operation and maintenance.
 - (b) May Include:
 - (I) Drawings and other documents illustrating the scale and relationships of the Features, Functions and Characteristics of the project, which shall all be prepared by an Architect or Engineer, as appropriate, who is registered pursuant to Section 32-121.
 - (II) Additional design information or documents that the

Article 1

Purchasing Agency elects to include.

15. "Design Services" means Architect Services, Engineer Services or Landscape Architect Services.
16. "Designee" means a duly authorized representative of the director.
17. "Director" means the director of the department of administration.
18. "Employee" means an individual drawing a salary from a state governmental unit, whether elected or not, and any noncompensated individual performing personal services for any state governmental unit.
19. "Engineer Services" means those professional Engineer Services that are within the scope of Engineering Practice as provided in Title 32, Chapter 1.
20. "Finance Services" means financing for a construction services project.
21. "General services administration contract" means contracts awarded by the United States government general services administration.
22. "Grant" means the furnishing of financial or other assistance, including state funds or federal grant funds, by any state governmental unit to any person for the purpose of supporting or stimulating educational, cultural, social or economic quality of life, if there is no substantial involvement between the state governmental unit and the recipient during performance. Grant does not include an agreement whose primary purpose is to procure a specific end product in the form of materials, services or construction. A contract resulting from such an agreement is not a grant but a procurement contract.
23. "Job-Order-Contracting" means a project delivery method in which:
 - (a) The contract is a requirements contract for indefinite quantities of construction.
 - (b) The construction to be performed is specified in job orders issued during the contract.
 - (c) Finance Services, Maintenance Services, Operations Services, Preconstruction Services. Design Services and other related services may be included.

Article 1

24. "Landscape Architect Services" means those professional Landscape Architect Services that are within the scope of landscape architectural practice as provided in Title 32, Chapter 1.
25. "Maintenance Services" means routine maintenance, repair and replacement of existing facilities, structures, buildings or real property.
26. "Materials":
- (a) Means all property, including equipment, supplies, printing, insurance and leases of property.
 - (b) Does not include land, a permanent interest in land or real property or leasing space.
27. "Operations Services" means routine operation of existing facilities, structures, buildings or real property.
28. "Owner" means a state purchasing agency or state governmental unit.
29. "Person" means any corporation, business, individual, union, committee, club, other organization or group of individuals.
30. "Preconstruction Services" means advice during the design phase.
31. "Procurement":
- (a) Means buying, purchasing, renting, leasing or otherwise acquiring any materials, services, construction or Construction Services.
 - (b) Includes all functions that pertain to obtaining any material, services or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.
32. "Procurement officer":
- (a) Means any person duly authorized to enter into and administer contracts and make written determinations with respect to the contracts.
 - (b) Includes an authorized representative acting within the limits of the Authorized Representative's authority.

Article 1

33. "Purchasing agency" means any state governmental unit which is authorized by this chapter or Rules Adopted Pursuant to this Chapter, or by way of delegation from the director, to enter into contracts.
34. "Services":
- (a) Means the furnishing of labor, time or effort by a contractor or subcontractor which does not involve the delivery of a specific end product other than required reports and performance.
 - (b) Does not include employment agreements or collective bargaining agreements.
35. "State governmental unit" means any department, commission, council, board, bureau, committee, institution, agency, government corporation or other establishment or official of the executive branch or corporation commission of this state.
36. "Subcontractor" means a person who contracts to perform work or render service to a contractor or to another subcontractor as a part of a contract with a state governmental unit.
37. "Using agency" means any state governmental unit which utilizes any materials, services or construction procured under this chapter. Sec. 12. Section 41-2533, Arizona Revised Statutes, is amended to read:

R2-7-102. Definitions

In this Chapter, unless the context otherwise requires:

1. "Mandatory State Contract" means a contract established or authorized by the State Procurement Administrator through which state governmental units are required to purchase and other eligible procurement units may purchase.
2. "Clergy" means a minister of a religion.
3. "Days" mean calendar days and shall be computed pursuant to A.R.S. § 1-243.
4. "Dentist" means a person licensed pursuant to A.R.S. Title 32, Chapter 11.

Article 1

5. "Finished goods" mean units of manufactured product awaiting sale.
6. "Legal counsel" means a person licensed as an attorney pursuant to rules of the Supreme Court, A.R.S. Volume 17A.
7. "May" denotes the permissive.
8. "Physician" means a person licensed pursuant to Title 32, Chapter 13 or 17.
9. "Raw materials" means goods, excluding equipment and machinery, purchased for use in manufacturing a product.
10. "Shall" denotes the imperative.
11. "State Procurement Administrator" means the person holding the position as the administrator of the State Procurement Office.
12. "Trade secret" means a secret, commercially valuable plan, formula, process or device that is used for making, preparing, compounding or processing trade commodities and that can be said to be a product of either innovation or substantial effort.

§ 41-2504. Supplementary general principles of law applicable

Unless displaced by the particular provisions of this chapter, the principles of law and equity, including the Uniform Commercial Code of this state, the common law of contracts as applied in this state and law relative to agency, fraud, misrepresentation, duress, coercion and mistake supplement the provisions of this chapter.

R2-7-103. Time and Place of Market Price

R2-7-104. Confidential Information

- A. If a person believes that the person's bid, proposal, offer, specification, or protest submitted to the state contains trade secrets or other proprietary data and should remain confidential under A.R.S. § 41-2533(D) or 41-2534(D), the person shall include with the submission a statement that explains and supports the person's claim that the submission contains such information. The person also shall specifically identify in the

Article 1

submission all trade secrets and other proprietary data that the person believes remain confidential.

- B. The information identified by the person as confidential shall not be disclosed until the Director makes a written determination.

The procurement officer shall make an initial determination whether the information identified is confidential under A.R.S. § 41-2533(D) or 41-2534(D). If the procurement officer determines that the information is not confidential under A.R.S. § 41-2533(D) or 41-2534(D), the procurement officer shall refer the matter to the Director. The Director shall review the statement and information and shall determine in writing within a reasonable time whether the information is a trade secret or other proprietary data that shall remain confidential. If the Director determines that the information is a trade secret or other proprietary data that shall remain confidential, the information shall remain confidential.

- C. If the Director determines to disclose the information, the Director shall inform the person in writing of such determination.

R2-7-105. State Employee or Official Use of Contracts Prohibited

State employees and officials shall not be permitted to make purchases for personal or business use of any contract entered into by the state. Unless otherwise authorized by the Director (or the Director's designee)

Article 1

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CHAPTER 23
ARIZONA PROCUREMENT CODE

ARTICLE 2
PROCUREMENT ORGANIZATION

§ 41-2511. Authority of the director

- A. Except as otherwise provided in this chapter, the director may adopt rules, consistent with this chapter, governing the procurement and management of all materials, services and construction to be procured by this state and the disposal of materials.
- B. The director shall serve as the central procurement officer of this state.
- C. Except as otherwise provided in this chapter, the director shall, in accordance with rules adopted under this chapter:
 - 1) Procure or supervise the procurement of all materials, services and construction needed by this state.
 - 2) Establish guidelines for the management of all inventories of materials belonging to this state.
 - 3) Sell, trade or otherwise dispose of surplus materials belonging to this state.
 - 4) Establish and maintain programs for the inspection, testing and acceptance of materials, services and construction.

§ 41-2512. Delegation of authority by the director

The director may delegate authority to any state governmental unit.

R2-7-201. Delegation of Procurement Authority

- A. The Director shall consider the following factors in making the decision to delegate procurement authority.
 - 1) The procurement expertise, specialized knowledge and past experience and performance of the state governmental unit.

Article 1

- 2) The impact of the delegation on procurement efficiency and effectiveness;
and
 - 3) The abilities and resources of the Department to exercise the authority if it is not delegated.
- B. Delegation shall be in writing and shall specify:
- 1) The activity or function authorized;
 - 2) Any limits or restrictions on the exercise of the delegated authority;
 - 3) Whether the authority may be further delegated; and
 - 4) The duration of the delegation.
- C. Authority delegated by the Director may be revoked or modified by the Director.
- D. Any state governmental unit receiving a delegation of authority shall exercise that authority according to the Arizona Procurement Code, these rules and the terms of the delegation.

R2-7-202. Delegation of Authority for Procurements to the State Procurement Administrator

The State Procurement Administrator may delegate to any using agency the authority to make purchases pursuant to R2-7-336 and R2-7-337 if the purchase is estimated not to exceed an aggregate amount of \$10,000. Any delegation shall be in writing and may be limited as the State Procurement Administrator directs. Authority delegated by the State Procurement Administrator may be revoked or modified by the State Procurement Administrator.

§ 41-2513. Authority to contract for certain services

- A. For the purpose of procuring the services of clergy, certified public accountants, legal counsel pursuant to § 41-192, subsection E, physicians or dentists as defined by the laws of this state, any state governmental unit may act as a purchasing agency and contract on its own behalf for such services, subject to this chapter and rules adopted by the director.

Article 1

- B. In accordance with the provisions of § 41-192, subsection E and notwithstanding any contrary statute, no contract for the services of legal counsel may be awarded without the approval of the attorney general.
- C. The auditor general shall approve state agency contracting for financial and compliance auditing services except if specific statutory authority is otherwise provided. The auditor general shall ensure that such contract audits are conducted in accordance with generally accepted governmental auditing standards. An audit shall not be accepted until it has been approved by the auditor general.
- D. The government information technology agency established by § 41-3502 may approve all information technology purchases exceeding twenty-five thousand dollars for a budget unit as defined in § 41-3501 . Purchases shall not be artificially divided to avoid review.
- E. Payment for any services, including those services described in subsections A, B and C of this section, procured under this chapter shall not be made unless pursuant to a fully approved written contract.

§ 41-2514. State procurement rules

- A. The director may adopt and issue rules pursuant to chapter 6 of this title to carry out the purposes of this chapter.
- B. Except by mutual consent of the parties to the contract, no rule promulgated under this chapter may change any commitment, right or obligation of this state or of a contractor under a contract in existence on the effective date of the rule.

§ 41-2515. Collection of data concerning public procurement

All using agencies shall furnish such reports as the director may require concerning usage, needs and stocks on hand, and the director may prescribe forms for use by the using agencies in requisitioning, ordering and reporting of materials, services and construction.

Article 1

§ 41-2516. Procurement advisory groups

- A. The director may appoint advisory groups to assist with respect to specifications or procurement in specific areas and with respect to any other matters within the authority of the director.
- B. Members of advisory groups are not eligible to receive compensation but are eligible for reimbursement of expenses pursuant to title 38, chapter 4, article 2.

Article 2

**CHAPTER 23
ARIZONA PROCUREMENT CODE**

ARTICLE 3

SOURCE SELECTION AND CONTRACT FORMATION

§ 41-2531. Definitions

In this article, unless the context otherwise requires:

1. "Bidder Prequalification" means determining in accordance with rules adopted pursuant to this chapter that a prospective bidder or offeror satisfies the criteria for being included on the bidder's list.
2. "Cost-reimbursement contract" means a contract under which a contractor is reimbursed for costs which are reasonable, allowable and allocable in accordance with the contract terms and the provisions of this chapter, and paid a fee, if provided for in the contract.
3. "Demonstration project" means a project in which a vendor supplies a service or material to this state for which the state does not pay but for which this state may be obligated to provide routine support such as utility cost and operating personnel.
4. "Established catalogue price" means the price included in a catalogue, price list, schedule or other form that:
 - (a) Is regularly maintained by a manufacturer, distributor or contractor.
 - (b) Is either published or otherwise available for inspection by customers.
 - (c) States prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the materials or services involved.
5. "Invitation for bids" means all documents, whether attached or incorporated by reference, which are used for soliciting bids in accordance with the procedures prescribed in § 41-2533.
6. "Multistep sealed bidding" means a two phase process consisting of a technical first phase composed of one or more steps in which bidders submit unpriced technical offers to be evaluated by this state and a second phase in which those bidders whose technical offers are determined to be acceptable during the first phase have their price bids

Article 2

- considered.
7. "Paper" means newspaper, high grade office paper, fine paper, bond paper, offset paper, xerographic paper, duplicator paper and related types of cellulosic material containing not more than ten per cent by weight or volume of noncellulosic material such as laminates, binders, coatings or saturants.
 8. "Paper product" means paper items or commodities, including paper napkins, towels, corrugated paper and related types of cellulosic products containing not more than ten per cent by weight or volume of noncellulosic material such as laminates, binders, coatings or saturates.
 9. "Post-consumer material" means a discard generated by a business or residence that has fulfilled its useful life. Post-consumer material does not include discards from industrial or manufacturing processes.
 10. "Purchase description" means the words used in a solicitation to describe the materials, services or construction for purchase and includes specifications attached to, or made a part of, the solicitation.
 11. "Recycled paper" means paper products which have been manufactured from materials otherwise destined for the waste stream and which contain at least forty per cent recovered wastepaper with ten per cent of that being post- consumer material.
 12. "Request for information" means all documents issued to vendors for the sole purpose of seeking information about the availability in the commercial marketplace of materials or services.
 13. "Request for proposals" means all documents, whether attached or incorporated by reference, which are used for soliciting proposals in accordance with procedures prescribed in § 41-2534.
 14. "Responsible bidder or offeror" means a person who has the capability to perform the contract requirements and the integrity and reliability which will assure good faith performance.
 15. "Responsive bidder " means a person who submits a bid which conforms in all material respects to the invitation for bids.

Article 2

16. "Unsolicited proposal" means a written proposal that is submitted on the initiative of the offeror for the purposes of obtaining a contract with this state and that is not in response to a formal or informal request from this state.
17. "Wastepaper" means recyclable paper and paperboard, including high grade office paper, computer paper, fine paper, bond paper, offset paper, xerographic paper, duplicator paper and corrugated paper.

R2-7-301. Definitions

In this Article, unless the context otherwise requires:

1. "Bid sample" means an item furnished by a bidder to show the characteristics of the item offered in the bid.
2. "Capability" means capability at the time of contract award.
3. "Clarification" means written or oral communication with a bidder or offeror, including demonstrations or questions and answers, for the sole purpose of information gathering or of eliminating minor informalities or correcting nonjudgmental mistakes in a bid or proposal. Clarification does not otherwise afford the bidder or offeror the opportunity to alter or change its bid or proposal.
4. "Cost analysis" means the evaluation of cost data.
5. "Cost data" means information concerning the actual or estimated cost of labor, material, overhead, and other cost elements that have been actually incurred or that are expected to be incurred by the contractor in performing the contract.
6. "Cost-plus-a-percentage-of-cost contract" means a contract that, prior to completion of the work, the parties agree that the fee will be a predetermined percentage of the total cost of the work.
7. "Defective data" means data that is inaccurate, incomplete or non-current.
8. "Descriptive literature" means information available in the ordinary course of business that shows the characteristics, construction, or operation of an item offered in a bid or proposal.

Article 2

9. "Discussions" means oral or written negotiations between the state and an offeror during which information is exchanged about specifications, scope of work, terms and conditions and price set forth in the initial proposal. Communication with an offeror for the sole purpose of clarifications does not constitute "discussions".
10. "Incremental award" means 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.
11. "Minor informality" means mistakes, excluding judgmental errors, that have negligible effect on price, quantity, quality, delivery, or other contractual terms and the waiver or correction of which does not prejudice other bidders or offerors.
12. "Multiple award" means an award of separate contracts for an indefinite quantity for one or more similar materials or services to more than one bidder or offeror.
13. "Price analysis" means the evaluation of price data.
14. "Price data" means information concerning prices, including profit, for materials, services, or construction substantially similar to those being procured under a contract or subcontract. In this definition, "prices" refers to offered or proposed selling prices, historical selling prices, or current selling prices of the items being purchased.
15. "Regional award" means the division of a contract for one or more similar materials or services into geographic regions.
16. "Small business" means a concern defined in A.R.S. § 41-1001(14).
17. "Solicitation" means an Invitation for Bids, a Request for Technical Offers, a Request for Proposals, a Request for Quotations, or any other invitation or request by which the state invites a person to participate in a procurement.
18. "Technical offer" means unpriced written information from a prospective contractor stating the manner in which the prospective contractor intends to perform certain work and its qualifications.

Article 2

R2-7-302. General Provisions

- A. A procurement officer shall neither award a contract nor incur an obligation on behalf of the state unless sufficient funds are available for the specific procurement.
- B. Any bid or proposal that is conditioned upon award to the bidder or offeror of both the particular contract being solicited and another state contract shall be deemed nonresponsive or unacceptable.

R2-7-303. Extension of Offer Acceptance Time

After opening of bids or proposals, the procurement officer may request bidders or offerors who have submitted timely bids or proposals to extend, in writing, the time during which the state may accept their bids or proposals. It is not necessary to receive a written concurrence from all bidders or offerors to award a contract. A written concurrence is required from those bidders or offerors who are to be awarded a contract and that concurrence must be received by the procurement officer before the original bid or proposal expires.

R2-7-304. Purchase Requests

- A. If a state governmental unit determines the need for a material or service, it shall prepare a purchase request.
- B. Upon receipt of a purchase request from a state governmental unit, a procurement officer is authorized to determine the form and manner in which the procurement shall be solicited, except as otherwise provided in this Chapter.
- C. The procurement officer shall reject the purchase request, if after consultation with the requesting state governmental unit, the procurement officer determines that it is not advantageous to the state. The determination shall state the reasons for the rejection and shall accompany the returned purchase request.
- D. Disagreements between a using agency and the State Purchasing Administrator concerning actions taken under subsection (B) or (C) of this rule, shall be brought to the

Article 2

Director for resolution. Disagreements between a purchasing agency and its procurement officer shall be resolved in accordance with the agency's delegation of authority.

R2-7-305. Assignment of Rights and Duties

The rights and duties of a state contract are not transferable or otherwise assignable without the written consent of the procurement officer.

R2-7-306. Change of Name

- A. If a contractor requests to change the name in which it holds a state contract, the procurement officer may, upon receipt of a document indicating name change, enter into a written amendment with the contractor to effect the name change. The amendment shall provide that no other terms and conditions of the contract are changed.
- B. All change of name amendments shall be reported to the State Procurement Administrator before the date that the amendment becomes effective.

R2-7-307. Installment Purchases

Installment purchases may be used when advantageous to the state. If an installment purchase is used, provisions for installment purchase payments shall be included in the solicitation document.

R2-7-308. Multiple-source Contracting

- A. If the procurement officer anticipates that any of the awards described in subsections (B) through (D) of this rule will be made, the solicitation shall include a notification of the right of the state to make such an award and the criteria upon which such an award will be based.
- B. An incremental award may be made only if the procurement officer determines in writing that such an award is necessary to obtain the required quantity or delivery.

Article 2

- C. A multiple award shall be made only if the procurement officer determines in writing that a single award is not advantageous to the state. A multiple award shall be limited to the least number of suppliers necessary to meet the requirements of the using agencies.
- D. A regional award may be made only if material or service is required to widely scattered locations or a particular requirement is of a local nature.

R2-7-309. Purchase of Items Separately from Construction Contract

The determination whether materials shall be procured as part of or separate from construction contract shall only be made by the State Procurement Administrator and Assistant Director for Facilities Management.

R2-7-310. Contract Change Orders and Amendments

Any contract change order or amendment that exceeds \$100,000, or a contract change order or amendment of \$100,000 or less that exceeds \$10,000 or 10% of the contract amount, whichever is greater, may be executed only if the State Procurement Administrator or, in the case of construction, Assistant Director for Facilities Management determines in writing that the change order or amendment is advantageous to the state. This rule shall not apply to the extension of a contract the price of which was competed and evaluated under the contractor's original bid or proposal.

R2-7-311. Arizona State Contracts

- A. State governmental units shall use existing Arizona state contracts to satisfy their needs for those materials and services covered by such contracts.
- B. If a state governmental unit believes that a particular Arizona state contract does not satisfy its needs, the state governmental unit may not otherwise purchase the material or service without the written approval from the State Procurement Administrator. A copy of the approval shall be filed in the corresponding purchase order file maintained by the state governmental unit.

Article 2

§ 41-2532. Methods of source selection

Unless otherwise authorized by law, all state contracts shall be awarded by competitive sealed bidding as provided in § 41-2533, except as provided in §§ 41-2534 through 41-2538 and §§ 41-2553, 41-2554, 41-2558, 41-2559, 41-2572, 41-2578 and 41-2636.

§ 41-2533. Competitive sealed bidding

- A. Contracts shall be awarded by competitive sealed bidding except as otherwise provided in § 41-2532.
- B. An invitation for bids shall be issued and shall include a purchase description and all contractual terms and conditions applicable to the procurement.
- C. Adequate public notice of the invitation for bids shall be given a reasonable time before the date set forth in the invitation for the opening of bids, in accordance with rules adopted by the director. The notice may include publication one or more times in a newspaper of general circulation a reasonable time before bid opening. If the invitation for bids is for the procurement of services other than those described in §§ 41-2513 and 41-2578, the notice shall include publication in a single newspaper or in multiple newspapers within this state with an accumulated general circulation of at least fifty thousand subscribers for two publications which are not less than six nor more than ten days apart. The second publication shall be not less than two weeks before bid opening. At least one of the newspapers must be circulated within the affected governmental jurisdiction.
- D. Bids shall be opened publicly at the time and place designated in the invitation for bids. The amount of each bid, and such other relevant information as may be specified by rule, together with the name of each bidder shall be recorded. This record shall be open to public inspection at the bid opening in a manner prescribed by rule. The bids shall not be open for public inspection until after a contract is awarded. To the extent the bidder designates and the state concurs, trade secrets or other proprietary data contained in the bid documents shall remain confidential in accordance with rules adopted by the director.

Article 2

- E. Bids shall be unconditionally accepted without alteration or correction, except as authorized in this chapter. Bids shall be evaluated based on the requirements set forth in the invitation for bids, as prescribed in rules adopted by the director. The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids.
- F. The correction or withdrawal of erroneous bids before or after bid opening, based on bid mistakes, may be permitted in accordance with rules adopted by the director. After bid opening, no corrections in bid prices or other provisions of bids prejudicial to the interest of this state or fair competition shall be permitted. Except as otherwise provided by rule, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, shall be supported by a written determination made by the director.
- G. The contract shall be awarded to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and criteria set forth in the invitation for bids. The amount of any applicable transaction privilege or use tax of a political subdivision of this state is not a factor in determining the lowest bidder if a competing bidder located outside of this state is not subject to a transaction privilege or use tax of a political subdivision of this state. If all bids for a construction project exceed available monies as certified by the appropriate fiscal officer, and the low responsive and responsible bid does not exceed such monies by more than five per cent, the director may in situations in which time or economic considerations preclude resolicitation of work of a reduced scope negotiate an adjustment of the bid price, including changes in the bid requirements, with the low responsive and responsible bidder, to bring the bid within the amount of available monies.
- H. The multistep sealed bidding method may be used if the director determines in writing that it is not practical to initially prepare a definitive purchase description which is suitable to permit an award based on competitive sealed bidding. An invitation for bids may be issued requesting the submission of technical offers to be followed by an invitation for bids limited to those bidders whose offers are determined to be technically acceptable

Article 2

under the criteria set forth in the first solicitation, except that the multistep sealed bidding method may not be used for construction contracts.

- I. If the price of a recycled paper product which conforms to specifications is within five per cent of a low bid product which is not recycled and the recycled product bidder is otherwise the lowest responsible and responsive bidder, the award shall be made to the bidder offering the recycled product. The director may adopt rules requiring a five per cent preference for other products made from recycled materials.

R2-7-312. Prospective Vendors Lists

- A. The State Procurement Administrator shall compile and maintain a prospective vendors list. Inclusion of the name of a person shall not indicate whether the person is responsible concerning a particular procurement or otherwise capable of successfully performing a state contract.
- B. Persons desiring to be included on the prospective vendors list shall notify the State Procurement Administrator. Upon notification, the State Procurement Administrator shall mail or otherwise provide the person with a vendor registration form. The person shall complete the vendor registration form and return it to the State Procurement Office. Within five days after receiving the vendor registration form, the State Procurement Administrator shall add the person to the prospective vendors list unless the State Procurement Administrator makes a written determination that inclusion is not advantageous to the state.
- C. Persons that fail to respond to solicitations for two consecutive procurements of similar items may be removed from the applicable vendors list after mailing a notice to the business. Persons may be reinstated upon written request.

R2-7-313. Invitation for Bids

- A. In all competitive sealed bidding procurements, the purchasing agency shall issue an Invitation for Bids on a form approved by the State Procurement Administrator or, in the case of construction, the Assistant Director for Facilities Management. Invitation for Bids

Article 2

shall be issued at least 14 days before the time and date set for bid opening in the Invitation for Bids unless a shorter time is deemed necessary for a particular procurement as determined in writing by the State Procurement Administrator or, in the case of construction, the Assistant Director for Facilities Management.

B. Content

1) The Invitation for Bids shall include the following:

- (a) Instructions and information to bidders concerning the bid submission requirements, including the time and date set for bid opening, the address of the office to which bids are to be received, the period that the bid shall remain open, and any other special information;
- (b) The purchase description, specifications, evaluation criteria, delivery or performance schedule, and inspection and acceptance requirements; and
- (c) The contract terms and conditions, including warranty and bonding or other security requirements, as applicable.

2) 2. If the Invitation for Bids incorporates documents by reference, the Invitation for Bids shall specify where such documents may be obtained.

3) 3. The Invitation for Bids shall require the acknowledgement by the bidder of the receipt of any amendments issued.

4) 4. An Invitation for Bids may require the submission of bid samples, descriptive literature, technical data and may require inspection or testing of a product before award.

C. The purchasing agency shall mail or otherwise furnish Invitations for Bids or Notices of the Availability of Invitation for Bids to all prospective vendors registered at the State Procurement Office for the specific material, service or construction being bid.

D. A copy of the Invitation for Bids shall be made available for public inspection at the procurement officer's office.

Article 2

R2-7-314. Pre-bid Conferences

A procurement officer may conduct a pre-bid conference within a reasonable time but not less than seven days before the bid opening to explain the procurement requirements. Statements made at the pre-bid conference shall not be considered amendments to the invitation for bids unless a written amendment is issued pursuant to R2-7-315.

R2-7-315. Amendments to Invitations for Bids

- A. An amendment to an Invitation for Bids shall be issued if necessary to:
- 1) Make changes in the Invitation for Bids;
 - 2) Correct defects or ambiguities; or
 - 3) Furnish to other bidders information given to one bidder if the information will assist the other bidders in submitting bids or if the lack of the information will prejudice the other bidders.
- B. Amendments to Invitations for Bids shall be so identified and shall be sent to all persons to whom the procurement officer distributed an Invitation for Bids.
- C. Amendments shall require that the bidder acknowledge receipt of the amendment by signing and returning the amendment with the bid or before the time and date set for opening.
- D. Amendments shall be issued within a reasonable time before bid opening to allow prospective bidders to consider them in preparing their bids. If the time and date set for bid opening does not permit sufficient time for bid preparation, the time and date for bid opening shall be extended in the amendment or, if necessary, by telegram or telephone and confirmed in the amendment.

R2-7-316. Pre-opening Modification or Withdrawal of Bids

- A. A bidder may modify or withdraw its bid at any time before bid opening if the modification or withdrawal is received in writing before the time and date set for bid opening in the location designated in the Invitation for Bids for receipt of bids. A bidder or the bidder's authorized representative may withdraw the bid in person if, before the time and date set

Article 2

- for bid opening, the identity of the person requesting withdrawal is established and that person signs a receipt for the bid.
- B. All documents concerning a modification or withdrawal of a bid shall be retained in the appropriate procurement file.

R2-7-317. Late Bids, Late Withdrawals, and Late Modifications

- A. A bid, modification or withdrawal is late if it is received at the location designated in the Invitation for Bids for receipt of bids after the time and date set for bid opening.
- B. A late bid, late modification, or late withdrawal shall be rejected unless the bid, modification, or withdrawal is received before contract award at the location designated in the Invitation for Bids for receipt of bids and would have been timely received but for the action or inaction of state personnel directly serving the purchasing agency.
- C. Bidders submitting bids, modifications or withdrawals that are rejected as late shall be so notified as soon as practicable.
- D. Documentation concerning a late bid, late modification, or late withdrawal shall be retained in the appropriate procurement file.

R2-7-318. Receipt, Opening, and Recording of Bids

- A. Except as provided in subsection (B) of this rule, each bid and modification shall be time-stamped upon receipt and stored unopened in a secure place until the time and date set for bid opening.
- B. An envelope that is not marked as a bid or does not identify the bidder or solicitation may be opened solely for the purpose of identification. Record shall be made on the envelope of the reason for opening it, the date and time it was opened, the solicitation to which the bid responded, and the signature of the person who opened the envelope. The envelope shall be resealed and retained in the procurement file.
- C. Bids and modifications shall be opened publicly in the sequence that they were received and in the presence of one or more witnesses at the time, date, and location designated in the Invitation for Bids for bid opening. The name of each bidder, the bid price, and

Article 2

other information deemed appropriate by the procurement officer shall be read aloud and recorded on a bid abstract. The name of the required witness shall also be recorded. The bid abstract shall be available for public inspection.

- D. Bids shall not be available for public inspection before contract award pursuant to A.R.S. § 41-2533(D). After contract award, the bids shall be available for public inspection, except to the extent that the withholding of information is permitted or required by law. If the bidder designates a portion of its bid as confidential, it shall isolate and identify in writing the confidential portions in accordance with R2-7-104.

R2-7-319. Mistakes in Bids

- A. A bidder may correct mistakes discovered before the time and date set for bid opening by withdrawing or correcting the bid as provided in R2-7-316.
- B. After bid opening, a bid mistake based on an error in judgment may not be corrected or withdrawn. Other bid mistakes may be corrected or withdrawn pursuant to subsections (C) through (E) of this rule.
- C. After bid opening, the procurement officer shall either waive minor informalities in a bid or allow the bidder to correct them if correction is advantageous to the state.
- D. After bid opening, the bid may not be withdrawn and shall be corrected to the intended bid if a bid mistake and the intended bid are evident on the face of the bid.
- E. After bid opening, the State Procurement Administrator or, in the case of construction, the Assistant Director for Facilities Management may permit a bidder to withdraw a bid if:
- 1) A nonjudgmental mistake is evident on the face of the bid but the intended bid is not evident; or
 - 2) The bidder establishes by clear and convincing evidence that a nonjudgmental mistake was made.
- F. Mistakes shall not be corrected after award of the contract except where the State Procurement Administrator or Assistant Director for Facilities Management makes a written determination that it would be unconscionable not to allow the mistake to be corrected.

Article 2

- G. If correction or withdrawal of a bid after bid opening is permitted or denied under subsections (D) and (E) of this rule, the State Procurement Administrator or, in the case of construction, the Assistant Director for Facilities Management shall prepare a written determination showing that the relief was permitted or denied under these rules and regulations.

R2-7-320. Bid Evaluation and Award

- A. The contract shall be awarded to the lowest responsible and responsive bidder whose bid meets the requirements and evaluation criteria set forth in the Invitation for Bids. Unless otherwise provided in the Invitation for Bids, award may be made by individual line item, by group of line items, or for the aggregate total of all line items.
- B. A product acceptability evaluation may be conducted to determine whether a bidder's product is acceptable as set forth in the Invitation for Bids but not to determine whether one bidder's product is superior to another bidder's product. Any bidder's offering that does not meet the acceptability requirements shall be rejected as nonresponsive.
- C. Bids shall be evaluated to determine which bidder offers the lowest cost to the state in accordance with the evaluation criteria set forth in the Invitation for Bids. Only objectively measurable criteria that are set forth in the Invitation for Bids shall be applied in determining the lowest bidder. Examples of such criteria include, but are not limited to, transportation cost, energy cost, ownership cost, and other identifiable costs or life cycle cost formulae. Evaluation factors need not be precise predictors of actual future costs, but to the extent possible the evaluation factors shall be reasonable estimates based upon information the procurement officer has available concerning future use.
- D. A contract may not be awarded to a bidder submitting a higher quality item than that designated in the Invitation for Bids unless the bidder is also the lowest bidder as determined under subsection (C) of this rule. The procurement officer may seek clarification of a bid but this rule does not permit discussions with any bidder.
- E. If there are two or more low responsive bids from responsible bidders that are identical in price and that meet all the requirements and criteria set forth in the Invitation for Bids,

Article 2

award shall be made by drawing lots. If time permits, the bidders involved shall be given an opportunity to attend the drawing. The drawing shall be witnessed by at least one person other than the procurement officer supervising the drawing.

- F. A record showing the basis for determining the successful bidder shall be retained in the procurement file.
- G. A written notice of award shall be sent to the successful bidder. In procurements over \$100,000, each unsuccessful bidder shall be notified of the award. Notice of award shall be made available to the public.

R2-7-321. Only One Bid Received

If only one responsive bid is received in response to an Invitation for Bids, an award may be made to the single bidder if the procurement officer determines in writing that the price submitted is fair and reasonable, and that either other prospective bidders had reasonable opportunity to respond, or there is not adequate time for resolicitation. Otherwise the bid may be rejected pursuant to the provisions of A.R.S. § 41-2539 and:

- 1) New bids may be solicited; or
- 2) The proposed procurement may be cancelled; or
- 3) If the procurement officer determines in writing that the need for the material or service continues and the acceptance of the one bid is not advantageous to the state, the procurement may then be conducted under A.R.S. §§ 41-2536 or 41-2537 as appropriate.

R2-7-322. Multi-step Sealed Bidding

- A. The multi-step sealed bidding method may be used if the procurement officer determines in writing that:
 - 1) Available specifications or purchase descriptions are not sufficiently complete to permit full competition without technical evaluations and discussions to ensure mutual understanding between each bidder and the state;
 - 2) Definite criteria exist for evaluation of technical offers;

Article 2

- 3) More than one technically qualified source is expected to be available; and
 - 4) A fixed-price contract will be used.
- B. The procurement officer may hold a conference with bidders before submission or at any time during the evaluation of the unpriced technical offers.

R2-7-323. Phase One of Multi-step Sealed Bidding

- A. Multi-step sealed bidding shall be initiated by the issuance of an Invitation to Submit Technical Offers. The Invitation to Submit Technical Offers shall be issued according to R2-7-313 and shall contain the following information:
- 1) Notice that the procurement shall be conducted in two phases and that priced bids will be considered only in the second phase and only from those offerors whose unpriced technical offers are found acceptable in the first phase;
 - 2) The best description of the material or services desired;
 - 3) The requirements for the technical offers, such as drawings and descriptive literature;
 - 4) The criteria for evaluating technical offers;
 - 5) The closing date and time for receipt of technical offers and the location where offers should be delivered or mailed; and
 - 6) A statement that discussions may be held.
- B. The Invitation to Submit Technical Offers may be amended after the submission of the unpriced technical offers. The amendment shall be distributed only to bidders who submitted unpriced technical offers, and those bidders shall be permitted to submit new unpriced technical offers or to amend the offers already submitted. If an amendment materially changes the procurement, the Invitation to Submit Technical Offers shall be cancelled in accordance with A.R.S. § 41-2539.
- C. Unpriced technical offers shall not be opened publicly but shall be opened in the presence of two or more procurement officials. Late technical proposals shall not be

Article 2

considered except under the circumstances set forth in R2-7-317(B). The contents of unpriced technical offers shall not be disclosed to unauthorized persons.

- D. Unpriced technical offers shall be evaluated solely in accordance with the criteria set forth in the Invitation to Submit Technical Offers and shall be determined to be either acceptable or potentially acceptable for further consideration or unacceptable. A determination that an unpriced technical proposal is unacceptable shall be in writing, state the basis of the determination and be retained in the procurement file. If the procurement officer determines a bidder's unpriced technical offer is unacceptable, the procurement officer shall notify that bidder of the determination and that the bidder shall not be afforded an opportunity to amend its technical offer.
- E. The procurement officer may conduct discussions with any bidder who submits an acceptable or potentially acceptable technical offer. During discussions, the procurement officer shall not disclose any information derived from one unpriced technical offer to any other bidder. After discussions, the procurement officer shall establish a closing date for receipt of final technical offers and shall notify in writing bidders submitting acceptable or potentially acceptable offers of the closing date. The procurement officer shall keep a record of all discussions.
- F. After receipt of final technical offers, the procurement officer shall determine whether the technical offers are acceptable for consideration in phase two or unacceptable.
- G. At any time during phase one, offers may be withdrawn.

R2-7-324. Phase Two of Multi-step Sealed Bidding

- A. Upon completion of phase one, the procurement officer shall issue an Invitation for Bids and conduct Phase Two under R2-7-313 through R2-7-320 as a competitive sealed bidding procurement, except that the Invitation for Bids shall be issued only to bidders whose technical offers were determined to be acceptable in phase one.
- B. Unpriced technical offers of unsuccessful bidders shall be open to public inspection except to the extent set forth in R2-7-318.

Article 2

§ 41-2534. Competitive sealed proposals

- A. If, under rules adopted pursuant to this chapter, the director determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to this state, a contract for materials or services may be entered into by competitive sealed proposals. This section does not apply to procurement of construction or construction services. Construction services shall be procured pursuant to § 41-2537 or 41-2578. The director may provide by rule that it is either not practicable or not advantageous to this state to procure specified types of materials or services by competitive sealed bidding.
- B. Proposals shall be solicited through a request for proposals.
- C. Adequate public notice of the request for proposals shall be given in the same manner as provided in § 41-2533.
- D. Proposals shall be opened publicly at the time and place designated in the request for proposals. The name of each offeror and such other relevant information as is specified by rule shall be publicly read and recorded in accordance with regulations promulgated by the director. All other information contained in the proposals shall be confidential so as to avoid disclosure of contents prejudicial to competing offerors during the process of negotiation. The proposals shall be open for public inspection after contract award. To the extent the bidder designates and the state concurs, trade secrets or other proprietary data contained in the bid documents shall remain confidential in accordance with rules adopted by the director.
- E. The request for proposals shall state the relative importance of price and other evaluation factors. Specific numerical weighting is not required.
- F. As provided in the request for proposals, and under rules adopted by the director, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible to being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair treatment with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after

Article 2

submissions and before award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

- G. The award shall be made to the responsive and responsible offeror whose proposal is determined in writing to be the most advantageous to this state taking into consideration the evaluation factors set forth in the request for proposals. No other factors or criteria may be used in the evaluation. The amount of any applicable transaction privilege or use tax of a political subdivision of this state is not a factor in determining the most advantageous proposal if a competing offeror located outside this state is not subject to a transaction privilege or use tax of a political subdivision of this state. The contract file shall contain the basis on which the award is made.

R2-7-325. Competitive Sealed Proposals

- A. The State Procurement Administrator shall determine in writing that competitive sealed bidding is either not practicable or not advantageous to the state. The State Procurement Administrator may make a class determination that it is either not practicable or not advantageous to the state to procure specified types of materials or services by competitive sealed bidding. The State Procurement Administrator may modify or revoke a class determination at any time.
- B. Competitive sealed bidding may not be practicable or advantageous if it is necessary to:
- 1) Use a contract other than a fixed-price type; or
 - 2) Conduct oral or written discussions with offerors concerning technical and price aspects of their proposals; or
 - 3) Afford offerors an opportunity to revise their proposals; or
 - 4) Compare the different price, quality, and contractual factors of the proposals submitted; or
 - 5) Award a contract in which price is not the determining factor.

R2-7-326. Request for Proposals

Article 2

- A. A Request for Proposals shall set forth those factors listed in R2-7-313(B) that are applicable and shall also state:
- 1) The type of materials or services required and a description of the work involved;
 - 2) The type of contract to be used;
 - 3) Whether cost or pricing data is required;
 - 4) That offerors may designate as trade secrets or proprietary data portions of the proposals;
 - 5) That discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award;
 - 6) The minimum information that the proposal shall contain; and
 - 7) The closing date and time for receipt of proposals.
- B. A Request for Proposals shall be issued at least 14 days before the closing date and time for receipt of proposals unless a shorter time is determined necessary in writing by the State Procurement Administrator.
- C. Request for Proposal forms shall be approved by the State Procurement Administrator.
- D. Notice of the Request for Proposals shall be issued in accordance with R2-7-313.
- E. Vendors lists compiled and maintained in accordance with R2-7-312 shall serve as a basis for soliciting competitive sealed proposals.
- F. Before submission of initial proposals, amendments to Requests for Proposals shall be made in accordance with R2-7-315. After submission of proposals, amendments may be made in accordance with R2-7-323(B).

R2-7-327. Pre-proposal Conferences

Pre-proposal conferences may be convened in accordance with R2-7-314.

R2-7-328. Late Proposals, Late Modifications or Late Withdrawals

Article 2

- A. A proposal received after the closing date and time for receipt of proposals is late and shall not be considered except under the circumstances set forth in R2-7-317(B). A best and final offer received after the closing date and time for receipt of best and final offers is late and shall not be considered except under the circumstances set forth in R2-7-317(B).
- B. A modification of a proposal received after the closing date and time for receipt of proposals is late and shall not be considered except under the circumstances set forth in R2-7-317(B).
- C. A modification of a proposal resulting from an amendment issued after the closing date and time for receipt of proposals or a modification of a proposal resulting from discussions during negotiations shall be considered if received by the closing date and time set forth in the amendment or by the closing date and time for submission of best and final offers, whichever is applicable. If the modifications described in this subsection are received after the respective date and time described in this subsection, the modifications are late and shall not be considered except under the circumstances set forth in R2-7-317(B).
- D. A proposal may be withdrawn at any time before the closing date and time for receipt of best and final offers. Withdrawal of a proposal after submission of best and final offers is permissible only in accordance with R2-7-333.

R2-7-329. Receipt of Proposals

- A. Each proposal received shall be date and time stamped and retained in a secure place until the closing date and time for receipt of proposals. A Register of Proposals shall be prepared and shall set forth the name of each offeror and the identity of the Request for Proposals for which the proposal was submitted.
- B. Proposals shall be opened in the presence of witnesses. The name of each offeror shall be publicly read and recorded. Before contract award, proposals and modifications shall be shown only to state personnel having a legitimate interest in them or persons assisting the state in evaluation.

Article 2

- C. If only one proposal is received in response to a Request for Proposals, the procurement officer may either make an award in accordance with R2-7-334 or, if time permits, resolicit.

R2-7-330. Evaluation of Proposals

- A. Evaluation of the proposals shall be based on the evaluation factors set forth in the Request for Proposals.
- B. For the purpose of conducting discussions, the procurement officer shall determine, in accordance with subsection (A) of this rule, that proposals are either reasonably susceptible of being selected for award or unacceptable. A determination that a proposal is unacceptable shall be in writing, state the basis of the determination, and be retained in the procurement file. If the procurement officer determines that an offeror's proposal is not reasonably susceptible of being selected for award, the procurement officer shall notify that offeror of the determination and that the offeror shall not be afforded an opportunity to modify its offer.

R2-7-331. Discussions with Individual Offerors

The procurement officer shall establish procedures and schedules for conducting discussions. Disclosure of one offeror's price to another and any information derived from competing proposals is prohibited. The procurement officer shall keep a record of all discussions in a manner prescribed by the State Procurement Administrator.

R2-7-332. Best and Final Offers

If discussions are conducted pursuant to R2-7-331, the procurement officer shall issue a written request for best and final offers. The request shall set forth the date, time and place for the submission of best and final offers. Best and final offers shall be requested only once, unless the State Procurement Administrator makes a written determination that it is advantageous to the state to conduct further discussions or change the state's requirements. The request for best and final offers shall inform offerors that, if they do not

Article 2

submit a notice of withdrawal or a best and final offer, their immediate previous offer will be construed as their best and final offer.

R2-7-333. Mistakes in Proposals

- A. Prior to the time and date set for receipt of best and final offers, any offeror with whom discussions have been held may withdraw the proposal or correct any mistake by modifying the proposal.
- B. After receipt of best and final offers, an offeror may withdraw a proposal or correct a mistake in accordance with R2-7-319(B) through (G).

R2-7-334. Contract Award

- A. The procurement officer shall award a contract to the offeror whose proposal is determined in writing to be most advantageous to the state based on the factors set forth in the Request for Proposals. The determination shall explain the basis of the award.
- B. If the contract awarded exceeds \$100,000, each unsuccessful offeror shall be notified in writing of the award.
- C. After contract award the proposals shall be open for public inspection except to the extent that the withholding of information is permitted or required by law. If the offeror designates a portion of its proposal as confidential, it shall isolate and identify in writing the confidential portions in accordance with R2-7-104.

§ 41-2535. Procurements not exceeding a prescribed amount; small businesses; exception for construction services contracts; simplified construction procurement program

- A. Any procurement which does not exceed the aggregate dollar amount of thirty-five thousand dollars may be made in accordance with rules adopted by the director, except that the procurements shall be made with such competition as is practicable under the circumstances.
- B. Any procurement which does not exceed the aggregate dollar amount of less than twenty-five thousand dollars shall be restricted, if practicable, to small businesses as

Article 2

- defined in rules adopted by the director . The procurement officer shall rotate the small business solicited to compete for any procurement of less than twenty-five thousand dollars. If it is impracticable to restrict a particular procurement to small businesses, the procurement officer shall make a determination setting forth the reasons and place it in the contract file.
- C. Procurement requirements shall not be artificially divided or fragmented so as to constitute a purchase under this section and to circumvent the source selection procedures required by § 41-2533 or 41-2534 or be artificially combined to circumvent this section.
- D. A procurement involving construction not exceeding one hundred thousand dollars may be made pursuant to rules adopted by the director in accordance with this section which shall be known as the simplified construction procurement program. At a minimum the rules shall require that:
- 1) A list is maintained of persons who desire to receive solicitations to bid on construction projects to which additions shall be permitted throughout the year.
 - 2) The list of persons is available for public inspection.
 - 3) Agreements for construction are on forms approved by the director.
 - 4) A performance bond and a payment bond as required by § 41-2574 are provided for contracts for construction by contractors.
 - 5) All information submitted by bidders pursuant to this section be confidential according to § 41-2533, subsection D.
 - 6) All bids for construction are opened at a public opening.
 - 7) All persons desiring to submit bids be treated equitably and the information related to each project be available to all eligible persons.
 - 8) Competition for construction projects under the simplified construction procurement program is encouraged to the maximum extent possible.

Article 2

R2-7-335. Small Business Set-aside

- A. When practical and except as provided under subsection (D) of this rule, purchases estimated to cost less than \$10,000 shall be restricted to small businesses in accordance with the procedures set forth in subsections (B) and (C) of this rule. Purchases shall be conducted in accordance with R2-7-336.
- B. If a request for quotations is issued for the purchase, it shall contain a notice that only small businesses as defined in these rules may respond. Any request for quotations that requires written quotes shall request bidders to self-certify in their quotes that they are a small business. If verbal quotes are accepted in response to a written request for quotations or if the bidder fails to certify in a written quote that it is a small business, the procurement officer shall confirm before awarding a contract that the intended awardee is a small business. A bidder shall be presumed to be a small business if it has registered on the state's prospective vendors list as a small business. The procurement officer shall make a written notation in the contract file of that confirmation.
- C. If a request for quotation is not issued, the procurement officer shall verbally request confirmation that the bidder contacted to offer a quote is a small business. The procurement officer shall confirm before awarding a contract for a purchase that the intended awardee is a small business and shall make a written notation in the contract file of that confirmation.
- D. It is declared to be impractical for the procurement officer to determine a bidder's status as a small business under the following circumstances:
- 1) Sole-source procurements as defined in A.R.S. § 41-2536;
 - 2) Emergency procurements as defined in A.R.S. § 41-2537;
 - 3) Purchases not expected to exceed \$1,000;
 - 4) Purchases delegated within a purchasing agency to field offices; and
 - 5) Purchases that have been unsuccessfully competed under subsections (B) and (C) of this rule, including failure to obtain fair and reasonable prices.

Article 2

R2-7-336. Procurements Not Exceeding an Aggregate Amount of \$25,000

A. Purchases estimated to cost from \$10,000 to \$25,000 shall be made in accordance with the following procedures:

- 1) Purchasing agencies that are not authorized by the state procurement administrator to utilize the state procurement office's electronic notification/distribution system shall either conduct purchases according to A.R.S. §§ 41-2533 or 41-2534 for purchases estimated to cost from \$10,000 to \$25,000 or request that the state procurement office conduct the procurement for them
- 2) If practical, purchasing agencies authorized by the state procurement administrator to utilize the electronic notification/distribution system shall conduct purchases estimated to cost from \$10,000 to \$25,000 in accordance with the procedures set forth in subsections (A)(3) through (10) of this rule.
- 3) The procurement officer shall issue a request for quotations. The request for quotations shall be transmitted to the state procurement office's electronic notification/distribution system.
- 4) Requests for quotations on the electronic notification/distribution system shall be retained on that system for a period of not less than 11 days as defined in R2-7-102(5) and computed pursuant to A.R.S. § 1-243.
- 5) Bidders shall submit quotes on a form approved by the state procurement administrator and the quotes shall be recorded and placed in the procurement file.
- 6) Award shall be made to the responsible bidder submitting the quotation which is most advantageous to the state and conforms to the solicitation.
- 7) If only one responsive quotation is received, a statement shall be included in the contract file setting forth the basis for determining that the price is fair and reasonable. This determination may be based on a comparison of the proposed price with prices found reasonable on previous purchases or current price lists.

Article 2

- 8) If the procurement officer determines that it is not practical to utilize the procedures set forth in subsections (A)(3) through (6) of this rule, the procurement officer shall document in writing the reasons that compliance with those procedures is impractical. A procurement officer who determines that it is impractical to comply with subsection (A)(3) shall follow the procedures set forth in subsection (B) of this rule. A procurement officer who determines that it is impractical to comply with subsection (A)(4) shall transmit the request for quotations to the electronic notification/distribution system and retain it on that system for a number of days reasonable under the circumstances.
 - 9) The procurement officer may determine that an emergency exists under A.R.S. § 41-2537 as the basis for not placing the purchase on the electronic notification/distribution system. The procurement officer shall report the emergency procurement in writing to the state procurement office within two days of making the determination that an emergency existed.
 - 10) Any sole-source procurement under A.R.S. § 41-2536 shall be approved in advance by the state procurement office.
 - 11) Purchases estimated to cost less than \$10,000 may be placed on the electronic notification/distribution system by purchasing agencies that are connected to the system.
 - 12) Solicitation notices of the availability of solicitations issued pursuant to R2-7-313(C) and R2-7-326(D) for purchases that exceed \$25,000 may be placed on the electronic notification/distribution system and sent to those registered vendors capable of receiving them electronically.
- B. If practical, purchases estimated to cost from \$5,001 to \$9,999 shall be made in accordance with the following procedures:
- 1) If applicable under R2-7-335, bidders shall be limited to small businesses.
 - 2) At least three bidders shall be solicited to submit written quotations.

Article 2

- 3) The procurement officer shall issue a Request for Quotations to a reasonable number of vendors. The Request for Quotation need not be sent to all vendors on the vendors list but shall be sent to any vendor who specifically requests the Request for Quotation. Vendors solicited shall be rotated to the extent necessary to give all vendors a fair and equal opportunity to compete.
 - 4) The procurement officer shall issue the request for quotation a reasonable time as determined under the circumstances of each case by the procurement officer.
 - 5) Quotes shall be submitted in accordance with subsection (A)(5) of this rule. Award shall be made in accordance with subsection (A)(6) or, where applicable, subsection (A)(7) of this rule.
- C. If practical, purchases estimated to cost from \$1,001 to \$5,000 shall be made in accordance with the following procedures:
- 1) If applicable under R2-7-335, bidders shall be limited to small businesses.
 - 2) At least three bidders shall be solicited to submit verbal or written quotations.
 - 3) Quotations need not be solicited from all vendors on the vendors list but shall be solicited from any vendor who specifically requests to submit a quotation. Vendors solicited shall be rotated to the extent necessary to give all vendors a fair and equal opportunity to compete.
 - 4) Procurements made under this rule shall also comply with R2-7-336(A)(4) and (5).
 - 5) Quotations shall be recorded and a record sufficient to facilitate auditing of the purchasing agency shall be placed in the procurement file.
- D. For purchases of \$1,000 or less, purchasing agencies shall utilize procedures providing for adequate and reasonable competition and for making records to facilitate auditing of the purchasing agency.
- E. For purposes of a multi-term contract, the total amount of the contract over the full term, including the amounts of any options to extend, will determine whether it is subject to this Section.

Article 2

R2-7-337. Other Procurements Not Exceeding an Aggregate Amount of \$10,000

- A. If material, service or construction is available from only one vendor, and the purchase is estimated to cost less than \$10,000, the sole source procurement method set forth in A.R.S. § 41-2536 shall be used, except that head of the purchasing agency or the State Procurement Administrator may make the determination that the sole source method is appropriate. This subsection does not apply to procurements described in R2-7-336(C).
- B. If purchases of services specified in A.R.S. §§ 41-2513 and 41-2578 are estimated to cost less than \$10,000, the methods specified in this rule may be used in lieu of the procedure specified in A.R.S. §§ 41-2538 and 41-2578.

§ 41-2536. Sole source procurement

- A. contract may be awarded for a material, service or construction item without competition if the director determines in writing that there is only one source for the required material, service or construction item. The director may require the submission of cost or pricing data in connection with an award under this section. Sole source procurement shall be avoided, except when no reasonable alternative sources exist. A written determination of the basis for the sole source procurement shall be included in the contract file.

R2-7-338. Sole Source Procurement

- A. A using agency seeking a sole source procurement shall prepare a written request documenting the existence of a sole source condition, including the specific efforts made to determine the availability of any other source. The request shall include an explanation of the procurement need. The request shall be signed by a designated official of the using agency at the assistant director level, its equivalent or above.
- B. Except as provided in R2-7-337(A), a sole source procurement may be conducted only if the Director determines in writing before the initiation of the procurement that a sole source procurement is required. Sole source procurement shall not be used unless there is clear and convincing evidence that there is only one source for the required material or

Article 2

service and that no other type of material or service will satisfy the requirements of the using agency. The using agency requesting sole source procurement shall provide written evidence to support a sole source determination.

- C. The procurement officer shall negotiate with the single supplier, to the extent practicable, a contract advantageous to the state. The procurement officer shall use the state's terms and conditions as the contract document unless the procurement officer receives an exemption from the State Procurement Administrator.
- D. The provisions of this rule apply to all sole source procurements unless emergency conditions exist as defined in A.R.S. § 41-2537.

§ 41-2537. Emergency procurements

Notwithstanding any other provision of this chapter, the director may make or authorize others to make emergency procurements if there exists a threat to public health, welfare, or safety or if a situation exists which makes compliance with § 41-2533 or 41-2534 impracticable, unnecessary or contrary to the public interest as defined in rules adopted by the director, except that such emergency procurements shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.

R2-7-339. Emergency Procurements

- A. An emergency condition may arise from, but is not limited to, floods, epidemics, riots, or equipment failures. An emergency condition creates an immediate and serious need for materials, services, or construction that cannot be met through normal procurement methods and that seriously threatens the functioning of state government, the preservation or protection of property or the health or safety of any person.
- B. An emergency procurement shall be limited to those materials, services, or construction necessary to satisfy the emergency need.

Article 2

R2-7-340. Emergency Procurement Procedure

- A. A using agency seeking an emergency procurement shall prepare a written request documenting the existence of an emergency condition and explaining the procurement need. The request shall be signed by a designated official of the using agency at the assistant director level, its equivalent or above.
- B. The request shall be submitted to the Assistant Director for Finance, with a copy to the State Procurement Administrator.
- C. Except as provided in subsections (E) and (F) of this rule, the Director shall determine in writing whether to grant the request. If the request is approved, the determination shall state the manner in which the procurement is to be effected, whether procurement authority is delegated to the using agency, and the limits of the determination.
- D. A copy of each request and determination processed under this procedure shall be kept on file in the using agency requesting the emergency procurement, the office of the Director, and the State Procurement Office.
- E. If the nature of the emergency does not permit submission of a written request, the using agency may make a verbal request to the Director who may make a verbal determination and delegation. The request required under subsection (A) of this rule shall be submitted to the Director within two working days following the initiation of the emergency procurement.
- F. The Director may approve a written request subsequent to the procurement if:
 - 1) The emergency necessitated immediate response and it was impracticable to contact the Director;
 - 2) The procurement was made with as much competition as was practicable under the circumstances;
 - 3) The price paid was reasonable; and
 - 4) The request required under subsection (A) of this rule was submitted to the Director within two working days following the initiation of the emergency procurement.

Article 2

§ 41-2538. Competitive selection procedures for certain professional services

- A. The services specified in § 41-2513 shall be procured in accordance with this section, except as authorized under § 41-2535, 41-2536 or 41-2537.
- B. Persons engaged in providing the types of services specified in § 41-2513 may submit statements of qualifications and expressions of interest in providing such types of services. The director may specify a uniform format for statements of qualifications. Persons may amend these statements at any time by filing a new statement.
- C. Adequate notice of the need for such services shall be given by the purchasing agency through a request for proposals. The request for proposals shall describe the services required and list the type of information and data required of each offeror.
- D. The head of the purchasing agency or a designee of such officer may conduct discussions with any offerors who submit a proposal to determine the offeror's qualifications for further consideration. Discussions shall not disclose any information derived from proposals submitted by other offerors.
- E. The award shall be made to the offeror determined in writing by the head of the purchasing agency or a designee of such officer to be best qualified based on the evaluation factors set forth in the request for proposals and after a written determination that the compensation is fair and reasonable. Selection may be made pursuant to the provisions of this section without requiring priced proposals, but if price is included in proposals submitted, no contract may be awarded solely on the basis of price.

R2-7-341. Competitive Selection Procedures for Services of Clergy, Physicians, Dentists, Legal Counsel, or Certified Public Accountants

- A. The services of clergy, physicians, dentists, legal counsel, or certified public accountants, as specified in A.R.S. § 41-2513, shall be procured in accordance with R2-7-342 through R2-7-348, except as authorized under A.R.S. §§ 41-2535, 41-2536 or 41-2537.
- B. Price shall be an evaluation factor in the procurements of the services specified in subsection (A) of this rule unless the State Procurement Administrator determines in

Article 2

writing that price as an evaluation factor is either not practicable or not advantageous to the state.

R2-7-342. Statement of Qualifications

- A. If the services specified in R2-7-341 are needed on a recurring basis, the procurement officer may solicit persons engaged in providing the services to submit annual statements of qualifications on a prescribed form that shall include the following information:
- 1) Technical education and training;
 - 2) General or special experience, certifications, licenses, and memberships in professional associations, societies, or boards;
 - 3) An expression of interest in providing a particular service; and
 - 4) Any other pertinent information requested by the procurement officer.
- B. Persons who have submitted statements of qualifications may amend those statements at any time by filing a new statement.

R2-7-343. Request for Proposals

The Request for Proposals shall be in accordance with R2-7-326. The Requests for Proposals shall also be distributed to persons who have submitted statements of qualifications under R2-7-342 for the particular services sought.

R2-7-344. Receipt of Proposals

Proposals shall be received and opened in accordance with R2-7-329. Mistakes in proposals may be corrected or proposals withdrawn in accordance with R2-7-333. Late proposals, late modifications, or late withdrawals shall be considered in accordance with R2-7-328.

Article 2

R2-7-345. Evaluation of Proposals

Proposals shall be evaluated in accordance with R2-7-330.

R2-7-346. Discussions with Individual Offerors

The purchasing agency conducting the procurement may conduct discussions with any offeror whose proposal is reasonably susceptible to being selected for award. Discussions shall be conducted in accordance with R2-7-331. Best and final offers shall be requested in accordance with R2-7-332.

R2-7-347. Evaluation and Contract Award Where Price is an Evaluation Factor

If price is one of the evaluation factors for contract award set forth in the Request for Proposals, the procurement officer shall evaluate proposals and award the contract in accordance with R2-7-334.

R2-7-348. Selection and Contract Award Where Price is not an Evaluation Factor

- A. If price is not a factor, the purchasing agency shall determine in writing the acceptable proposals and rank the three most qualified offerors.
- B. The offeror determined to be best qualified shall submit cost or pricing data to the purchasing agency.
- C. The purchasing agency shall negotiate a contract with the best qualified offeror at compensation determined in writing to be fair and reasonable.
- D. If the head of the purchasing agency and the best qualified offeror fail to negotiate a contract, the head of the purchasing agency shall notify the offeror in writing of the termination of negotiations. The head of the purchasing agency may then enter into negotiations with the next most qualified offeror. If negotiations fail, they shall be terminated, the offeror given notice, and negotiations commenced with the next most qualified offeror.

Article 2

- E. If the purchasing agency is unable to negotiate a contract with any of the offerors initially selected as the best qualified offerors, proposals may be resolicited or additional offerors may be selected based on original, acceptable proposals in the order of their qualification ranking. Negotiations may continue until a contract is awarded.
- F. A written record in a manner prescribed by the State Procurement Administrator shall be maintained in the procurement file.

R2-7-349. Annual Report

Each purchasing agency shall submit annually to the Director a report of all service contracts awarded under A.R.S. § 41-2538 in the preceding fiscal year. The report shall identify the parties to the contract, the contract amount, duration, and the services performed.

§ 41-2539. Cancellation of invitation for bids or requests for proposals

An invitation for bids, a request for proposals or other solicitation may be cancelled or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation if it is in the best interests of this state. The reasons for the cancellation or rejection shall be made part of the contract file.

R2-7-350. Cancellation of Solicitations; Rejection of Bids or Proposals

Each solicitation issued by the state shall state that the solicitation may be cancelled or bids or proposals rejected.

R2-7-351. Cancellation of Solicitation Before the Date and Time for Receipt of Bids and Proposals

- A. Before the date and time that receipt of bids or proposals are due, a solicitation may be cancelled in whole or in part if the procurement officer determines in writing that cancellation is advantageous to the state.

Article 2

- B. If a solicitation is cancelled before the date and time that receipt of bids or proposals are due, notice of cancellation shall be sent to all persons to whom the procurement officer distributed a solicitation. The notice of cancellation shall identify the solicitation and briefly explain the reason for cancellation.
- C. Any bids or proposals that have been received shall be returned unopened to the bidders or offerors.

R2-7-352. Cancellation of Solicitation After Receipt of Bids or Proposals

- A. After receipt of bids or proposals but before award, a solicitation may be cancelled and all bids or proposals may be rejected in whole or in part if the procurement officer determines in writing that cancellation and rejection are advantageous to the state.
- B. A notice of cancellation and rejection shall be sent to all bidders or offerors submitting bids or proposals in accordance with R2-7-351(B).
- C. Bids or proposals received under the cancelled solicitation shall be retained in the procurement file. If the purchasing agency intends to issue another solicitation within a reasonable time after cancellation for the same materials, services or construction as under the cancelled solicitation, the purchasing agency may withhold from public inspection bids or proposals submitted under the cancelled solicitation if the procurement officer makes a written determination that such action is in the state's best interest. After award of a contract under the second solicitation, bids or proposals submitted in response to the cancelled solicitation shall be open for public inspection unless non-disclosure is required under R2-7-105(E).
- D. The determination to cancel a solicitation and reject bids or proposals shall be made a part of the procurement file and shall be available for public inspection.

R2-7-353. Rejection of Individual Bids or Proposals

- A. A bid may be rejected if:
 - 1) The bidder is determined to be nonresponsible pursuant to R2-7-354; or
 - 2) The bid is nonresponsive in accordance with R2-7-320.

Article 2

- B. A proposal or quotation may be rejected if:
- 1) The person responding to the solicitation is determined to be nonresponsible pursuant to R2-7-354; or
 - 2) 2. It is unacceptable;
 - 3) 3. The proposed price is unreasonable; or
 - 4) 4. It is otherwise not advantageous to the state.
- C. Bidders or offerors whose bids or proposals are rejected under subsection (A) or (B) of this rule shall be notified in writing for the rejection. Record of the rejection shall be made part of the procurement file.

§ 41-2540. Responsibility of bidders and offerors

- A. A written determination of nonresponsibility of a bidder or offeror shall be made in accordance with rules adopted by the director. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility shall be grounds for a determination of nonresponsibility with respect to the bidder or offeror. A finding of nonresponsibility shall not be construed as a violation of the rights of any person.
- B. Information furnished by a bidder or offeror pursuant to this section shall not be disclosed outside of the office of the director or the purchasing agency without prior written consent by the bidder or offeror except to law enforcement agencies.

R2-7-354. Responsibility of Bidders and Offerors

- A. A procurement officer shall determine that a bidder or offeror is responsible before awarding a contract to that bidder or offeror. The procurement officer's signature on the contract constitutes a determination that the bidder or offeror awarded the contract is responsible.
- B. Factors to be considered in determining if a bidder or offeror is responsible include:

Article 2

- 1) The bidder's or offeror's financial, physical, personnel or other resources, including subcontracts;
 - 2) The bidder's or offeror's record of performance and integrity;
 - 3) Whether the bidder or offeror is qualified legally to contract with the state; and
 - 4) Whether the bidder or offeror supplied all necessary information concerning its responsibility.
- C. The procurement officer may establish specific responsibility criteria for a particular procurement. Any specific responsibility criteria shall be set forth in the solicitation.
- D. If a procurement officer determines that a bidder or offeror is nonresponsible, the determination shall be in writing and set forth the basis for the determination. A copy of the determination shall be promptly sent to the nonresponsible bidder or offeror. The final determination shall be made part of the procurement file.

§ 41-2541. Prequalification of contractors

Prospective contractors may be prequalified for particular types of materials, services and construction. Prospective contractors have a continuing duty to provide the director with information on any material change affecting the basis of prequalification. Solicitation mailing lists of potential contractors shall include the prequalified contractors.

R2-7-355. Pre-qualification

- A. A prospective contractor need not be prequalified to be awarded a contract. Prequalification does not represent a determination of responsibility.
- B. The existence of a qualified product list pursuant to R2-7-404(D)(2) does not constitute prequalification of any prospective supplier of that product.

Article 2

§ 41-2542. Bid and contract security

The director may require, in accordance with rules adopted by the director, the submission of security to guarantee faithful bid and contract performance. In determining the amount and type of security required for each contract, the director shall consider the nature of the performance and the need for future protection to this state. The requirement for security must be included in the invitation for bids or request for proposals.

R2-7-356. Bid and Performance Bonds for Material or Service Contracts

- A. Bid and performance bonds or other security may be required for material or service contracts if the procurement officer determines that such requirement is advantageous to the state. The requirement for bonds or other security shall be included in the solicitation.
- B. Acceptable bid or performance security shall be limited to:
 - 1) A surety bond executed solely by a surety company or companies holding a certificate of authority to transact surety business in this state issued by the Director of the Department of Insurance pursuant to A.R.S. Title 20, Chapter 2, Article 1, and in a form prescribed by R2-7-505; or
 - 2) A certified or cashier's check.
- C. Bid or performance bonds shall not be used as a substitute for a determination of bidder responsibility.
- D. If a bid is withdrawn at any time before bid opening, any bid security shall be returned to the bidder.

§ 41-2543. Cost or pricing data

- A. The submission of current cost or pricing data may be required in connection with an award in situations in which analysis of the proposed price is essential to determine that the price is reasonable and fair. A contractor shall, except as provided in subsection C, submit current cost or pricing data and shall certify that, to the best of the contractor's knowledge and belief, the cost or pricing data submitted was accurate, complete and

Article 2

current as of a mutually determined specified date before the date of either:

- 1) The pricing of any contract awarded by competitive sealed proposals or pursuant to the sole source procurement authority, if the total contract price is expected to exceed an amount established by department rules.
 - 2) The pricing of any change order or contract modification which is expected to exceed an amount established by department rules.
- B. Any contract, change order or contract modification under which a certificate is required shall contain a provision that the price to this state shall be adjusted to exclude any significant amounts by which this state finds that the price was increased because the contractor-furnished cost or pricing data was inaccurate, incomplete or not current as of the date agreed on between the parties. Such adjustment by this state may include profit or fee.
- C. The requirements of this section need not be applied to contracts if any of the following applies:
- 1) The contract price is based on adequate price competition.
 - 2) The contract price is based on established catalogue prices or market prices.
 - 3) Contract prices are set by law or rule.
 - 4) It is determined in writing in accordance with rules adopted by the director that the requirements of this section may be waived, and the reasons for the waiver are stated in writing.

R2-7-357. Submission of Cost or Pricing Data

- A. Cost or pricing data shall be submitted except as provided in subsection (E) of this rule if the procurement officer determines in writing that:
- 1) The amount of an original or adjusted price of a contract to be awarded by competitive sealed proposals, emergency procurement, sole source procurement, or pursuant to A.R.S. § 41-2578(D)(1) may exceed \$100,000;

Article 2

or

- 2) The price adjustment of a contract awarded by competitive sealed bidding will result in an increase in cost in excess of \$100,000; or
 - 3) If the submission of cost or pricing data is otherwise advantageous to the state.
- B. Cost or pricing data shall be submitted to the procurement officer prior to the commencement of price negotiations at the time and in the manner prescribed by the procurement officer.
- C. In an emergency, cost or pricing data may be submitted at a reasonable time after the contract is awarded.
- D. The offeror or contractor shall keep all cost or pricing data submitted current until the negotiations are concluded.
- E. Pursuant to A.R.S. § 41-2543(C), the State Procurement Administrator may waive the requirement that cost or pricing data be submitted if such officer determines in writing that the waiver is advantageous to the state.
- F. A copy of all determinations by the procurement officer or the State Procurement Administrator that pertain to the submission of cost or pricing data shall be maintained in the contract file.

R2-7-358. Certification of Current Cost or Pricing Data

- A. As soon as practicable after agreement is reached on an original or adjusted contract price, the offeror or contractor shall certify in a form approved by the Director that the cost or pricing data submitted in support of a proposal pursuant to R2-7-357 is accurate, complete, and current as of a mutually determined date.
- B. The procurement officer may waive the requirement that cost or pricing data be certified if he determines in writing that adequate price competition exists after examining cost or pricing data that is submitted in support of a proposal.

Article 2

- C. Additional certification or submission of additional data is not required if an option exercised subsequent to initial negotiation is based upon previously certified cost or pricing data.
- D. The solicitation shall include a notice that certified cost or pricing data must be submitted.

R2-7-359. Refusal to Submit Cost or Pricing Data

- A. If the offeror fails to submit cost or pricing data in the required form, the procurement officer may reject the offer.
- B. If a contractor fails to submit data to support a price adjustment in the form required, the procurement officer may:
 - 1) Reject the price adjustment;
 - 2) Set the amount of the price adjustment subject to the contractor's rights under Article 9 of the Arizona Procurement Code.

R2-7-360. Defective Cost or Pricing Data

- A. The procurement officer may reduce the contract price if, upon a written determination, the cost or pricing data is defective.
- B. The contract price shall be reduced in the amount of the defect plus related overhead and profit or fee if the procurement officer relied upon the defective data in awarding the contract.
- C. Any dispute as to the existence of defective cost or pricing data or the amount of an adjustment due to defective cost or pricing data may be appealed as a contract controversy under Article 9. Notwithstanding an appeal, the contract price shall be adjusted.
- D. If certification of current cost or pricing data is required, the awarded contract shall include notice of the right of the state to a reduction in price if certified cost or pricing data is subsequently determined to be defective.

Article 2

R2-7-361. Price or Cost Analysis

The procurement officer shall conduct a price or cost analysis if submission of price or cost data is required.

§ 41-2544. Types of contracts

Subject to the limitations of this section, any type of contract which will promote the best interests of this state may be used, except that the use of a cost-plus-a-percentage-of-cost contract is prohibited. A cost-reimbursement contract may be used only if a determination is made in writing that such contract is likely to be less costly to this state than any other type or that it is impracticable to obtain the materials, services or construction required except under such a contract.

R2-7-362. Authority to Use Contract Types

- A. The following contract types may be used by the procurement officer without obtaining a prior approval by the State Procurement Administrator:
- 1) Fixed-price contract, except fixed price cost incentive contract;
 - 2) Lease; and
 - 3) Lease with purchase option.
- B. Any other type of contract may be used only if the State Procurement Administrator determines in writing prior to solicitation that the use of the contract is permitted by law and is advantageous to the state.

R2-7-363. Fixed-price Contracts

- A. A fixed-price contract may be used if:
- 1) The extent and type of work necessary to meet state requirements can be reasonably specified; and
 - 2) The cost can be reasonably estimated.
- B. A firm fixed-price contract may be used if prices advantageous to the state can be established at the outset of the contract.

Article 2

C. Fixed-price contract with price adjustment

- 1) The solicitation for a fixed-price contract with price adjustment and the contract shall specify the basis for determining the price adjustment.
- 2) Notice of price adjustment shall be given by the contractor in the manner and within the time specified in the contract.

R2-7-364. Lease and Lease-purchase Contracts

- A. A lease may be entered into only after the procurement officer determines in writing that:
- 1) A lease is advantageous to the state;
 - 2) All conditions for renewal and costs of termination are set forth in the lease;
and
 - 3) The lease is not used to circumvent required procurement procedures.
- B. A purchase option in a lease may be exercised only if the lease containing the purchase option was awarded under competitive sealed bidding or competitive sealed proposals and only after the procurement officer makes the determination required by R2-7-367(B).

R2-7-365. Cost-reimbursement and Cost Incentive Contracts

- A. Cost-reimbursement or cost incentive type contract may be used only when the State Procurement Administrator determines in writing that the use of such contract is advantageous to the state.

R2-7-366. Time and Materials Contracts and Labor Hour Contracts

- A. Time and materials and labor hour contracts shall, to the extent possible, contain a stated ceiling or an estimate of a contractual amount that shall not be exceeded without prior approval of the State Procurement Administrator.

Article 2

- B. A time and materials or labor hour contract may only be used if the State Procurement Administrator determines in writing that:
- 1) Personnel have been assigned to closely monitor the performance of the work; and
 - 2) It is advantageous to the state to use such contract; and
 - 3) No other contract type is practicable.

R2-7-367. Option Provisions

- A. If the procurement officer determines that a contract is to include an option for renewal, extension, or purchase, the applicable option provisions shall be included in the solicitation.
- B. Before exercising any option for renewal, extension, or purchase the procurement officer shall determine in writing that a competitive procurement is not more advantageous to the state than exercise of the particular option.

§ 41-2545. Approval of accounting system

Except with respect to firm fixed-price contracts, no contract type may be used unless it is determined in writing by the director, the head of a purchasing agency or a designee of either officer that the proposed contractor's accounting system is adequate to allocate costs.

R2-7-368. Approval of Accounting System

Before the award of any contract except a firm fixed-price contract, the procurement officer shall determine in writing that the proposed contractor's accounting system will permit timely development of all necessary cost data in the form required by the specific contract type contemplated and is adequate to allocate costs pursuant to Article 7.

§ 41-2546. Multiterm contracts

- A. Unless otherwise provided by law, a contract for materials or services may be entered

Article 2

- into for a period of time up to five years, as deemed to be in the best interest of this state, if the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and monies are available for the first fiscal period at the time of contracting. A contract may be entered into for a period of time exceeding five years if, under rules adopted pursuant to this chapter, the director determines in writing that such a contract would be advantageous to this state. Payment and performance obligations for succeeding fiscal periods are subject to the availability and appropriation of monies.
- B. Before the use of a multiterm contract, it shall be determined in writing that:
- 1) Estimated requirements cover the period of the contract and are reasonable and continuing.
 - 2) Such a contract will serve the best interests of this state by encouraging effective competition or otherwise promoting economies in state procurement.
- C. If monies are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled and the contractor may only be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the materials or services delivered under the contract or which are otherwise not recoverable. The cost of cancellation may be paid from any appropriations available for such purposes.

§ 41-2547. Right to inspect plant

The state may at reasonable times inspect the part of the plant or place of business of a contractor or any subcontractor which is related to the performance of any contract awarded or to be awarded by this state.

§ 41-2548. Right to audit records

- A. The state may, at reasonable times and places, audit the books and records of any person who submits cost or pricing data as provided in § 41-2543 to the extent that the books and records relate to the cost or pricing data. Any person who receives a contract,

Article 2

change order or contract modification for which cost or pricing data is required shall maintain the books and records that relate to the cost or pricing data for five years after the completion of the contract pursuant to § 35-214.

- B. The state is entitled to audit the books and records of a contractor or any subcontractor under any contract or subcontract to the extent that the books and records relate to the performance of the contract or subcontract. The books and records shall be maintained by the contractor for a period of five years after the completion of the prime contract pursuant to § 35-214 and by the subcontractor for a period of five years after the completion of the subcontract pursuant to § 35-214.

§ 41-2549. Reporting of anticompetitive practices

If for any reason collusion or other anticompetitive practices are suspected among any bidders or offerors, a notice of the relevant facts shall be transmitted to the director and the attorney general. This section does not require a law enforcement agency conducting an investigation into such practices to convey such notice to the director.

R2-7-369. Anticompetitive practices among bidders or offerors

Upon submitting a bid or offer, the bidder or offeror must certify that the submission of the bid or offer did not include collusion or other anticompetitive practices.

§ 41-2550. Retention of procurement records

All procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the Arizona state library, archives and public records.

§ 41-2551. Record of procurement actions

- A. The director shall maintain a record listing all contracts in excess of an amount to be determined by regulation made under § 41-2536 or 41-2537 for a minimum of five years. The record shall contain:

Article 2

- 1) Each contractor's name.
- 2) The amount and type of each contract.
- 3) A listing of the materials, services or construction procured under each contract.

B. The record shall be available for public inspection.

R2-7-370. Record of Procurement Actions

A record of contracts in excess of \$10,000 made under A.R.S. §§ 41-2536 or 41-2537 shall be maintained pursuant to A.R.S. § 41-2551.

§ 41-2552. Change order

A change order exceeding an amount or percentage established by regulation may be executed only after the director determines in writing that the change order is advantageous to this state.

§ 41-2553. Procurement of information systems and telecommunications systems; definitions

- A. Notwithstanding the criteria for contract award prescribed in § 41-2533, a contract for information systems or telecommunications systems shall be awarded to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and criteria set forth in the invitation for bids, which shall include as price evaluation criteria the total life cycle cost and application benefits of the information systems or telecommunications systems to the using agency. No factors or criteria, other than those set forth in the invitation for bids, may be used in the evaluation of bids for information systems or telecommunications systems. Procedures for awarding contracts for information systems or telecommunications systems pursuant to this subsection shall be the same as those prescribed in § 41-2533.
- B. Notwithstanding the criteria for contract award prescribed in § 41-2534, a contract for information systems or telecommunications systems shall be awarded to the responsible offeror whose proposal is determined in writing to be the most advantageous to the state,

Article 2

taking into consideration the evaluation factors set forth in the request for proposals, which shall include as evaluation factors the total life cycle cost and application benefit of each proposal. No factors or criteria, other than those set forth in the request for proposals, may be used in the evaluation of proposals for information systems or telecommunications systems. Procedures for awarding contracts for information systems or telecommunications systems pursuant to this subsection shall be the same as those prescribed in § 41-2534.

C. Notwithstanding subsections A and B of this section, when awarding a state contract for information systems or telecommunications systems, the director may award the contracts in accordance with § 41-2533 or 41-2534, except before a using agency acquires the information systems or telecommunications systems, it shall take into account the total life cycle cost and application benefit of the systems in the same manner that the total life cycle cost and application benefit are taken into account under subsections A and B of this section.

D. As used in this section:

- 1) "Application benefit" means a quantified assessment of the benefits to be achieved in state program and support areas by the information systems or telecommunications systems proposed by the vendor, including reasonably projected reductions in program costs and increases in productivity of state personnel.
- 2) "Information systems" means a system of hardware, software or vendor support costing more than one hundred thousand dollars that processes information or data by electronic data processing methods and devices.
- 3) "Life cycle" means the useful life of the information systems or telecommunications systems to the original using agency to perform the application for which it was initially procured.
- 4) "State contract" means an indefinite quantity contract for one or more similar materials or services that is awarded to more than one bidder or offeror to satisfy the needs of more than one using agency.

Article 2

- 5) "Telecommunications systems" means a system costing more than one hundred thousand dollars, including but not limited to all instrumentalities, facilities, apparatus and services, for the transmission and reception of messages, impressions, signs, signals, pictures, sounds or any other symbols by wire, radio, optical cable, electromagnetic or other similar means.
- 6) "Total life cycle cost" means vendor costs, total state costs and financing costs throughout the life cycle of the information systems or telecommunications systems being purchased.
- 7) "Total state costs" means costs to the state for the information systems or telecommunications systems including energy, facilities, personnel and all other identifiable state costs.
- 8) "Vendor costs" means costs of all hardware, materials, software, transportation, vendor support and all other identifiable costs associated with the vendor's proposal or bid.
- 9) "Vendor support" means services provided by the vendor for items such as consulting, education, management of the information systems or telecommunications systems, systems planning, development, integration and maintenance and training.

§ 41-2554. Procurement of earth moving, material handling, road maintenance and construction equipment; definitions

- A. Notwithstanding the criteria for contract award prescribed in § 41-2533, a contract for earth moving, material handling, road maintenance and construction equipment shall be awarded to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and criteria set forth in the invitation for bids, which shall include as price evaluation criteria the total life cycle cost including residual value of the earth moving, material handling, road maintenance and construction equipment and such other additional evaluation factors set forth in the invitation for bids. No factors or criteria may be used in the evaluation of bids for earth moving, material handling, road maintenance and construction equipment, other than those specified in the invitation for

Article 2

- bid. Additional evaluation factors shall include, to the extent practicable, outright purchase. The contract award shall be based on the price evaluation criteria deemed by the state to be most advantageous to the state. Procedures for awarding contracts for earth moving, material handling, road maintenance and construction equipment pursuant to this subsection shall be the same as those prescribed in § 41-2533.
- B. Notwithstanding the criteria for contract award prescribed in § 41-2534, a contract for earth moving, material handling, road maintenance and construction equipment shall be awarded to the responsible offeror whose proposal is determined in writing to be the most advantageous to the state. The evaluation factors set forth in the request for proposals shall include the total life cycle cost including residual value of each proposal and such other additional evaluation factors set forth in the request for proposals. No factors or criteria may be used in the evaluation of proposals for earth moving, material handling, road maintenance and construction equipment, other than those specified in the request for proposal. Additional evaluation factors set forth in the request for proposal shall include, to the extent practicable, outright purchase. The contract award shall be based on the price evaluation criteria deemed by the state to be most advantageous to the state. Procedures for awarding contracts for earth moving, material handling, road maintenance and construction equipment pursuant to this subsection shall be the same as those prescribed in § 41-2534.
- C. The minimum unit list price for earth moving, material handling, road maintenance and construction equipment shall be adjusted annually by the consumer price index, United States average.
- D. As used in this section:
- 1) "Earth moving, material handling, road maintenance, and construction equipment" means a track-type tractor, motor grader, excavator, landfill compactor, wheel tractor scraper, off-highway truck, wheel loader or track loader, having a published manufacturer's minimum unit list price of fifty thousand dollars or more and a minimum expected life cycle of three years.
 - 2) "Outright purchase" means the initial cost to the state for the earth moving,

Article 2

material handling, road maintenance, and construction equipment, including all vendor charges and financing costs.

- 3) "Residual value" means the guaranteed minimum market value of the earth moving, material handling, road maintenance and construction equipment at the end of the life cycle of the earth moving, material handling, road maintenance and construction equipment being procured, as determined by a guaranteed minimum value offered by the vendor or other parties in its bid.
- 4) "Total life cycle cost" means total state costs and financing costs through the life cycle of the earth moving, material handling, road maintenance and construction equipment being purchased less residual value.
- 5) "Total state costs" means cost to the state for the earth moving, material handling, road maintenance and construction equipment including repair costs, present value of monies, vendor charges, and all other identifiable state costs that may be incurred.
- 6) "Vendor charges" means costs of all vendor support, materials, transportation and all other identifiable costs associated with the vendor's proposal or bid.
- 7) "Vendor support" means services provided by the vendor for items such as consulting, education and training.

§ 41-2555. Request for information

The procurement officer may issue a request for information to obtain data about services or materials available to meet a specific need. Adequate public notice as specified in § 41-2533 shall be provided.

§ 41-2556. Demonstration projects

- A. A demonstration project may be undertaken if the director determines in writing that the project is innovative and unique. This state shall not be obligated to pay the contractor, or to procure or lease the services or materials supplied by the contractor. The contract

Article 2

term shall not exceed two years. A written determination of the basis for the contract award shall be included in the contract file.

- B. A contract to procure or lease services or materials previously supplied during a demonstration project shall be conducted under the provisions of this article.
- C. Except as otherwise provided by law, a contractor for a demonstration project shall not be precluded from participating as a bidder or offeror in a procurement for the services or materials supplied during a demonstration project.

§ 41-2557. Unsolicited proposals

A contract may be awarded based on an unsolicited proposal only if the director determines in writing that the conditions of either § 41-2536 or 41- 2537 exist. The determination shall include all of the following:

- 1) The proposal is innovative and unique.
- 2) The proposal is not available without restriction from another source and does not closely resemble a similar product which is either available or pending in the industry.
- 3) The technical office of the purchasing agency receiving the proposal has sufficiently supported its recommendations with facts and circumstances that preclude competition.
- 4) The procurement officer has approved in writing the award of a contract based on the unsolicited proposal.

§ 41-2558. General services administration contracts

Notwithstanding §§ 41-2533 and 41-2534, the director or the director's designee may evaluate general services administration contracts for materials and services. The director or the director's designee may authorize a purchasing agency to make purchases under a contract approved by the director or the director's designee without complying with the requirements prescribed in § 41-2533 or 41-2534 if the director or the director's designee determines all of the following apply:

Article 2

- 1) The price is equal to or less than the contractor's current federal supply contract price.
- 2) The contractor has indicated in writing that the contractor is willing to extend the current federal supply contract pricing, terms and conditions.
- 3) The purchase order adequately identifies the federal supply contract on which the order is based.
- 4) It is cost-effective and in the best interests of this state.

§ 41-2559. Public-private partnership contracts

- A. A purchasing agency may enter into public-private partnership contracts to finance the technology needs of the purchasing agency. The funding for services under a public-private partnership contract entered into pursuant to this section shall be contingent on and computed according to established performance standards and shall be attributable to the successful implementation of the technology program for the period specified in the contract. A purchasing agency may issue requests for information and requests for proposals to solicit private partners that are interested in providing programs under a contract entered into pursuant to this section.
- B. Each request for proposals issued pursuant to this section shall require each private partner to propose specific performance improvements and measurement approaches to be used to measure the value delivered by the vendor technology solution. The purchasing agency shall include an assessment of the proposed value of the vendor technology solution in its evaluation criteria to select the best value solution for the purchasing agency.
- C. A contract entered into between a purchasing agency and an automated systems vendor shall provide for payment of fees on a contractually specific amount based on the achievement of measured performance improvements that are mutually agreed to by the contractor and the purchasing agency and monies for payment of these fees are not subject to legislative appropriation. The following are subject to review and approval by the head of the purchasing agency:

Article 2

- 1) The terms of contracts entered into pursuant to this section relating to the measurement of the performance improvement attributable to the vendor technology program.
 - 2) Payment of fees based on the achievement of the established performance measures.
- D. Before a public-private partnership contract is awarded pursuant to this section, the joint legislative budget committee staff shall be consulted with regard to the potential fiscal impact of the contract to the state. If the joint legislative budget committee staff finds a significant negative fiscal impact to the state, the staff shall report its findings to the joint legislative budget committee.

Article 3

**CHAPTER 23
ARIZONA PROCUREMENT CODE**

**ARTICLE 4
SPECIFICATIONS**

§ 41-2561. Definition

As used in this article, "specification" means any description of the physical or functional characteristics, or of the nature of a material, service or construction item. Specification may include a description of any requirement for inspecting, testing or preparing a material, service or construction item for delivery.

R2-7-401. Definitions

In this Article, unless the context otherwise requires:

1. "Brand name or equal specification" means a specification that uses one or more manufacturers' names or catalogue numbers to describe the standard of quality, performance, and other characteristics needed to meet state requirements, and that provides for the submission of equivalent products.
2. "Brand name specification" means a specification limited to one or more items by manufacturers' names or catalogue numbers.
3. "Proprietary specification" means a specification that describes a material made and marketed by a person having the exclusive right to manufacture and sell such material and excludes other material with similar quality, performance or functional characteristics from being responsive to the solicitation.
4. "Qualified products list" means an approved list of materials described by model or catalogue numbers that, prior to competitive solicitation, the state has determined will meet the applicable specification requirements.
5. "Specification for a common or general use item" means a specification that has been developed and approved for repeated use in procurements pursuant to R2-7-404(A).
6. "Standard commercial material" means material that, in the normal course of business, is

Article 3

customarily maintained in stock or readily available by a manufacturer, distributor or dealer for the marketing of such material.

§ 41-2562. Duties of the director

- A. The director shall establish guidelines governing the preparation, maintenance and content of specifications for materials, services and construction required by this state. The director shall prepare, issue, revise, maintain and monitor the use of specifications for materials, services and construction required by this state.
- B. Notwithstanding the provisions of § 41-2501, all procurement solicitations for volatile organic compound containing commodities shall include a request for substitute commodities with lower or no volatile organic content. Substitute products shall not have increased toxicity compared to the original commodity.

R2-7-402. Preparation of Specifications

- A. Specifications shall be prepared by the Director, or by using agencies pursuant to R2-7-408 or by contract pursuant to R2-7-410.
- B. In an emergency under A.R.S. § 41-2537, any necessary specifications may be utilized by the Purchasing or using agency without regard to the provisions of this Chapter.

R2-7-403. Content of Specifications

- A. A specification may provide alternate descriptions of materials, services, or construction items where two or more design, functional, or performance criteria will satisfactorily meet the state's requirements.
- B. To the extent practicable, a specification shall not include any solicitation term or condition or any contract term or condition.
- C. If a specification for a common or general use item has been developed in accordance with R2-7-404(A) or a qualified products list has been developed in accordance with R2-7-404(D) for a particular material, service, or construction item, it shall be used unless the

Article 3

State Procurement Administrator makes a written determination that its use is not advantageous to the state and that another specification shall be used.

- D. To the extent practicable, specifications shall emphasize functional or performance criteria. To facilitate the use of such criteria, using agencies shall use reasonable efforts to include the principal functional or performance requirements as a part of their purchase requisitions.

R2-7-404. Types of Specifications

- A. Specifications for common or general use items. To the extent practicable, a specification for common or general use item shall be prepared and utilized when:

- 1) A material, service or construction item is used in common by several using agencies or used repeatedly by one using agency, and the characteristics of the material, service, or construction item, as commercially produced or provided, remain relatively stable while the frequency or volume of procurements is significant;
- 2) The state's recurring needs require uniquely designed or specially produced items; or
- 3) The State Purchasing Administrator or using agency authorized to prepare such specifications finds it to be advantageous to the state.

- B. Brand name or equal specification

- 1) A brand name or equal specification may be used when the procurement officer determines in writing that use of a brand name or equal specification is advantageous to the state and that:
 - (a) No specification for a common or general use item or qualified products list is available;
 - (b) Time does not permit the preparation of another form of specification, other than a brand name specification; or

Article 3

(c) The nature of the product or the state's requirements makes use of a brand name or equal specification suitable for the procurement.

- 2) 2. Such determination may be made for categories of materials, services, or construction items or, in appropriate circumstances, for an entire procurement action even though a number of different items are being procured.
- 3) 3. A brand name or equal specification shall designate as many different brands as are practicable as "or equal" references.
- 4) 4. A brand name or equal specification shall include a description of the particular design, functional, or performance characteristics that are required unless the procurement officer authorized to approve specifications determines that the essential characteristics of the brand names designated in the specifications are commonly known.
- 5) 5. A solicitation that uses a brand name or equal specification shall explain 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. The solicitation shall state that products substantially equivalent to those brands designated shall qualify for consideration.

C. Brand name specification

- 1) A brand name specification may be prepared and utilized only if the State Procurement Administrator makes a written determination that only the identified brand name item will satisfy the state's needs.
- 2) If a brand name specification is utilized the procurement officer shall, to the extent practicable, identify sources from which the designated brand name item can be obtained and shall solicit such sources to achieve the maximum practicable competition. If only one source can supply the requirement, the procurement shall be made under A.R.S. § 41-2536.

Article 3

D. Qualified products list.

- 1) A qualified products list may be prepared and utilized when the procurement officer authorized to develop qualified products lists determines that testing or examination of the materials or construction items prior to issuance of the solicitation is desirable or necessary in order to best satisfy state requirements.
- 2) The procurement officer shall solicit as many potential suppliers as practicable to submit products for testing and examination to determine acceptability for inclusion on a qualified products list. Any potential supplier, even though not solicited, may offer its products for consideration in accordance with the schedule or procedure established for this purpose. The qualified products list shall not be modified after the solicitation is issued.
- 3) Inclusion on a qualified products list shall be based on results of tests or examinations conducted in accordance with requirements published by the State Procurement Office.
- 4) Qualified products lists' test results shall protect the identity of the suppliers.

R2-7-405. Confidentiality

- A. Specifications and any written determination or other document generated or used in the development of a specification shall be available for public inspection, except to the extent that the withholding of such information is permitted or required by law.
- B. If the supplier believes that information it has provided to the procurement officer contains trade secrets or proprietary data that should be kept confidential, a statement advising the procurement officer of this fact must accompany the specification in accordance with R2-7-104.

Article 3

§ 41-2563. Exempted services

Specifications for services procured under § 41-2513 may be prepared by a purchasing agency in accordance with this article and rules adopted under this article.

R2-7-406. [Reserved]

§ 41-2564. Relationship with using agencies

The director may obtain advice and assistance from using agencies in the development of specifications and may delegate in writing to a using agency the authority to prepare and use its own specifications.

R2-7-407. Using Agency Advice and Assistance

The using agency shall submit advice and assistance in the development of specifications or plans pursuant to a request from the Director.

R2-7-408. Preparation and Utilization of Specifications and Plans by Using Agencies

- A. The Director may delegate the authority to prepare and utilize specifications or plans to using agencies pursuant to R2-7-201.
- B. Using agencies delegated the authority to prepare and utilize specifications or plans shall comply with the requirements of Article 4.
- C. Notwithstanding the provisions of this rule or R2-7-410, the Director retains the authority to approve or disapprove all specifications and plans.

Article 3

§ 41-2565. Maximum practicable competition

All specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying this state's needs and shall not be unduly restrictive.

R2-7-409. Requirements of Nonrestrictiveness

- A. Nonexclusive specifications
 - 1) Unless otherwise permitted by this Chapter, all specifications shall describe the state's requirements in a manner that does not unnecessarily exclude a material, service, or construction item.
 - 2) Proprietary specifications shall not be used unless the State Procurement Administrator determines in writing that such specifications are required by demonstrable technological justification and that it is not practicable or advantageous to use a less restrictive specification. Past success in the material's performance, traditional purchasing practices, or inconvenience of drawing specifications do not justify the use of proprietary specifications.
- B. To the extent practicable, the state shall use accepted commercial specifications and shall procure standard commercial materials.

§ 41-2566. Specifications prepared by architects and engineers

All specifications, including those prepared by architects, engineers, consultants and others for public contracts, shall seek to promote overall economy for the purposes intended and encourage competition in satisfying this state's needs and shall not be unduly restrictive.

Article 3

3R2-7-410. Preparation of Specifications or Plans by Persons Other Than State Personnel

- A. The Director may contract for the preparation of specifications or plans for public contracts by persons other than state personnel including but not limited to architects, engineers, designers, and other draftsmen.
- B. The requirements of this Article shall apply to all specifications or plans prepared by persons other than state personnel pursuant to subsection (A) of this rule. Contracts for the preparation of specifications or plans by persons other than state personnel shall require them to adhere to such requirements.

R2-7-411. Conflict of Interest

- A. No person preparing or assisting in the preparation of specifications, plans or scopes of work shall receive any direct benefit from the utilization of those specifications, plans or scopes of work.
- B. A procurement officer may waive the restriction set forth in subsection (A) of this rule if the procurement officer determines in writing that its application would not be in the state's best interest. The procurement officer shall use as guidance in making that determination the organizational conflicts of interest regulations set forth in the Code of Federal Regulations, 48 CFR Chapter 1, Subpart 9.5 (October 1, 1991), excluding later amendments or editions, incorporated by reference herein and on file with the Secretary of State. The determination shall state the specific reasons that the restriction in subsection (A) of this rule has been waived.

§ 41-2567. Specifications for energy consumptive material

The director shall, in conjunction with the department of commerce, establish specifications based on considerations of energy conservation for the procurement of selected energy consumptive material.

Article 3

§ 41-2568. Specifications for recycled materials

To the extent practicable, specifications shall emphasize functional or performance criteria which do not discriminate against the use of recycled materials.

Article 4

**CHAPTER 23
ARIZONA PROCUREMENT CODE**

ARTICLE 5

PROCUREMENT OF CONSTRUCTION AND SPECIFIED PROFESSIONAL SERVICES

§ 41-2571. Definitions

As used in this article:

1. "Architect services", "engineer services", "land surveying services", "assayer services", "geologist services" and "landscape architect services" means those professional services within the scope of the practice of those services as provided in title 32, chapter 1, article 1.
2. "Cost" means the aggregate cost of all materials and services, including labor performed by force account.

R2-7-501. Definitions

In this Article, unless the context otherwise requires:

1. "Force account" means work performed by the state's regularly employed personnel.
2. "Specified professional services" means services of architect, engineer, land surveying, assayer, geologist and landscape architect.

§ 41-2572. Construction by state employees; construction by inmates of public institution

- A. A building, structure, addition or alteration of a public facility may be constructed by employees or force account, if the cost does not exceed twenty thousand dollars.
- B. A building, structure, addition or alteration at a public institution may be constructed by inmates if such work is determined to be advantageous to this state.

R2-7-502. Coordination with the Department

A purchasing agency procuring construction or architectural or engineering services for construction shall coordinate the procurement and contract administration with the

Article 4

Facilities Management Division of the Department as required by A.R.S. § 41-790 et seq.

§ 41-2573. Bid security

- A. As a guarantee that the contractor will enter into a contract , bid security is required for all construction procured pursuant to § 41-2533 and all construction services procured pursuant to § 41-2578, subsection F if the purchasing agency estimates that the budget for construction, excluding the cost of any finance services, maintenance services, operations services and any other related services included in the contract, will be more than the amount established by § 41-2535, subsection D. Bid security shall be a certified check, cashier's check or surety bond.
- B. Bid security shall be submitted in the following amounts:
- 1) For design-bid-build construction services, ten per cent of the contractor's bid.
 - 2) For design-build construction services awarded by competitive sealed proposals pursuant to § 41-2578, subsection F, ten per cent of the purchasing agency's construction budget for the project as stated in the request for proposals, excluding finance services, maintenance services, operations services or any other related services included in the contract.
 - 3) For job-order-contracting construction services awarded by competitive sealed proposals pursuant to § 41-2578, subsection F, the amount prescribed by the purchasing agency in the request for proposals, but not more than ten per cent of the purchasing agency's estimated budget for construction during the first year under the contract, excluding any finance services, maintenance services, operations services or any other related services included in the contract.
- C. Nothing in this section prevents a state governmental unit from requiring such bid security in relation to any construction contract. The surety bond shall be executed and furnished

Article 4

as required by title 34, chapter 2, and the conditions and provisions of the surety bond regarding the surety's obligations shall follow the form required by § 34-606.

- D. If the invitation for bids or request for proposals requires security, noncompliance requires that the bid be rejected unless, pursuant to rules, it is determined that the bid fails to comply in a nonsubstantial manner with the security requirements.
- E. After the bids or proposals are opened, they are irrevocable for the period specified in the invitation for bids or request for proposals, except as provided in § 41-2533, subsection F and § 41-2578 subsection F. If a bidder is permitted to withdraw its bid before award, no action may be had against the bidder or the bid security.

R2-7-503. Bid Security

- A. Invitations for Bid on state construction contracts shall require the submission of bid security in an amount equal to at least 10% of the bid, at the time the bid is submitted. If a bidder fails to submit the required bid security with the bid, the bid shall be deemed nonresponsive except as provided by R2-7-503(C).
- B. Acceptable bid security. Acceptable bid security shall be limited to:
 - 1) An annual or one-time surety bond executed solely by a surety company or companies holding a certificate of authority to transact surety business in this state issued by the Director of the Department of Insurance pursuant to A.R.S. Title 20, Chapter 2, Article 1 and in a form as prescribed by A.R.S. § 41-2573 and R2-7-505; or
 - 2) A certified or cashier check.
- C. Nonsubstantial failure to comply. The Assistant Director for Facilities Management may determine that noncompliance is nonsubstantial if:
 - 1) Only one bid is received and there is not sufficient time to rebid;or

Article 4

- 2) The amount of the bid security submitted, although less than the amount required by the Invitation for Bids, is equal to or greater than the difference between the apparent low bid and the next higher acceptable bid; or
- 3) The bid security is inadequate as a result of correcting or modifying a bid in accordance with R2-7-319, if the bidder increases the amount of security to required limits within two days after notification.

§ 41-2574. Contract performance and payment bonds

A. The following bonds or security is required and is binding on the parties to the contract if the value of a construction award exceeds the amount established by § 41-2535:

- 1) A performance bond that is executed and furnished as required under title 34, chapter 2, article 2 or chapter 6, as applicable, in an amount equal to one hundred per cent of the price specified in the contract conditioned on the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract, except that, for job-order-contracting construction services, The performance bond shall cover the full amount of construction under the job-order-contracting construction services contract, shall not include any design services, preconstruction services, finance services, maintenance services, operations services or other related services included in the contract, shall initially be based on the purchasing agency's estimate of the amount of construction that will be done under the contract and, for multiyear contracts, may be a single bond for the full term of the contract or a separate bond for each year of the contract, as determined by the purchasing agency, and except that for construction-manager- at-risk construction services and design-build construction services, the amount of the performance bond shall be the price

Article 4

of construction services, excluding the cost of any design services, preconstruction services, finance services, maintenance services, operations services and other related services included in the contract. The performance bond shall cover performance of construction included in the contract and shall not cover performance of any design services, preconstruction services, finance services, maintenance services, operations services or other related services included in the contract. This bond is solely for the protection of this state. The conditions and provisions of the performance bond regarding the surety's obligations shall follow the form required under § 34-222, subsection G or § 34-608, subsection G, as applicable.

- 2) A payment bond that is executed and furnished as required by title 34, chapter 2, article 2 or chapter 6, as applicable, in an amount equal to one hundred per cent of the price specified in the contract for the protection of all persons supplying labor or material to the contractor or its subcontractors for the performance of the construction provided for in the contract, except that, for job-order-contracting construction services, the payment bond shall cover the full amount of construction under the job-order-contracting construction services contract, shall not include any design services, preconstruction services, finance services, maintenance services, operations services or other related services included in the contract, shall initially be based on the purchasing agency's estimate of the amount of construction that will be done under the contract and, for multiyear contracts, may be a single bond for the full term of the contract or a separate bond for each year of the contract, as determined by the purchasing agency, and except that, for construction-manager-at-risk construction services and design-build construction services, the amount of the payment bond shall be the price of construction services, excluding the cost of any design services,

Article 4

preconstruction services, finance services, maintenance services, operations services or any other related services included in the contract. The conditions and provisions of the payment bond regarding the surety's obligations shall follow the form required under § 34-222, subsection F or § 34-608, subsection F, as applicable.

- B. For design-bid-build construction, the bonds prescribed in subsection A of this section shall be provided on and at the same time as execution of the contract. For construction-manager-at-risk, design-build and job-order- contracting construction services, the bonds prescribed in subsection A of this section shall be provided only on and at the same time as execution of a contract or an amendment to a contract that commits the contractor to provide construction for a fixed price, guaranteed maximum price or other fixed amount within a designated time frame. For design-build or job-order-contracting construction services, if a person or firm that is not licensed to perform construction pursuant to title 32, chapter 10 has a construction services contract with the purchasing agency and has contracted for the construction portion of the construction services contract with a firm that is licensed to perform construction pursuant to title 32, chapter 10:
- 1) The person or firm holding the contract shall provide the payment bond and the performance bond.
 - 2) The firm licensed to perform construction is not required to provide the payment bond or the performance bond.
- C. If the prime contract or specifications require any persons supplying labor or materials in the prosecution of the work to furnish payment or performance bonds, these bonds shall be executed solely by a surety company or companies holding a certificate of authority to transact surety business in this state issued by the director of the department of insurance pursuant to title 20, chapter 2, article 1. Notwithstanding the provisions of any other statute, the bonds shall not be executed by an individual surety or sureties, even if the requirements of § 7-101 are satisfied.

Article 4

R2-7-504. Performance and Payment Bonds

- A. Acceptable performance and payment bonds shall be limited to a performance bond and a payment bond executed solely by a surety company or companies holding a certificate of authority to transact surety business in this state issued by the Director of the Department of Insurance pursuant to A.R.S. Title 20, Chapter 2, Article 1 and in a form prescribed by A.R.S. § 41-2574 and R2-7-505.
- B. The performance bond and the payment bond shall be delivered by the contractor to the state at the same time the contract is executed. If a contractor fails to deliver the required performance bond or payment bond, the contractor's bid shall be rejected, its bid security shall be enforced, and award of the contract shall be made pursuant to this Chapter.

§ 41-2575. Repealed by Laws 1992, Ch. 227, § 7, eff. September 30, 1992

R2-7-505. Bond Forms

Bid bonds, performance bonds, and labor and material payment bonds shall be executed on forms substantially equivalent to SPO 301, SPO 302, and SPO 303, respectively, on file with the Secretary of state and incorporated by this reference.

§ 41-2576. Contract payment retention: partial payment

- A. Ten per cent of all construction contract payments shall be retained by this state as insurance of proper performance of the contract or, at the option of the contractor, a substitute security may be provided by the contractor in an authorized form pursuant to rules adopted by the director. The contractor is entitled to all interest from any such substitute security.
- B. When the contract is fifty per cent completed, one-half of the amount retained or securities substituted pursuant to this section shall be paid to the contractor upon the contractor's request provided the contractor is making satisfactory progress on the contract and there is no specific cause or claim requiring a greater amount to be retained.

Article 4

After the contract is fifty per cent completed, no more than five per cent of the amount of any subsequent progress payments made under the contract shall be retained providing the contractor is making satisfactory progress on the project, except that if at any time the state determines satisfactory progress is not being made ten per cent retention shall be reinstated for all progress payments made under the contract subsequent to the determination.

- C. Any retention shall be paid or substitute security shall be returned to the contractor within sixty days after final completion and acceptance of work under the contract. Retention of payments by a purchasing agency longer than sixty days after final completion and acceptance requires a specific written finding by the purchasing agency of the reasons justifying the delay in payment. No purchasing agency may retain any monies after sixty days which are in excess of the amount necessary to pay the expenses the purchasing agency reasonably expects to incur in order to pay or discharge the expenses determined by the finding justifying the retention of monies.
- D. This state shall not accept any substitute security unless accompanied by a signed and acknowledged waiver of any right or power of the obligor to set off any claim against either the state governmental unit or the contractor in relationship to the security assigned. In any instance in which this state accepts substitute security as provided in this section, any subcontractor undertaking to perform any part of the contract is entitled to provide such security to the contractor.
- E. Notwithstanding anything to the contrary in this section:
 - 1) Retention is not required for job-order-contracting construction services contracts, except that the purchasing agency may elect to require retention for a job-order-contracting construction services contract. If the purchasing agency elects to require retention, subsections A through D apply to the job-order-contracting construction services contract, except that:
 - (a) Retention shall be five per cent of each payment instead of ten per cent reducing to five per cent.

Article 4

(b) Retention applicable to each job order shall be released within sixty days after final completion of the job order and acceptance of the work under the job order.

(c) No retention on the job order may be released until that time.

(d) The retention percentage shall not be increased.

- 2) This section applies only to amounts payable in a construction services contract for construction and does not apply to amounts payable in a construction services contract for design services, preconstruction services, finance services, maintenance services, operations services or any other related services included in the contract.

R2-7-506. The Form of Substitute Security

The form of security that may substitute for contract payment retention is limited to the following:

1. An assignment of time certificates of deposit by financial institutions licensed by this state;
2. Share certificate of a saving and loan institution or credit union authorized to transact business in this state; or
3. Security issued or guaranteed as to principal and interest by:
 - a. The United States;
 - b. The state;
 - c. Counties, municipalities and school districts within this state.

R2-7-507. Conditions for Use of Substitute Security

- A. A contractor may submit substitute security to replace contract payment retention if:
- 1) The use of substitute security is requested of the Director for work performed under the contract;

Article 4

- 2) The substitute security is submitted prior to each progress payment in an amount of no less than 10% of each progress payment or once in an amount no less than 10% of the total contract amount;
- 3) The interest earned on such security shall accrue to the benefit of the contractor but shall be retained until the procurement officer has approved completion and acceptance of all work to be performed under the contract;
- 4) The term of such security shall not mature until after the estimated contract completion date;
- 5) The security shall mature no later than one year after the estimated contract completion date; and
- 6) The substitute security shall not be released without written approval by procurement officer.

B. A contractor may submit a single substitute security for more than one project provided that:

- 1) The amount of such security is no less than 10% of the aggregate amount of all contracts or all progress payments;
- 2) The Director determines that such single substitute security is advantageous to the state; and
- 3) Such security complies with the requirements of subsection (A) of this rule.

§ 41-2577. Progress payments

A. Progress payments may be made by this state to the contractor on the basis of a duly certified and approved estimate of the work performed during a preceding period of time as set by rule, except that a percentage of all estimates shall be retained as provided in § 41-2576. The progress payments shall be paid on or before fourteen days after the estimate of the work is certified and approved. The estimate of the work shall be deemed received by the owner on submission to any person designated by the owner for the submission, review or approval of the estimate of the work. An estimate of the work submitted under this section shall be deemed approved and certified after seven days

Article 4

from the date of submission unless before that time the owner or owner's agent prepares and issues a specific written finding detailing those items in the estimate of the work that are not approved and certified under the contract. The owner may withhold an amount from the progress payment sufficient to pay the expenses the owner reasonably expects to incur in correcting the deficiency set forth in the written finding. On completion and acceptance of separate divisions of the contract on which the price is stated separately in the contract, payment may be made in full including retained percentages, less deductions, unless a substitute security has been provided pursuant to § 41-2576. No contract for construction may materially alter the rights of any contractor, subcontractor or material supplier to receive prompt and timely payment as provided under this section.

- B. The contractor shall pay to his subcontractors or material suppliers and each subcontractor shall pay to his subcontractor or material supplier, within seven days of receipt of each progress payment, unless otherwise agreed in writing by the parties, the respective amounts allowed the contractor or subcontractor on account of the work performed by his subcontractors, to the extent of each such subcontractor's interest therein, except that no contract for construction may materially alter the rights of any contractor, subcontractor or material supplier to receive prompt and timely payment as provided under this section. These payments to subcontractors or material suppliers shall be based on payments received pursuant to this section. Any diversion by the contractor or subcontractor of payments received for work performed on a contract, or failure to reasonably account for the application or use of such payments, constitutes grounds for disciplinary action by the registrar of contractors. The subcontractor or material supplier shall notify the registrar of contractors and the purchasing agency in writing of any payment less than the amount or percentage approved for the class or item of work as set forth in this section.
- C. A subcontractor may notify the purchasing agency in writing requesting that the subcontractor be notified by the purchasing agency in writing within five days from payment of each progress payment made to the contractor. The subcontractor's request

Article 4

remains in effect for the duration of the subcontractor's work on the project.

- D. Nothing in this chapter prevents the contractor or subcontractor, at the time of application and certification to the owner or contractor, from withholding such application and certification to the owner or contractor for payment to the subcontractor or material supplier for unsatisfactory job progress, defective construction work or materials not remedied, disputed work or materials, third party claims filed or reasonable evidence that a claim will be filed, failure of a subcontractor to make timely payments for labor, equipment and materials, damage to the contractor or another subcontractor, reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum or a reasonable amount for retention that does not exceed the actual percentage retained by the owner.
- E. If any payment to a contractor is delayed after the date due interest shall be paid at the rate of one per cent per month or a fraction of the month on such unpaid balance as may be due.
- F. If any periodic or final payment to a subcontractor is delayed by more than seven days after receipt of periodic or final payment by the contractor or subcontractor, the contractor or subcontractor shall pay his subcontractor or material supplier interest, beginning on the eighth day, at the rate of one per cent per calendar month or a fraction of a calendar month on such unpaid balance as may be due.

R2-7-508. Repealed

§ 41-2578. Procurement of specified professional and construction services; definition

- A. Architect services, assayer services, construction-manager-at-risk construction services, design-build construction services, engineer services, job-order-contracting construction services, geologist services, landscape architect services and land surveying services shall be procured as provided in this section except as authorized by §§ 41-2535, 41-2536 and 41-2537.
- B. This state shall provide notice, in accordance with rules, of each procurement of professional services or construction services specified in this section and shall award

Article 4

contracts on the basis of demonstrated competence and qualifications for the type of professional services or construction services pursuant to procedures prescribed in this section.

C. In the procurement of these professional services or construction services pursuant to this section:

1) For procurement of professional services if the contract amount is one hundred thousand dollars or less, the director shall encourage firms engaged in the lawful practice of the profession to submit annually a statement of qualifications and experience. The director or the head of the purchasing agency shall initiate an appropriately qualified selection committee for each contract in accordance with rules adopted by the director or purchasing agency. The selection committee shall evaluate current statements of qualifications and experience on file with the director or purchasing agency, together with those that may be submitted by other firms regarding the proposed contract. If possible, the selection committee shall conduct discussions with at least three firms regarding the contract and the relative methods of furnishing the required services and, if possible, shall select, in order of preference and based on criteria established and published by the selection committee, a short list of at least three of the firms deemed to be the most qualified to provide the services required. The selection committee:

(a) Shall base the selection of the short list and order of preference on demonstrated competence and qualifications only.

(b) Shall not request or consider fees, price, man-hours or any other cost information in the selection of the short list or order of preference.

(2) For professional services if the contract amount is more than one hundred thousand dollars and for all construction services, the purchasing agency

Article 4

shall follow the procedure prescribed in this paragraph. Notwithstanding paragraph 1 of this subsection, for professional services otherwise subject to paragraph 1 of this subsection, the purchasing agency may elect to follow the procedures prescribed in this paragraph. The purchasing agency shall issue a request for qualifications for each contract and publish notice of the request for qualifications in the same manner as provided in § 41-2533, subsection C. The director or head of a purchasing agency shall initiate an appropriately qualified selection committee for each contract in accordance with rules adopted by the director. If procuring professional services, the purchasing agency shall determine the number and qualifications of the selection committee members. A selection committee for the procurement of construction services shall not have more than seven members and shall include at least one person who is a licensed contractor and one person who is an architect or an engineer who is registered pursuant to § 32-121. A contractor is not required to serve on the selection committee if the contract does not include construction and if the contract does not require delivery of a design or a set of construction documents. These members may be employees of the purchasing agency or outside consultants. Outside contractors, architects and engineers serving on a selection committee shall not receive compensation from the purchasing agency for performing this service, but the purchasing agency may elect to reimburse outside contractors, architects and engineers for travel, lodging and other expenses incurred in connection with service on a selection committee. A person who is a member of a selection committee shall not be a contractor under the contract or provide construction, materials or services under the contract. The selection committee shall:

- (a) Evaluate the statements of qualifications and performance data that are submitted in response to the purchasing

Article 4

agency's request for qualifications for the proposed contract.

- (b) If determined by the purchasing agency and included by the purchasing agency in the request for qualifications, conduct discussions with at least three but not more than five persons or firms as specified in the request for qualifications regarding the contract and the relative methods of approach for furnishing the required professional services or construction services.
- (c) In order of preference, based on criteria established and published by the selection committee and included in the request for qualifications, select a short list of three of the persons or firms the selection committee deems to be the most qualified to provide the professional services or construction services. If only two responsible and responsive persons or firms respond to the solicitation, the selection committee may proceed with the selection process with those two persons or firms or the selection committee may readvertise pursuant to this subsection as the selection committee deems necessary or appropriate.
- (d) Base the selection of the short list and order of preference on demonstrated competence and qualifications only.
- (e) Not request or consider fees, price, man-hours or any other cost information in the selection of the short list or order of preference.
- (f) For a request for qualifications for construction services only, not include on the short list any person or firm that includes or employs any person or firm that has provided for compensation any services relating to the project covered by

Article 4

the request for qualifications.

- D. The director shall award a contract for professional services or construction services to one of the persons or firms on the short list prepared pursuant to subsection C of this section as provided in subsection E or F of this section, except that, if only two persons or firms that the selection committee determines are qualified respond to the request for proposals pursuant to subsection F of this section or if one of the three persons or firms drops out of the selection process pursuant to subsection E or F of this section so that only two persons or firms remain on the short list, the purchasing agency, as the purchasing agency deems necessary or appropriate, may elect to proceed with the selection process with the two persons or firms or elect to readvertise pursuant to subsection C of this section.
- E. The procurement officer shall enter into negotiations for a contract with the highest qualified person or firm for the professional services or construction services. The negotiations shall include consideration of compensation and other contract terms that the officer determines to be fair and reasonable to this state. In making this decision, the procurement officer shall take into account the estimated value, the scope, the complexity and the nature of the professional services or construction services to be rendered. If the procurement officer is unable to negotiate a satisfactory contract with the person or firm considered to be the most qualified, at a price and on other contract terms the procurement officer determines to be fair and reasonable to this state, the procurement officer shall formally terminate negotiations with that person or firm. The procurement officer may undertake negotiations with the next most qualified person or firm in sequence until an agreement is reached or a determination is made to reject all persons or firms on the short list. If a contract for construction services is entered into pursuant to this subsection, construction shall not commence until the purchasing agency and contractor agree in writing on a fixed price or a guaranteed maximum price for the construction to be commenced.
- F. As an alternative to subsection E of this section, the procurement officer may award

Article 4

design-build construction services or job-order-contracting construction services as follows:

- 1) The procurement officer shall use the selection committee appointed for the contract pursuant to subsection C of this section.
- 2) The procurement officer shall issue a request for proposals to the persons or firms on the short list developed pursuant to subsection C of this section.
- 3) For design-build construction services and job-order-contracting construction services, the request for proposals shall include:
 - (a) The purchasing agency's project schedule and project budget or life cycle budget for a procurement that includes maintenance services or operations services.
 - (b) A statement that the contract will be awarded to the person or firm whose proposal receives the highest number of points under a scoring method.
 - (c) A description of the scoring method, including a list of the factors in the scoring method and the number of points allocated to each factor. The factors in the scoring method shall include:
 - (I) For design-build construction services only, demonstrated compliance with the design requirements.
 - (II) Offeror qualifications.
 - (III) Offeror financial capacity.
 - (IV) Compliance with the purchasing agency's project schedule.
 - (V) For design-build construction services only, if the request for proposals specifies that the purchasing agency will spend its project

Article 4

budget and not more than its project budget and is seeking the best proposal for the project budget, compliance of the offeror's price or life cycle price for procurements that include maintenance services, operations services or finance services with the purchasing agency's budget as prescribed in the request for proposals.

(VI) For design-build construction services if the request for proposals does not contain the specifications prescribed in item (v) and for job-order- contracting construction services, the price or life cycle price for procurements that include maintenance services, operations services or finance services.

(VII) A offeror quality management plan.

(VIII) Other evaluation factors as determined by the purchasing agency, if any.

(d) For design-build construction services only, The design requirements.

(e) A requirement that each offeror submit separately a technical proposal and a price proposal and that the offeror's entire proposal is responsive to the requirements in the request for proposals. For design-build construction services, the price in the price proposal shall be a fixed price or a guaranteed maximum price.

(f) A statement that in applying the scoring method the selection committee will separately evaluate the technical

Article 4

proposal and the price proposal and will evaluate and score the technical proposal before opening the price proposal.

(g) If the purchasing agency conducts discussions pursuant to paragraph 5 of this subsection, a statement that discussions will be held and a requirement that each offeror submit a preliminary technical proposal before the discussions are held.

- 4) If the purchasing agency determines to conduct discussions pursuant to paragraph 5 of this subsection, each offeror shall submit a preliminary technical proposal to the purchasing agency before those discussions are held.
- 5) If determined by the purchasing agency and included by the purchasing agency in the request for proposals, the selection committee shall conduct discussions with all persons or firms that submit preliminary technical proposals. Discussions shall be for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair treatment with respect to any opportunity for discussion and for clarification by the owner. Revision of preliminary technical proposals shall be permitted after submission of preliminary technical proposals and before award for the purpose of obtaining best and final proposals. In conducting any discussions, information derived from proposals submitted by competing offerors shall not be disclosed to other competing offerors.
- 6) After completion of any discussions pursuant to paragraph 5 of this subsection or if no discussions are held, each offeror shall submit separately its final technical proposal and its price proposal.
- 7) Before opening any price proposal, the selection committee shall open the final technical proposals, evaluate the final technical proposals and score the

Article 4

final technical proposals using the scoring method in the request for proposals. No other factors or criteria may be used in the evaluation and scoring.

- 8) After completion of the evaluation and scoring of all final technical proposals, the selection committee shall open the price proposals, evaluate the price proposals, score the price proposals and complete the scoring of the entire proposals using the scoring method in the request for proposals. No other factors or criteria may be used in the evaluation and scoring.
- 9) The procurement officer shall award the contract to the responsive and responsible offeror whose proposal receives the highest score under the method of scoring in the request for proposals. No other factors or criteria may be used in the evaluation.
- 10) The contract file shall contain the basis on which the award is made.
- 11) For design-build construction services only, the procurement officer shall award a stipulated fee equal to a percentage, as prescribed in the request for proposals, of the purchasing agency's project budget, as prescribed in the request for proposals, but not less than two-tenths of one per cent of the project budget to each short list offeror who provides a responsive, but unsuccessful, proposal. If the procurement officer does not award a contract, all responsive short list offerors shall receive the stipulated fee. The procurement officer shall pay the stipulated fee to each offeror within ninety days after the award of the initial contract or the decision not to award a contract. In consideration for paying the stipulated fee, the procurement officer may use any ideas or information contained in the proposals in connection with any contract awarded for the project, or in connection with a subsequent procurement, without any obligation to pay any additional compensation to the unsuccessful offerors. Notwithstanding the other provisions of this paragraph, an unsuccessful short list offeror may elect to

Article 4

waive the stipulated fee. If an unsuccessful short list offeror elects to waive the stipulated fee, the purchasing agency may not use ideas and information contained in the offeror's proposal, except that this restriction does not prevent the purchasing agency from using any idea or information if the idea or information is also included in a proposal of an offeror that accepts the stipulated fee.

- G. Until award and execution of a contract by a purchasing agency, only the name of each person or firm on the short list developed pursuant to subsection C of this section shall be available to the public. All other information received by the purchasing agency in response to the request for qualifications or contained in the proposals shall be confidential in order to avoid disclosure of the contents that may be prejudicial to competing offerors during the selection process. The proposals shall be open to public inspection after the contract is awarded and the purchasing agency has executed the contract. To the extent that the offeror designates and the purchasing agency concurs, trade secrets and other proprietary data contained in a proposal remain confidential.
- H. A purchasing agency may cancel a request for qualifications or a request for proposals or reject in whole or in part any or all proposals as specified in the solicitation if it is in the best interest of the purchasing agency. The purchasing agency shall make the reasons for cancellation or rejection part of the contract file.
- I. Notwithstanding any other law:
 - 1) The contractor for construction-manager-at-risk, design-build or job-order-contracting construction services is not required to be registered to perform design services pursuant to title 32, chapter 1 if the person or firm actually performing the design services on behalf of the contractor is appropriately registered.
 - 2) The contractor for construction-manager-at-risk, design-build or job-order-contracting construction services is not required to be licensed to perform construction pursuant to title 32, chapter 10 if the firm actually performing the

Article 4

construction on behalf of the contractor is appropriately licensed.

- 3) Each project under a design-build construction services contract or a construction-manager-at-risk construction services contract shall be a specific, single project. For the purposes of this paragraph, "specific, single project" means a project that is constructed at a single location, at a common location or for a common purpose.

J. For job-order-contracting construction services only:

- 1) 1.The dollar amount of an individual job order shall not be more than the amount set by the director in a rule adopted pursuant to chapter 6 of this title as the maximum amount of an individual job order, except that the amount for school districts in rules adopted pursuant to § 15-213, subsection A shall be the same amount as adopted by the director and, without affecting the scope of § 41-2501, subsection N or any similar provision, the amount for the Arizona board of regents, the legislative and judicial branches of state government and the state compensation fund shall be the amount adopted by the Arizona board of regents, the legislative or judicial branches of state government or the state compensation fund, respectively, either in an action noticed pursuant to title 38, chapter 3, article 3.1 or a rule adopted pursuant to chapter 6 of this title. This maximum amount shall not be more than seven hundred fifty thousand dollars. requirements shall not be artificially divided or fragmented in order to constitute a job order that satisfies this requirement.
- 2) 2.If the contractor subcontracts or intends to subcontract part or all of the work under a job order and if the job-order construction services contract includes descriptions of standard individual tasks, standard unit prices for standard individual tasks and pricing of job orders based on the number of units of standard individual tasks in the job order:
 - (a) The contractor has a duty to deliver promptly to each subcontractor invited to bid a coefficient to the contractor to

Article 4

do all or part of the work under one or more job orders:

(I) A copy of the descriptions of all standard individual tasks on which the subcontractor is invited to bid.

(II) A copy of the standard unit prices for the individual tasks on which the subcontractor is invited to bid.

(b) If not previously delivered to the subcontractor, the contractor has a duty to deliver promptly the following to each subcontractor invited to or that has agreed to do any of the work included in any job order:

(I) A copy of the description of each standard individual task that is included in the job order and that the subcontractor is invited to perform.

(II) The number of units of each standard individual task that is included in the job order and that the subcontractor is invited to perform.

(III) The standard unit price for each standard individual task that is included in the job order and that the subcontractor is invited to perform.

K. Notwithstanding anything to the contrary in this section or this title, a purchasing agency shall not:

1) Enter into a contract as contractor to provide construction-manager- at- risk construction services, design-build construction services or job- order- contracting construction services.

Article 4

- 2) Contract with itself, with another purchasing agency, with this state or with any other governmental unit of this state or the federal government for the purchasing agency to provide construction-manager-at-risk construction services, design-build construction services or job-order-contracting construction services.
- L. The prohibitions prescribed in subsection K of this section do not prohibit a purchasing agency from providing construction for itself as provided by law.
- M. For the purposes of this section, "professional services" includes architect services, engineer services, landscape architect services, assayer services, geologist services and land surveying services and any combination of those services.

R2-7-509. Procurement of Specified Professional Services

- A. Annual statement of qualifications and performance data. Firms desiring to provide specified professional services to the state may submit annually to the State Procurement Office a statement of qualifications and performance data which shall include, but not be limited to, the following:
- 1) The education, training, and qualifications of members of the firm and key employees;
 - 2) An executed United States General Services Administration Standard Form 254;
 - 3) Any other pertinent information requested by the procurement officer.
- B. Firms may amend statements of qualifications and performance by filing a new statement.
- C. The Director shall publish an informational brochure, which shall be available in the State Procurement Office, to assist firms desiring to provide specified professional services.

R2-7-510. Public Notice of Specified Professional Services

- A. Prior to public notice of the need for specified professional services, the head of the using agency shall determine in writing that the services to be acquired are services defined in

Article 4

- A.R.S. § 41-2571 and may recommend that the services be obtained pursuant to rule R2-7-514 or R2-7-515.
- B. Notice of need for specified professional services shall be given by the procurement officer pursuant to R2-7-313(C). Such notice shall be issued not less than 14 days in advance of when responses must be received. The notice shall contain a statement of the services required that adequately describes the project and specifies how a solicitation containing specific information on the project may be obtained.
- C. A request for proposals or request for supplemental statements that describes the state's project requirements, shall be issued to all firms responding to the public notice. Notice of any pre-proposal conference and the criteria to be used in selecting firms shall be included in the request.

R2-7-511. Specified Professional Services Selection Committee

- A. If a contract for specified professional services is expected to exceed the amount established by A.R.S. § 41-2535, the head of a purchasing agency shall designate an appropriate selection committee. The selection committee shall be comprised of an uneven number and not less than three members who shall serve at the pleasure of the head of the purchasing agency. Selection committee members shall include:
- 1) The procurement officer to serve as chairman;
 - 2) A representative of the using agency;
 - 3) A person registered in one of the professions involved in the proposed project;
 - 4) If the estimated project cost is expected to exceed \$2,000,000, a non-state employee registered in one of the professions involved in the proposed project.
 - 5) Such other members as the head of a purchasing agency shall deem appropriate.
- B. The selection committee shall evaluate:

Article 4

- 1) Annual statement of qualifications and performance data of those firms responding to the request;
 - 2) Proposals or supplemental statements.
- C. No person serving on the selection committee shall receive any direct or indirect benefit from the project under consideration.

R2-7-512. Cancellation or Rejection of the Solicitation

The solicitation may be cancelled or proposals rejected in accordance with R2-7-350, R2-7-351, R2-7-352 and R2-7-353.

R2-7-513. Selection Committee Evaluation

- A. To the extent possible, the selection committee shall, when using the single negotiated fee method pursuant to R2-7-514 select no fewer than three firms; or, when using the multiple fee proposals method pursuant to R2-7-515, select no fewer than five firms as being professionally and technically qualified. These firms shall be evaluated to determine each firm's:
- 1) Capabilities and qualifications for performing the contract; and
 - 2) Methods of approach.
- B. The selection committee shall prepare a memorandum of the selection process which indicates how the evaluation criteria were applied to determine the ranking of the three most qualified firms.

R2-7-514. Single Negotiated Fee Method of Award

- A. The procurement officer shall negotiate a contract with the most qualified firm for the required services at compensation determined in writing to be fair and reasonable to the state. Contract negotiations shall be directed toward:

Article 4

- 1) Making certain that the firm has a clear understanding of the scope of the work, specifically, the essential requirements involved in providing the required services;
 - 2) Determining that the firm will make available the necessary personnel and facilities to perform the services within the required time; and
 - 3) Agreeing upon compensation that is fair and reasonable, taking into account the estimated value, scope, complexity, and nature of the required services.
- B. The firm selected for award shall submit and certify cost and pricing data pursuant to A.R.S. § 41-2543.
- C. Failure to negotiate with the most qualified firm
- 1) If fair and reasonable compensation, contract requirements, and contract documents cannot be agreed upon with the most qualified firm, the procurement officer shall advise the firm in writing of the termination of negotiations.
 - 2) The procurement officer shall negotiate with the next most qualified firm in sequence or cancel the solicitation.
- D. Written notice of the award shall be sent to the firm with whom the contract is successfully negotiated. Each firm with whom discussions were held shall be notified of the award. Notice of award shall be made available to the public.
- E. After award of the contract, a memorandum setting forth the principal elements of the negotiation shall be prepared by the procurement officer. Such memorandum shall contain sufficient detail to reflect the significant considerations controlling price and the other terms of the contract. Such memorandum shall be included in the procurement file and be available to the public upon request.

Article 4

R2-7-515. Multiple Fee Proposal Method of Award

- A. The director or head of a purchasing agency shall select a professional architect, engineer, land surveyor, landscape architect, assayer or geologist, as appropriate, to prepare and seal a scope of services.
- B. After determination of the three firms deemed to be the most highly qualified, the selection committee shall issue a request for the fee proposal to such firms.
- C. Firms shall be afforded fair and equal treatment with respect to any opportunity for discussions and revisions of fee proposals. The procurement officer shall establish procedures and schedules for conducting discussions. If during discussions there is a need for any substantial clarification or change in the scope of services, it shall be amended to incorporate such clarification or change. Disclosure of any information derived from competing fee proposals is prohibited. Any substantial oral clarification of a fee proposal shall be reduced to writing by the offeror. The procurement officer shall keep a record of the date, time, place, purpose, and persons in attendance at such meetings.
- D. The procurement officer shall establish a common date and time for the submission of final offers. Final offers shall be submitted only once, provided, however, the Assistant Director for Facilities Management may make a written determination that it is advantageous to the state to conduct additional discussions or change the state's requirements and require another submission of final offers. Otherwise, no discussions of or changes in the final offers shall be allowed prior to selection for award. Firms shall also be informed that if they do not submit a notice of withdrawal or another final offer, their immediate previous offer will be construed as their final offer.
- E. Notice of award shall be made in accordance with R2-7-514(D) and (E).

§ 41-2579. Project delivery methods for design and construction services; report

- A. A purchasing agency may procure design services, construction and construction services, as applicable, under any of the following project delivery methods:
 - 1) Design-bid-build.
 - 2) Construction-manager-at-risk.

Article 4

- 3) Design-build.
 - 4) Job-order-contracting.
- B. For the design-bid-build project delivery method, the director shall procure:
- 1) Design services pursuant to § 41-2578.
 - 2) Construction by competitive sealed bidding, except as otherwise provided in § 41-2532.
- C. The director shall procure construction services under the construction- manager-at-risk, design-build and job-order-contracting project delivery methods pursuant to § 41-2578.
- D. The director shall procure design services relating to a construction- manager-at-risk construction services project pursuant to § 41-2578.
- E. For job-order-contracting construction services projects, if the director does not include design services in the job-order-contracting construction services contract, the director shall procure any design services relating to job-order-contracting construction services projects under the contract pursuant to § 41-2578.
- F. On or before January 15 of each year, any state entity that uses construction-manager-at-risk, design-build or job-order-contracting to procure construction services in a calendar year shall transmit to the governor, the president of the senate, the speaker of the house of representatives, the secretary of state and the director of the department of library, archives and public records a report on the total benefits associated with the use of construction-manager-at-risk, design-build or job-order-contracting to procure construction services. The report shall include a statement of costs incurred in securing the services, any overall administrative benefits realized through the use of the procurement methods, the number of projects begun in the preceding calendar year using the procurement methods and the cost and description of each project, any anticipated cost savings resulting from the use of the procurement methods and any actual cost savings realized through the use of the procurement method.

Article 5

**CHAPTER 23
ARIZONA PROCUREMENT CODE**

ARTICLE 6

CONTRACT CLAUSES

§ 41-2585. Contract clauses

- A. The director may permit or require the inclusion of clauses providing for appropriate remedies, adjustments in prices, time of performance or other contract provisions.
- B. The director may modify clauses for inclusion in any particular state contract, provided that any variations are supported by a written determination that states the circumstances justifying the variation and provided that notice of any material variation is stated in the solicitation.
- C. All contract clauses shall be consistent with the provisions of this chapter and the regulations issued pursuant to this chapter.

R2-7-601. Standard Terms and Conditions

State governmental units that have been delegated procurement authority by the Director shall use as standard terms and conditions in contracts for materials, services or construction clauses approved by the Director.

§ 41-2586. Indemnity agreements in construction and architect-engineer contracts void; definitions

- A. A covenant, clause or understanding in, collateral to or affecting a construction contract or subcontract or architect-engineer professional service contract or subcontract that purports to indemnify, to hold harmless or to defend the promisee of, from or against liability for loss or damage resulting from the negligence of the promisee or the promisee's agents, employees or indemnitee is against the public policy of this state and is void.
- B. Notwithstanding subsection A, a contractor who is responsible for the performance of a construction contract or subcontract may fully indemnify a person, firm, corporation, state

Article 5

or other agency for whose account the construction contract or subcontract is not being performed and who, as an accommodation, enters into an agreement with the contractor that permits the contractor to enter on or adjacent to its property to perform the construction contract or subcontract for others.

C. In this section:

- 1) "Architect-engineer professional service contract or subcontract" means a written or oral agreement relating to the design, construction administration, study, evaluation or other professional services furnished in connection with any actual or proposed construction, alteration, repair, maintenance, moving, demolition or excavation of a structure, street or roadway, appurtenance or other development or improvement to land.
- 2) "Construction contract or subcontract" means a written or oral agreement relating to the construction, alteration, repair, maintenance, moving, demolition or excavation or other development or improvement to land.

Article 6

**CHAPTER 23
ARIZONA PROCUREMENT CODE**

ARTICLE 7

COST PRINCIPLES

§ 41-2591. Cost principles rules

The director shall adopt rules setting forth cost principles which shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions which provide for the reimbursement of costs.

R2-7-701. Cost Principles

The cost principles set forth in the Code of Federal Regulations, 48 CFR Chapter 1, Subchapter e, Part 31, (October 1, 1991) excluding later amendments and editions, on file with the Secretary of State and incorporated by this reference, shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions that provide for the reimbursement of costs.

Article 7

**CHAPTER 23
ARIZONA PROCUREMENT CODE**

ARTICLE 8

MATERIALS MANAGEMENT

§ 41-2601. Definitions

In this article, unless the context otherwise requires:

1. "Excess materials" means any materials which have a remaining useful life but which are no longer required by the using agency in possession of the materials.
2. "Nonexpendable materials" means all tangible materials which have an original acquisition cost over an amount set by regulation and a probable useful life of more than one year.
3. "Surplus materials" means any materials that no longer have any use to this state or materials acquired from the United States government. This includes obsolete materials, scrap materials and nonexpendable materials that have completed their useful life cycle.

R2-7-801. Transferred

§ 41-2602. Material management rules

The director shall adopt rules governing:

1. The management of materials during their entire life cycle.
2. The acquisition and distribution of federal surplus materials.
3. The sale, lease or disposal of surplus materials by public auction, competitive sealed bidding or other appropriate method designated by rule.
4. The purchase of any such materials by an employee of the owning or disposing agency.
5. The transfer of excess and surplus materials.
6. The trade-in of excess or surplus materials.

Article 7

R2-7-802. Transferred

R2-7-803. Transferred

R2-7-804. Transferred

R2-7-805. Transferred

§ 41-2603. Surplus material program

The department may acquire surplus materials from the United States government and may distribute surplus materials as may be usable and necessary for public purposes to a state governmental unit or a political subdivision.

R2-7-806. Transferred

§ 41-2604. Authority for transfer of material

Notwithstanding any law to the contrary, the governing board, or in case there is none, the executive head of any state governmental unit, political subdivision or nonprofit institution determined to be eligible to receive surplus materials, may confer on any officer or employee thereof continuing authority to secure the transfer to it of surplus materials and to obligate its monies to the extent necessary to comply with the laws and conditions of such transfers. The director shall adopt rules establishing guidelines for use in determining eligibility.

R2-7-807. Transferred

§ 41-2605. Fees and charges

The department shall make proper charges and assess proper fees for the acquisition,

Article 7

receipt, warehousing, rehabilitation, delivery, distribution or transfer of excess and surplus materials. Such fees and charges shall be fair and equitable and shall be based on services performed, including acquisition, receipt, warehousing, rehabilitation, delivery, distribution or transfer. A reasonable charge shall be made for maintenance and repair services.

R2-7-808. Transferred

§ 41-2606. Surplus materials revolving funds

- A. The state surplus materials revolving fund is established. All monies coming into the department derived from state surplus materials fees and charges shall be placed in the state surplus materials revolving fund. All uncommitted monies in the state surplus materials revolving fund in excess of one hundred thousand dollars at the close of any fiscal year revert to the state general fund.
- B. The federal surplus materials revolving fund is established. All monies coming into the department derived from federal surplus materials shall be placed in the federal surplus materials revolving fund. All uncommitted monies in the federal surplus materials revolving fund in excess of fifty thousand dollars at the close of any fiscal year shall be returned to agencies and institutions through discounted service and handling charges to eligible donees in the following fiscal year until the surplus is depleted.
- C. Monies in the funds shall be available, subject to legislative appropriation, for the purpose of carrying out the provisions of this article.

R2-7-809. Transferred

§ 41-2607. Allocation of proceeds from sales, transfers or disposal of surplus materials

Unless otherwise provided by law, the director shall adopt rules for the allocation of proceeds from the sale, transfer, lease or disposal of excess and surplus materials.

R2-7-810. Transferred

Article 8

**CHAPTER 23
ARIZONA PROCUREMENT CODE**

ARTICLE 9

LEGAL AND CONTRACTUAL REMEDIES

§ 41-2611. Rules of procedure

The director may adopt rules of procedure providing for the expeditious administrative review of all contract claims or controversies both before the purchasing agency and through an appeal heard before the director in accordance with chapter 6, article 10 of this title.

§ 41-2612. Subject of rules

The rules adopted by the director pursuant to § 41-2611 shall, as a minimum, address the following subjects:

- 1) Protested solicitations and awards.
- 2) Suspension or debarment of contractors.
- 3) Breach of contract controversies and contract claims.

§ 41-2613. Debarment and suspension of contractors

- A. The director shall adopt rules providing for the suspension and debarment of any person from consideration for award of contracts pursuant to this chapter. If there are reasonable grounds for debarment the rules of the director may provide for the suspension of any person for not to exceed six months. A debarment shall not exceed three years.
- B. The causes for debarment or suspension include the following:
 - 1) Conviction of any person or any subsidiary or affiliate of any person for commission of a criminal offense arising out of obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.

Article 8

- 2) Conviction of any person or any subsidiary or affiliate of any person under any statute of the federal government, this state or any other state for embezzlement, theft, fraudulent schemes and artifices, fraudulent schemes and practices, bid rigging, perjury, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty which affects responsibility as a state contractor.
 - 3) Conviction or civil judgment finding a violation by any person or any subsidiary or affiliate of any person under state or federal antitrust statutes.
 - 4) Violations of contract provisions of a character which are deemed to be so serious as to justify debarment action, such as either of the following:
 - (a) Knowingly fails without good cause to perform in accordance with the specification or within the time limit provided in the contract.
 - (b) Failure to perform or unsatisfactory performance in accordance with the terms of one or more contracts, except 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.
 - (5) Any other cause deemed to affect responsibility as a state contractor, including suspension or debarment of such person or any subsidiary or affiliate of such person by another governmental entity for any cause listed in rules of the director.
- C. A written determination to debar or suspend shall be issued pursuant to the rules of the director which shall:
- 1) State the reasons for the action taken.
 - 2) Inform any debarred or suspended person involved of the right to administrative review as provided in this article.

Article 8

- D. A copy of the decision under subsection C shall be mailed or otherwise furnished to any debarred or suspended person and to any intervening party.

§ 41-2614. Judicial review

Except as provided in § 41-1092.08, subsection H, any final decision of the director under this chapter is subject to judicial review pursuant to title 12, chapter 7, article 6 by any party to the proceeding before the director, and the complaint seeking review shall be filed with the superior court in Maricopa county and served on the director and the purchasing agency.

§ 41-2615. Exclusive remedy

Notwithstanding any law to the contrary, including the provisions of title 12, chapter 7, article 2 and title 12, chapter 9, article 1, this article and the rules promulgated under this article shall provide the exclusive procedure for asserting a claim against this state or any agency of this state arising in relation to any procurement conducted under this chapter.

§ 41-2616. Violation; classification; liability; civil penalty; enforcement authority

- A. A person who contracts for or purchases any material, services or construction in a manner contrary to the requirements of this chapter, the rules adopted pursuant to this chapter, the rules adopted by the state board of education pursuant to § 15-213 or rules adopted by the Arizona board of regents, the Arizona lottery commission or the judicial branch pursuant to § 41-2501 is personally liable for the recovery of all public monies paid plus twenty per cent of such amount and legal interest from the date of payment and all costs and damages arising out of the violation.
- B. A person who intentionally or knowingly contracts for or purchases any material, services or construction pursuant to a scheme or artifice to avoid the requirements of this chapter, rules adopted pursuant to this chapter, rules adopted by the state board of education pursuant to § 15-213 or rules adopted by the state board of regents, the state lottery

Article 8

commission or the judicial branch pursuant to § 41-2501 is guilty of a class 4 felony.

- C. A person who serves on an evaluation committee for a procurement shall sign a statement before reviewing bids or proposals that the person has no interest in the procurement other than that disclosed and will have no contact with any representative of a competing vendor related to the particular procurement during the course of evaluation of bids or proposals, except those contacts specifically authorized by §§ 41-2534, 41-2537, 41-2538 and 41-2578. The person shall disclose on the statement any contact unrelated to the pending procurement that the person may need to have with a representative of a competing vendor and any contact with a representative of a competing vendor during evaluation of bids or proposals except those contacts specifically authorized by §§ 41-2534, 41-2537, 41-2538 and 41-2578. A person who serves on an evaluation committee and who fails to disclose contact with a representative of a competing vendor or who fails to provide accurate information on the statement is subject to a civil penalty of at least one thousand dollars but not more than ten thousand dollars.
- D. The attorney general on behalf of this state shall enforce the provisions of this chapter.

§ 41-2617. Contracts for procurement of construction; delay; recovery of damages by contractor

- A contract for the procurement of construction shall include a provision which provides for negotiations between the state governmental unit and the contractor for the recovery of damages related to expenses incurred by the contractor for a delay for which the state governmental unit is responsible, which is unreasonable under the circumstances and which was not within the contemplation of the parties to the contract. This section shall not be construed to void any provision in the contract which requires notice of delays, provides for arbitration or other procedure for settlement or provides for liquidated damages.

Article 8

R2-7-901. Definitions

In this Article, unless the context otherwise requires:

1. "Affiliate" means any person whose governing instruments require it to be bound by the decision of another person or whose governing board includes enough voting representatives of the other person to cause or prevent action, whether or not the power is exercised. It may also include persons doing business under a variety of names, or where there is a parent-subsidary relationship between persons.
2. "Debarment" means an action taken by the Director under R2-7-925 to prohibit a person from participating in state procurements.
3. "Filed" means delivery to the procurement officer or to the Director, whichever is applicable. A time/date stamp affixed to a document by the office of the procurement officer or the Director, whichever is applicable, shall be determinative of the time of delivery for purposes of filing.
4. "Governing instruments" means those legal documents that establish the existence of an organization and define its powers including articles of incorporation or association, constitution, charter and by-laws.
5. "Interested party" means an actual or prospective bidder or offeror whose economic interest may be affected substantially and directly by the issuance of a solicitation, the award of a contract or by the failure to award a contract. Whether an actual or prospective bidder or offeror has an economic interest will depend upon the circumstances of each case.
6. "Suspension" means an action taken by the Director under R2-7-930 temporarily disqualifying a person from participating in state procurements.

R2-7-902. Resolution of Bid Protests

The procurement officer of the contracting agency issuing the solicitation shall have the authority to resolve bid protests. Appeals from the decisions of the procurement officer may be made to the Director pursuant to R2-7-909.

Article 8

- A. Any interested party may protest a solicitation issued by the state, or the proposed award or the award of a state contract.
- B. Content of protest. The protest shall be in writing and shall include the following information:
 - 1) The name, address and telephone number of the protester;
 - 2) The signature of the protester or its representative;
 - 3) Identification of the purchasing agency and the solicitation or contract number;
 - 4) A detailed statement of the legal and factual grounds of the protest including copies of relevant documents; and
 - 5) The form of relief requested.

R2-7-903. Filing of a Protest

- A. Any interested party may protest a solicitation issued by the state, or the proposed award or the award of a state contract.
- B. Content of protest. The protest shall be in writing and shall include the following information:
 - 1) The name, address and telephone number of the protester;
 - 2) The signature of the protester or its representative;
 - 3) Identification of the purchasing agency and the solicitation or contract number;
 - 4) A detailed statement of the legal and factual grounds of the protest including copies of relevant documents; and
 - 5) The form of relief requested.

R2-7-904. Time for Filing Protests

- A. Protests concerning improprieties in a solicitation

Article 8

- 1) Protests based upon alleged improprieties in a solicitation that are apparent before the bid opening shall be filed before bid opening. Protests based upon alleged improprieties in a solicitation that are apparent before the closing date for receipt of initial proposals shall be filed before the closing date for receipt of initial proposals.
 - 2) In procurements requesting proposals, protests concerning improprieties that do not exist in the initial solicitation but that are subsequently incorporated into the solicitation shall be filed by the next closing date for receipt of proposals following the incorporation.
- B. In cases other than those covered in subsection (A) of this rule, protests shall be filed within ten days after the protester knows or should have known the basis of the protest, whichever is earlier.
- C. The protester shall give notice of the protest to the State Procurement Administrator within a reasonable time.
- D. If the protester shows good cause, the procurement officer of the contracting agency may consider any protest that is not filed timely.
- E. The procurement officer shall immediately give notice of the protest to all interested parties.

R2-7-905. Stay of Procurements During the Protest

If a protest is filed before the award of a contract or before performance of a contract has begun, the award may be made or contract performance may proceed, unless the State Procurement Administrator stays the contract award or performance on determining in writing that there is a reasonable probability that the protest will be sustained or that stay is not contrary to the best interests of the state.

Article 8

R2-7-906. Confidential Information

- A. Material submitted by a protester shall not be withheld from any interested party except to the extent that the withholding of information is permitted or required by law as determined pursuant to A.R.S. § 41-2533(D) or 41-2534(D) and R2-7-104.
- B. If the protester believes the protest contains material that should be withheld, a statement advising the procurement officer of this fact shall accompany the protest submission in accordance with R2-7-104.

R2-7-907. Decision by the Procurement Officer

- A. The procurement officer of the purchasing agency shall issue a written decision within 14 days after a protest has been filed pursuant to R2-7-903. The decision shall contain an explanation of the basis of the decision and a statement that the decision may be appealed to the Director of the Department of Administration within five days from receipt of the decision.
- B. The procurement officer shall furnish a copy of the decision to the protester, by certified mail, return receipt requested, or by any other method that provides evidence of receipt.
- C. The time limit for decisions set forth in subsection (A) of this rule may be extended by the Director for good cause for a reasonable time not to exceed 30 days. The Director shall notify the protester in writing that the time for the issuance of a decision has been extended and the date by which a decision will be issued.
- D. If the procurement officer fails to issue a decision within the time limits set forth in subsection (A) or (C) of this rule, the protester may proceed as if the procurement officer had issued an adverse decision.

R2-7-908. Remedies

- A. If the procurement officer of the purchasing agency sustains the protest in whole or part and determines that a solicitation, proposed contract award, or contract award does not

Article 8

- comply with the procurement statutes and regulations, the officer shall implement an appropriate remedy.
- B. In determining an appropriate remedy, the procurement officer shall consider all the circumstances surrounding the procurement or proposed procurement including, but not limited to, the seriousness of the procurement deficiency, the degree of prejudice to other interested parties or to the integrity of the procurement system, the good faith of the parties, the extent of performance, costs to the government, the urgency of the procurement, and the impact of the relief on the purchasing agency's mission.
- C. An appropriate remedy may include one or more of the following:
- 1) Decline to exercise an option to renew under the contract;
 - 2) Terminate the contract;
 - 3) Amend the solicitation;
 - 4) Issue a new solicitation;
 - 5) Award a contract consistent with procurement statutes and regulations; or
 - 6) Such other relief as is determined necessary to ensure compliance with procurement statutes and regulations.

R2-7-909. Appeals to the Director

- A. An appeal from a decision entered or deemed to be entered by the procurement officer shall be filed with the Director within five days after the date the decision is received. The appellant shall also file a copy of the appeal with the procurement officer.
- B. Content of appeal. The appeal shall contain:
- 1) The information set forth in R2-7-903(B), including the identification of protected information in the manner set forth in R2-7-906;
 - 2) A copy of the decision of the procurement officer; and
 - 3) The precise factual or legal error in the decision of the procurement officer from which an appeal is taken.

Article 8

R2-7-910. Notice of Appeal

- A. The procurement officer shall immediately give notice of the appeal to interested parties.
- B. The Director shall upon request furnish copies of the appeal to those named in subsection (A) of this rule subject to the provisions of R2-7-906.

R2-7-911. Stay of Procurement During Appeal

If a stay was issued pursuant to R2-7-905, the filing of an appeal shall automatically continue the stay unless the Director makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the state.

R2-7-912. Agency Report

- A. The procurement officer shall file a complete report on the appeal with the Director within ten days after the date the appeal is filed. At the same time, the procurement officer shall furnish a copy of the report to the appellant by certified mail, return receipt requested, and to any interested parties who have responded to the notice given pursuant to R2-7-910(B). The report shall contain copies of:
 - 1) The appeal;
 - 2) The bid or proposal submitted by the appellant;
 - 3) The bid or proposal of the firm that is being considered for award;
 - 4) The solicitation, including the specifications or portions relevant to the appeal;
 - 5) The abstract of bids or proposals or relevant portions;
 - 6) Any other documents that are relevant to the protest; and
 - 7) A statement by the procurement officer setting forth findings, actions, recommendations and any additional evidence or information necessary to determine the validity of the appeal.
- B. Extension for filing of report

Article 8

- 1) The procurement officer may request in writing an extension of the time period setting forth the reason for extension.
- 2) The Director's determination on the request shall be in writing, state the reasons for the determination, and, if an extension is granted, set forth a new date for the submission of the report. The Director shall notify the procurement officer and the appellant in writing that the time for the submission of the report has been extended and the date by which the report will be submitted.

C. Comments on report

- 1) The appellant shall file comments on the agency report with the Director within seven days after receipt of the report. Copies of the comments shall be provided by the appellant to the procurement officer of the purchasing agency and other interested parties.
- 2) The Director may grant an extension on the time period to file comments pursuant to a written request made by the appellant within the period set forth in paragraph (C)(1) of this rule stating the reason an extension is necessary. The Director's determination on the request shall be in writing, state the reasons for the determination, and, if the extension is granted, set forth a new date for the filing of comments. The Director shall notify the procurement officer of any extension.

R2-7-913. Dismissal Before Hearing

The Director shall dismiss, upon a written determination, an appeal before scheduling a hearing if:

1. The appeal does not state a valid basis for protest; or
2. The appeal is untimely pursuant to R2-7-909(A).

Article 8

R2-7-914. Hearing

Hearings on appeals of bid protest decisions shall be conducted as contested cases pursuant to these rules and the Arizona Administrative Procedure Act (Article 1, Chapter 6, Title 41, Arizona Revised Statutes).

R2-7-915. Remedies

If the Director sustains the appeal in whole or part and determines that a solicitation, proposed award, or award does not comply with procurement statutes and regulations, remedies shall be implemented pursuant to R2-7-908.

R2-7-916. Contract Claims

- A. Claims under contracts shall be filed with the procurement officer administering the contract within 12 months after claim arises.
- B. The procurement officer administering the contract shall have the authority to settle and resolve contract claims subject to subsection (C) of this rule. Appeals from decisions of the procurement officer may be made to the Director pursuant to R2-7-919.
- C. The settlement or resolution of a claim in excess of \$10,000 requires the prior written approval of the State Procurement Administrator.

R2-7-917. Procurement Officer's Decision

- A. If a claim cannot be resolved by mutual agreement, the procurement officer shall, upon a written request by the contractor for a final decision, issue a written decision no more than 60 days after the request is filed. Before issuing a final decision, the procurement officer shall review the facts pertinent to the claim and secure any necessary assistance from legal, fiscal, and other advisors.
- B. Final decision. The procurement officer shall furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt. The decision shall include:

Article 8

- 1) A description of the claim;
- 2) A reference to the pertinent contract provision;
- 3) A statement of the factual areas of agreement or disagreement;
- 4) A statement of the procurement officer's decision, with supporting rationale;
- 5) A paragraph substantially as follows:

(a) "This is the final decision of the procurement officer. This decision may be appealed to the Director of the Department of Administration. If you appeal, you must file a written notice of appeal with the Director within five days from the date you receive this decision".

R2-7-918. Issuance of a Timely Decision

- A. The time limit for decisions set forth in R2-7-917(A) may be extended for good cause for a reasonable time not to exceed 30 days. The procurement officer shall notify the contractor in writing that the time for the issuance of a decision has been extended and the date by which a decision shall be issued.
- B. If the procurement officer fails to issue a decision within 60 days after the request is filed or within the time prescribed under subsection (A) of this rule, the contractor may proceed as if the procurement officer had issued an adverse decision.

R2-7-919. Appeals and Reports to the Director

- A. An appeal from a final decision of a procurement officer on a claim shall be filed with the Director within five days from the date the decision is received. The appellant shall also file a copy of the appeal with the procurement officer.
- B. Content of appeal. The appeal shall contain a copy of the decision of the procurement officer and the precise factual or legal error in the decision of the procurement officer from which an appeal is taken.

Article 8

- C. The procurement officer shall file a complete report on the appeal with the Director within ten days from the date the appeal is filed. At the same time, the procurement officer shall furnish a copy of the report to the appellant by certified mail, return receipt requested. The report at a minimum shall contain a copy of the claim, a copy of the procurement officer's decision, if applicable, and any other documents that are relevant to the claim.

R2-7-920. Controversies Involving State Claims Against a Contractor

All claims asserted by the state against a contractor that are not resolved by mutual agreement shall promptly be referred by the procurement officer to the Director for a hearing without regard to the procedures set forth in these rules R2-7-916 through R2-7-919.

R2-7-921. Hearing

Hearings on appeals of claims decisions shall be conducted as contested cases pursuant to these rules and the Arizona Administrative Procedure Act (Article 1, Chapter 6, Title 41, Arizona Revised Statutes).

R2-7-922. Authority to Debar or Suspend

The Director has the sole authority to debar or suspend a person from participating in state procurements.

R2-7-923. Initiation of Debarment

Upon receipt of information concerning a possible cause for debarment, the Director shall investigate the possible cause. If the Director has a reasonable basis to believe that a cause for debarment exists, the Director may propose debarment under R2-7-925.

Article 8

R2-7-924. Period of Debarment

- A. The period of time for a debarment shall not exceed three years from the date of the debarment determination.
- B. If debarment is based solely upon debarment by another governmental agency, the period of debarment may run concurrently with the period established by that other debarring agency.

R2-7-925. Notice

If the Director proposes debarment, the Director shall notify the person and affected affiliates in writing within seven days by certified mail, return receipt requested, of the proposed debarment and that a hearing shall be scheduled in accordance with this Article.

R2-7-926. Notice to Affiliates

- A. If the Director proposes to debar an affiliate, the affiliate shall have a right to appear in any hearing on the proposed debarment to show mitigating circumstances.
- B. The affiliate shall in writing advise the Director within 30 days of receipt of the notice under R2-7-925 of its intention to appear under subsection (A) of this rule. Failure to provide written notice of appearance within the 30-day period shall be a waiver of the right to appear in the hearing.

R2-7-927. Imputed Knowledge

- A. Improper conduct may be imputed to an affiliate for purposes of debarment where the impropriety occurred in connection with the affiliate's duties for or on behalf of, or with the knowledge, approval, or acquiescence of, the contractor.
- B. The improper conduct of a person or its affiliate having a contract with a contractor may be imputed to the contractor for purposes of debarment where the impropriety occurred in

Article 8

connection with the person's duties for or on behalf of, or with the knowledge, approval, or acquiescence of, the contractor.

R2-7-928. Reinstatement

- A. The Director may at any time after a final decision on a debarment reinstate a debarred person or rescind the debarment upon a determination that the cause upon which the debarment is based no longer exists.
- B. Any debarred person may request reinstatement by submitting a petition to the Director supported by documentary evidence showing that the cause for debarment no longer exists or has been substantially mitigated.
- C. The Director may require a hearing on the request for reinstatement.
- D. The decision on reinstatement shall be in writing, be made within seven days after the request for a hearing is filed and specify the factors on which it is based.
- E. Decisions on reinstatement requests are not subject to judicial appeal.

R2-7-929. Limited Participation

The Director may allow a debarred person to participate in state contracts on a limited basis during the debarment period upon a written determination that participation is advantageous to the state. The determination shall specify the factors on which it is based and define the extent of the limits imposed.

R2-7-930. Suspension

- A. If adequate grounds for debarment exist, the Director may suspend a person from receiving any award in accordance with the procedures in R2-7-932.
- B. The Director shall not suspend a person pending debarment unless compelling reasons require suspension to protect state interests.

Article 8

R2-7-931. Period and Scope of Suspension

- A. Unless otherwise agreed to by the parties, the period of suspension shall not be more than 30 days without satisfying the notice requirements of R2-7-932.
- B. For purpose of suspension, a person's conduct may be imputed to an affiliate or another person in accordance with R2-7-927.

R2-7-932. Notice, Hearing, Determination, and Appeal

- A. The Director shall notify the person suspended by personal service or certified mail, return receipt requested.
- B. The notice of suspension shall state:
 - 1) The basis for suspension;
 - 2) The period, including dates, of the suspension;
 - 3) That bids or proposals shall not be solicited or accepted from the person and, if received, will not be considered; and
 - 4) That the person is entitled to a hearing on the suspension if the person files a written request for a hearing with the Director within seven days after receipt of the notice.
- C. If a suspended party requests a hearing, the hearing officer shall arrange for a prompt hearing unless the Attorney General determines that a hearing at such time is likely to jeopardize an investigation. In no case shall the hearing be delayed longer than six months after notice of suspension.
- D. A hearing requested under this Section shall be conducted, to the extent practicable, in accordance with these rules and the Arizona Administrative Procedure Act (Article 1, Chapter 6, Title 41, Arizona Revised Statutes).

R2-7-933. Master List

- A. The Director shall maintain a master list of debarments, suspension, and voluntary exclusions under this Article.

Article 8

- B. The master list shall show as a minimum the following information:
- 1) The names and vendor number of those persons whom the state has debarred or suspended under this Article;
 - 2) The basis of authority for the action;
 - 3) The period of debarment or suspension, including the expiration date; and
 - 4) The name of the debarring or suspending agency, if the state's debarment or suspension is based on debarment or suspension by another governmental agency.
- C. The master list shall include a separate action listing persons voluntarily excluded from participation in state contracts.

R2-7-934. Hearing Procedures

- A. If a hearing is required or permitted under these rules, the Director shall act as a hearing officer or appoint a hearing officer. The Director may also direct the parties to engage in settlement negotiations or alternative disputes resolution procedures before scheduling a hearing.
- B. If a hearing is required or permitted under these rules, the hearing officer shall arrange for a prompt hearing and notify the parties in writing of the time and place of the hearing.
- C. The hearing shall be conducted in an informal manner without formal rules of evidence or procedure.
- D. The hearing officer may:
- 1) Hold pre-hearing conferences to settle, simplify, or identify the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding;
 - 2) Require parties to state their positions concerning the various issues in the proceeding;
 - 3) Require parties to produce for examination those relevant witnesses and documents under their control;

Article 8

- 4) Rule on motions and other procedural items on matters pending before such officer;
 - 5) Regulate the course of the hearing and conduct of participants;
 - 6) Establish time limits for submission of motions or memoranda;
 - 7) Impose appropriate sanctions against any person failing to obey an order under these procedures, which may include:
 - (a) Refusing to allow the person to assert or oppose designated claims or defenses, or prohibiting that person from introducing designated matters in evidence;
 - (b) Excluding all testimony of an unresponsive or evasive witness; and
 - (c) Expelling person from further participation in the hearing;
 - 8) Take official notice of any material fact not appearing in evidence in the record, if the fact is among the traditional matters of judicial notice; and
 - 9) Administer oaths or affirmations; and
 - 10) Issue a stay of contract award or contract performance.
- E. A transcribed record of the hearing shall be made available at cost to the requesting party.

R2-7-935. Recommendation by the Hearing Officer

- A. The hearing officer shall make a recommendation to the Director based on the evidence presented. The recommendation shall include findings of fact and conclusions of law.
- B. The Director may affirm, modify, or reject the hearing officer's recommendation in whole or in part, may remand the matter to the hearing officer with instructions, or make any other appropriate disposition.

Article 8

R2-7-936. Final Decision by the Director

A decision by the Director shall be final. The decision shall be sent within 20 days after the conclusion of the hearing to all parties by personal service or certified mail, return receipt requested. The decision shall state that any party adversely affected may within ten days request a rehearing with the Director.

R2-7-937. Rehearing of Director's Decision

- A. Any party, including a procurement officer, who is aggrieved by the Director's decision may file a written request for rehearing of the decision specifying the particular grounds.
- 1) The request for rehearing shall be filed with the Director within ten days after receipt of the decision and shall include any supporting affidavits.
 - 2) The request shall be clearly designated as a "Request for Rehearing".
 - 3) The Director shall within five days after the request is filed notify interested parties of the request by personal service or certified mail, return receipt requested.
- B. An interested party may within ten days after receipt of the notice file a response including opposing affidavits.
- C. Any argument not raised in the request or in a response is waived.
- D. The Director may require the filing of written briefs and may provide for oral argument.
- E. A rehearing of the decision may be granted for any of the following causes:
- 1) Irregularity in the proceedings before the Director or an abuse of discretion by the Director, depriving the requesting party of a fair hearing;
 - 2) Misconduct of the Director, his staff or the hearing officer or any party;
 - 3) Accident or surprise that could not have been prevented by ordinary prudence;
 - 4) Newly discovered material evidence that could not with reasonable diligence have been discovered and produced at the original hearing;
 - 5) Excessive or insufficient penalties;

Article 8

- 6) Error in the admission or rejection of evidence or other error of law occurring at the hearing;
 - 7) A showing that the decision is not justified by the evidence or is contrary to law.
- F. The Director's decision concerning a request for rehearing shall be in writing and shall state the basis of the decision. A decision granting a rehearing shall specify with particularity the grounds on which the rehearing is granted, and the date, time and place of the rehearing. The rehearing shall cover only those matters specified in the decision.
- G. The Director, within the time for filing a request for rehearing under this rule, may on his own initiative order a rehearing of his decision for any reason for which he might have granted a rehearing on request of a party.

Article 9

**CHAPTER 23
ARIZONA PROCUREMENT CODE**

ARTICLE 10

INTERGOVERNMENTAL PROCUREMENT

§ 41-2631. Definitions

In this article, unless the context otherwise requires:

1. "Cooperative purchasing" means procurement conducted by, or on behalf of, more than one public procurement unit.
2. "Local public procurement unit" means any political subdivision and any agency, board, department or other instrumentality of such political subdivision.
3. "Nonprofit educational or public health institution" means any educational or public health institution, no part of the income of which is distributable to its members, directors or officers, as defined in rules adopted by the director and includes certified nonprofit agencies for disabled individuals as defined in § 41-2636.
4. "Public procurement unit" means either a local public procurement unit, the department, any other state or an agency of the United States.

R2-7-1001. Definition

"Eligible procurement unit" means a public procurement unit or a nonprofit educational or public health institution.

R2-7-1002. Applicability

Agreements entered into pursuant to Article 10 of the Arizona Procurement Code shall be limited to the areas of procurement, warehousing or materials management.

Article 9

R2-7-1003. Intergovernmental Procurement Agreements Approval

All agreements entered into pursuant to Article 10 of the Arizona Procurement Code by the state shall be approved by the State Procurement Administrator.

§ 41-2632. Cooperative purchasing authorized

A. Any public procurement unit may either participate in, sponsor, conduct or administer a cooperative purchasing agreement for the procurement of any materials, services or construction with one or more public procurement units in accordance with an agreement entered into between the participants. A nonprofit educational or public health institution may enter into an agreement pursuant to this section if one or more of the parties involved is a public procurement unit. An agreement entered into as provided in this article is exempt from § 11-952, subsections D and F. Parties under a cooperative purchasing agreement may:

- 1) Sponsor, conduct or administer a cooperative agreement for the procurement or disposal of any materials, services or construction.
- 2) Cooperatively use materials or services.
- 3) Commonly use or share warehousing facilities, capital equipment and other facilities.
- 4) Provide personnel, except that the requesting public procurement unit shall pay the public procurement unit providing the personnel the direct and indirect cost of providing the personnel, in accordance with the agreement.
- 5) On request, make available to other public procurement units informational, technical or other services that may assist in improving the efficiency or economy of procurement. The public procurement unit furnishing the informational or technical services has the right to request reimbursement for the reasonable and necessary costs of providing such services.

B. The activities described in this section do not limit what parties may do under a cooperative purchasing agreement.

Article 9

R2-7-1004. Cooperative State Purchasing Agreement in Form of a State Requirements Contract

Any state requirements contract with an eligible procurement unit entered into pursuant to A.R.S. § 41-2642 shall provide that:

1. Payment for materials or services and inspection and acceptance of materials or services ordered by the eligible procurement unit under Department contracts shall be the exclusive obligation of such unit;
2. The exercise of any rights or remedies by the eligible procurement unit shall be the exclusive obligation of such unit;
3. The Department may terminate without notice any cooperative purchasing agreement if the eligible procurement unit fails to comply with the terms of the contract;
4. Failure of an eligible procurement unit to secure performance from the contractor in accordance with the terms and conditions of its purchase order does not necessarily require the state to exercise its own rights or remedies;
5. The eligible procurement unit shall not use a state contract as a method for obtaining addition concessions or reduced prices for similar material or services; and
6. The Department shall provide the eligible procurement unit a list monthly of material and services available from state contracts. An annual fee established by the State Procurement Office and approved by the Director for a copy of such list, plus a fee established by the State Procurement Office for each additional copy, shall be paid by the eligible procurement unit to the Department.

R2-7-1005. Informational and Technical Services

The State Procurement Administrator shall develop, maintain and distribute a list of information and technical services available from the State Procurement Office. Such list shall contain the names of any suspended or debarred contractors and shall be

Article 9

distributed to all eligible procurement units that have entered into a cooperative purchasing agreement with the Department.

§ 41-2633. Use of payments received by a supplying public procurement unit

All payments received by a public procurement unit supplying personnel or services shall be available to the supplying public procurement unit to defray the cost of the cooperative program.

§ 41-2634. Public procurement units in compliance with chapter requirements

If the public procurement unit administering a cooperative purchase complies with the requirements of this chapter, any public procurement unit participating in such a purchase is deemed to have complied with this chapter. Public procurement units may not enter into a cooperative purchasing agreement for the purpose of circumventing this chapter.

§ 41-2635. Contract controversies

- A. Under a cooperative purchasing agreement in which this state is a party, controversies arising between an administering public procurement unit and its bidders, offerors or contractors shall be resolved in accordance with article 9 of this chapter.
- B. Any local public procurement unit which is not subject to article 9 of this chapter may enter into an agreement with a public procurement unit to establish procedures or use such unit's existing procedures to resolve controversies with contractors, whether or not such controversy arose from a cooperative purchasing agreement.

§ 41-2636. Procurement from Arizona industries for the blind, certified nonprofit agencies for disabled individuals and Arizona correctional industries; definitions

- A. The director shall appoint a committee to determine those materials and services that are provided, manufactured, produced and offered for sale by Arizona industries for the blind, certified nonprofit agencies for disabled individuals and Arizona correctional industries and that satisfy the requirements of state governmental units and to establish a fair

Article 9

- market price for all approved materials and services offered for sale which meet these requirements.
- B. Materials and services from Arizona correctional industries shall be presented to the committee for approval. Office products, vinyl binders and furniture refurbishing services shall be exempt from this article. State governmental units shall purchase office products, vinyl binders and furniture from Arizona correctional industries if each of the following apply:
- 1) Such materials and services are readily available.
 - 2) Such materials and services are capable of timely delivery.
 - 3) Such materials and services are of equal quality and price for these same materials and services in the private sector.
- C. State governmental units shall purchase approved materials and services if such materials and services are readily available.
- D. Notwithstanding the requirements of § 41-2532, state governmental units and local public procurement units may purchase or contract for any products, materials and services directly from Arizona industries for the blind, certified nonprofit agencies for disabled individuals and Arizona correctional industries without competitive bidding if the delivery and quality of the products, materials or services meet the unit's reasonable requirements.
- E. The committee shall meet during the first month of each fiscal year to determine which articles, products or services Arizona correctional industries, certified nonprofit agencies for disabled individuals and Arizona industries for the blind should continue to manufacture for state use, to advise such agencies and industries of any changes in specifications and to identify new articles or products which should be manufactured.
- F. For the purposes of this section:
- 1) "Certified nonprofit agency for disabled individuals" means a nonprofit activity center or sheltered workshop that satisfies all of the following:
 - (a) Is organized under the laws of this state or another state, is

Article 9

operated in the interest of disabled individuals and The net income of which does not inure in whole or in part to the benefit of any shareholder or other individual.

(b) Complies with any applicable occupational health and safety standard required by the laws of the United states and this state.

2) "Disabled individual" means an individual who, because of the nature of the individual's disabilities, is not able to fully participate in competitive employment and for whom specialized employment opportunities must be provided.

R2-7-1006. Establishment of the Committee

- A. The Director shall appoint a Committee to determine under A.R.S. § 41-2636 whether materials or services offered by Arizona Industries for the Blind ("AIB") and Arizona Correctional Industries ("ACI") should be placed on an Arizona state contract for mandatory purchase by state governmental units. The state procurement Administrator or his or her designee shall serve as chairman. Committee members shall serve at the pleasure of the Director.
- B. The chairman may appoint a subcommittee to assist in the evaluation of materials and services under consideration by the committee.

R2-7-1007. Evaluation of Materials and Services

- A. For each material or service under consideration by the Committee, AIB or ACI shall submit to the Committee, where appropriate, specifications, production data, and pricing data relating to each material or service for which an Arizona state contract is sought.
- B. The Committee shall evaluate each material or service to determine the following:
 - 1) The existence and extent of a need within state governmental units for the material or service;

Article 9

- 2) The availability of the material or service from AIB or ACI to meet those needs;
- 3) That AIB or ACI is generally capable of meeting the reasonable delivery requirements of state governmental units;
- 4) That the quality of the material or service is substantially equivalent to that available from the private sector; and
- 5) A reasonable price for the material or service or, if AIB or ACI has established a price, that it is equivalent to the price for a substantially similar material or service available from the private sector.

R2-7-1008. Contract Awards by the Committee

- A. If a majority of the Committee votes that the criteria set forth in R2-7-1007(B) have been met, the State Procurement Office shall enter into an Arizona state contract with AIB or ACI for the material or service.
- B. If a majority of the Committee votes that at least the criterion set forth in R2-7-1007(B)(4) has been met, the Committee may direct the State Procurement Office to enter into a contract with AIB or ACI for the material or service from which state governmental units may, but are not required to, purchase.
- C. Contracts awarded under this rule shall be for one year with up to three one-year options to renew. If the State Procurement Office, when considering the exercise of an option to renew, makes an initial determination that the criteria set forth in R2-7-1007(B) no longer are being met, the State Procurement Office shall refer the matter to the Committee for a final determination.
- D. If a majority of the Committee determines that the criteria set forth in R2-7-1007(B) no longer are being met respecting a material or service covered under a contract awarded under this rule, the Committee shall withdraw its approval of such material or service and notify the State Procurement Office and the AIB or ACI, as appropriate. The State Procurement Office, upon receipt of such notice, shall discontinue procurement of the

Article 9

disapproved material or service until such time as the Committee again may approve the material or service.

R2-7-1009. Procurement of Other AIB or ACI Materials or Services by State Governmental Units

A state governmental unit may enter into an agreement pursuant to R2-7-1004 to purchase without competitive bidding a material or service that AIB or ACI has not submitted to the Committee or that has been rejected by the Committee provided delivery and quality of the material or service meet the state governmental unit's reasonable requirements.

§ 41-2637. Compliance with federal requirements

If a procurement involves the expenditure of federal assistance or contract monies, the director shall comply with federal law and authorized regulations which are mandatory applicable and which are not presently reflected in this chapter.

Article 10

**CHAPTER 23
ARIZONA PROCUREMENT CODE**

ARTICLE 11

SMALL BUSINESS PROCUREMENT PROGRAM [REPEALED]

§§ 41-2651, 41-2652. Repealed by Laws 1988, Ch. 145, § 3, eff. January 1, 1991

CHAPTER 23
ARIZONA PROCUREMENT CODE

ARTICLE 12

STATE AGENCY RECYCLING MATERIALS PROCUREMENT PROGRAM

§ 41-2661. State agency office paper recycling

- A. For purposes of this article, the definitions found in § 49-831 apply to this article.
- B. The department shall require that all state governmental units, including universities, establish a program for the recycling of all wastepaper generated by those units including, at a minimum, high-grade office paper and corrugated paper. Under the program, each unit shall ensure the separate collection of approximately fifty per cent of the office wastepaper generated by each unit not later than November 1, 1991.
- C. The department shall establish procedures for collecting and storing the wastepaper containers to be used in this program.
- D. The department shall administer the contracts with buyers of wastepaper.
- E. On or before January 31 of each year, the director of the department of administration shall evaluate the amount of wastepaper recycled by state governmental units and make all necessary modifications to the administration of the program to maximize the amount of wastepaper that is effectively and practicably recycled.

§ 41-2662. State agency purchase of recycled materials

- A. The purchase of paper or paper products for use by various agencies and departments of state government shall be in accordance with this chapter. If a state agency purchases or causes the purchase of printing on recycled paper pursuant to this section, it shall require the printed material to include a printed statement or symbol which indicates that the document is printed on recycled paper. This subsection does not apply to the purchase of paper containers for food or beverages.
- B. Not later than November 1, 1991 and annually thereafter, the director shall report to the governor and the legislature on the following:

Article 11

- 1) Methods and results of the purchase of paper and other recycled materials.
- 2) Findings and recommendations regarding definitions and bid specifications in state procurement contracts.
- 3) Availability, performance, appropriate uses, markets and price of paper and other recycled material.
- 4) Potential state agency demand for and feasibility of cooperative purchases with political subdivisions.
- 5) Appropriate record keeping and reporting mechanisms.
- 6) Other similar matters of program design and administration.