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3 AAC is amended by adding a new chapter to read:

Chapter 109. Procurement for Alaska Energy Authority Managed Grants.

Article

1. Roles and Responsibilities (3 AAC 109.010 - 3 AAC 109.040)
2. Source Selection General Requirements (3 AAC 109.060 - 3 AAC 109.200)
3. Competitive Sealed Bidding (3 AAC 109.210 - 3 AAC 109.330)
4. Competitive Sealed Proposals (3 AAC 109.340 - 3 AAC 109.440)
5. Other Procurement Methods (3 AAC 109.450 - 3 AAC 109.500)
6. Contract Formation and Modification (3 AAC 109.510 - 3 AAC 109.560)
7. Legal and Contractual Remedies (3 AAC 109.570 - 3 AAC 109.620)
8. Additional Principles and Administrative Provisions (3 AAC 109.650 – 3 AAC 109.710)
9. General Provisions (3 AAC 109.900)

Article 1. Roles and Responsibilities

Section

10. Applicability
20. General standards for procurements on behalf of a grantee
30. Roles and responsibilities
40. Applicability of regulations

3 AAC 109.010. Applicability. (a) This chapter applies to procurement for construction, supplies, services, and professional services for a project conducted by the authority in managing a grant on behalf of a grantee. This chapter applies only to procurements exempt AS 36.30 (State Procurement Code) under AS 36.30.850(b)(1).

(b) This chapter applies only to procurements initiated on or after July 10, 2015.
(Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.020. General standards for procurements on behalf of a grantee. This chapter sets out procedures for the authority to conduct procurements on behalf of grantees in a manner that

- (1) provides for the needs of the grantee;
- (2) is efficient, cost-effective, and consistent; and
- (3) is justifiable to potential bidders, offerors, and contractors. (Eff. ___/___/___,

Register _____)

Authority: AS 44.83.080

3 AAC 109.030. Roles and responsibilities. (a) The executive director is vested with and may exercise all of the rights, powers, and duties that relate to the management of construction, supplies, services, and professional services procured under this chapter by the authority on behalf of a grantee.

(b) The executive director may delegate to other qualified employees of the authority any right, power, or duty described in (a) of this section, except that the executive director shall retain the right, power, and duty to consider appeals of protests under 3 AAC 109.570.

(c) The executive director in exercising any right, power, or duty described in (a) of this section shall

- (1) appoint a chief procurement officer for the authority for procurements under

this chapter; and

(2) take actions necessary to resolve any protest appeal under 3 AAC 109.570 or any appeal of contract claim under 3 AAC 109.590.

(d) Subject to a delegation of the authority from the executive director under this chapter, the chief procurement officer of the authority shall

(1) procure or supervise the procurement of all supplies, services, construction, and professional services;

(2) prescribe the time, manner, and form of making requisitions for supplies and services;

(3) prescribe standard forms for solicitation documents and contracts;

(4) take actions necessary to provide a recommendation to the executive director on a protest appeal under 3 AAC 109.570; and

(5) provide for other matters that may be necessary to carry out this chapter.

(e) An employee of the authority may exercise a delegated power only in accordance with the delegation and this chapter. The delegation must be in writing and may be revoked at any time, with or without cause, by the executive director. (Eff. ___/___/___, Register _____)

Authority: AS 44.83.080

3 AAC 109.040. Applicability of other terms and conditions. Nothing in this chapter prevents the authority from complying with the terms and conditions of a grant, gift, bequest, cooperative agreement, or federal assistance agreement. (Eff. ___/___/___, Register _____)

Authority: AS 44.83.080

Article 2. Source Selection General Requirements.

Section

60. Nondiscrimination in source selection

70. Exclusion of prospective contractor from competition

80. Lists of contractors

90. Specifications

100. Contract terms and conditions

110. Construction project delivery methods

120. Multiple awards

130. Bid, payment, and performance bonds

150. Public notice of competitive sealed bids and competitive sealed proposals

160. Multi-step solicitations

170. Amendments or extensions to a solicitation

180. Cancellation of the solicitation or rejection of all bids or proposals

190. Disposition of canceled or rejected bids or proposals

200. Protest of cancellation of a solicitation

3 AAC 109.060. Nondiscrimination in source selection. Source selection and contract awards may not be based on discrimination because of race, religion, color, national origin, sex, age, marital status, pregnancy, parenthood, disability, or political affiliation. (Eff. ___/___/___, Register _____)

Authority: AS 44.83.080

3 AAC 109.070. Exclusion of prospective contractor from competition. (a) A procurement officer may issue a competitive solicitation that prohibits an individual or

contractor from submitting a bid or proposal if

(1) the procurement officer makes a determination that the contractor or individual assisted in drafting the invitation to bid or request for proposal and gained substantial information regarding the invitation to bid or request for proposal that is not available to other bidders or offerors;

(2) the contractor or individual is listed on any state or federal list of debarred contractors;

(3) the contractor or individual has headquarters in a country listed in Tier 3 of the most recent Trafficking in Persons Report published by the United States Secretary of State under 22 U.S.C. 7107(b)(1)(C);

(4) the contractor or individual would only act as a broker in supplying the goods or services and not add value to the transaction; or

(5) award to a specific contractor or individual could create a conflict of interest that would compromise the objectivity or purposes of the contract.

(b) If an excluded contractor or individual submits a bid or proposal, the procurement officer shall reject the bid or proposal as nonresponsive. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.080. Lists of contractors. For the purpose of providing notice for competitive bids and proposals, the chief procurement officer may establish and maintain contact information for contractors who have expressed an interest in doing business with the authority.

(Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.090. Specifications. (a) The purpose of a specification is to serve as a basis for obtaining, in an efficient, cost-effective, and consistent manner, a supply, service, or construction item suitable for the needs of the grantee.

(b) The chief procurement officer shall monitor the content and use of specifications for supplies, services, professional services, and construction required under this chapter.

(c) The chief procurement officer may obtain expert advice and assistance in the development of specifications and establish operational procedures governing the testing and trial use of equipment, materials, and other supplies by the authority, and the application of resulting information and data to specifications or procurements.

(d) Specifications must promote overall economy for the purposes intended, encourage competition in satisfying the needs of the grantee, and to the extent practicable, emphasize functional or performance criteria necessary to meet the needs of the grantee and may not be unduly restrictive. The requirements of this subsection regarding the purposes and nonrestrictiveness of specifications apply to all specifications, including those prepared by architects, engineers, designers, and other professionals.

(e) Except for small procurements under 3 AAC 109.460, a specification that limits the procurement of items to a single manufacturer's name or catalog number may be used only if the procurement officer determines in writing that only the identified brand name item or items will satisfy the needs of the grantee.

(f) The procurement officer may use brand name or equal specifications for the purpose of identifying the performance and functional requirements of a commodity.

(g) The procurement officer shall procure standard commercial products if practicable.

Under the direction of the chief procurement officer, the authority may develop and maintain a list of standard commercial products. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.100. Contract terms and conditions. (a) The chief procurement officer may determine the contractual provisions, terms, and conditions of solicitations and contracts, if the provisions, terms, and conditions are not contrary to statutory or regulatory requirements or the federal funding source governing the procurement.

(b) The chief procurement officer shall develop and maintain standard contract terms subject to review and approval as to form by the attorney general. Modification of these standard terms is subject to review and approval as to form by the attorney general.

(c) Contractual terms and conditions may not have the effect of unnecessarily limiting competition or exclusively requiring a proprietary supply, service, or construction item resulting in procurement from a single source unless no other requirement will suffice.

(d) The standard contract terms will be included or referenced in all invitations to bid under 3 AAC 109.220 and requests for proposals under 3 AAC 109.350. (Eff. ___/___/___, Register _____)

Authority: AS 44.83.080

3 AAC 109.110. Construction project delivery methods. (a) One or more of the following project delivery methods may be used for procurements related to design, construction, routine repair, maintenance, management, or operations for projects or facilities of the grantee:

- (1) design-bid-build;
- (2) construction management;
- (3) construction management with the general contractor at risk;
- (4) design-build;
- (5) design-build-operate-maintain;
- (6) design-build-finance-operate;
- (7) any variation of the methods described in (1) - (6) of this subsection.

(b) Participation in a report or study that is subsequently used in the preparation of design requirements for a construction project does not automatically disqualify a firm from participating as a member of a proposing team offering proposals under any of the project delivery methods described in (a) of this section, unless the procurement officer determines that participation by the firm in the report or study provided that firm with a substantial competitive advantage.

(c) Subject to the review and approval of the chief procurement officer, a construction procurement may be solicited by an invitation to bid under 3 AAC 109.220, a request for proposals under 3 AAC 109.350, multi-step bids or proposals under 3 AAC 109.160, or another procurement method under 3 AAC 109.450 - 3 AAC 109.500 (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.120. Multiple awards. (a) The procurement officer may issue a solicitation with the intent to make multiple awards if award to two or more bidders or offerors of similar products or services is necessary for adequate delivery, service, or product compatibility. A multiple award shall be made in accordance with 3 AAC 109.210 – 3 AAC 109.330 (competitive sealed bidding), 3 AAC 109.340 – 3 AAC 109.440 (competitive sealed proposals), or 3 AAC 109.460 (small procurements), as applicable.

(b) If the intent of the solicitation is to establish multiple indefinite-delivery or indefinite-quantity term contracts, the contract period, including optional renewals and the process for selection and award of work orders or purchase orders, must be included in the original solicitation

and subsequent contract award. (Eff. ___/___/___, Register _____)

Authority: AS 44.83.080

3 AAC 109.130. Bid, payment, and performance bonds. (a) Bid bonds or bid security in the amount of at least five percent of the bid price

(1) must be submitted with all invitations to bid for construction projects estimated to cost over \$100,000; and

(2) if needed for the protection of the grantee or authority as determined by the procurement officer, may be required in invitations to bid for contracts for supplies, services, or professional services.

(b) Payment and performance bonds, or other acceptable security approved by the chief procurement officer,

(1) shall be required for all construction contracts over \$100,000; and

(2) if needed for the protection of the grantee or authority as determined by the procurement officer, may be required for other contracts.

(c) Any bid, payment, or performance bonding requirements must

(1) be set out in the solicitation; and

(2) identify the acceptability of alternative forms of security that may be substituted for the required bond, subject to approval of the chief procurement officer.

(d) If the invitation to bid requires security, the procurement officer shall reject a bid that does not comply with the bid security requirement unless the officer determines that the bid fails to comply in a nonsubstantial manner with the security requirements. (Eff. ___/___/___, Register _____)

Authority: AS 44.83.080

3 AAC 109.150. Public notice of competitive sealed bids and competitive sealed proposals. (a) The procurement officer shall provide public notice of a competitive sealed bid or a competitive sealed proposal at least 21 days before the date for the opening of bids or proposals.

(b) If the procurement officer determines in writing that a shorter notice period is advantageous or required for a particular project and adequate competition is anticipated, the 21-day period may be shortened.

(c) Notice shall be posted on the Alaska Online Public Notice System and the authority's website. When practicable, notice may also include

(1) publication in a newspaper calculated to reach prospective bidders;

(2) posting in public places within the area where the work is to be performed or the material furnished;

(3) communicating in other appropriate media, including posting in electronic media;

(4) notifying bidders or offerors who have expressed an interest in previous solicitations of the authority;

(5) electronically notifying prospective contractors on the appropriate list maintained by the authority under 3 AAC 109.080.

(d) Nothing in this section limits use of additional methods of public notice in order to reach prospective contractors.

(e) The procurement officer shall provide notice of an invitation to bid or request for proposals to a prospective contractor upon request.

(f) The procurement officer may require payment of duplication costs or a cash

deposit for supplying the invitation to bid.

(g) Failure to comply with the notice requirements of this section does not invalidate a solicitation or the award of a contract. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.160. Multi-step solicitations. When it is considered impractical to initially prepare a definitive purchase description to support an award based on price or other definitive criteria, the procurement officer may issue an invitation to bid, request for information, or request for proposals seeking the submission of technical information or data to be followed by an invitation to bid or request for proposals limited to

(1) the bidders or offerors whose offers are determined to be technically qualified;

or

(2) a short list of bidders or offerors who are determined to be best qualified under the criteria set out in the first step of the solicitation. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.170. Amendments or extensions to a solicitation. (a) Before the opening of bids or proposals, a solicitation may be amended, or time for opening may be extended, upon the procurement officer's determination that the extension or amendment satisfies 3 AAC 109.020. Notice shall be provided so that potential bidders or offerors have access to the amendment.

(b) If, after the deadline for receipt of proposals under 3 AAC 109.360, there is a need for any substantial clarification or material change in the request for proposals, the request may be amended to incorporate the clarification or change. The procurement officer shall provide notice of the amended request and the date and time established for receipt of new or amended proposals. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.180. Cancellation of the solicitation or rejection of all bids or proposals. Before the deadline for receipt of bids or proposals, after the opening of bids or proposals, or after notice of intent to award but before award, the chief procurement officer may cancel the solicitation or reject all bids or proposals. Reasons for cancellation or rejection include one or more of the following:

(1) the supplies, services, or construction being procured are no longer required;

(2) ambiguous or otherwise inadequate specifications were part of the solicitation;

(3) the solicitation did not provide for consideration of all factors of significance to satisfy 3 AAC 109.020;

(4) prices exceed available money, and to adjust quantities or reduce services to accommodate available money would not be appropriate;

(5) all otherwise acceptable bids or proposals received are at unacceptable prices;

(6) there is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith;

(7) only one proposal or bid was received;

(8) proceeding with the solicitation or award does not satisfy 3 AAC 109.020. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.190. Disposition of canceled or rejected bids or proposals. (a) If at any

time during the solicitation process a request for proposals or invitation to bid is canceled, the procurement officer shall return the bids or proposals if the time for filing a protest has expired and a protest has not been filed.

(b) The procurement officer shall keep a list of returned bids or proposals in the procurement file. (Eff. ___/___/___, Register _____)

Authority: AS 44.83.080

3 AAC 109.200. Protest of cancellation of a solicitation. Not more than 10 days after a notice of cancellation is issued by the procurement officer, an interested party may protest the cancellation of an invitation to bid or request for proposals by filing with the procurement officer a written protest that includes the information required under 3 AAC 109.570. (Eff. ___/___/___, Register _____)

Authority: AS 44.83.080

Article 3. Competitive Sealed Bidding

Section

- 210. General policy
- 220. Invitation to bid
- 230. Pre-opening correction or withdrawal of bids
- 240. Submission and receipt of bids
- 250. Bid openings
- 260. Correction and withdrawal of bids after bid opening
- 270. Bid evaluation
- 280. Determination of responsibility
- 290. Rejection of individual bids
- 300. Contract award for competitive sealed bids
- 310. Subcontractors on construction contracts
- 320. Documentation of award
- 330. Notice of intent to award

3 AAC 109.210. General policy. The authority will use competitive sealed bidding when the requirements of the grantee are definite and can be sufficiently described by industry standards or practices so that price can be the primary basis for award, if the bid is determined to be responsive to the authority's requirements and the bidder is determined to be responsible. (Eff. ___/___/___, Register _____)

Authority: AS 44.83.080

3 AAC 109.220. Invitation to bid. (a) When competitive sealed bidding is used, the procurement officer shall issue an invitation to bid. It must include a time, place, and date by which the bid must be received, a purchase description, a description of all contractual terms and conditions applicable to the procurement including the bid evaluation criteria, and the basis for award.

(b) A bidder must have a valid Alaska business license before contract award.

(c) A bidder for a construction contract must submit evidence of the bidder's registration under AS 08.18 at the time designated in the invitation to bid.

(d) If the chief procurement officer makes a written finding that the release of the estimated cost of goods or services would adversely affect the ability of the authority to obtain

the best competitive bid, the estimated cost of the goods or services is confidential during the solicitation process and may not be released to the public before bid opening.

(e) A bidder, in the submission of a bid, must certify under penalty of perjury that the price submitted was independently arrived at without collusion. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.230. Pre-opening correction or withdrawal of bids. (a) A bid may be corrected or withdrawn by written request received in the office designated in the invitation for bids before the time and date set for opening.

(b) A request under (a) of this section must provide authorization for the person making the correction or withdrawal to do so.

(c) If a bid is withdrawn, the bid security, if any, shall be returned to the bidder along with the copies of the unopened bid documents not later than 15 days after bid opening. A copy of the correspondence requesting the withdrawal shall be included in the procurement file.

(d) All documents relating to the correction of a bid shall be included in the procurement file. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.240. Submission and receipt of bids. (a) A bid submitted on paper must be submitted in a sealed envelope with the invitation to bid number identified on the outside of the envelope. Upon receipt, the bid and any bid corrections shall be stored in a secure place until the time and date set for bid opening.

(b) The procurement officer may issue and receive competitive sealed bids through an electronic bidding system, if the system is able to receive electronic bid documents and corrections to bid documents, document the date and time of receipt of bid documents, secure the electronic bid submissions from being reviewed until after the date and time of bid opening, and provide an accessible public record that documents the solicitation.

(c) Bids shall be unconditionally accepted without alteration or correction, except as authorized in 3 AAC 109.230 and 3 AAC 109.260.

(d) A bid, bid correction, or withdrawal of a bid received at the place designated for receipt of bids after the time and date set for receipt of bids is late.

(e) A late bid, correction, or withdrawal may not be accepted unless the delay was due to an error of the authority.

(f) A late bid or correction may not be opened or considered. The procurement officer shall document the date and time the late bid or correction was received and return the unopened late bid or correction to the bidder after the protest period has passed. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.250. Bid openings. (a) The procurement officer shall open all bids and corrections received before the date and time designated in the invitation to bid.

(b) All bid openings are open to the public at the place, date, and time designated in the invitation to bid.

(c) The name of each bidder, the bid price, and other information determined appropriate by the procurement officer shall be tabulated at the bid opening. The tabulation is open to public inspection as soon as practicable after the bid opening.

(d) The procurement officer shall open bids for public inspection when the notice of

intent to award a contract is given.

(e) To the extent the bidder designates and the procurement officer concurs, trade secrets and other proprietary data contained in a bid document will not be opened for public inspection under (d) of this section. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.260. Correction and withdrawal of bids after bid opening. (a) After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the grantee or fair competition are not permitted except as provided under (d) of this section.

(b) If, before award, a procurement officer knows of an error in a bid, the procurement officer shall notify the bidder of the error.

(c) Inadvertent errors discovered after opening but before award, other than minor informalities, may not be corrected. If a bidder submits proof that clearly and convincingly demonstrates that an inadvertent error other than a minor informality was made, the bidder may withdraw the bid.

(d) The procurement officer may correct a bid that contains a minor informality. A correction of a minor informality may include correcting the bid submission to the intended correct bid price if the correct price is evident from the bid document. The procurement officer shall initial any correction made to the bid documents.

(e) A decision to permit the correction or withdrawal of a bid, or to cancel an award or contract based on bid mistake, shall be supported by a written determination made by the procurement officer.

(f) If a bidder is permitted to withdraw a bid before award, an action may not be maintained against the bidder or the bid security. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.270. Bid evaluation, (a) The procurement officer shall evaluate bids based on the requirements set out in the invitation to bid, which may include criteria to determine acceptability such as inspection, testing, quality, delivery, and suitability for a particular purpose. An evaluation of product acceptability may be conducted to determine whether a bidder's offering is acceptable as set out in the invitation to bid. A bid that does not meet the acceptability requirements shall be rejected as nonresponsive.

(b) The procurement officer shall evaluate bids to determine which bid offers the lowest price to the authority in accordance with the evaluation criteria set out in the invitation to bid. The criteria that will affect the bid price and be considered in evaluation for award must be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. Evaluation factors need not be precise predictors of actual future costs, but to the extent possible the evaluation factors must

(1) be reasonable estimates based upon information the procurement officer has available concerning future use; and

(2) treat all bids equitably.

(c) Criteria may not be used in bid evaluation if they are not set out in the invitation to bid.

(d) Nothing in this section permits contract award to a bidder submitting a higher quality item than that designated in the invitation for bids if the bidder is not also the lowest bidder as determined under (b) of this section.

(e) An alternate or conditioned bid submitted by a bidder that requires a change to a material term of the solicitation is nonresponsive unless a response to a specific condition or alternative is requested and authorized in the invitation to bid.

(f) Negotiations are not permitted under this section except that after opening bids a procurement officer may request bidders extend the time during which the authority may accept a bid. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.280. Determination of responsibility. (a) Before contract award the procurement officer shall consider whether the apparent low bidder is responsible. Factors that may be considered in determining whether the apparent low bidder is responsible include whether the bidder

- (1) has a satisfactory record of performance;
- (2) is qualified legally to contract with the authority under this chapter; and
- (3) has supplied all necessary information in connection with the inquiry

concerning responsibility.

(b) The procurement officer may require the apparent low bidder to demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel, by submitting

- (1) evidence that the contractor possesses the necessary items;
- (2) acceptable plans to subcontract for the necessary items;
- (3) a documented commitment from, or explicit arrangement with, a satisfactory

source to provide the necessary items; or

- (4) other information required by the procurement officer.

(c) The procurement officer's determination of responsibility does not relieve the contractor from the requirements for performance under the contract.

(d) If a prospective contractor supplies information in response to a request for information made by a procurement officer under (b) of this section, the procurement officer may not open for public inspection under 3 AAC 109.250(d) financial information and any agreements with suppliers or subcontractors supplied in response to the request unless the prospective contractor gives prior written consent to their disclosure.

(e) If the apparent low bidder is determined not to be responsible, the procurement officer may reject the bid and award the contract to the next lowest responsive and responsible bidder.

(Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.290. Rejection of individual bids. The procurement officer may reject an individual bid for one or more of the following reasons:

- (1) the bid is nonresponsive;
- (2) the bidder that submitted the bid is not responsible as determined under standards set out in 3 AAC 109.280;
- (3) the bidder is excluded from bidding under 3 AAC 109.070;
- (4) the supply, service, or construction item fails to meet the specifications or other acceptability criteria set out in the solicitation;

(5) only one bid was received and the chief procurement officer determines that award does not satisfy 3 AAC 109.020. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.300. Contract award for competitive sealed bids. (a) The procurement officer shall award a contract based on the solicited bids with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and criteria set out in the invitation to bid.

(b) Tie bids are low responsive bids from responsible bidders which are identical in price. If low tie bids exist, award shall be made through a random drawing or flip of the coin. Award may not be made by dividing the procurement among bidders offering identical low price bids. (Eff. ___/___/___, Register _____)

Authority: AS 44.83.080

3 AAC 109.310. Subcontractors on construction contracts. (a) Within five working days after the identification of the apparent low bidder for a construction contract solicited through a competitive sealed bidding, the apparent low bidder shall submit a list of the subcontractors the bidder proposes to use in the performance of the construction contract.

(b) The list must include the name and location of the place of business for each subcontractor, evidence of each subcontractor's valid Alaska business license, and evidence of each subcontractor's registration as a contractor under AS 08.18.

(c) A construction contractor or the apparent low bidder for a construction contract may replace a listed subcontractor if the subcontractor

(1) fails to comply with AS 08.18;

(2) files for bankruptcy or becomes insolvent;

(3) fails to execute a contract with the construction contractor or bidder involving performance of the work for which the subcontractor was listed and the construction contractor or bidder acted in good faith;

(4) fails to obtain bonding;

(5) fails to obtain insurance acceptable to the authority;

(6) fails to perform the contract with the construction contractor or bidder involving work for which the subcontractor was listed;

(7) must be replaced in order for the contractor to satisfy required state or federal affirmative action requirements; or

(8) refuses to agree or abide with the labor agreement of the construction contractor or bidder. (Eff. ___/___/___, Register _____)

Authority: AS 44.83.080

3 AAC 109.320. Documentation of award. Following award, a record showing the basis for determining the successful bidder shall be made a part of the procurement file. (Eff.

___/___/___, Register _____)

Authority: AS 44.83.080

3 AAC 109.330. Notice of intent to award. (a) Notice of intent to award does not constitute a formal award of a contract. The notice of intent to award must include

(1) a statement of a bidder's right under 3 AAC 109.570 to protest the award, including the time within which the protest must be received; and

(2) the name of the successful bidder.

(b) Unless only one responsive bid is received, the notice of intent to award shall be issued to each bidder at least five days before formal award of the contract. If only one responsive bid is received, the contract award may proceed as soon as practical after the notice of intent to award is issued. (Eff. ___/___/___, Register _____)

Authority: AS 44.83.080

Article 4 Competitive Sealed Proposals.

Section

- 340. Conditions for use
- 350. Request for proposals
- 360. Submission, receipt, and treatment of competitive sealed proposals
- 370. Evaluation of proposals
- 380. Rejection of individual proposals
- 390. Clarification of offers
- 400. Proposal discussions with offerors and best and final offers
- 410. Contract negotiations
- 420. Contract award
- 430. Documentation of contractor selection
- 440. Notice of intent to award

3 AAC 109.340. Conditions for use. (a) The procurement officer may procure supplies or services by competitive sealed proposals if the procurement officer determines that the use of competitive sealed proposals is more practical or advantageous for satisfying 3 AAC 109.020 than competitive sealed bidding.

(b) The following types of supplies and services for which the use of competitive sealed bidding is either not practicable or not advantageous for satisfying 3 AAC 109.020 may be procured by competitive sealed proposals without a written determination by the procurement officer:

- (1) professional services contracts;
- (2) architectural, engineering, and land surveying contracts;
- (3) design-build construction contracts;
- (4) design-build-operate contracts.

(c) Award under competitive sealed proposals will be made to the responsive and responsible offeror who provides the highest ranked proposal based on the criteria and evaluation processes identified in the request for competitive sealed proposals if the procurement officer and the offeror are able to negotiate a contract for the benefit of the grantee consistent with the solicitation and the offeror's proposal. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.350. Request for proposals. A request for competitive sealed proposals must contain

- (1) the date, time, and place for delivering proposals;
- (2) a specific description of the supplies, construction, services, or professional services to be provided under the contract;
- (3) the standard contract terms under which the supplies, construction, services, or professional services are to be provided, or a reference to those terms;
- (4) any other specific terms under which the supplies, construction, services, or professional services are to be provided;
- (5) the requirement that the offeror document having the required professional and contractor's licenses necessary to provide the supplies, services, or professional services requested;
- (6) the information necessary for an offeror to submit a proposal or references to any information that cannot reasonably be included with the request;
- (7) the requirement that an offeror certify under penalty of perjury that the price submitted was independently arrived at without collusion, if the proposal requires offerors to provide price information with their submissions; and

(8) a description of the criteria that the procurement officer shall consider and the process that the procurement officer shall use when evaluating the proposals received; criteria may include

(A) the offeror's experience in performing work similar to that sought in the request for proposals; evaluation of that experience may include

(i) reviewing the offeror's conformance to specifications and standards of good workmanship, forecasting and containment of costs or prices, history of reasonable and cooperative behavior and overall concern for the interests of the customer, safety, risk management, and adherence to contract schedules; and

(ii) the review of evaluations by private persons and officials of other government entities that have retained the services of the offeror, with respect to control of costs, quality of work, ability to meet deadlines, and other factors related to the offeror's experience;

(B) the offeror's qualifications and competence of persons who would be assigned to perform the services, as reflected by technical training and education;

(C) the offeror's ability to perform the services, as reflected by workload and the availability of adequate personnel, equipment, and facilities to perform the services expeditiously;

(D) the offeror's methods or proposed plan for delivering the goods or services;

(E) efforts proposed to support the local economy;

(F) the location of the office of the offeror where the work will be performed;

(G) the offeror's employment practices with regard to women and minorities; and

(H) the price for goods or services to be provided; evaluation of the price may include a comparison of total proposed costs, analysis of rates, life cycle costs, proposed fees, indirect costs, payment schedules or terms, or other factors that may have an impact on the total program cost of the goods or services; in soliciting architectural, engineering, and land surveying services, the procurement officer may only include price as an evaluation factor when, in the judgment of the procurement officer, the services required are repetitious in nature, and the scope, nature, and amount of services required are thoroughly defined by measurable and objective standards to reasonably enable firms or persons making proposals to compete with a clear understanding and interpretation of the services required; in order to include price as a factor in soliciting architectural, engineering, and land surveying services, a majority of the persons involved in evaluation of the proposals must be registered in the state to perform architectural, engineering, or land surveying services. (Eff. ___/___/___, Register _____)

Authority: AS 44.83.080

3 AAC 109.360. Submission, receipt, and treatment of competitive sealed proposals.

(a) Proposals may be accepted electronically. Proposals submitted on paper must be submitted in a sealed envelope with the competitive proposal number identified on the outside of the envelope. Upon receipt, the proposal and any proposal corrections shall be stored in a secure place.

(b) The procurement officer may issue and receive competitive sealed proposals through an electronic solicitation system, if the system is able to receive electronic proposal

documents and corrections to proposal documents, document the date and time of receipt of proposal documents, secure the electronic submissions from being reviewed until after the date and time for receipt of proposals, and provide an accessible public record that documents the solicitation.

(c) After the date set for receipt of proposals, a register of proposals shall be prepared. The register must include the name of each offeror and a description of the supply, service, or construction item offered. The procurement officer shall open the register of proposals and all the contents of all proposals for public inspection when the procurement officer issues a notice of intent to award.

(d) The procurement officer shall receive, open, and evaluate proposals so as to avoid disclosure of contents to competing offerors before notice of intent to award a contract is issued.

(e) To the extent the offeror designates and the procurement officer concurs, trade secrets and other proprietary data contained in the proposal will not be opened for public inspection under (c) of this section.

(f) A proposal or proposal correction received at the place designated for receipt of proposals after the time and date set for receipt of proposals is late.

(g) A late proposal or correction may not be opened or considered unless the delay was due to an error of the authority. The procurement officer shall document the date and time the late proposal or correction was received and return the unopened late proposal or correction to the offeror after the protest period has passed.

(h) If a solicitation is canceled after proposals are received but before a notice of intent to award a contract has been issued, and if a protest of the solicitation or of the cancellation of the solicitation has not been filed by an interested party, the procurement officer shall return all proposals to the offerors that submitted proposals once the time specified for filing a protest has expired. The procurement officer shall keep a list of returned proposals in the file for the solicitation. (Eff. ___/___/___, Register _____)

Authority: AS 44.83.080

3 AAC 109.370. Evaluation of proposals. (a) The procurement officer shall evaluate proposals based on the evaluation criteria and processes identified in the request for proposals. The procurement officer may not use other factors, criteria, or processes.

(b) The procurement officer, or a procurement evaluation committee consisting of at least the procurement officer and two other authority employees, shall evaluate proposals. Other authority employees, public officials, experts, or representatives of participating organizations may be substituted as appropriate if there is no conflict of interest and the procurement evaluation committee is made up of at least the procurement officer and two employees of the authority or substitutes.

(c) If a procurement evaluation committee evaluates the proposals, each member shall exercise independent judgment, and the vote of one member may not be weighted more than the vote of any other member.

(d) The procurement evaluation committee may hold meetings to discuss the proposals received. Evaluators may independently adjust their own scores or rankings as a result of these discussions.

(e) Numerical rating systems may be used, but are not required. If a numerical rating system is used, evaluators are not required to provide additional documentation for scoring, if the relative weight of the criteria and system is defined in the solicitation.

(f) If a numerical rating system is not used, each evaluator shall provide a brief narrative consistent with the evaluation criteria documenting the basis for the evaluator's ranking in writing.

(g) The procurement officer shall document the evaluation process and provide a summary of the final ranking of proposals for the procurement file. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.380. Rejection of individual proposals. Reasons for rejecting an individual proposal include one or more of the following:

(1) the proposal is nonresponsive to the minimum requirements identified in the solicitation;

(2) the offeror submitting the proposal is not responsible as determined under standards set out in 3 AAC 109.280;

(3) the offeror submitting the proposal is excluded from submitting a proposal under 3 AAC 109.070;

(4) after evaluation and discussion, only one proposal is available for award, and the chief procurement officer determines that proceeding with the award does not satisfy 3 AAC 109.020. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.390. Clarification of offers. (a) In order to determine if a proposal is reasonably susceptible for award, communications by the procurement officer or the procurement evaluation committee are permitted with an individual offeror to clarify the contents of an offeror's proposal.

(b) Clarification is limited to clarification of ambiguities or conflicts in the proposal and may not be a negotiation or allow for material changes to the proposal being evaluated.

(c) The procurement officer may limit communications to only those offerors who submitted proposals requiring clarification in order to complete the evaluation of those proposals.

(d) The evaluation by the procurement officer or the procurement evaluation committee may be adjusted as a result of a clarification under this section. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.400. Proposal discussions with offerors and best and final offers. (a) At the discretion of the procurement officer, an offeror whose proposal is reasonably susceptible for award as determined in the initial evaluation may be offered the opportunity to confidentially discuss the proposal with the procurement officer or procurement evaluation committee.

(b) The opportunity for confidential discussions, if held, must be extended to all offerors submitting proposals determined reasonably susceptible for award.

(c) Meetings with offerors under this section are not subject to AS 44.62.310 - 44.62.319 (Open Meetings Act).

(d) Auction techniques that reveal one offeror's price to another, and disclosure of any information derived from competing proposals, are prohibited.

(e) The procurement officer may limit discussions to specific sections of the proposals received or specific sections of the request for proposals.

(f) The conditions, terms, or price of the proposal may be altered or otherwise changed during the course of the discussions, if the changes are within the scope of the request for proposals. Any modifications to a proposal as a result of discussions shall be reduced to writing by the offeror within the time frame designated by the procurement officer.

(g) Following discussions, the procurement officer may set a date and time for the submission of best and final proposals.

(h) Best and final proposals may be submitted more than once if the chief procurement officer makes a written determination that it is in the best interests of the purposes of this chapter to conduct additional discussions or change the requirements and request submission of another round of best and final proposals.

(i) If an offeror does not submit a best and final proposal or a notice of withdrawal, the offeror's previous proposal is considered the offeror's best and final proposal for the purpose of evaluation and award.

(j) The evaluation of a proposal may be adjusted as a result of discussions under this section.

(k) After best and final proposals are received, final evaluations will be conducted as described in 3 AAC 109.370. (evaluation of proposals). (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.410. Contract negotiations. (a) After evaluation of proposals including an adjustment of an evaluation of a proposal, the procurement officer may negotiate with the offeror of the highest ranked proposal for the purpose of obtaining contract terms consistent with the solicitation and most favorable to the grantee.

(b) The procurement officer may request or the offeror may propose changes to the offeror's proposal during contract negotiations. The changes must be reasonable and may not have the effect of substantially changing the scope of work or price if the change would alter the ranking of the highest ranked proposal. All changes will be documented in writing and incorporated into the contract documents.

(c) If the offeror with the highest ranked proposal fails to negotiate in good faith, fails to negotiate within the time period set by the procurement officer, or is unable to adjust the price as may be required by the procurement officer without materially affecting the scope of work, the procurement officer may terminate negotiations and begin contract negotiations with the offeror of the next highest ranked proposal in the manner prescribed in this section. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.420. Contract award. The procurement officer shall award a contract under competitive sealed proposals to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the grantee, taking into consideration the evaluation factors set out in the request for proposals and any contract negotiations. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.430. Documentation of contractor selection. When a contractor has been selected by competitive sealed proposal, the procurement officer shall enter into the procurement file a written record of the basis on which the selection was found to be most advantageous to the purposes of this chapter. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.440. Notice of intent to award. Notice of intent to award shall be issued in accordance with 3 AAC 109.330. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

Article 5. Other Procurement Methods.

Section

- 450. Determinations to use other procurement methods
- 460. Small procurements
- 470. Limited competition procurements
- 490. Non-competitive procurements
- 500. Innovative procurements

3 AAC 109.450. Determinations to use other procurement methods. The procurement officer responsible for making a determination to conduct a non-competitive procurement, limited competition procurement, or an innovative procurement shall examine the material facts of the procurement and independently determine whether the procurement is eligible for the procurement method contemplated. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.460. Small procurements. (a) Procurement requirements may not be artificially divided or fragmented so as to constitute a purchase under this section or to circumvent the source selection procedures required under 3 AAC 109.210 - 3 AAC 109.330 or 3 AAC 109.340 - 3 AAC 109.440.

(b) The procurement officer shall use reasonable and adequate procedures, and make records that facilitate auditing of the procurement, when procuring supplies, services, professional services, or construction estimated to cost not more than \$5,000.

(c) The procurement officer shall use the following procedures in the procurement of supplies, services, professional services, or construction estimated to cost more than \$5,000, but not more than \$25,000:

(1) for the solicitation,

(A) at least three firms or persons shall be contacted for a quotation or informal proposal; and

(B) the solicitation may be made verbally or in writing; in the solicitation, the procurement officer shall include the specifications, the award criteria, and the date and time responses are due;

(2) for the award, the procurement officer shall make the award

(A) in accordance with the specifications and award criteria in the solicitation; and

(B) to the responsive and responsible firm or person that submitted the lowest quotation or the informal proposal that is the most advantageous to the grantee;

(3) as part of the file on the procurement, the procurement officer shall include the

(A) name of the person who made the solicitation and the date of the solicitation;

(B) information provided by the procurement officer under (1)(B) of this subsection;

(C) names of the firms or persons contacted, a summary of any verbal responses, and copies of all quotations or informal proposals received; and

(D) justification for the award.

(d) The procurement officer shall use the following procedures for the procurement of supplies, services, professional services, or construction estimated to cost more than \$25,000, but not more than \$100,000.

(1) for the solicitation,

(A) at least three firms or persons shall be contacted for a quotation or an

informal proposal;

(B) the solicitation shall be made in writing; in the solicitation, the procurement officer shall include the specifications, the award criteria, the requirement that the response be made in writing, and the date and time responses are due;

(2) for the award, the procurement officer shall

(A) make the award

(i) in accordance with the specifications and award criteria in the solicitation; and

(ii) to the responsive and responsible firm or person that submitted the lowest quotation or the informal proposal that is the most advantageous to the grantee; and

(B) provide written notice of the award, including the name of the successful offeror, to each firm or person providing a quotation or informal proposal, and will describe protest rights under 3 AAC 109.580 and the time limitations within which a protest must be received;

(3) as part of the file on the procurement, the procurement officer shall include

(A) a copy of the solicitation made under (1)(B) of this subsection;

(B) the names of the firms or persons contacted and copies of all written quotations or informal proposals received; and

(C) documentation of and the justification for the award.

(e) Nothing in this section prevents postings in electronic media to satisfy the competitive solicitation and notice of award requirements. Quotes and informal proposals may be submitted in electronic media if permitted by the procurement officer. (Eff. ___/___/___, Register _____)

Authority: AS 44.83.080

3 AAC 109.470. Limited competition procurements. (a) A contract may be awarded under this section when the chief procurement officer determines in writing that a situation exists that makes competitive sealed bidding or competitive sealed proposals impractical or contrary to the interests of the grantee.

(b) Situations that may justify conducting a limited competition procurement include

(1) procurements that cannot be publicly advertised without compromising the interests of the grantee or authority;

(2) procurements that may have been previously solicited by competitive sealed proposals or competitive sealed bids but the procurement officer was unable to award because no responsible and responsive bids or proposals were received and the grantee still has an immediate need for the goods or services.

(c) To determine if two or more sources are interested in a procurement, the procurement officer may provide notice under 3 AAC 109.150 requesting letters of interest in a limited competition procurement.

(d) Solicitation under this section may be limited to two or more potential contractors that the chief procurement officer determines may be able to provide a response to the solicitation.

(e) Under this section the procurement officer shall solicit bids or proposals and conduct negotiations, as appropriate, as to price, delivery, and terms, equally with each potential contractor. (Eff. ___/___/___, Register _____)

Authority: AS 44.83.080

3 AAC 109.490. Non-competitive procurements. (a) A procurement officer may contract

for supplies, services, professional services, or construction without the use of competitive source selection

(1) for any contract issued by another state or federal government agency where the authority is authorized to place orders under the terms and conditions of that contract;

(2) for a contract where the total cost is not more than \$5,000 and the price is fair and reasonable;

(3) for a contract that was previously competitively bid, but where only one nonresponsive bid was received and the chief procurement officer determines that negotiation with that bidder is in the grantee's best interest because

(A) an immediate need exists for the goods or services; or

(B) re-solicitation is unlikely to increase the number of bids;

(4) for a contract where time is of the essence and the chief procurement officer makes a determination that the non-competitive procurement is in the grantee's best interest because

(A) the time required to solicit competitive bids or proposals for the equipment or services would adversely impact the grantee's project;

(B) the price for goods or services is reasonable compared to the impacts of a delay;

(C) the proposed contractor is in a unique position to be able to meet the grantee's needs; and

(D) the duration of the contract is limited; or

(5) for a contract where the chief procurement officer determines that award of a contract by competitive sealed bidding, competitive sealed proposals, or small procurement procedures is not practicable, and that award to a single source is in the grantee's best interests as no other reasonable source of the supplies or services is available that could meet the requirements and schedule; the procurement officer may advertise its intent to make a single source award to determine if a single source award is appropriate.

(b) For procurements made under (a)(3), (4), and (5) of this section, the chief procurement officer's determination must be in writing and include a written explanation with evidence necessary for the independent examination and determination of the material facts of the procurement. The determination by the chief procurement officer that a specific course of action is or is not "in the grantee's best interest" means a determination that is reasonable under the circumstances and is not arbitrary, capricious, or prompted by corruption. A request to use a non-competitive procurement method that is based on a determination that it is "in the grantee's best interest" must cite the specific and significant interests to support use of the non-competitive procurement method.

(c) A procurement officer shall conduct negotiations, as appropriate, as to the price, delivery, and terms of a non-competitive procurement identified in (a)(3), (4), and (5) of this section, and the contractor shall provide cost and pricing data in accordance with 3 AAC 109.560.

(d) The determination required for procurements under (a)(3), (4), and (5) of this section may only be made by the chief procurement officer or the executive director in the absence of the chief procurement officer.

(e) The procurement file must include a copy of the determinations for procurements made under (a)(3), (4), and (5) of this section. (Eff. ___/___/___, Register _____)

Authority: AS 44.83.080

3 AAC 109.500. Innovative procurements. (a) A contract may be awarded for supplies,

services, professional services, or construction using an innovative procurement process, with or without competitive sealed bidding or competitive sealed proposals, when the chief procurement officer determines in writing that it satisfies 3 AAC 109.020 to use an innovative competitive procurement process in the procurement of new or unique requirements of the grantee or authority, new technologies, or to achieve best value.

(b) The chief procurement officer shall submit a procurement plan to the attorney general for review and approval as to form before issuing the notice required by (c) of this section. The plan must, at a minimum, address the method of solicitation, scope, method of award, protest procedures, and proposed contract provisions.

(c) A procurement under this section is subject to public notice requirements of 3 AAC 109.150.

(d) A record of an innovative procurement must be available for public inspection upon completion or cancellation of the procurement, and must contain

- (1) a copy of the contract;
- (2) the written determination of the chief procurement officer to use the innovative procurement procedure;
- (3) the procurement plan as approved as to form by the attorney general;
- (4) the record of notice as required under 3 AAC 109.150;
- (5) the record of respondents to the solicitation; and
- (6) the contract award. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

Article 6. Contract Formation and Modification.

Section

- 510. Type of contracts
- 520. Contract contents
- 530. Contract term and cancellation
- 540. Contract amendments
- 550. Standard contract clauses
- 560. Cost principles and contractor cost and pricing data

3 AAC 109.510. Type of contracts. Any type of contract that will promote the best interests of the grantee may be used, except that the use of a cost-plus-a-percentage-of-cost contract is prohibited. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.520. Contract contents. (a) Each contract awarded as a result of competitive sealed bids or competitive sealed proposals must contain

- (1) a statement of the amount of the contract;
- (2) the date for the supplies to be delivered or the expected period of performance of the construction, services, or professional services;
- (3) a description of the supplies, construction, services, or professional services to be provided; and
- (4) certification by the procurement officer or other official of the authority that sufficient money is available to be encumbered to cover the obligation under the contract or will be available before the procurement officer issues a notice to proceed or purchase order against the contract.

(b) The procurement officer may also incorporate clauses for adjustments in prices,

period of performance, and scope in addition to other terms or requirements included in the solicitation or negotiated between the procurement officer and the contractor. (Eff. ___/___/___, Register _____)

Authority: AS 44.83.080

3 AAC 109.530. Contract term and cancellation. (a) Unless otherwise provided by law, a contract for supplies, services, or professional services may be entered into for any period of time considered to be in the best interests of the grantee or authority, if the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first grant period at the time of contracting.

(b) Payment and performance obligations for succeeding grant periods shall be subject to the availability and designation of funds for purposes of the contract.

(c) Before using a multi-term contract, the procurement officer shall determine in writing that

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

(2) the contract will serve the best interests of the of the grantee or authority by encouraging effective competition and efficient contract administration.

(d) When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be canceled.

(e) Upon cancellation, the contractor may only be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies, services, or professional services delivered under the contract that are not otherwise recoverable. (Eff. ___/___/___, Register _____)

Authority: AS 44.83.080

3 AAC 109.540. Contract amendments. (a) The procurement officer may amend a contract or purchase order if the contract includes clauses or terms that allow for and anticipate change orders, additional work, changes in scope, price adjustments, follow-up phases of work, or renewals consistent with the original scope and estimates of term and price documented with the source selection method used in the award.

(b) The procurement officer may amend a contract or purchase order when there is an unanticipated change in work beyond the estimated or actual contract price, term, or scope, if

(1) the solicitation was conducted following the small procurement procedures under 3 AAC 109.460, the amendment or change order, or cumulative contract amendments or change orders, will not cause the total contract amount, as amended, to exceed by 50 percent or more the original contract price, and the new total price of the contract, including all change orders and amendments, does not exceed the dollar limit for small procurements under 3 AAC 109.460; or

(2) the original contract is greater than \$100,000, and the amount of the unanticipated amendment or change order, or cumulative unanticipated contract amendments or change orders, will be less than 20 percent of the original contract amount, including any anticipated amendments or contract adjustments.

(c) Before issuing an amendment that exceeds the dollar limits in (b)(1) or (2) of this section, the chief procurement officer shall provide a written determination required under 3 AAC 109.490(a) (4) or (5).

(d) The procurement officer shall obtain cost and pricing data in accordance with 3 AAC 109.560 from the contractor to confirm the price adjustment is fair and reasonable. The

authority's controller, or the controller's designee, must certify that there are sufficient funds to pay for any increase in price before issuing an amendment. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.550. Standard contract clauses. (a) The chief procurement officer, in consultation with the attorney general, may establish standard contract clauses that provide for appropriate remedies and cover the following subjects:

- (1) liquidated damages;
- (2) order of precedence of contract documents;
- (3) specified excuses for delay or nonperformance;
- (4) termination of the contract for default;
- (5) termination of the contract in whole or in part for the convenience of the grantee or authority;
- (6) adjustments in time including renewals or extensions;
- (7) dispute resolution;
- (8) adjustments in price;
- (9) changes in work;
- (10) additional work;
- (11) amendments.

(b) The standard clauses to be used in a contract will be identified in a separate appendix to the contract and referenced in the solicitation.

(c) A procurement officer may vary the standard clauses for inclusion in a particular contract if

- (1) the variations and the circumstances justifying them are documented; and
- (2) the procurement officer receives written approval of the attorney general as to

form. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.560. Cost principles and contractor cost and pricing data. (a) Before an award of a non-competitive contract or a change order or contract modification, the contractor or prospective contractor shall submit cost and pricing data. The contractor or prospective contractor shall certify that, to the best of the contractor's or prospective contractor's knowledge and belief, the data submitted is accurate, complete, and current as of a mutually determined specified date and will continue to be accurate and complete during the performance of the contract.

(b) When a contractor becomes aware of a situation that may form the basis of a claim for compensation that exceeds the amount designated as the base amount of the contract and before performing additional work or supplying additional materials, the contractor shall submit cost and pricing data on the additional work or materials. The contractor shall certify that, to the best of the contractor's knowledge and belief, the data submitted is accurate, complete, and current and is the actual cost to the contractor of performing the additional work or supplying the additional materials.

(c) A contract, change order, or contract modification under which a certification is required under (a) or (b) of this section must contain a provision that the contract price, including the contractor's profit or fee, will be adjusted to exclude any significant sums by which the procurement officer finds that the price is increased because the cost or pricing data furnished by the contractor or prospective contractor is inaccurate, incomplete, or not current as of the date agreed upon by the parties.

(d) The requirements of (a) of this section do not apply when

(1) the contract price is based on adequate price competition obtained through a competitive solicitation;
(2) the contract price is set by law or regulation; or
(3) the chief procurement officer determines in writing that the requirements of (a) of this section may be waived and the reasons for waiver are stated.

(e) The procurement officer may use the federal cost principles as guidance in contract negotiations. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

Article 7. Legal and Contractual Remedies.

Section

570. Applicability of procurement protest and appeal procedures

580. Protest of small procurement

590. Contract claims

600. Misrepresentations, fraud, and attempted fraud

610. Debarment

620. Exclusive remedy

3 AAC 109.570. Applicability of procurement protest and appeal procedures._(a)

Except for protests of small procurements made under 3 AAC 109.580, the provisions of AS 36.30.560 - 36.30.615 apply to the protest or appeal of a protest on a solicitation, a proposed contract award, or the award of a contract for supplies, services, professional services, or construction. In applying the provisions of AS 36.30.560 - 36.30.615 under this chapter,

(1) the rights, powers, and duties relating to appeals of protests concerning the procurement of supplies, services, professional services, or construction duties under AS 36.30 assigned to any commissioner is vested in the executive director with respect to appeals of protests, and the executive director may delegate the rights, powers, and duties to the chief procurement officer ;

(2) the chief procurement officer is responsible for taking all necessary actions following the procedures in AS 36.30.610 and 36.30.615 to develop a recommendation regarding a protest appeal;

(3) the chief procurement officer may request, as provided under AS 44.64.030(b), that the office of administrative hearings (AS 44.64.010) conduct a hearing on an appeal in accordance with AS 36.30.670, make findings of fact and conclusions of law, and provide a recommended decision for the chief procurement officer to furnish to the executive director;

(4) the chief procurement officer shall make a recommendation to the executive director for a final decision on protest appeals not subject to 3 AAC 109.580; the executive director retains the final decision-making authority on a protest appeal and may affirm, modify, or reject the recommended decision, in whole or in part, may remand to the chief procurement officer or any hearing officer or administrative law judge with instructions, or may take other appropriate action.

(b) Protest of procurements with a total award value of \$100,000 or less must be made under 3 AAC 109.580. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.580. Protest of small procurement. (a) An interested party shall attempt to informally resolve any protest with the procurement officer regarding a procurement with a total

award value of \$100,000 or less. If the attempt is unsuccessful, the interested party may protest the solicitation or the award of a small procurement contract solicited or awarded under 3 AAC 109.460. The protest must be filed with the executive director. The protester must file a copy of the protest with the procurement officer.

(b) If protesting a solicitation issued under 3 AAC 109.460, a protest must be filed before the date and time that quotations or informal proposals are due to the authority.

(c) If protesting the award of a small procurement contract of not more than \$25,000, the protest must be filed not later than 10 days after the date of the solicitation or award, whichever is later.

(d) If protesting the award of a small procurement contract greater than \$25,000, a protest must be filed not later than 10 days after the date that notice of award is made.

(e) To be accepted by the authority, a protest filed under (a), (b), (c), or (d) of this section must contain

- (1) the name, address, and telephone number of the protester;
- (2) the signature of the protester or the protester's representative;
- (3) identification of the solicitation or contract at issue;
- (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.

(f) The procurement officer shall immediately give notice of the protest to the contractor or, if no award has been made, to all firms or persons that were solicited for the small procurement.

(g) The executive director or the executive director's designee may

- (1) with the concurrence of the protester, assign the protest to the chief procurement officer or other responsible state official for a final administrative resolution under alternate dispute resolution;

(2) conduct a hearing on the protest consistent with the procedures set out in 3 AAC 109.570(a)(3); or

(3) issue a final decision under (h) of this section.

(h) The executive director or the executive director's designee shall

- (1) issue a final decision denying the protest and stating the reasons for denial;
- (2) issue a final decision that sustains the protest, in whole or in part, and instruct the procurement officer to implement an appropriate remedy; or

(3) remand to the chief procurement officer or any hearing officer or administrative law judge with instructions.

(i) The final decision of the executive director or the executive director's designee under (h) of this section constitutes the final action of the authority on the protest. (Eff. ___/___/___, Register _____)

Authority: AS 44.83.080

3 AAC 109.590. Contract claims. (a) The provisions of AS 36.30.620 - 36.30.631 apply to any contract claim concerning a contract awarded by the procurement officer under this chapter.

(b) Hearings on contract claims will be conducted in accordance with AS 36.30.670 - 36.30.685, and any arbitration of a construction contract will be conducted in accordance with 2 AAC 12.950 - 2 AAC 12.989.

(c) The rights, powers, and duties relating to appeals of claims and arbitration of construction contracts concerning the procurement of supplies, services, professional services, or construction that are assigned under AS 36.30 to any commissioner are vested under this chapter

with the executive director. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.600. Misrepresentations, fraud, and attempted fraud. (a) A person who makes or uses a misrepresentation in support of a contract claim under this chapter, or who practices or attempts to practice a fraud, at any stage of proceedings relating to a procurement or contract claim under this chapter

(1) forfeits all claims relating to that procurement or contract; and

(2) is obligated to reimburse all sums paid on the claim and for all costs attributable to review of the claim.

(b) The procurement officer or executive director shall make specific findings of misrepresentation, attempted fraud, or fraud before declaring a forfeiture under (a)(1) of this section.

(c) Upon a finding that the recipient of a contract issued under this chapter made a misrepresentation or fraudulent claim at any stage of proceedings relating to a procurement or contract controversy, the procurement officer may, after consulting with the attorney general, declare the contract void.

(d) In this section, "misrepresentation" means a false or misleading statement of material fact, or conduct intended to deceive or mislead concerning material fact, whether it succeeds in deceiving or misleading. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.610. Debarment. (a) The provisions of AS 36.30.635 - 36.30.665 and 2 AAC 12.630 - 2 AAC 12.670 apply to any debarment action undertaken by the authority against a contractor to prohibit a contractor from participating in any solicitation or award under this chapter.

(b) Hearings on a debarment action will be conducted in accordance with AS 36.30.650 and 2 AAC 12.650 - 2 AAC 12.670.

(c) The rights, powers and duties relating to debarment actions assigned to the commissioner of administration under AS 36.30 are vested with the executive director with respect to any debarment actions undertaken by the authority under this chapter. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

Article 8. Additional Principles and Administrative Provisions.

Section

650. Supplementary general principles of law applicable

660. Requirement of good faith

670. Trade secrets and confidential technical data

680. Public access to procurement records

690. Retention of procurement records

700. Procurement records for competitive sealed bids and proposals

710. Procurement records for other procurements

3 AAC 109.650. Supplementary general principles of law applicable. Unless displaced by the particular provisions of this chapter, the principles of law and equity, including AS 45.01 - AS 45.08, AS 45.12, AS 45.14, and AS 45.29 (Uniform Commercial Code), the law merchant, and law relative to capacity to contract, agency, fraud, misrepresentation, duress,

coercion, mistake, or bankruptcy supplement the provisions of this chapter. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.660. Requirement of good faith. All parties involved in the negotiation, performance, or administration of contracts of the authority under this chapter shall act in good faith. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 110.680. Public access to procurement records. (a) Procurement records under this chapter are public records in accordance with AS 40.25.110.

(b) If a bidder or proposer submits a procurement record and requests that it be kept confidential, the chief procurement officer shall determine whether the procurement record appears to be confidential and notify the bidder or proposer of the determination. If the authority receives a public records request for a procurement record determined to appear to be confidential, the authority will notify the bidder or proposer of the public records request to enable the bidder or proposer to protect the confidentiality of the procurement record. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.690. Retention of procurement records. Procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the state archivist. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.700. Procurement records for competitive sealed bids and proposals. The executive director shall keep a contract file open for public inspection for each contract awarded under competitive sealed bids and competitive sealed proposals. The file may be maintained in a reproducible electronic format and must contain

- (1) a copy of the solicitation document;
- (2) a register of bids or proposals received;
- (3) a copy of each responsive bid or proposal received;
- (4) the basis of award; and
- (5) a copy of the contract that includes a description of the supplies, services,

professional services, or construction procured under each contract. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

3 AAC 109.710. Procurement records for other procurements. The executive director shall keep a contract file open for public inspection for each limited competition procurement, innovative procurement, or non-competitive procurement under 3 AAC 109.490(a)(3), (4), and (5). The file may be maintained in a reproducible electronic format and must contain

- (1) the determination, as required, regarding the source selection method used;
- (2) for innovative procurements, the procurement plan approved by the attorney

general;

- (3) if the procurement is solicited,
 - (A) a copy of the solicitation document used;
 - (B) a copy of the notice posted or list of potential offerors contacted;

- (C) a register of offers or proposals received;
- (D) a copy of each responsive offer or proposal received; and
- (E) the basis of award;
- (4) if the procurement is not solicited,
 - (A) cost and pricing data; and
 - (B) a copy of the quote, offer, or proposal received if different from the final contract; and
- (5) a copy of the contract that includes a description of the supplies, services, professional services, or construction procured under each contract. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080

Article 9. General Provisions.

Section

900. Definitions

- 3 AAC 109.900. Definitions.** In this chapter, unless the context requires otherwise,
- (1) "authority" means the Alaska Energy Authority;
 - (2) "Alaska business license" means a license required under AS 43.70 (Alaska Business License Act);
 - (3) "Alaska Online Public Notice System" means the system developed under AS 44.62.175 ;
 - (4) "alternate dispute resolution" means negotiation or mediation voluntarily used to resolve issues in controversy;
 - (5) "change order" means a written order signed by the procurement officer directing the contractor to make changes that the changes clause of the contract authorizes the procurement officer to order without the consent of the contractor;
 - (6) "chief procurement officer" means the person appointed by the executive director under 3 AAC 109.030(c)(1) as the chief procurement officer of the authority;
 - (7) "competitive sealed bidding" means the procedure under 3 AAC 109.210 - 3 AAC 109.330;
 - (8) "competitive sealed proposals" means the procedure under 3 AAC 109.340 - 3 AAC 109.440;
 - (9) "construction" means
 - (A) the process of building, altering, repairing, maintaining, improving, or demolishing a highway, structure, building, or other improvement of any kind to real property;
 - (B) includes services and professional services relating to planning and design required for the construction;
 - (C) does not include the routine operation of an improvement to real property;
 - (10) "contract" means all types of agreements, regardless of what they may be called, for the procurement or disposal of supplies, services, professional services, or construction;
 - (11) "contract modification" means a written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of a contract accomplished by mutual action of the parties to the contract;
 - (12) "cost and pricing 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;

(13) "design-build construction contract" means a construction contract between the authority and a design-builder to furnish architecture, engineering, and related design services, and to furnish construction services, including labor and materials;

(14) "executive director" means the executive director of the authority;

(15) "grantee" means any entity that receives a grant of money or property under which the authority manages the grant on behalf of the entity;

(16) "grant" means property furnished by the state, whether real or personal, designated by law, including an appropriation act, as a grant;

(17) "interested party" means an actual or prospective bidder or offeror whose economic interest might be affected substantially and directly by the issuance of a contract solicitation, the award of a contract, or the failure to award a contract;

(18) "minor informality"

(A) means a matter of form rather than substance that

(i) is evident from the bid document, or is an insignificant matter that has a negligible effect on price, quantity, quality, delivery, or contractual conditions; and

(ii) can be waived or corrected without prejudice to other bidders;

(B) includes typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors that are evident from the bid document;

(19) "nonresponsive" means a bid or proposal that does not conform in all material respects to the solicitation;

(20) "person" means a business, individual, union, committee, club, other organization, or group of individuals;

(21) "procurement"

(A) means buying, purchasing, renting, leasing, or otherwise acquiring supplies, equipment, services, or construction for the authority;

(B) includes functions that pertain to the obtaining of supplies, equipment, services, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration;

(22) "procurement officer "

(A) means a person authorized to enter into and administer contracts for the authority and make written determinations with respect to them;

(B) includes an authorized representative of a procurement officer acting within the limits of the delegated authority;

(23) "professional services" means professional, technical, or consultant's services that are predominantly intellectual in character, result in the production of a report or the completion of a task, and include analysis, evaluation, prediction, planning, or recommendation;

(24) "protester" means an actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or the award of a contract and who files a protest;

(25) "reasonable and adequate procedures"

(A) means procedures that ensure fairness to potential offerors and competition commensurate with the circumstances of the procurement, considering price, mission requirements, and available competition;

(B) includes contacting only one potential offeror in appropriate circumstances;

(26) "responsive bidder" means a firm or person who has submitted a bid that conforms in all material respects to the solicitation;

(27) "services"

(A) means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports that are merely incidental to the required performance;

(B) does not include employment agreements or collective bargaining agreements;

(28) "solicitation" means an invitation to bid, a request for proposals, a request for quotations, or any other method of soliciting bids, proposals, or quotes to perform a contract with the authority;

(29) "specification" means a description of the physical or functional characteristics, or of the nature of a supply, service, professional service, or construction project; it may include requirements for licensing, inspecting, testing, and delivery;

(30) "supplies"

(A) means all property of the authority, including equipment, materials, and insurance;

(B) includes privately owned real property leased for the authority's use, such as office space;

(C) does not include the acquisition or disposition of other interests in land. (Eff. ___/___/___ , Register _____)

Authority: AS 44.83.080