City of Las Cruces®
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Council Action and Executive Summary

Item # 22 **Ordinance/Resolution#** 2589 **Council District:** ___

For Meeting of September 7, 2010
(Adoption Date)

TITLE: AN ORDINANCE AMENDING THE LAS CRUCES MUNICIPAL CODE SECTIONS 24-131, 24-132, 24-162 AND 24-164 TO REQUIRE COST OR PRICE ANALYSIS ON ALL FEDERALLY FUNDED PROCUREMENT AS REQUIRED BY FEDERAL REGULATIONS.

PURPOSE OF ACTION: To amend the Procurement Code to state that a cost and or price analysis is to be performed for all federally funded procurements and contract modifications.

Drafter and Staff Contact: ROBERT TELLES		**Department:** FINANCE		**Phone:** 575-541-2514	
Department	**Signature**	**Phone**	**Department**	**Signature**	**Phone**
Department Director		541-2050	Budget		541-2107
Other			Assistant City Manager		541-2271
Legal		541-2128	City Manager		541-2076

BACKGROUND / KEY ISSUES / CONTRIBUTING FACTORS:
The City of Las Cruces receives funding from the Federal Transportation Agency (FTA) that is subject to Circular 4221.F. published and issued by the FTA. This circular sets procurement regulations upon the City for all purchases utilizing FTA funds. The FTA conducts a review of City procurements affected by FTA funds every three years to provide guidance and assistance to the City for ensuring the stipulations within Circular 4221.F. are adhered to. The most recent triennial review included a finding concerning the City Procurement Code that resulted in a recommendation for more specific language regarding a requirement for cost or price analysis on all federally funded procurement, including FTA's. Staff's review of the City Procurement Code surfaced four sections where modifications were necessary to comply with the recommendation. The tracked changes on EXHIBIT A are recommended changes to the City Procurement Code for consideration by City Council for approval.

SUPPORT INFORMATION:

1. Ordinance
2. Exhibit "A" – Procurement Code

(Continue on additional sheets as required)

SOURCE OF FUNDING:

Is this action already budgeted?			
	Yes	☐	See fund summary below
	No	☒	If No, then check one below:
Not Applicable	*Budget Adjustment Attached*	☐	Expense reallocated from: _____
		☐	Proposed funding is from a new revenue source (i.e. grant; see details below)
		☐	Proposed funding is from fund balance in the _____ Fund.
Does this action create any revenue?			
	Yes	☐	Funds will be deposited into this fund: _____
Not Applicable	No	☒	There is no new revenue generated by this action.

FUND SUMMARY:

Fund Name(s)	Account Number(s)	Expenditure Proposed	Available Budgeted Funds in Current FY	Remaining Funds	Purpose for Remaining Funds
Not Applicable					

OPTIONS / ALTERNATIVES:

1. Vote "Yes"; this will modify the City Procurement Code to adhere to FTA recommendation.
2. Vote "No"; could be contrary to FTA recommendations and adversely impact future funding opportunities.
3. Vote to "Amend" could improve on the City's response to the FTA recommendation.
4. Vote to "Table", this could delay the adoption past the FTA deadline of September 8, 2010.

REFERENCE INFORMATION

None

COUNCIL BILL NO. 11-009

ORDINANCE NO. 2589

AN ORDINANCE AMENDING THE LAS CRUCES MUNICIPAL CODE SECTIONS 24-131, 24-132, 24-162 AND 24-164 TO REQUIRE COST OR PRICE ANALYSIS ON ALL FEDERALLY FUNDED PROCUREMENT AS REQUIRED BY FEDERAL REGULATIONS.

The City Council is informed that:

WHEREAS, the City of Las Cruces receives funding from the Federal Transportation Agency (FTA) that is subject to Circular 4221.F. published and issued by the FTA, and

WHEREAS, this circular sets procurement regulations upon the City for all purchases utilizing FTA funds and,

WHEREAS, the most recent triennial review conducted by the FTA regarding FTA funded purchases included a finding concerning the City's Procurement Code that resulted in a recommendation for more specific language requiring cost or price analysis to be performed on all federally funded procurement and,

WHEREAS, staff's review of the City Procurement Code identified Sections 24-131, 24-132, 24-162 and 24-164 whereby modifications were necessary to comply with the FTA recommendation, and,

WHEREAS, the City Council has reviewed and considered the changes presented in ATTACHMENT 1 relating the recommendation by the FTA.

NOW THEREFORE, be it ordained by the governing body of the City of Las Cruces:

(I)

THAT Section 24-131 of the Las Cruces Municipal Code is amended to read as follows:

"Sec. 24-131. Cost or pricing data.

(a) *Required submissions relating to award of contracts.* A prospective

contractor shall submit cost or pricing data when the city contract is federally funded or is to be awarded on a noncompetitive basis.

(b) *Exceptions.* Except for federally funded purchases, the submission of cost or pricing data relating to the award of a contract is not required when

(1) The contract price is based on established catalogue prices or market prices;

(2) The contract price is set by law or regulation; or

(3) It is determined in writing by the purchasing manager that the requirements of subsection (a) of this section may be waived, and the determination states the reasons for such waiver.

(c) *Required submissions relating to change orders or contract modifications:* For federally funded purchases and as otherwise required by the purchasing manager, the contractor shall submit cost or pricing data prior to the pricing of any change order or contract modification, including adjustments to contracts awarded by competitive sealed bidding, whether or not cost or pricing data was required in connection with the initial pricing of the contract.

(d) *Certification required.* A contractor, actual or prospective, required to submit cost or pricing data in accordance with this section shall certify that, to the best of his knowledge and belief, the cost or pricing data submitted was accurate, complete, and current as of a mutually specified date prior to the award of the contract or the pricing of the change order or contract modification.

(e) *Price adjustment provision required.* Any contract award, change order, or contract modification under which the submission and certification of cost or pricing data are required shall contain a provision stating that the price to the city, including profit or fee, shall be adjusted to exclude any significant sums by which the city finds that such price was increased because the contractor-furnished cost or pricing data was inaccurate, incomplete, or not current as of the date agreed upon between the city and the contractor.", and,

(II)

THAT Section 24-132 of the Las Cruces Municipal Code is amended to read as follows:

"Sec. 24-132. Cost or price analysis.

(a) Under this chapter, a cost analysis or a price analysis, as appropriate, shall be conducted for contracts established through the application of section 24-95 (Sole Source). A written record of such cost analysis or price analysis shall be made a part of the contract file.

(b) For all federally funded purchases, a cost or price analysis must be conducted as required by applicable federal regulations for all related contracts including contract cost modifications. The cost or price analysis shall be public record. ", and,

(III)

THAT Section (f) is added to Section 24-162 (b)(1) of the Las Cruces Municipal Code to read as follows:

"(f.) For all federally funded purchases, cost or price analysis shall be the only means from which pricing shall be determined.", and,

(IV)

THAT Section 24-164 of the Las Cruces Municipal Code is amended to read as follows:

"Sec. 24-164. Cost reimbursement.

If a city contract is being funded in whole or in part by assistance from a federal agency, reimbursement to contractors for incurred costs or cost estimates included in negotiated prices shall be subject to appropriate federal cost principles, e.g., subpart 1-15 of title 41, Code of Federal Regulations.", and,

(V)

THAT City staff is hereby authorized to do all deeds necessary in the accomplishment of the herein above.

DONE AND APPROVED this _____ day of _____ 201___.

APPROVED:

(SEAL)

_____
Mayor

ATTEST:

_____
City Clerk

VOTE:
Mayor Miyagishima: _____
Councillor Silva: _____
Councillor Connor: _____
Councillor Pedroza: _____
Councillor Small: _____
Councillor Sorg: _____
Councillor Thomas: _____

Moved by: _____

Seconded by: _____

APPROVED AS TO FORM:

_____
City Attorney

EXHIBIT A

Chapter 25

LCMC

Procurement Code

Chapter 24
PROCUREMENT CODE*

- **Cross References:** Finance, § 2-1181 et seq.

Article I. In General
Sec. 24-1. Definitions.
Sec. 24-2. Purpose.
Sec. 24-3. Applicability.
Sec. 24-4. Authorized exemptions.
Secs. 24-5--24-30. Reserved.

Article II. Purchasing Manager
Sec. 24-31. Position created.
Sec. 24-32. Authority and duties.
Sec. 24-33. Delegation to others.
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Article III. Source Selection and Contract Information
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Sec. 24-62. Notice of projects; recommendations.
Sec. 24-63. Files of qualifications of firms and persons.
Sec. 24-64. Approval of contracts.
Sec. 24-65. Emergency procedure.
Sec. 24-66. Contracting for designated professional services; selection procedure.
Secs. 24-67--24-90. Reserved.

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Sec. 24-91. Competitive sealed bidding.
Sec. 24-92. Request for proposals.
Sec. 24-93. Direct contact.
Sec. 24-94. Small purchases.
Sec. 24-95. Sole source procurement.
Sec. 24-96. Emergency procurement.
Sec. 24-97. Procurement of lease financing.
Sec. 24-98. Cancellation/rejection of invitation for bid or request for proposal.
Sec. 24-99. Authority to award.
Sec. 24-100. Resident and local preferences.
Secs. 24-101--24-103. Reserved.
Sec. 24-104. Appeals.
Secs. 24-105--24-130. Reserved.

Division 3. Qualifications and Duties
Sec. 24-131. Cost or pricing data.
Sec. 24-132. Cost or price analysis.
Sec. 24-133. Bid and performance bonds on supply or service contracts.
Secs. 24-134--24-160. Reserved.

Division 4. Types of Contracts and Contract Administration
Sec. 24-161. Types of contracts.
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Sec. 24-169. City records.
Secs. 24-170--24-195. Reserved.

Article IV. Specifications
Sec. 24-196. Maximum practicable competition.
Sec. 24-197. Qualified products list.
Sec. 24-198. Brand name or equal specification.
Sec. 24-199. Brand name specification.
Secs. 24-200--24-225. Reserved.

Article V. Procurement of Construction, Architect-Engineer and Land Surveying Services
Sec. 24-226. Management of construction contracting.
Sec. 24-227. Bid security and performance bonds.
Sec. 24-228. Fiscal responsibility.
Secs. 24-229--24-255. Reserved.

Article VI. Debarment or Suspension
Sec. 24-256. Authority to debar.
Sec. 24-257. Notice of decision.
Sec. 24-258. Administrative appeal.
Secs. 24-259--24-285. Reserved.

Article VII. Appeals and Remedies
Sec. 24-286. Bid protests.
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Secs. 24-288--24-315. Reserved.

Article VIII. Existing Contracts
Sec. 24-316. Procurement using existing contracts.
Secs. 24-317--24-345. Reserved.

Article IX. Cooperative Procurement
Sec. 24-346. Authority for cooperative procurement.
Secs. 24-347--24-375. Reserved.

Article X. Ethics in Public Contracting
Sec. 24-376. Criminal penalties.
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ARTICLE I.

IN GENERAL

Sec. 24-1. Definitions.

The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Approved equals means approved specifications as established by the industry or the user.

Architect-engineer and land surveying services means those professional services within the scope of the practice of architecture, professional engineering, or land surveying, as defined by the laws of the state procurement code.

Blind trust means an independently managed trust in which the employee-beneficiary has no management rights and in which the employee-beneficiary is not given notice of alterations in or other disposition of the property subject to the trust.

Brand name or equal specifications means a specification limited to one or more items by manufacturers' names or catalog numbers to describe the standard of quality, performance, and other salient characteristics needed to meet city requirements, and which provides for the submission of equivalent products.

Brand name specification means a specification limited to one or more items by manufacturers' names or catalog numbers.

Business means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity.

Change order means a written order signed and issued by the purchasing manager, directing the contractor to make changes which the contract authorizes.

Confidential information means any information which is available to an employee only because of the employee's status as an employee of the city and is not a matter of public knowledge or available to the public on request.

Construction means the process of building, altering, improving or demolishing any public structure or building, or other public improvements of any kind to any public real property. It does not include the routine operation, repair, or maintenance of existing structures, buildings, or real property.

Contract means all types of city agreements, regardless of what they may be called, for the procurement of supplies, services or construction.

Contract limitations and change orders means a construction related written order signed and issued as per the contract limitation and change order policy directing the contractor to make a change, which the contract authorizes with or without the contractor's consent.

Contract modification (bilateral change) means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract.

Contractor means an offeror who has been awarded a contract.

Cost analysis means the evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be repaid.

Cost data means factual information concerning the cost of labor, material, overhead, and other cost elements which are expected to be incurred or which have been actually incurred by the contractor in performing the contract.

Cost-reimbursement contract means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and this chapter, and a fee or profit, if any.

Direct or indirect participation means involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing or in any other advisory capacity.

Disadvantaged business means a small business which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or for any publicly owned business, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals, and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

Electronic means electrical, digital, magnetic, optical, electromagnetic, or any other similar technology.

Employee means an individual drawing salary or wages from the city, whether elected or not; any uncompensated individual performing personal services for the city or any department, agency, commission, council, board or any other entity established by the executive or legislative branch of the city; and any uncompensated individual serving as an elected official of the city.

External procurement unit means any procurement organization not located in this state which, if in this state, would qualify as a state agency or a local public body. Any agency of the United States government is an external procurement unit.

Financial interest means:

(1) Ownership of one percent or more of any property or business; or

(2) Holding a position in a business such as officer, director, trustee, partner, employee, or the like, or holding any position of management.

Gratuity means anything of value that is presented or promised in anticipation of receiving a

consideration, whether or not the consideration is less than, equal to or greater than the value presented or promised.

Immediate family means a spouse, children, parents, brothers, and sisters.

Invitation for bids means all documents, whether attached or incorporated by reference, used for soliciting sealed bids.

Offeror means the other party's bid/proposal made to enter into a contract that conforms in all material respects to the requirements set forth in the invitation for bids/proposals. Material respects include but are not limited to price, quality, quantity or delivery requirements.

Person means any business, individual, union, committee, club, or other organization, or group of individuals.

Price analysis means the evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and cost to be reimbursed.

Pricing data means factual information concerning prices for items substantially similar to those being procured. Prices in this definition refer to offered or proposed selling prices, historical selling prices and current selling prices. The definition refers to data relevant to both prime and subcontract prices.

Procurement means the buying, purchasing, renting, leasing, or otherwise acquiring of any supplies, service, or construction, including description of requirements, selection, and solicitation of sources, preparation and award of contract, and all phases of contract administration.

Professional services means the services of architects, engineers, archaeologists, bond underwriters, financial, computer and insurance consultants, medical arts practitioners, scientists, management and system analysts, certified public accountants, registered public accountants, lawyers, psychologists, planners, researchers and persons or businesses providing similar services.

Public agency means a public entity subject to or created by the city or the state.

Qualified products list means an approved list of supplies, services, or construction items described by model or catalog numbers, which, prior to competitive solicitation, the city has determined will meet the applicable specification requirements.

Request for proposals means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.

Responsible bidder or offeror means a person who has the capability in all respects to perform fully the contract requirements, and the tenacity, perseverance, experience, integrity, reliability, capacity, facilities, equipment, and credit which will ensure good faith performance.

Responsive bidder or offer means a person who has submitted a bid or offer which conforms in all material respects to the requirements set forth in the invitation for bids or request for proposals.

Services means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. This term shall not include employment agreements or collective bargaining agreements.

Small business means a United States business which is independently owned and which is not dominant in its field of operation or an affiliate or subsidiary of a business dominant in its field of operation.

Specification means any description of the physical or functional characteristics or of the nature of a supply, service, or construction item. It may include a description of any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery.

Supplies includes but is not limited to equipment, materials, printing and insurance.

Technical services means research and development (R&D) work, the development and installation of management information systems (MIS), materials requirement planning (MRP) systems, and the development of technical manuals, printing services, and repair services.

Using agency means any department, commission, board, or public agency requiring supplies, services, or construction procured pursuant to this chapter.

Verified means vendor confirmed receipt of electronic message.
(Code 1988, § 25.5-3; Ord. No. 1923, § 1, 6-17-02)
Cross References: Definitions generally, § 1-2.

Sec. 24-2. Purpose.

The purpose of this chapter is to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity.
(Code 1988, § 25.5-1)

Sec. 24-3. Applicability.

(a) This chapter applies to contracts for the procurement of supplies, services, and construction entered into by the city after the effective date of the ordinance from which this chapter derives. It shall apply to every expenditure of public funds by the city or a public agency for public purchasing irrespective of the source of the funds, except for procurement that is exempt as set forth herein.

(b) When the procurement involves the expenditure of federal assistance or contract funds, the procurement shall be conducted in accordance with any mandatory applicable federal law and regulations. Nothing in this chapter shall prevent any public agency from complying with the terms and conditions of any grant, gift, or bequest that is otherwise consistent with law.
(Code 1988, § 25.5-2; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-4. Authorized exemptions.

This chapter shall not apply to the following:

(1) Procurement of goods, services or construction from state agencies, public bodies or external procurement units.

(2) Procurement of publicly provided or publicly regulated gas, electricity, water, sewer or refuse collection services.

(3) Purchases of books and periodicals from publishers or copyright holders thereof to include publications offered on CDs, videos, or the Internet.

(4) Travel or shipping by common carrier or by private conveyance, or to meals and lodging. Payment for conference registrations, membership dues, or any other similar items, which are administrative in nature and are determined to be non-competitive by the city purchasing manager.

(5) Purchase of livestock.

(6) Art objects or artifacts or for their creation.

(7) Procurement from self-determination corporations or other such enterprises designed and operated to assist in the care or maintenance of the sick and indigent and the prevention thereof, and aided by state or federal antipoverty programs or through private philanthropy.

(8) Leases, exchanges or purchases of real property or a permanent interest in land.

(9) Services of bond underwriters.

(10) Services of expert witnesses needed in conjunction with litigation, court reporting services and legislative activities.

(11) Purchases, rentals, leases (personal and real property), and professional/technical services contracts necessary for the investigation of criminal activities. The police department may purchase such materials and services without quotations, requests for proposals, or bids if such would compromise a criminal investigation as determined by the chief of police in writing. All funds expended for this type activity will be properly receipted and accounted for with supporting documentation. All documentation will be maintained by the police department and shall be subject to internal audit. Rentals, leases, and professional/technical services will be limited to the term of an investigation.

(Code 1988, § 25.5-181; Ord. No. 1923, § 1, 6-17-02)

Secs. 24-5--24-30. Reserved.

ARTICLE II.

PURCHASING MANAGER*

* **Cross References:** Officers and employees, § 2-56 et seq.

Sec. 24-31. Position created.

There is created the position of purchasing manager, who shall be the city's principal public purchasing official.
(Code 1988, § 25.5-21; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-32. Authority and duties.

(a) *Principal public purchasing official.* Except as otherwise provided in this chapter, the purchasing manager shall serve as the principal public purchasing official for the city and shall be responsible for the procurement of supplies, services, and construction in accordance with this chapter, as well as the management and disposal of supplies.

(b) *Duties.* In accordance with this chapter and subject to the supervision of the city manager, the purchasing manager shall:

(1) Procure or supervise the procurement of all supplies, services, and construction needed by the city.

(2) Sell, trade, or otherwise dispose of surplus supplies belonging to the city.

(3) Establish and maintain programs for specifications development, contract administration and inspection and acceptance, in cooperation with the public agencies using the supplies, services and construction.

(c) *Operational procedures.* Consistent with this chapter and with the approval of the city council, the purchasing manager may adopt operational procedures relating to the execution of his/her duties.
(Code 1988, § 25.5-22; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-33. Delegation to others.

The purchasing manager may delegate authority to purchase supplies, services, or construction items to other city officials, if such delegation is deemed necessary for the effective procurement of those items. Notwithstanding section 24-257, procurement authority with respect to certain supplies, services or construction may be delegated to other city officials by the city manager with the approval of the city council, when such delegation is deemed necessary for the effective procurement of these supplies, services, or construction.
(Code 1988, § 25.5-23; Ord. No. 1923, § 1, 6-17-02)

Secs. 24-34--24-60. Reserved.

ARTICLE III.

SOURCE SELECTION AND CONTRACT INFORMATION

DIVISION 1.

PROFESSIONAL AND TECHNICAL SERVICES PROCUREMENT*

* **Editors Note:** Ord. No. 1923, § 1, adopted June 17, 2002, changed the title of division 1 from "generally" to "professional and technical services procurement."

Sec. 24-61. Selection advisory committee.

(a) There is a selection advisory committee which shall consist of the utilities, finance, public works, facilities, and community development department heads as permanent members. For each request for proposal, there are temporary members comprised of two representatives designated by the city manager based on the type of professional services being acquired and a representative of the department for which the professional services are being acquired.

(b) A member of the selection advisory committee shall serve until a successor is appointed. An alternate may be designated by any member to attend in that member's place.

(c) The finance officer, as the department head responsible for the procurement process, shall serve as chair for the selection advisory committee.

(d) The city's purchasing manager or designee shall serve as staff coordinator for the selection advisory committee.

(e) The selection advisory committee shall develop and, from time to time, amend operating procedures. Said procedures must be adopted by resolution of the city council.
(Code 1988, § 2-137; Ord. No. 1701, § I, 9-14-98; Ord. No. 1703, §§ III, X, 10-19-98; Ord. No. 1923, § 1, 6-17-02; Ord. No. 1947, § 1, 3-3-03)

Sec. 24-62. Notice of projects; recommendations.

(a) When the fee for professional or technical services is estimated to be $50,000 or more, the city shall cause to be published, at least two weeks before initial screening of professional firms or persons by the selection advisory committee, a legal advertisement containing a brief description of the work to be performed by the professional firms or persons, and inviting interested firms to submit their qualifications for consideration by the selection advisory committee.

(b) If the estimated cost of the services is less than $50,000.00, review by the selection advisory committee is not required. The purchasing manager may select a qualified firm to provide these services based on adopted purchasing procedures established in section 24-94(f).

(c) When the fee for the professional/technical services is $50,000 or more, the selection advisory committee shall submit the name of the most qualified professional firm or person to the city council, for purposes of review and approval by the council. Nothing in this subsection shall prohibit the submission of more than one firm.
(Code 1988, § 2-139; Ord. No. 1701, § I, 9-14-98; Ord. No. 1703, §§ IV--VII, X, 10-19-98; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-63. Files of qualifications of firms and persons.

The purchasing manager may maintain a file of qualifications of all firms or persons qualified to perform professional and technical services for city projects. These files shall be updated at the request of the selections advisory committee to provide current qualification information. Interviews and presentation of qualifications shall be conducted at the direction of the selection advisory committee. Mailed inquiries may be solicited to provide specific information as may be considered necessary by the selection advisory committee.
(Code 1988, § 2-139; Ord. No. 1703, § X, 10-19-98; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-64. Approval of contracts.

(a) All city projects that require the contracting for professional and technical services in an amount of $50,000.00 or more shall be performed under separate contract, and each contract shall require final approval by the city council.

(b) After city council approval, contracts, except state and federal agency and other non-procurement contracts, will be signed by the purchasing manager or his designee. State, federal agency and other non-procurement contracts will be signed by the mayor or city manager or their designees.

(c) This section shall apply only to the primary professional firm. Any subcontractor shall be evaluated as a part of the primary contract.
(Code 1988, § 2-140, Ord. No. 1703, § X, 10-19-98; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-65. Emergency procedure.

If the city manager determines that urgent and compelling reasons require emergency contractual, professional and technical services, the city manager, notwithstanding any section of this division, may approve such services, provided that the city manager shall notify the city council of the action citing the compelling and urgent reasons for the action. A complete report shall be submitted to the city council by the using department within a week of the procurement.
(Code 1988, § 2-141; Ord. No. 1701, § I, 9-14-98; Ord. No. 1703, § X, 10-19-98; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-66. Contracting for designated professional services; selection procedure.

(a) Criteria. Except as provided under sections 24-96 through 24-316, or 24-346, professional and technical services shall be procured in accordance with this section.

(b) Where the primary contract may be awarded through the procurement code without review by the selection advisory committee, nothing in this division shall require that the selection advisory committee

separately review subcontractors who are an integral part of the primary contract.
(Code 1988, § 25.5-33, § 2-136; Ord. No. 1701, § I, 9-14-98; Ord. No. 1703, §§ I, II, X, 10-19-98; Ord. No. 1923, § 1, 6-17-02)

Secs. 24-67--24-90. Reserved.

DIVISION 2.

METHODS OF SOURCE SELECTION

Sec. 24-91. Competitive sealed bidding.

(a) *Conditions for use.* All contracts of the city shall be awarded by competitive sealed bidding, except as otherwise provided in sections 24-92 through 24-96, 24-316 and 24-346.

(b) *Invitation for bids.* An invitation for bids shall be issued and shall include specifications and all contractual terms and conditions applicable to the procurement.

(c) *Public notice.* For contracts estimated to be $25,000 or more, adequate public notice of the invitation for bid shall be given at a reasonable time not less than seven calendar days prior to the date set forth for the opening of the bid. The public notice shall state the place, date, and time of bid opening, and where bid documents may be inspected or obtained. Public notice for bids that are estimated to be less than $50,000.00 shall be published only in a local newspaper of general circulation. All other public notice estimated at $50,000.00 or more may include publication in a newspaper of general circulation, mailing, or posting through an electronic medium which is accessible to the general public.

(d) *Bid opening.* A bid shall be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids. A Late bid will not be accepted. Lateness will be determined by the purchasing managers time clock, and the purchasing managers determination of promptness or lateness will be final. The amount of each bid and such other relevant information as the purchasing manager deems appropriate, together with the name of each bidder, shall be recorded; the record and each bid shall be open to public inspection. A copy of the information may be obtained by sending a self-addressed stamped envelope with reference to the bid number and title to the purchasing department. This information will not be given over the telephone.

(e) *Bid acceptance and bid evaluation.* A bid 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 bid, which may include criteria to determine acceptability, such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The invitation for bid 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 bid. Original cover sheet and all documents must be returned fully executed, if not so returned, bid will be rejected.

(f) *Correction or withdrawal of bids; cancellation of awards.* Correction or withdrawal of an inadvertently erroneous bid before or after bid opening or cancellation of awards or contracts based on such bid mistakes may be permitted where appropriate. Mistakes discovered before bid opening may be modified or withdrawn by written or telegraphic notice in the office designated in the invitation for bids prior to the time set for bid opening. After bid opening, no changes in bid prices or other provisions of bids prejudicial to the interest of the city or fair competition shall be permitted. In lieu of bid correction, a low bidder alleging a material mistake of fact may be permitted to withdraw its bid if:

(1) The mistake is clearly evident on the face of the bid document but the intended correct bid is not similarly evident; or

(2) The bidder submits evidence which clearly and convincingly demonstrates that a mistake was made. 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 purchasing manager.

(g) *Award.* Unless otherwise determined impractical by the purchasing manager, bids resulting in contract(s) totaling less than $50,000.00 in the aggregate shall be awarded only to qualified local manufacturers or local businesses as defined pursuant to Section 24-100 in this chapter. Contracts shall be awarded to the lowest responsible and responsive bidder who meets the requirements and criteria set forth in the invitation for bid. If the low responsive bid exceeds available funds by less than ten percent, the purchasing manager is authorized, when time or economic considerations preclude re-solicitation of work of a reduced scope, to negotiate an adjustment of the bid price with the lowest responsive and responsible bidder, in order to bring the bid within the amount of available funds.

(h) *Multistep sealed bidding.* When it is considered impractical to prepare initially a purchase description to support an award based on price, an invitation for bids may be issued requesting the submission of unpriced offers to be followed by an invitation for bids limited to those bidders whose offers have been determined to be technically acceptable under the criteria set forth in the first solicitation.
(Code 1988, § 25.5-31; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-92. Request for proposals.

(a) *Conditions for use.* When the purchasing manager determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the city, a contract may be entered into by use of the request for proposal method set forth herein.

(b) *Request for proposal.* A proposal shall be solicited through a request for proposal.

(c) *Public notice.* Adequate public notice of the request for proposal shall be given in the same manner as provided in section 24-91.

(d) *Receipt of proposal.* No proposal shall be handled so as to permit disclosure of the identity of any offeror or the contents of any proposal to competing offerors prior to the deadline for receipt of the proposal by the purchasing manager. A register of proposals shall be prepared containing the name of each offeror. The register of proposals shall be open for public inspection not later than three days after the deadline for receipt of proposals. During the evaluation of proposals, and until approval of the recommendation of award by the city council, the contents of proposals may not be disclosed to the public. If a request for proposals is canceled and a similar RFP will be issued within six months, the contents of proposals received in response to the first request for proposals may not be disclosed until after approval by the city council of the recommendation of award for the second RFP or cancellation of the RFP.

(e) *Evaluation factors.* The request for proposal shall state the relative importance of price and other evaluation factors.

(f) *Discussion with responsible offeror and revision to proposal.* As provided in the request for proposal, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to ensure full understanding of and conformance to the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of the identity of competing offerors or of any information derived from proposals submitted by competing offerors. Any modification received during the revision and negotiation stages will become a part of the permanent record.

"(g) *Award.* Awards shall be made to the highest ranking responsible offeror taking into consideration the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation except that, unless otherwise determined impractical by the purchasing manager, award(s) resulting in contract(s) totaling less than $50,000.00 in the aggregate shall be awarded only to qualified local manufacturers or local businesses as defined pursuant to Section 24-100 in this chapter. The contract file shall contain the basis on which the award is made
(Code 1988, § 25.5-32; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-93. Direct contact.

Direct contact with city elected officials or city staff, other than the purchasing manager, during the bid/proposal process will render the bid/proposal as non-compliant and no further consideration will be given the bid/proposal.
(Ord. No. 1923, § 1, 6-17-02)

Sec. 24-94. Small purchases.

(a) Authority. Any contract less than $50,000.00 for supplies, services, and construction, excluding professional/technical services, may be made in accordance with the procedures set forth in this section. Contract requirements shall not be artificially divided so as to constitute a small purchase under this section.

(b) Purchases $25,000.00 or more but less than $50,000.00. Unless determined impractical by the purchasing manager, for a purchase estimated to be $25,000.00 or more but less than $50,000.00, no less than three businesses shall be solicited to submit written quotations. Award shall be based on the lowest price meeting specifications. A record of the solicitation and written responses shall be maintained as public record.

(c) Purchases $10,000 or more but less than $25,000. Unless determined impractical by the purchasing manager, for a purchase estimated to be $10,000.00 or more but less than $25,000.00, prices from no less than three sources shall be obtained. Award shall be based upon the lowest price meeting specifications. Solicitations, responses and/or other pricing documentation shall be recorded and maintained as public record.

(d) Purchases $5,000 or more but less than $10,000.00. Unless determined impractical by the purchasing manager, for a purchase estimated to be $5,000 or more but less than $10,000, adequate and reasonable price competition for the supply, service, or construction shall be obtained. Solicitations, responses and/or other pricing records shall be documented and maintained as public record.

(e) Purchases less than $5,000. Unless otherwise determined impractical by the purchasing manager, for a purchase estimated to be less than $5,000, purchase is to be made only by authorized City employees at the best obtainable price considering time and process efficiencies.

(f) Professional/technical services less than $50,000.00. Unless otherwise determined impractical by the purchasing manager, for professional/technical services estimated to be less than $50,000.00, shall be purchased in accordance with the following:

(1) All professional/technical services estimated to be less $50,000.00 shall be procured by the central purchasing manager calling a reasonable number of firms to obtain either verbal, telephone or written offers when practical. Procurement over this amount shall be by competitive sealed proposal as per section 24-62 or 24-92 as applicable.

(2) The central purchasing officer or designee shall provide such information as is necessary to provide the potential offeror the opportunity to provide a proper and timely response. Included in the information shall be the factors to be evaluated and the relative weights assigned each factor.

(3) The types of questions to be asked of the potential offeror may include, but not be limited to:

a. The specialized design and technical competence of the business, including a joint venture or association, regarding the type of services required.

b. Capacity and capability of the business to perform the work, including any specialized services, within the time limitation, if any.

c. Past record of performance or contracts with government agencies or private industry with respect to such factors as control of costs, quality of work, and ability to meet schedules.

d. Proximity to or familiarity with the area in which the project is located.

e. The anticipated price, if price is a factor, for services based upon the information provided by the central purchasing officer as to the scope of work.

f. Other criteria determined to be essential to the particular contract or project.

(4) The award shall be based on the highest ranking respondent considering the evaluation factors provided in the solicitation. The city may negotiate with any responding offeror with the intent to obtain best and final offer of the offeror. "

(Code 1988, § 25.5-34; Ord. No. 1703, § IX, 10-19-98; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-95. Sole source procurement.

A contract may be awarded without competition when the purchasing manager determines in writing, after conducting a good-faith review of available sources, that there is only one source for the required supply, service, or construction item; or when it is likely that award to any other source would result in:

(1) Substantial duplication of cost to the city that is not expected to be recovered through competition; or

(2) Unacceptable delays in fulfilling the city's requirement.

The purchasing manager may conduct negotiations, as appropriate, as to price, delivery, and terms. A record of sole source procurement shall be maintained as a public record and shall list each contractor's name, the amount and type of each contract, a listing of the items procured under each contract, and the identification number of each contract file.

(Code 1988, § 25.5-35; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-96. Emergency procurement.

Notwithstanding any other section of this chapter, the city manager may authorize the purchasing

manager or designee to make emergency procurement of supplies, services, or construction items when there exists a threat to public health, welfare, or safety, provided that such emergency procurement 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. As soon as practicable, a record of each emergency procurement shall be made and shall set forth the contractor's name, the amount and type of the contract, a listing of the items procured under the contract, and the identification number of the contract file.
(Code 1988, § 25.5-36; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-97. Procurement of lease financing.

(a) The procurement of lease financing shall be conducted according to the conditions and requirements of section 24-92.

(b) Award recommendation shall be made to the city council by the finance director.
(Code 1988, § 25.5-37)

Sec. 24-98. Cancellation/rejection of invitation for bid or request for proposal.

Under this chapter, an invitation for bid, a request for proposal, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, when it is in the best interests of the city. The reasons therefor shall be made part of the contract file. Each solicitation issued by the city shall state that the solicitation may be canceled and that any bid or proposal may be rejected in whole or in part for good cause when in the best interests of the city. Notice of cancellation shall be sent to all businesses solicited. The notice shall identify the solicitation, explain the reason for cancellation and, where appropriate, explain that an opportunity will be given to compete on any resolicitation or any future procurement of similar items. Reasons for rejection shall be provided upon request of unsuccessful bidders or offerors.
(Code 1988, § 25.5-38; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-99. Authority to award.

(a) In the discretion of the purchasing manager, if no acceptable bid or offer is received on the solicitation the central purchasing office may purchase the required goods or services in the open market at the best obtainable price, or re-advertise the request for bid or proposal.

(b) The purchasing manager shall be authorized to enter into all budgeted purchase contracts subject to the following conditions:

(1) For purchases of goods, construction or services in excess of $35,000.00 but less than $50,000.00, the purchasing manager shall obtain written approval from the city manager prior to contracting.

(2) For purchases of goods, construction or services in excess of $50,000.00, the purchasing agent manager shall obtain approval from the city council prior to contracting.

(3) For the purpose of this section, aggregate cost shall not be the determinative on multiyear contracts.

(4) Signing of contracts will be as per section 24-64(b).

(Code 1988, § 25.5-39; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-100. Resident and local preferences.

(a) *Definitions.* For purposes of this section, the following definitions also apply;

(1) The terms "resident business" and "resident manufacturer" shall be defined as set forth in section 13-1-21 NMSA 1978 and as amended. The term "resident contractor" is defined in section 13-4-2, NMSA 1978 and as amended.

(2) The terms "local business" and "local manufacturer" shall mean that the business or manufacturer maintains a place of business in the city and that:

a. Ten or more of its employees are residents of the city or 25 percent or more of its employees are residents of the city, whichever is greater;

b. If a corporation, 25 percent **or** of its employees are residents of the city;

c. If a partnership, its partners owning a majority beneficial interest in the partnership are residents of the city; or

d. If an individual or sole proprietor, he or she is a resident of the city.

(b) *Preference factor.* The preference factor for the resident and local preference shall be 0.95 for bids and shall be 1.05 for proposals except for federal funded bids/proposals. Federal funded bids/proposals are not subject to a preference factor.

(c) *Priority of categories.* The priority of categories for bids and proposals are:

(1) Local manufacturer;

(2) Local business;

(3) Resident manufacturer;

(4) Resident business;

(5) Resident contractor for public works projects.

(d) *Bids for goods and services.* When bids for the purchase of goods or services are received, the lowest bid received from those bidders in the first category listed above shall be multiplied by the preference factor for bids. If the bid receiving the preference is equal to or lower than the lowest bid received, the contract

shall be recommended for award to the bidder receiving the preference. If no bids are received from bidders in the first category or if the bid receiving the preference does not qualify for an award after multiplication by the preference factor, the same procedure shall be followed with respect to the next category of bidders listed, and then to the next category until a bid qualifies for recommendation of award. If no bid qualifies for recommendation of award, then the contract shall be recommended for award without regard to resident or local preferences.

(e) *Proposals for goods and services.* When proposals for the purchase of goods or services are received, the evaluation score of the proposal receiving the highest score in the first category listed above shall be multiplied by the preference factor for proposals. If the proposal receiving the preference is equal to or higher than the highest score of all proposals received, the recommendation of award shall be made to the proposer receiving the preference. If no proposals are received from proposers in the first category or if the proposal receiving the preference does not qualify for an award after multiplication by the preference factor, the same procedure shall be followed with respect to the next category of proposers listed above, and then to the next category until a proposal qualifies for recommendation of award. If no proposal qualifies for recommendation of award, then the contract shall be recommended for award without regard to resident or local preferences.

(f) *Bids or proposals for public works projects.* Only the resident contractor preferences shall apply to bids for public works projects.

(g) *Qualification for resident preference.* No **resident business or manufacture** shall be given any preference in the purchase of goods or services by the city unless it has qualified with the state purchasing agent as a resident business or manufacturer and obtain a certification number as provided in section 13-1-22, NMSA 1978 and as amended. The certification number must be submitted with its bid for an offeror to qualify for this preference. The city purchasing office shall determine if a resident preference is applicable to a particular offer on a case by case basis.

(h) *Qualification for **local** preference.* The city purchasing office shall prepare a form to be completed by all the offerors who qualify as a local business or manufacturer. The completed form with the information certified by the offerer must be submitted by the offeror with its bid or proposal for an offeror to qualify for this preference. If the offeror does business within the city limits, it must have a current city business registration.

(i) *Limitations.* No offeror shall receive more than a five percent preference pursuant to this section on any one offer submitted. Only the principal offeror or one of the principal offerors, not a subcontractor, may qualify for an offer for a preference.

(j) *Application.* This section shall not apply to general procurement contracts when bids exceed $5,000,000.00 and shall not apply to public works projects or federally aided construction projects or when the expenditure of federal funds designed for a specific contract is involved.
(Code 1988, § 25.5-40; Ord. No. 1923, § 1, 6-17-02)

Secs. 24-101--24-103. Reserved.

Editors Note: Ord. No. 1923, § 1, adopted June 17, 2002, repealed sections 24-101--24-103 in their entirety. Former sections 24-101--24-103 pertained to resident business, contractor or manufacturer preference; prequalification; and revocation of certification numbers, respectively, and derived from the Code of 1988, §§ 25.5-41, 25.5-43, 25.5-44.

Sec. 24-104. Appeals.

All appeals under this division will be handled in accordance with section 24-286, except the bonding requirements shall not apply.
(Code 1988, § 25.5-45; Ord. No. 1923, § 1, 6-17-02)

Secs. 24-105--24-130. Reserved.

DIVISION 3.

QUALIFICATIONS AND DUTIES

Sec. 24-131. Cost or pricing data.

(a) *Required submissions relating to award of contracts.* A prospective contractor shall submit cost or pricing data when the city contract **is federally funded or** is to be awarded on a noncompetitive basis.

(b) *Exceptions.* **Except for federally funded purchases, t~~T~~he** submission of cost or pricing data relating to the award of a contract is not required when:

(1) The contract price is based on established catalogue prices or market prices;

(2) The contract price is set by law or regulation; or

(3) It is determined in writing by the purchasing manager that the requirements of subsection (a) of this section may be waived, and the determination states the reasons for such waiver.

(c) *Required submissions relating to change orders or contract modifications.* **~~The purchasing manager may require a contractor to~~For federally funded purchases and as otherwise required by the purchasing manager, the contractor shall** submit cost or pricing data prior to the pricing of any change order or contract modification, including adjustments to contracts awarded by competitive sealed bidding, whether or not cost or pricing data was required in connection with the initial pricing of the contract.

(d) *Certification required.* A contractor, actual or prospective, required to submit cost or pricing data in accordance with this section shall certify that, to the best of his knowledge and belief, the cost or pricing data submitted was accurate, complete, and current as of a mutually specified date prior to the award of the contract or the pricing of the change order or contract modification.

(e) *Price adjustment provision required.* Any contract award, change order, or contract modification under which the submission and certification of cost or pricing data are required shall contain a provision stating that the price to the city, including profit or fee, shall be adjusted to exclude any significant sums by which the city finds that such price was increased because the contractor-furnished cost or pricing data was inaccurate, incomplete, or not current as of the date agreed upon between the city and the contractor.
(Code 1988, § 25.5-52; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-132. Cost or price analysis.

(a) Under this chapter, a cost analysis or **a price analysis, as appropriate, shall be conducted for contracts established through the application of section 24-95.~~prior to award of the contract other than one awarded under sections 24-91, 24-92, 24-94, 24-96, 24-316, and 24-346.~~** A written record of such cost analysis or price analysis shall be made a part of the contract file.

(b) For all federally funded purchases, a cost or price analysis must be conducted as required by applicable federal regulations for all related contracts including contract cost modifications. The cost or price analysis shall be public record.

(Code 1988, § 25.5-53)

Sec. 24-133. Bid and performance bonds on supply or service contracts.

Bid and performance bonds or other security may be requested for supply contracts or service contracts as the purchasing manager or head of a using agency deems advisable to protect the city's interest. Any such bonding or security requirements shall be set forth in the solicitation. Bid or performance bonds shall not be used as a substitute for a determination of a bidder or offeror's responsibility.
(Code 1988, § 25.5-54; Ord. No. 1923, § 1, 6-17-02)

Secs. 24-134--24-160. Reserved.

DIVISION 4.

TYPES OF CONTRACTS AND CONTRACT ADMINISTRATION

Sec. 24-161. Types of contracts.

(a) *General authority.* Subject to the limitations of this section, any type of contract which is appropriate to the procurement and which will promote the best interests of the city may be used, provided that the use of a cost-plus-a-percentage-of-cost contract be approved by the city council. A cost reimbursement contract may be used only when a determination is made in writing that such contract is likely to be less costly to the city than any other type or that it is impracticable to obtain the supply, service, or construction item required except under such a contract.

(b) *Multiterm contracts.*

(1) *Specified period.* Unless otherwise provided by law, a contract for supplies or services may be entered into for any period of time deemed to be in the best interests of the city, provided 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 fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds thereof.

(2) *Determination prior to use.* Prior to the utilization of a multiterm contract, it shall be determined in writing that:

a. Estimated requirements cover the period of the contract and are reasonably firm and continuing; and

b. Such a contract will serve the best interests of the city by encouraging effective competition or otherwise promoting economies in city procurement.

(c) *Multiple source contracting.*

(1) *Generally.* A multiple source award is an award of an indefinite quantity contract for one or more similar supplies or services to more than one bidder or offeror. The obligation to order the city's actual requirements is limited by the provision of Uniform Commercial Code section 2-306(1).

(2) *Limitations on use.* A multiple source award may be made when award to two or more bidders or offerors for similar products is necessary for adequate delivery, service, or product compatibility. Any multiple source award shall be made in accordance with the provisions of sections 24-91, 24-92, 24-94 and 24-96, as applicable. Multiple source awards shall not be made when a single award will meet the city's needs without sacrifice of economy or service. Awards shall not be made for the purpose of dividing the business, making available product or supplier selection to allow for user preference unrelated to utility or economy, or avoiding the resolution of tie bids. Any such awards shall be limited to the least number of suppliers necessary to meet the valid

requirements.

(3) *Eligible users.* All eligible users of the contract shall be named in the solicitation, and it shall be mandatory that the actual requirements of such users that can be met under the contract be obtained in accordance with the contract, provided that the city shall reserve the right to take bids separately if:

a. A particular quantity requirement arises which exceeds its normal requirement or an amount specified in the contract; and

b. The purchasing manager approves a finding that the supply or service available under the contract will not meet a nonrecurring special need of the city.

(4) *Intent to use.* If a multiple source award is anticipated prior to issuing a solicitation, the city shall reserve the right to make such an award, and the criteria for award shall be stated in the solicitation.

(5) *Determination required.* The purchasing manager shall make a written determination setting forth the reasons for a multiple source award, which shall be made a part of the procurement file.

(Code 1988, § 25.5-61; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-162. Contract clauses.

(a) *Required generally.* All city contracts for supplies, services, and construction shall include provisions necessary to define the responsibilities and rights of the parties to the contract. The purchasing manager, after consultation with the city attorney, may issue clauses appropriate for supply, service, or construction contracts, addressing among others the following subjects:

(1) Statement of work, delivery schedules, and period of performance;

(2) The unilateral right of the city to order in writing changes in the work within the scope of the contract;

(3) The unilateral right of the city to order in writing temporary stopping of the work or delaying performance that does not alter the scope of the contract;

(4) Variations occurring between estimated quantities of work in the contract and actual quantities;

(5) Defective pricing;

(6) Liquidated damagesto include administrative contractual or legal remedies for violation of contract terms;

(7) Specified excuses for delay or nonperformance;

(8) Termination of the contract for default or cause;

(9) Termination of the contract in whole or in part for the convenience of the city;

(10) Suspension of work on a construction project ordered by the city; and

(11) Site conditions differing from those indicated in the contract, or ordinarily encountered, except that a differing site conditions clause need not be included in a contract when:

a. The contract is negotiated;

b. The contractor provides the site or design; or

c. The parties have otherwise agreed with respect to the risk of differing site conditions.

(b) *Price adjustments.*

(1) Adjustments in price resulting from the use of contract clauses required by subsection (a) of this section shall be computed in one or more of the following ways:

a. By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;

b. By unit prices specified in the contract or subsequently agreed upon;

c. By the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;

d. In such other manner as the contracting parties may mutually agree; or

e. In the absence of agreement by the parties, by a unilateral determination by the city of the costs attributable to the events or situations under such clauses with adjustment of profit or fee as computed by the city, as accounted for in accordance with industry price list, catalogue or market prices and subject to the appeals and remedies in article VII of this chapter.

f. For all federally funded purchases, cost or price analysis shall be the only means from which pricing shall be determined.

(2) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to section 24-131.

(c) *Standard clauses and modification.* The purchasing manager, after consultation with the city attorney, may establish standard contract clauses for use in city contracts. If the purchasing manager establishes any standard clauses addressing the subjects set forth in subsection (a) of this section, such clauses may be varied, provided that any variations are supported by a written determination that states the circumstances justifying such variations, and provided that notice of any such material variation be stated in the invitation for bids or request for proposals.

(Code 1988, § 25.5-62; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-163. Contract administration.

For the purpose of this chapter, a contract administration system designed to ensure that a contractor is performing in accordance with the solicitation under which the contract was awarded, and the terms and conditions of the contract, shall be maintained.
(Code 1988, § 25.5-63)

Sec. 24-164. Cost reimbursement.

If a city contract is being funded in whole or in part by assistance from a federal agency, reimbursement to contractors for incurred costs or cost estimates included in negotiated prices ~~may~~ **shall** be subject to appropriate federal cost principles, e.g., subpart 1-15 of title 41, Code of Federal Regulations.
(Code 1988, § 25.5-64)

Sec. 24-165. Approval of accounting system.

Except with respect to firm fixed-price city contracts, no contract type shall be used unless it has been determined in writing by the purchasing manager that the proposed contractor's accounting system:

(1) Will permit timely development of all necessary cost data in the form required by the specific contract type contemplated; and

(2) Is adequate to allocate costs in accordance with generally accepted cost accounting principles.
(Code 1988, § 25.5-65; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-166. Right of inspection.

The city may, at reasonable times, inspect the part of the plant, place of business, or work site of a contractor or subcontractor at any tier which is pertinent to the performance of any contract awarded or to be awarded by the city.
(Code 1988, § 25.5-66)

Sec. 24-167. Right to audit records.

(a) *Audit of cost or pricing data.* The city may at reasonable times and places, audit the books and records of any contractor who has submitted cost or pricing data pursuant to section 24-131 to the extent that such books, documents, papers, and records are pertinent to such cost or pricing data. Any person who receives a contract, change order, or contract modification for which cost of pricing data is required shall maintain such books, documents, papers, and records that are pertinent to such cost or pricing data for three years from the date of final payment under the contract.

(b) *Contract audit.* The city shall be entitled to audit the books and records of a contractor or a subcontractor at any tier under any negotiated contract or subcontract other than a firm fixed-price contract to the extent that such books, documents, papers, and records are pertinent to the performance of such contract or

subcontract. Such books and records shall be maintained by the contractor for a period of three years from the date of final payment under the prime contract and by the subcontractor for a period of three years from the date of final payment under the subcontract.
(Code 1988, § 25.5-67)

Sec. 24-168. Reporting of anticompetitive practices.

When for any reason collusion or other anticompetitive practices are suspected among any bidders or offerors for a city contract, a notice of the relevant facts shall be transmitted to the state attorney general by the city attorney.
(Code 1988, § 25.5-68)

Sec. 24-169. City records.

(a) *Contract file.* All determinations and other written records pertaining to the solicitation, award, or performance of a city contract shall be maintained for the city in a contract file by the purchasing manager.

(b) *Retention of procurement records.* All procurement records shall be retained and disposed of by the city in accordance with records retention and guidelines and schedules set by the city clerk.
(Code 1988, § 25.5-69; Ord. No. 1923, § 1, 6-17-02)

Secs. 24-170--24-195. Reserved.

ARTICLE IV.

SPECIFICATIONS

Sec. 24-196. Maximum practicable competition.

Under this chapter, all specifications shall be drafted so as to promote overall economy for the purposes intended and to encourage competition in satisfying the city's needs, and shall not be unduly restrictive. The policy enunciated in this section applies to all specifications including, but not limited to those prepared for the city by architects, engineers, designers, and draftsmen.
(Code 1988, § 25.5-81)

Sec. 24-197. Qualified products list.

The city may adopt qualified product lists that shall allow for maximum competition as is practical and that will satisfy the requirements of the city.
(Code 1988, § 25.5-82)

Sec. 24-198. Brand name or equal specification.

(a) *Use.* Under this chapter, brand name or equal specifications may be used when the purchasing manager determines in writing that:

(1) No other design or performance specification or qualified products list is available;

(2) Time does not permit the preparation of another form of purchase description, not including a brand name specification;

(3) The nature of the product or the nature of the city's requirements makes use of a brand name or equal specification suitable for the procurement; or

(4) Use of a brand name or equal specification is in the city's best interest.

Samples of "or equal" materials should be submitted with the bid; however, they may be submitted after the bid opening if adequate time is allowed to evaluate the samples before the bid is awarded.

(b) *Designation of several brand names.* Brand name or equal specifications shall seek to designate three, or as many different brands as are practicable, as "or equal" references, and shall further state that substantially equivalent products to those designated will be considered for award.

(c) *Required characteristics.* Unless the purchasing manager determines in writing that the essential characteristics of the brand names included in the specifications are commonly known in the industry or trade, brand name or equal specifications shall include a description of the particular design, functional, or performance characteristics which are required.

(d) *Nonrestrictive use of brand name or equal specifications.* Where a brand name or equal

specification is used in a solicitation, the solicitation shall contain explanatory language 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.
(Code 1988, § 25.5-83; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-199. Brand name specification.

(a) *Use.* Since use of a brand name specification is restrictive of product competition, it may be used only when the purchasing manager makes a written determination that only the identified brand name item will satisfy the city's needs.

(b) *Competition.* The purchasing manager shall seek to identify sources from which the designated brand name item can be obtained and shall solicit such sources to achieve whatever degree of price competition is practicable. If only one source can supply the requirement, the procurement shall be made under section 24-95.
(Code 1988, § 25.5-84; Ord. No. 1923, § 1, 6-17-02)

Secs. 24-200--24-225. Reserved.

ARTICLE V.

PROCUREMENT OF CONSTRUCTION, ARCHITECT-ENGINEER AND LAND SURVEYING SERVICES

Sec. 24-226. Management of construction contracting.

The head of the city department responsible for a construction project shall have discretion to select the appropriate method of construction contracting management for a particular project. In determining which method to use, the department head shall consider the city's requirements, its resources, and the potential contractor's capabilities.
(Code 1988, § 25.5-91; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-227. Bid security and performance bonds.

(a) *Bid security.* For the purpose of this article, bid security is subject to the following:

(1) *Required.* Bid security shall be required for all competitive sealed bidding for construction contracts when the price is estimated by the purchasing manager to exceed $50,000.00. Bid security shall be a bond provided by a surety company authorized to do business in the state or the equivalent in cash or otherwise supplied in a form satisfactory to the city. Nothing in this subsection shall prevent the requirement of such bonds on construction contracts under $50,000.00 when the circumstances warrant.

(2) *Amount.* Bid security shall be in an amount equal to at least five percent of the amount of the bid.

(3) *Rejection of bids for noncompliance.* When the invitation for bids requires security, noncompliance requires that the bid be rejected unless it is determined that the bid fails to comply only in a nonsubstantial manner with the security requirements.

(4) *Withdrawal of bids.* If a bidder is permitted to withdraw its bid before award as provided in section 24-91(f), no action shall be taken against the bidder or the bid security.

(5) *Authority to require additional bonds.* Nothing in this section shall be construed to limit the authority of the city to require a bid bond or other security in addition to those bonds, or in circumstances other than specified in subsection (a)(1) of this section.

(b) *Contract performance and payment bonds.*

(1) *Required; amounts.* When a construction contract is awarded in excess of $25,000.00, the following bonds or security shall be delivered to the city and shall become binding on the parties upon the execution of the contract:

a. A performance bond satisfactory to the city, executed by a surety company authorized to do business in the state or otherwise secured in a manner satisfactory to the city, in an amount equal to 100 percent of the price specified in the contract; and

b. A payment bond satisfactory to the city, executed by a surety company authorized to do business in the state or otherwise secured in a manner satisfactory to the city, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract. The bond shall be in an amount equal to 100 percent of the price specified in the contract.

(2) *Reduction of bond amounts.* After notice to the city council, the purchasing manager is authorized to reduce the amount of performance and payment bonds to 50 percent of the contract price for each bond when a written determination is made that it is in the best interests of the city to do so.

(3) *Authority to require additional bonds.* Nothing in this subsection shall be construed to limit the authority of the city to require a performance bond or other security in addition to those bonds or in circumstances other than specified in subsection (b)(1) of this section.

(4) *Right to file suit on payment bonds.* Unless otherwise authorized by law, any person who has furnished labor or material to the contractor or subcontractors for the work provided in the contract, for which a payment bond is furnished under this subsection, and who has not been paid in full within 90 days from the date on which that person performed the last of the labor or supplied the material shall have the right to sue on the payment bond for any amount unpaid at the time the suit is instituted and to prosecute the action for the amount due that person. However, any person having a contract with a subcontractor of the contractor, but having no express or implied contract with the contractor furnishing the payment bond, shall have a right of action upon the payment bond upon giving written notice to the contractor within 90 days from the date on which that person performed the last of the labor or supplied the material. That person shall state in the notice the amount claimed and the name of the party to whom the material was supplied or for whom the labor was performed. The notice shall be served personally or by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office or conducts business.

(5) *Location for filing suit on payment bonds.* Unless otherwise authorized by law, every suit instituted upon a payment bond shall be brought in a court of competent jurisdiction for the county or district in which the construction contract was to be performed.

(c) *Copies of bond forms.* Any person may request and obtain from the city a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond shall be prima facie evidence of the contents, execution, and delivery of the original.
(Code 1988, § 25.5-92; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-228. Fiscal responsibility.

(a) When the aggregate sum of contract modifications, change orders, or contract price adjustments exceeds $50,000.00, all subsequent contract modifications, change orders, or contract price adjustments shall be subject to city council approval, except for those contracts that will be or are approved under the contract limitations and change order policy.

(b) Aggregate contract modifications, change orders, or price adjustments up to $50,000.00 shall be authorized by the city manager conditioned upon the award limitations stated in section 24-99.
(Code 1988, § 25.5-93; Ord. No. 1923, § 1, 6-17-02)

Secs. 24-229--24-255. Reserved.

ARTICLE VI.

DEBARMENT OR SUSPENSION

Sec. 24-256. Authority to debar.

(a) The purchasing manager, after consulting with the city attorney and the contract administrator, as defined by the using department, is authorized to debar a person for cause from consideration for the award of future city contracts for a specified period of time. The debarment may apply to a person in his individual as well as corporate capacity. The debarment shall be for a period of not more than three years.

(b) The causes for debarment shall include one or more of the following:

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

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

(3) Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals.

(4) Violation of any city or noncity contract provision, as follows, of a character which is regarded by the purchasing manager to be so serious as to justify debarment action:

a. Deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or

b. A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts, including failure to pay subcontractors, provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment.

(5) Any other cause the purchasing manager determines to be so serious and compelling as to affect responsibility as a city contractor, including debarment by another governmental entity for any cause listed in this chapter.

(6) Violation of the ethical standards set forth in article X of this chapter.

(7) Any violation of the drug-free workplace regulations.

(Code 1988, § 25.5-101; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-257. Notice of decision.

(a) *Mailing notice.* Any written decision by the purchasing manager to debar a person under this article shall be sent by certified mail, return receipt requested, to the person affected by the decision, or by hand delivery and delivery receipt requested.

(b) *Contents of notice.* The written notice of the purchasing manager's decision shall set forth in detail all reasons for the debarment and shall inform the person of his rights concerning administrative appeal. (Code 1988, § 25.5-102; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-258. Administrative appeal.

(a) *Timely appeal.* The person debarred under this article may appeal the determination of the purchasing manager by filing, within five working days of the receipt of the determination, a written notice of appeal and filing an appeals bond with the city clerk in an amount to be set by resolution of the city council. Any notice of appeal not filed within the five-working-day period shall not be timely. The notice of appeal shall be filed with the city clerk and shall set forth in detail all reasons for the appeal. No debarred person shall contact orally or in writing any member of the appeals board outside of the adjudicatory process.

(b) *Appeals board.* All timely appeals of the purchasing manager's determination shall be heard by the appeals board within 15 working days after filing the notice of appeal with the city clerk. The appeals board shall consist of three members who are neither city employees nor city councilors and who shall be appointed by the city manager. The members may receive travel expenses or per diem or may serve voluntarily.

(c) *Notification of hearing.* The city clerk shall be responsible for notifying the debarred person of the time and place of the hearing, which shall be opened to the public and conducted in compliance with the Open Meetings Act.

(d) *Record of hearing.* The city shall provide a clerk who shall record the hearing and prepare a nonverbatim account of the hearing. Copies of the recordings and nonverbatim account shall be provided to the debarred person for a reasonable reproduction cost.

(e) *Conduct of hearing.* The hearing shall be informal but shall provide at a minimum for the swearing in and cross examination of witnesses by the parties involved. The appeals board shall have the authority to call for the attendance of witnesses and the production of documents, to swear witnesses, to call witnesses itself, to examine witnesses including the debarred person, and to hear all evidence properly brought before it. The formal rules of evidence shall not apply to this proceeding. The appeals board may adopt additional rules for hearings not inconsistent with this chapter.

(f) *Legal representation.* The debarred person may be represented before the appeals board by a representative of his choice. The representative shall be identified and his name made known to the board three days prior to the hearing. If the representative of the person who has appealed is an attorney, the purchasing manager may be represented by the city attorney.

(g) *Written decision of board.* After concluding the hearing, the appeals board shall issue a written decision either upholding or reversing the purchasing manager's determination within 15 working days of the completion of the hearing. The decision of the board shall be based upon the evidence received at the hearing

and shall be final.

(h) *Costs.* The losing party to the appeal shall be responsible for the reasonable costs of the appeal as determined by the appeals board. The board's determination of costs shall be based on the costs and expenses incurred by the board, including but not limited to the board's salary, attorneys' fees, reproduction and transcription costs.
(Code 1988, § 25.5-103; Ord. No. 1923, § 1, 6-17-02)

Secs. 24-259--24-285. Reserved.

ARTICLE VII.

APPEALS AND REMEDIES

Sec. 24-286. Bid protests.

(a) *Right to protest.* Any offeror who is aggrieved in connection with the procurement process of this chapter, including but not limited to the solicitation or award of a contract, may file a written protest with the purchasing manager. Such protest must be filed within five working days after the aggrieved bidder or offeror knows or should have known of the facts giving rise to the protest unless, otherwise specified in this chapter, and shall be accompanied by an appeals bond (except where prohibited by federal law) in an amount set by the city council by resolution (Resolution No. 00-148). If the protest concerns the awarding of a bid made pursuant to subsection 24-91(g) or 24-92(g), the protest must be filed within five working days of receipt of the purchasing's manager's determination. The protestor shall set forth in detail all reasons for the protest. The protest shall:

(1) Include the name and address of the protestor;

(2) Identify the contracting activity and the number of the solicitation, if any, and if a contract has been awarded the contract number, if any;

(3) Contain a statement of the grounds for protest;

(4) Include supporting exhibits, evidence affidavits or documents to substantiate any claim unless not available within the filing time, in which case the expected availability date shall be indicated; and

(5) Specify the ruling requested from the purchasing manager.

(b) *Duties of purchasing manager upon receipt of protest.* Upon receipt of any protest filed in accordance with section (a) of this section, the purchasing manager shall review the facts giving rise to the protest and within 15 working days mail to the protestor and all other bidders, return receipt requested, a written determination concerning the validity of the protest. The determination shall set forth the rationale, the proposed action to be taken by the purchasing manager or the city and shall inform the protestor and other bidders of their right to appeal the purchasing manager's determination in accordance with the appeal procedures set forth in subsection (c) of this section. Failure to timely appeal the purchasing manager's determination shall bar further recourse by the protestor or any other bidder, and the purchasing manager's determination and proposed action shall be final.

(c) *Appeal of purchasing manager's decision.* Any protestor or other bidder aggrieved by the purchasing's manager's determination made pursuant to subsection (b) of this section may appeal such determination by filing, within five working days of receipt of such decision, a written notice of appeal with the city clerk, which shall set forth in detail all reasons for the appeal and whether or not the protestor will be represented by an attorney.

(d) *Appeals board.* All timely appeals of the purchasing manager's determination shall be heard by

the appeals board within 15 working days after the filing of the notice of appeal with the city clerk. The appeals board shall consist of three members who are neither city employees nor city councillors and who shall be appointed by the city manager. The members may be paid or may serve voluntarily. The city clerk shall be responsible for notifying all protestors and other bidders of the time and place of the hearing.

(e) *Hearing procedures.* The hearing shall be informal but shall provide at a minimum for the swearing in and cross examination of witnesses by the city or any party having filed an appeal. The board may develop rules for the conduct of protest meetings. After concluding the hearing the appeals board shall issue a written determination, within 15 working days of holding a hearing, of either upholding or reversing the purchasing manager's determination. The determination shall be final.

(f) *Costs.* The losing party to the appeal shall be responsible for the reasonable costs of the appeal as determined by the appeals board. The board's determination of costs shall be based on the costs and expenses incurred by the board, including but not limited to the board's salary, attorneys' fees, reproduction and transcription costs.

(g) *State of procurement during protest.* If timely protest is made under subsection (a) of this section, the purchasing manager shall not proceed further with the solicitation or award of the contract until the appeal process has been concluded in accordance with this section or until the purchasing manager makes a determination based on the records that the award of the contract without delay is necessary to protect substantial interests of the city. If the purchasing manager determines an award without delay is necessary and the protestor later prevails in the appeal, the protestor shall be entitled only to reasonable costs, not to include attorney fees, associated with the preparation and submission of the bid.
(Code 1988, § 25.5-111; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-287. Remedies for solicitations or awards in violation of law.

(a) *Prior to bid opening or closing date for receipt of proposals.* If, prior to the bid opening or the closing date for receipt of proposals, the purchasing manager, after consultation with the city attorney, determines that a solicitation made under this chapter is in violation of federal, state, or municipal law, the solicitation shall be canceled or revised to comply with applicable law.

(b) *Prior to award.* If, after bid opening or the closing date for receipt of proposals, the purchasing manager, after consultation with the city attorney, determines that a solicitation or a proposed award of a contract made under this chapter is in violation of federal, state, or municipal law, the solicitation or proposed award shall be canceled.

(c) *After award.* If, after an award, the purchasing manager, after consultation with the city attorney, determines that a solicitation or award of a contract made under this chapter was in violation of applicable law, then:

(1) If the person awarded the contract has not acted fraudulently or in bad faith, the contract may be:

a. Ratified and affirmed, provided it is determined that doing so is in the best interests of the city; or

b. Terminated, and the person awarded the contract shall be compensated for actual costs reasonably incurred under the contract, plus a reasonable profit, prior to the termination; or

(2) If the person awarded the contract has acted fraudulently or in bad faith, the contract may be declared null and void or voidable, if such action is in the best interests of the city.

(Code 1988, § 25.5-113; Ord. No. 1923, § 1, 6-17-02)

Secs. 24-288--24-315. Reserved.

ARTICLE VIII.

EXISTING CONTRACTS

Sec. 24-316. Procurement using existing contracts.

Under this chapter, the purchasing manager may contract for services, construction or goods without the use of competitive bids or competitive proposals at a price equal to or less than:

(1) The current federal or state supply contract or catalogue price, whichever is lower, and the purchase order adequately identifies the contract relied upon. A copy of the federal supply contract or catalogue shall be made part of the procurement record.

(2) The current contract price held by other intrastate or interstate governmental bodies and their agencies. A copy of the contract relied upon shall be made part of the procurement record.

(3) A bid awarded by the city to the same contractor, for the same materials or services, within the past 24 months. A copy of the original documentation is to become a permanent part of the procurement record providing the vendor wishes to extend.

(Code 1988, § 25.5-121; Ord. No. 1923, § 1, 6-17-02)

Secs. 24-317--24-345. Reserved.

ARTICLE IX.

COOPERATIVE PROCUREMENT

Sec. 24-346. Authority for cooperative procurement.

The city council may either participate in, sponsor or administer a cooperative procurement agreement for the procurement of any city services, construction or items of tangible personal property with any other state agency, local public body or external procurement unit in accordance with an agreement entered into under the Joint Powers Agreements Act (NMSA 1978, §§ 11-1-1--11-1-7).
(Code 1988, § 25.5-131)

Secs. 24-347--24-375. Reserved.

ARTICLE X.

ETHICS IN PUBLIC CONTRACTING

Sec. 24-376. Criminal penalties.

To the extent that violations of the ethical standards of conduct set forth in this article constitute violations of the state Criminal Code, they shall be punishable as provided therein. Such penalties shall be in addition to the civil sanctions set forth in this article. Criminal, civil, and administrative sanctions against employees or nonemployees which are in existence on the effective date of the ordinance from which this chapter derives shall not be impaired.
(Code 1988, § 25.5-141)

Sec. 24-377. Employee conflict of interest.

(a) It shall be unethical for any city employee to participate directly or indirectly in a procurement contract when the city employee knows that:

(1) The city employee or any member of the city employee's immediate family has a financial interest pertaining to the procurement contract; or

(2) Any other person, business, or organization with whom the city employee or any member of a city employee's immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement contract.

(b) A city employee or any member of a city employee's immediate family who holds a financial interest in a disclosed blind trust shall not be deemed to have a conflict of interest with regard to matters pertaining to that financial interest.
(Code 1988, § 25.5-142)

Sec. 24-378. Gratuities and kickbacks.

(a) *Gratuities.* It shall be unlawful for any person to offer, give, or agree to give to any current or former city employee or for any current or former city employee to solicit, accept or agree to accept a gratuity in exchange for consideration pertaining to a city procurement. Consideration shall include but is not limited to a decision, approval, disapproval, recommendation or action that influences a procurement solicitation, contract award or the administration of a contract. No sample or sampling of a product or service shall be accepted by a city employee unless the purchasing manager determines that the sample or sampling is to be used in city activities for evaluation or product qualification purposes.

(b) *Kickbacks.* It shall be unlawful for any payment, gratuity, or offer of employment to be made by or on behalf of a subcontract under a contract to the prime contractor or higher tier subcontractor or any person associated therewith, as an inducement for the award of a subcontract or order.

(c) *Contract clause.* The prohibition against gratuities and kickbacks prescribed in this section shall be conspicuously set forth in every contract and solicitation therefor. Any person convicted of violating this

section shall be guilty of a petty misdemeanor.
(Code 1988, § 25.5-143; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-379. Contingent fees.

It shall be unlawful for a person to be retained or to retain a person to solicit or secure a city contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies for the purpose of securing business. Any person convicted of violating this section shall be guilty of a petty misdemeanor.
(Code 1988, § 25.5-144; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-380. Contemporaneous employment.

It shall be unethical for any city employee who is participating directly or indirectly in the procurement process to become or to be, while such a city employee, the employee of any person contracting with the governmental body by whom the employee is employed.
(Code 1988, § 25.5-145)

Sec. 24-381. Waivers from employee conflict of interest and contemporaneous employment.

The city council may grant a waiver from the employee conflict of interest provision in section 24-377 or the contemporaneous employment provision in section 24-380 upon making a written determination that:

(1) The contemporaneous employment or financial interest of the city employee has been publicly disclosed;

(2) The city employee will be able to perform his procurement functions without actual or apparent bias or favoritism; and

(3) The award will be in the best interests of the city.
(Code 1988, § 25.5-146)

Sec. 24-382. Use of confidential information.

It shall be unlawful for any city employee or former employee knowingly to use confidential information for actual or anticipated personal gain or for the actual or anticipated personal gain of any other person. Any person convicted of violating this section shall be guilty of a petty misdemeanor.
(Code 1988, § 25.5-147; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-383. Recovery of value transferred or received in breach of ethical standards.

(a) *Authority.* The value of anything transferred or received in breach of the ethical standards of this chapter by a city employee may be recovered from the city employee.

(b) *Recovery of kickbacks by city.* Upon a showing that a subcontractor made a kickback to a prime contractor or a higher tier subcontractor in connection with the award of a subcontract or order thereunder, it

shall be conclusively presumed that the amount thereof was included in the price of the subcontract or order and ultimately borne by the city and will be recoverable from the recipient. In addition, that amount may also be recovered from the subcontractor making such kickbacks. Recovery from one offending party shall not preclude recovery from other offending parties.
(Code 1988, § 25.5-148)

Secs. 24-384--24-410. Reserved.

ARTICLE XI.

FEDERALLY FUNDED PROCUREMENT

Sec. 24-411. Contractor records.

If a city contract is being funded in whole or in part by assistance from a federal agency, the contract shall include provisions requiring the contractor and subcontractors at any tier to:

(1) Maintain for three years from the date of final payment under the contract all books, documents, papers, and records pertinent to the contract; and

(2) Provide to the city, the federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives access to such books, documents, papers, and records for the purposes of examining, auditing, and copying them.

(Code 1988, § 25.5-161)

Sec. 24-412. Patents.

If a city contract involving research and development, experimental, or demonstration work is being funded in whole or in part by assistance from a federal agency, the contract shall include provisions:

(1) Giving notice to the contractor of the applicable grantor agency requirements and regulations concerning reporting of and rights to any discovery or invention arising out of the contract; and

(2) Requiring a contractor to include a similar provision in all subcontracts involving research and development, experimental, or demonstration work.

(Code 1988, § 25.5-162)

Sec. 24-413. Copyrights and rights in data.

If a city contract is being funded in whole or in part by assistance from a federal agency, the contract shall include a provision giving the contractor notice of the applicable regulations concerning the rights of the United States to any plans, drawings, specifications, computer programs, technical reports, operating manuals, and similar work products developed and paid for under the contract.

(Code 1988, § 25.5-163)

Sec. 24-414. Notice of federal public policy requirements.

If the city contract is being funded in whole or in part by assistance from a federal agency, and the contract is subject to one or more federal public policy requirements, such as: (i) equal employment opportunity; (ii) fair labor standards; (iii) energy conservation; (iv) environmental protection; or (v) other similar socioeconomic programs, the purchasing manager shall include contract provisions giving the contractor notice of these requirements and, where appropriate, including in those contract provisions the requirement that the contractor give a similar notice to all of its subcontractors.

(Code 1988, § 25.5-164; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-415. Buy American requirements.

If a city contract is being funded in whole or in part by assistance from a federal agency, the city shall adhere to the appropriate buy American requirements of the federal agency providing the assistance.
(Code 1988, § 25.5-165)

Sec. 24-416. Energy conservation.

If a city contract is being funded in whole or in part by assistance from a federal agency, the city's solicitation shall seek to promote energy conservation and shall comply with any mandatory standards and policies which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (PL 94-163).
(Code 1988, § 25.5-166)

Sec. 24-417. Small, women-owned and minority business enterprises.

(a) *Expand participation.* If a city contract is being funded in whole or in part by assistance from a federal agency, the purchasing manager shall take affirmative steps to ensure that small, women-owned, and minority businesses are utilized when possible as sources of supplies, services, and construction items.

(b) *Examples of affirmative steps.* Affirmative steps to be taken shall include the following:

(1) Including qualified small, women-owned, and minority businesses on solicitation lists;

(2) Ensuring that small, women-owned, and minority businesses are solicited whenever they are potential sources;

(3) When economically feasible, dividing total requirements into smaller tasks or quantities to permit maximum small, women-owned, and minority business participation;

(4) Where the requirement permits, establishing delivery schedules which will encourage participation by small, women-owned, and minority business; and

(5) Using the services and assistance of the small business administration or the office of minority business enterprise of the department of commerce, as required.

(c) *Pass-through to subcontracts.* A contractor awarded a federally funded contract shall take the affirmative steps, as linked in subsection (b) of this section, in awarding its subcontracts.
(Code 1988, § 25.5-167; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-418. Labor surplus area businesses.

If a city contract is being funded in whole or in part by assistance from a federal agency, the purchasing manager is encouraged to procure supplies, services, and construction items from businesses located in labor surplus areas.

(Code 1988, § 25.5-168; Ord. No. 1923, § 1, 6-17-02)

Sec. 24-419. Architectural and engineering services

(a) If a city contract is being funded in whole or in part by assistance from a federal agency, the city shall use qualifications-based competitive proposal procedures when contracting for Architectural and engineering services as defined in 40 U.S.C. §541 et seq. and 49 U.S.C. §5325(d). Services subject to this requirement include but are not necessarily limited to program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, and related services.

(b) Qualifications-based competitive proposal procedures require that:

(1) An offeror's qualifications be evaluated;

(2) Price be excluded as an evaluation factor;

(3) Negotiations be conducted with only the most qualified offeror; and

(4) Failing agreement on price, negotiations with the next most qualified offeror be conducted until a contract award can be made to the most qualified offeror whose price is fair and reasonable to the city.

(c) These qualifications-based competitive proposal procedures will be used for the procurement of the services listed above. This method of procurement will not be used to obtain other types of services even though a firm that provides architectural and engineering services is also a potential source to perform other types of services.

(d) The city will use article III, source selection and contract information, division 1, professional and technical services procurement to procure architectural and engineering services in accordance with the city's procurement code as amended.
(Ord. No. 2132, § I, 9-7-04)