

# **State of Maryland**



## **Procurement Manual**

# Maryland Procurement Manual

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# Maryland Procurement Manual

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## 1. Introduction and General Overview

### 1.1 Introduction

*Welcome to Maryland Procurement!*

The Maryland Procurement Manual (Manual) reviews the General Procurement Law of the State of Maryland as set forth in Division II of the State Finance and Procurement Article of the Maryland Annotated Code (SFP) and implemented by Title 21 of the Code of Maryland Regulations (COMAR).<sup>1</sup> It is intended to give the reader a practical understanding of one of the primary functions of State government that directly impacts virtually every agency and public need. The Manual is not a substitute for the procurement law, regulations or policies, but instead provides a general overview of State procurement.

To the extent that any policy, procedure, or guideline conflicts with Division II of the SFP, any other applicable statute or State procurement regulation, the statute or regulation shall prevail. The Manual contents applies to State agencies subject to Division II of the SFP. Standards for other agencies may vary. The State may change, delete, waive, suspend, or discontinue parts of, or the entirety of this Manual, at any time without prior notice. Please check back here for the latest procurement information since updates occur regularly.

Please direct any questions or comments regarding the Manual to Jamie Tomaszewski at [Jamie.tomaszewski@maryland.gov](mailto:Jamie.tomaszewski@maryland.gov).

### 1.2 General Overview

#### 1.2.1 State Procurement Principles

The principal purposes and policies of Maryland State procurement are as follows:

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<sup>1</sup> This Manual does not review the Maryland Minority Business Enterprise Program Manual (Amended July 2014) (MBE Program Manual), which is incorporated by reference into COMAR pursuant to COMAR 11.01.10.01 or the Federal Disadvantaged Business Enterprise Program (Rev. April 2018) (DBE Program Manual), which is required pursuant to 49 C.F.R. Part 26. These Program Manuals apply to MBE and DBE procurement matters at the Maryland Department of Transportation, which encompasses the Maryland Aviation Administration, Maryland Port Administration, Maryland Transit Administration, Motor Vehicle Administration, State Highway Administration, and Maryland Transportation Authority.

1. Providing for increased confidence in State procurements;
2. Ensuring fair and equitable treatment of all persons who deal with the State procurement system;
3. Providing safeguards for maintaining a State procurement system of quality and integrity;
4. Fostering effective broad-based competition in the State through support of the free enterprise system;
5. Promoting increased long-term economic efficiency and responsibility in the State by encouraging the use of recycled materials and environmentally preferable products and services. (See Section 1.4.5);
6. Providing increased economy in the State procurement system;
7. Getting the maximum benefit from the purchasing power of the State;
8. Simplifying, clarifying, and modernizing the law that governs State procurement;
9. Allowing the continued development of procurement regulations, policies, and practices in the State; and
10. Promoting development of uniform State procurement procedures to the extent possible.<sup>2</sup>

### **1.2.2 Structure of Maryland Procurement**

#### Board of Public Works

Procurement authority in the State is primarily vested in the Board of Public Works (BPW), a three-member administrative body consisting of the Governor, Comptroller, and State Treasurer.<sup>3</sup> This governmental entity is unique in the nation. The current structure of the BPW was established by an 1864 amendment to the Maryland Constitution. The BPW convenes approximately every other week, in meetings open to the public, to review, approve, and oversee several statutorily mandated projects and programs, including significant State expenditures for certain capital improvements, and the oversight of the sale, lease, or transfer of State real and personal property.<sup>4</sup> The review and approval of procurement awards of certain dollar amounts are delegated to designated “Control Agencies” within State government, with those Control Agencies providing a monthly report to the BPW of procurement awards approved by the Control

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<sup>2</sup> SFP §11-201(a); Code of Maryland Regulations (COMAR) 21.01.01.03.

<sup>3</sup> Maryland Constitution, Article XII; SFP §12-101.

<sup>4</sup> Board of Public Works Meeting Schedule: <http://bpw.maryland.gov/Pages/default.aspx#Calendar>

Agency. See Section 7 of this Manual for further information on the awards process as it relates to the BPW, including dollar amount thresholds for procurement actions requiring BPW approval.

### Control Agencies

State procurement authority is currently delegated to the following Control Agencies, also known as Primary Procurement Units or Control Authorities, up to specific dollar amount thresholds as set in regulation by the BPW<sup>5</sup>:

- *Department of General Services (DGS)*: Capital construction improvements contracts; capital construction-related services; architectural and engineering contracts; maintenance contracts; professional services; purchases, leases and rentals of motor vehicles for State officials and employees; electronic information processing hardware and software, including maintenance, telecommunications, and associated consulting services; commodities and supplies; and real estate leases, per COMAR 21.02.05.05.
- *Department of Transportation (MDOT)*: Transportation-related construction, capital construction, architectural and engineering, maintenance, and equipment contracts; supplies and services for aeronautics-related activities; capital expenditure contracts in connection with State roads, bridges, or highways.
- *The Treasurer (STO)*: Banking, investment, and other financial services contracts; insurance and insurance-related services contracts.
- *Maryland Port Administration (MPA)*: Port facility-related construction, construction-related services, architectural and engineering, maintenance, equipment, services (including information technology services), commodities and supplies, and leases of real property.

There are three additional Primary Procurement Units that are not Control Agencies. Those three are the University System of Maryland (USM), Morgan State University (MSU), and St. Mary's College of Maryland (SMCM).<sup>6</sup> This Procurement Manual is not designed to cover these three units as they follow their own procurement policies and

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<sup>5</sup> COMAR 21.02.01.04; See Procurement Manual Section 7, Awards Process, for specific dollar amount thresholds.

<sup>6</sup> SFP §11-101(l). See COMAR 21.01.03.01A.

procedures,<sup>7</sup> and with the exception of the Small Business Reserve (USM and MSU), the Minority Business Enterprise Program (MBE) and select other provisions, these three units are exempt from COMAR Title 21, the State's Procurement Regulations.

#### Procurement Reform Efforts – Chief Procurement Officer

There has been a significant increase in recent years in the number of commissions and studies tasked with reviewing Maryland State procurement laws, regulations, practices and procedures. These efforts culminated in the 2016 Commission to Modernize State Procurement, resulting in several bills passed in the 2017 legislative session of the General Assembly to reform and restructure State procurement.

Perhaps the most significant changes to current law are included in 2017 House Bill 1021, *Reorganization of State Procurement* (signed into law as Chapter 590, Laws of Maryland 2017 Session). Effective October 1, 2019, this statute created the procurement leadership position of the Chief Procurement Officer (CPO) within the Department of General Services and transferred procurement control authority from the Departments of Budget and Management, Public Safety and Correctional Services, and Information Technology to the Department of General Services.<sup>8</sup>

This Procurement Manual will be updated periodically to reflect these changes, as well as any other changes to State procurement structure or practices.

#### **1.2.3 Brief Overview of the Sections in this Procurement Manual**

Sections 2 through 8 of the Procurement Manual are structured in the general chronological order of State procurement activity:

Section 2, *Need Identification*, focuses on the various types of goods and services that are procured by the State. Exemptions from State procurement regulations are covered, as

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<sup>7</sup> University System of Maryland Procurement Policies and Procedures:

<http://www.usmd.edu/regents/bylaws/SectionVIII/VIII300.html>

; Morgan State University Procurement Policies and Procedures:

[http://www.morgan.edu/Documents/ADMINISTRATION/OFFICES/procurement/Policies\\_Procedures.pdf](http://www.morgan.edu/Documents/ADMINISTRATION/OFFICES/procurement/Policies_Procedures.pdf)

; St. Mary's College Procurement Policies and Procedures: <http://www.smcm.edu/businessoffice/wp-content/uploads/sites/40/2014/06/College-Procurement-Policy-and-Procedures.pdf>

<sup>8</sup>

<http://mgaleg.maryland.gov/webmga/frmMain.aspx?id=hb1021&stab=01&pid=billpage&tab=subject3&ys=2017RS>

well as the issuing of Requests for Information (RFI) prior to publishing procurement solicitations.

Section 3, *Pre-Solicitation*, covers the planning stages prior to preparing a procurement solicitation, including identifying potential procurement sources, budget certification steps, delegated purchasing authority, selecting the appropriate solicitation method, and finally, planning out the solicitation, including the timeline and schedule.

Section 4, *Solicitation Preparation*, includes procedures for drafting the solicitation, using third-party consultants when appropriate, setting MBE and Veteran-Owned Small Business Enterprises (VSBE) participation goals via a Procurement Review Group (PRG), and the review and approval process for solicitations.

Section 5, *Solicitation*, provides the steps for public advertisement and other notices of the solicitation, pre-bid/proposal conferences, requirements regarding communications with vendors, procedures for amending solicitations, receipt of vendor responses to solicitations, revisions to or withdrawals of vendor-submitted responses, and cancellations of solicitations.

Section 6, *Review / Evaluation Process*, covers the opening of vendor responses to solicitations, the conducting of initial reviews of vendor responses, vendor revisions or “cures” to proposals, the evaluation process for technical proposals, discussions with offerors, the opening and evaluation of financial proposals, best and final offers (BAFOs), the selection and recommendations of contract awards, and finally, debriefings of offerors.

Section 7, *Award Process*, includes the steps for approving contract awards, including agency approval limits, approvals by control agencies, and approval of contracts by BPW.

Section 8, *Contract Administration Process*, focuses on post-contract award activities including kick-off meetings with contractors, monitoring of contractor performance, tools for contract compliance, payments for goods or services received, contract renewal options and modifications, re-procurement plans, and contract closeouts or transitions to new contracts.

## 1.3 Public Access Procurement Information

### 1.3.1 eMaryland Marketplace *Advantage* (eMMA)

Maryland conducts the majority of its procurements through eMMA, the online procurement system that provides vendors, State personnel, and the public with easy access to State procurement information. Vendors have the ability to use eMMA to, among other things:

- Create a vendor profile;
- Complete the SBR self-certification;
- Receive notice of bid opportunities;
- Search for contracting opportunities;
- Submit bids electronically (when allowed); and
- Obtain bid results online.

Access to eMMA can be obtained through the “Login and Register” for eMMA link on the State’s Procurement Website: <https://procurement.maryland.gov/> or directly through the following link: <https://emma.maryland.gov/>

*Note: For some Maryland Department of Transportation (MDOT) construction and maintenance solicitations, vendors are required to register and utilize Bid Express to submit a bid. <https://www.bidx.com/maryland/main>*

### 1.3.2 State Procurement Website <https://procurement.maryland.gov/>

The State Procurement website includes links to information including BPW Advisories, Statewide Contracts, Green Purchasing, Competitive Procurement Checklists, Timelines, and Templates, Best Practices and other valuable information to assist you in procuring goods and services for the State.

Additionally, access to the State Finance and Procurement (SFP) Article and the Code of Maryland Regulations (COMAR) is available through links on this site.

## **1.4 Fundamentals for All Vendors, including Small, Minority-owned, Women-owned, & Veteran-owned Businesses**

### **1.4.1 In general, Businesses Must Register To Do Business with the State.**

**1.4.1.1** Maryland posts most procurements on eMMA. Vendors must register on eMMA to receive notifications of procurement opportunities and to receive a contract award. When a vendor creates a profile on eMMA, it will be required to indicate whether the firm is registered as a small business, certified as a minority- or woman-owned business, or verified as a veteran-owned business and designate what classifications of goods or services it provides. Vendors are encouraged to add as many product and service categories using the United Nations Standard Products and Services Code® (UNSPSC®) codes/commodities to their profiles as appropriate. This will help ensure that automated notices of procurement opportunities are delivered directly to the vendors' e-mail. Questions pertaining to the UNSPSC can be researched here: <https://www.unspsc.org/>.

**1.4.1.2** To be eligible for a Maryland contract award, vendors must be registered and in good standing as required by the State Department of Assessment and Taxation (SDAT), and not on the State debarment list. <http://dat.maryland.gov/businesses/Pages/default.aspx>

**1.4.1.3** Maryland has created online tools allowing vendors to conduct a variety of activities including: register and start a business, register a trade name, and establish tax accounts in Maryland. To perform such activities, a vendor can use the State's Business Express website: <https://businessexpress.maryland.gov/>

### **1.4.2 Small Business Reserve (SBR) Program<sup>9</sup>**

Maryland created the SBR Program to allow small businesses to compete against other small businesses instead of larger, more established companies for contract awards. Once a solicitation has been designated as "SBR," an award can only be made to a registered SBR vendor.

Agencies are required to spend at least 15% of their total fiscal year expenditures on qualified small businesses procurements. Effective October 1, 2017, the SBR Program applies to all

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<sup>9</sup> SFP Title 14, Subtitle 5; COMAR 21.11.01.06

designated State agencies. The SBR Program is a race- and gender-neutral program. To participate, an SBR vendor must be a for-profit business that meets the established small business requirements. The self-certification process is done through eMMA. SBR criteria can be found at: <http://gomdsmallbiz.maryland.gov/Pages/sbr-Program.aspx>.

All participating agencies/departments have an SBR liaison officer who advocates for small businesses. The list of liaison officers can be found on the Governor's Office of Small, Minority & Women Business Affairs' website at:

<https://gomdsmallbiz.maryland.gov/Pages/SBR-Liaison-Directory.aspx>

#### **1.4.3 Veteran-Owned Small Business Enterprises (VSBE)<sup>10</sup>**

The State's overall goal for VSBE participation is 1% of the dollar value of each agency's total procurements, through direct (prime) or indirect (subcontractor) VSBE participation.

Details on how to confirm a VSBE with federal Vetbiz verification by the Center for Verification and Evaluation of the United States Department of Veterans Affairs are available at <https://www.vip.vetbiz.gov/>.

Agencies are required to review each procurement and set appropriate VSBE participation goals. Agencies must assure that a contract award is not made until a recommended awardee has committed to the established VSBE participation goal by subcontracting with a verified VSBE or has requested a waiver and demonstrated a good faith effort to meet the goal. After a contract has been awarded, VSBE compliance is closely monitored.

Oversight of the VSBE and SBR programs is provided by the Governor's Office of Small, Minority & Women Business Affairs.

#### **1.4.4 Minority Business Enterprise (MBE) Program<sup>11</sup>**

The State's current overall goal for MBE participation is 29%<sup>12</sup> of the dollar value of each agency's total procurements, through direct (prime) or indirect (subcontractor) MBE participation. The MBE Program applies to all participating State agencies, and each agency is required to structure its procurement procedures to try to achieve the overall MBE goal each

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<sup>10</sup> SFP Title 14 Subtitle 6; COMAR 21.11.13

<sup>11</sup> SFP Title 14, Subtitle 3; COMAR 21.11.03

<sup>12</sup> COMAR 21.11.03.01

fiscal year. If there is federal funding for the procurement, the MBE Program requirements may be superseded by the federal Disadvantaged Business Enterprise (DBE) Program. (See Section 3.2.1C below).

Agencies are required to review each procurement and set appropriate MBE participation goals as well as subgoals based on GOSBA Guidelines.<sup>13</sup> Agencies must ensure that a contract award is not made until a recommended awardee has committed to the established MBE participation goals, if any, through the use of certified MBEs or has requested a waiver and demonstrated a good faith effort to meet the goals. After a contract has been awarded, the contractor and any subcontractor(s) will be required to provide the agency with periodic reports that the agency will use to monitor MBE compliance.

Each participating agency has an MBE liaison officer who coordinates agency outreach efforts to the MBE community, reviews agency contracting procedures to ensure compliance, assists in the resolution of contracting issues, and submits required MBE program reports or information on behalf of the agency. The list of liaison officers is available on the Governor's Office of Small, Minority & Women Business Affairs' website at <https://gomdsmallbiz.maryland.gov/Pages/MBE-Liaison-Directory.aspx>.

To become certified as a Maryland MBE, vendors must meet all eligibility requirements and complete a certification process administered by MDOT's Office of Minority Business Enterprise. Information on the eligibility standards and the certification process can be found on MDOT's website at <http://www.mdot.maryland.gov/newMDOT/MBE/Index.html>. Once certified, a firm must renew annually to maintain its MBE certification status.

#### **1.4.5 Maryland Environmentally Preferable Purchasing (EPP) Program**

The Green Maryland Act of 2010 established the Maryland Green Purchasing Committee (GPC), an inter-agency body to administer an environmentally preferable purchasing program for the state. Chaired by General Services, the GPC aims to foster the health of our communities and environment by promoting sustainable procurement practices in government. The GPC publishes and maintains Environmentally Preferable Purchasing (EPP) specifications

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<sup>13</sup> Link to the State of Maryland MBE Program Subgoal Directive and Guidelines for Setting Contract Subgoals: [https://gomdsmallbiz.maryland.gov/Documents/Legislation/SubgoalGuidanceImplementationGuidelinesFinal-website\\_000.pdf](https://gomdsmallbiz.maryland.gov/Documents/Legislation/SubgoalGuidanceImplementationGuidelinesFinal-website_000.pdf)

for several commodities and services categories that should be incorporated into relevant solicitations and contracts, as appropriate.

Maryland has enacted several laws and regulations related to environmentally preferable purchasing that Procurement staff should be familiar with. Procurement agencies are required to purchase environmentally preferable products or services, unless they do not perform adequately, are not available for a reasonable price in a reasonable period of time, or exclude competition. There are also numerous other requirements and prohibitions related to commodity or service specific procurements.

Agencies should utilize the “Green Purchasing Checklist for State of Maryland Employees” at the beginning of each procurement to ensure relevant specifications are included. This checklist can be found on the State’s Procurement website.

More about the Maryland Green Purchasing Committee, including relevant statutes, regulations, and environmentally preferable specifications can be found at:

<https://dgs.maryland.gov/Pages/GreenPurchasing/index.aspx>

## 1.5 Fundamentals for Procurement Professionals

### 1.5.1 Getting Started

As a procurement officer, bolster your knowledge and chances of success by:

- 1) Keeping a copy of COMAR Title 21 at your desk to reference as needed (daily);<sup>14</sup>
- 2) Asking questions from knowledgeable procurement staff; and
- 3) Attending procurement training classes, reading articles and books.

Before you begin a procurement, confirm that you have the authority to do so. Depending on the procurement type and anticipated total dollar value of the contract, different levels of approval may be required. (See Sections 3 and 7 for more information.)

Procurement is not performed by a single individual. While the procurement officer is responsible for conducting the procurement, other functions are performed by the program staff,

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<sup>14</sup> Link to COMAR online: <http://www.dsd.state.md.us/COMAR/ComarHome.html>

MBE/SBR/VSBE liaison officers, evaluation committee, attorneys, and other staff or user agencies. There are also buyers who use existing contracts and conduct small procurements to acquire the items or services needed by their agency, inventory clerks who oversee the inventory of supplies and materials owned and stocked by an agency, and the contract monitors who administer the contracts after award.

### **1.5.2 Training and Development**

As a procurement officer, engaging in ongoing training and professional development is key to maintaining proficiency. Online webinars, State procurement training classes, sustainable procurement training offered by the Maryland Green Purchasing Committee (GPC), classes from the National Institute of Governmental Purchasing (NIGP) and the Maryland Public Purchasing Association (MPPA), and training and certification programs, for example Certified Professional Public Buyer (CPPB) and Certified Public Procurement Officer (CPPO), through universities and colleges can be used to deepen your knowledge of procurement practices and prepare you for a successful career.

### **1.5.3 Setting Up (and Maintaining) the Procurement File<sup>15</sup>**

The Procurement File is the official record of the procurement process and should include:

- A record of all solicitation inquiries required to be recorded;
- A listing of every bidder or offeror solicited;
- All bids or offers received;
- All internal and external correspondence regarding the procurement;
- Written documentation from the procurement officer describing efforts to confirm the information in the affidavits submitted by the successful bidder or offeror, including, at a minimum, verification that the business has not been suspended or debarred by the State or federal government; and
- The final contract.

The procurement officer is responsible for creating, updating and maintaining the Procurement File from the beginning to the end of the procurement.

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<sup>15</sup> COMAR 21.05.01.06, COMAR 21.05.01.07.

## 1.6 Unlawful Actions / Ethical and Professional Conduct

State procurement professionals must comply with the Maryland Public Ethics Law, Maryland Code Annotated, General Provisions, Title 5. Violation of the Public Ethics Law may result in disciplinary action up to and including termination from State employment. For more information on the Public Ethics Law, please see the following links:

<http://ethics.maryland.gov/wp-content/uploads/filebase/state-employees/General-Information-Ethics-Law.pdf>

<http://ethics.maryland.gov/employeeofficials/>

A few examples of prohibited conduct are:

- An official or employee may not intentionally use the prestige of his office for personal gain or that of another.
- An official or employee may not participate in an official action, decision or matter in circumstances where the official or employee has an interest or where certain relatives of the official or employee have an interest.
- An official or employee may not hold any employment relationship that would impair his impartiality or independence of judgment.
- An official or employee may not disclose or use for personal economic benefit, or that of another, confidential information acquired by reason of his public position.
- A former official or employee may not assist or represent anyone other than the State for compensation in a case, contract or other specific matter involving the State, if that matter is one in which he significantly participated as an official or employee.
- Employees may not solicit gifts for themselves or others, and generally may not accept gifts from lobbyists or those regulated by or doing (or seeking to do) business with the employee's agency.

Maryland law also includes procurement-specific statutes under SFP Title 13 governing unlawful conduct and promises; conflict of interests; and participation in procurement. Procurement professionals and vendors seeking to do business with the State should be aware of the following provisions:

Pursuant to SFP §13-211, during a procurement, a competing contractor may not:

1. Offer, or even discuss, future employment or business opportunity with any procurement official of the agency conducting the procurement;
2. Offer or give or promise to offer or give any money, gratuity, or other thing of value to any procurement official of the agency conducting the procurement; or
3. Solicit or obtain from any officer or employee of an agency conducting the procurement, before the award of a contract, any proprietary or source selection information regarding the procurement.

Pursuant to SFP §13-212, if a solicitation involves selecting a contractor who will assist in the formation, award, or execution of any State contract, the solicitation document must require that a bidder or offeror provide an affidavit that discloses any actual or potential conflict of interests.

Pursuant to SFP §13-212.1, with some exceptions, an individual (or their employer) who assists in drafting a solicitation or selecting an awardee may not:

1. Submit a response to that solicitation; or
2. Assist or represent another person who is submitting a response to that solicitation.

The above identified laws should be strictly adhered to during each and every phase of a procurement, vendor meetings, vendor demos, market studies, etc.

## 2. Need Identification

### 2.1 Identifying the Need

The first step in a procurement is for the procurement officer to identify the type of purchase the agency needs. Such identification will determine the appropriate procurement path and also whether there are any relevant exemptions that may apply to the purchase. State agencies purchase many goods and services, including:

- Architectural and Engineering services;
- Human, social, cultural, educational services;
- Information technology services, supplies and equipment;
- Maintenance;
- Banking, investment, and other financial services;
- Insurance and insurance-related services;
- Leases for agency supplied employee housing;
- Purchasing, leasing, and rental contracts for acquisition of motor vehicles for use by State officials and employees;
- Construction and related services;
- Equipment;
- Commodities and Supplies;
- Services provided under an energy performance contract; and
- Other services.

Once the agency has identified the need, the procurement officer should determine whether the agency has the authority to procure that type of good or service and if Control Agency authority applies. Presently, the State has four control agencies with delegated procurement authority: (1) STO; (2) DGS; (3) MDOT; and (4) MPA.<sup>16</sup>

### 2.2 Determining if the Good/Service is Exempt

The procurement officer should determine whether the procurement or agency is exempt from the State's procurement regulations, e.g., under COMAR 21.01.03.01, SFP 11-202, or the

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<sup>16</sup> COMAR 21.02.01.03

agency's enabling statute. Even if a procurement or agency is exempt from one or more provisions of COMAR Title 21, the best practices provided in this Manual may be helpful to the procurement officer.

An example of a purchase that may be exempt from COMAR Title 21 is an agreement between a State agency and another governmental entity, also known as a memorandum of understanding (MOU) or an Interagency Agreement.<sup>17</sup> The Department of Budget and Management (DBM) has review and approval authority over certain Interagency Agreements between State agencies and public institutions of higher education.<sup>18</sup>

## **2.3 Request for Information**

A Request for Information (RFI) is used primarily as a planning tool when an agency does not have the necessary information to prepare a solicitation document. RFIs can be used to generally ascertain the level of interest of prospective respondents or to identify industry standards, best practices, potential performance measures, or delivery structures.

A preliminary solicitation document, which provides an initial description of the program objectives and specifications, may accompany an RFI for review by potential respondents. See SFP §13-212.1 for additional parameters. RFIs are not a source selection method and cannot be used to procure goods or services.

## **2.4 Contract Types<sup>19</sup>**

Any type of contract that promotes the best interests of the State may be used, except for cost-plus-a-percentage-of-cost contracts and subcontracts, which are prohibited.<sup>20</sup> Preference shall be given to the following contract types, in this order:

- (a) Fixed-price;
- (b) Fixed-price incentive;
- (c) Cost plus incentive fee; and

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<sup>17</sup> COMAR 21.01.03.01

<sup>18</sup> SFP §3-207; <https://dbm.maryland.gov/proc-contracts/Pages/InteragencyAgreementApprovals.aspx>

<sup>19</sup> COMAR 21.06.03

<sup>20</sup> COMAR 21.06.03.01

(d) Cost-plus fixed fee or cost-reimbursement.

The procurement officer should select a contract type to obtain the best value in the time required and at the lowest cost or price or greatest revenue to the State, and should review the elements of the procurement that directly affect cost, time, risk, and profit incentives bearing on the performance before choosing a contract type. Except for firm fixed-price contracts, a contract type may not be used unless the procurement officer determines that a contractor's accounting system complies with COMAR 21.06.03.01.B (4).

Factors to consider in selecting the contract type include:

- (a) The type and complexity of the procurement;
- (b) The difficulty in estimating performance costs;
- (c) The administrative costs to both parties;
- (d) The degree to which the State shall provide technical coordination during performance of the contract;
- (e) The effect of the choice of the type of contract on the amount of competition to be expected;
- (f) The stability of material or commodity market prices or wage levels;
- (g) The urgency of the requirement; and
- (h) The length of contract performance.

The types of contracts authorized under COMAR are listed below. Often a contract includes several contract types, for example, a multi-year indefinite quantity contract with firm-fixed-prices and multiple awards or a contract with a fixed-price element plus a cost-reimbursement element. Some contract types require written determinations before usage. See COMAR for more information regarding each contract type and any additional requirements.

#### 2.4.1 Fixed-Price Contracts

Appropriate for when the type of work can be reasonably specified and the cost reasonably estimated, e.g., construction or standard commercial products. Includes Fixed-Price (including fixed-unit-price (used in indefinite quantity contracts)), Firm Fixed-Price, and Fixed-Price with Price Adjustment contracts. This is the most commonly used contract type and the only contract type that can be used in competitive sealed bidding.

#### 2.4.2 Cost-Reimbursement Contracts

Contracts under which the State reimburses the contractor for those contract costs, within a stated ceiling, and a fee, if any, which are recognized as allowable and allocable under the cost and price principle regulations. Appropriate for when there are contract performance uncertainties or the cost of the contract cannot be sufficiently estimated. Requires appropriate monitoring by the State to assure objectives are met. Includes Cost and Cost-Plus Fixed Fee Cost-Reimbursement contracts.

#### 2.4.3 Cost Incentive Contracts

Allows for rewards or penalties when the contractor exceeds or falls short on performance or target cost. Includes Cost-Plus Incentive Fee and Fixed-Price Incentive contracts.

#### 2.4.4 Time and Material Contracts and Labor Hour Contracts

Includes dollar ceilings stated in the contract that may not be exceeded without the procurement officer's prior determination and approval. Requires appropriate monitoring by the State. Includes Time and Material or Labor Hour contracts.

#### 2.4.5 Quantity Contracts

Appropriate when anticipated quantities are known or unknown, depending on the circumstances, or when a specific minimum quantity is required. Includes Definite Quantity, Indefinite Quantity, and Requirements contracts.

#### 2.4.6 Multi-Year Contracts

Contracts that require appropriation for more than one fiscal year in order to promote procurement economy and efficiency. Requires specific information to be included in the solicitation.

#### 2.4.7 Multiple Award Contracts

When a contract award to two or more vendors for the same or similar goods or labor is needed for adequate delivery, services, availability, or for product compatibility. Not to be used when a single award would meet the State's needs without sacrifice of economy or service.

#### 2.4.8 Personal Property Leases

A contract for the use of supplies that are not owned by the State.

#### 2.4.9 Lease with Purchase Option

An option to purchase supplies or facilities off of a lease. Requires that the lease has been competitively procured.

### **3. Pre-Solicitation**

#### **3.1 Order of Considerations**

##### **3.1.1 State Resources**

Before engaging in contracting, an agency should consider whether it can meet its needs with State resources, including utilizing existing employees, Interagency Agreements or MOUs (see Section 2.2).

See COMAR 21.02.03.02(C) (7) and Md. State Personnel and Pensions Code Ann. §13-402.

##### **3.1.2 Existing State Contracts**

The agency should determine if there is an existing Statewide contract already in place from which the agency can procure the needed goods or services.

See, e.g., <http://dbm.maryland.gov/proc-contracts/Pages/statewide-contracts/home.aspx> for services contracts; <http://doit.maryland.gov/contracts/Pages/AllMasterContracts.aspx> for IT contracts; and <https://dgs.maryland.gov/Pages/Procurement/BidsAwards.aspx> for commodities and maintenance contracts.

##### **3.1.3 Preferred Providers**

When the State cannot meet its own needs and does not already have a Statewide contract in place, an agency must consider whether the need can be met by a preferred provider before proceeding to a competitive procurement.

The order of priority for preferred providers is as follows:<sup>21</sup>

1. Maryland Correctional Enterprises (MCE) (<https://mce.md.gov/>);
2. Blind Industries and Services of Maryland (BISM) (<https://www.bism.org/>);
3. Community Service Providers (Maryland Works) (<http://www.mdworks.com/>); and
4. An individual-with-disability-owned business.

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<sup>21</sup>COMAR 21.11.05.07(C)(2)

### **3.1.4 SBR Certified Businesses**

If none of the options above can provide the required goods or services, an agency may conduct a competitive procurement and should first consider designating the procurement as an SBR procurement. (See Section 1.4.2.)

## **3.2 Fund Certification**

### **COMAR 21.03.03.01 – Certification Requirement:**

Every contract, contract modification, change order, or adjustment in contract price is subject to prior written approval by the responsible manager as designated by the using agency and certification by the appropriate fiscal authority as to the availability of funds and to the effect of the modification, change, or adjustment on the project budget or the total construction cost. If the certification discloses a resulting increase in the project budget or total construction cost, the procurement officer may not execute or make the modification, change, or adjustment unless sufficient funds are available, or the scope of the project is adjusted to permit its completion within the project budget.

### **3.2.1 Fund Sources**

The State has several sources of funding<sup>22</sup> and includes the following:

#### **A. General Funds**

State funds that may be used for any activity of the State. State income and sales tax revenues are the primary sources of General Funds. About half of State spending is attributable to the General Fund.

#### **B. Special Funds**

Revenues dedicated to a specific purpose, such as licensing fees or certain tax revenues that may only be used for the purposes designated by law. For example, property transfer tax revenues are dedicated to Program Open Space and other specific uses. Similarly, the Transportation Trust Fund, a special fund, is supported by fuel tax and other transportation-related revenues.

#### **C. Federal Funds**

Grants and other payments from the federal government that are expended through the State budget to fund various activities funded by the federal government. Such

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<sup>22</sup> See The Maryland Citizen's Guide to the Budget: Glossary of Budget Terms -- <http://dbm.maryland.gov/budget/Pages/glossary.aspx>

funds are subject to applicable federal laws and regulations. Federal funds often require a State funding match. Before an agency can spend these funds, its budget must contain a Federal Fund Appropriation for at least the amount of funds to be spent. Medicaid and transportation programs are the largest sources of federal funding in the State budget. Where the federal funding is for transportation programs, the pertinent Maryland Department of Transportation (MDOT) modal administrations (the Maryland Aviation Administration, Maryland Transit Administration, and State Highway Administration) must apply the federal DBE Program consistent with the MDOT DBE Program Manual, which is available at [Insert Link to DBE Manual].<sup>23</sup>

### **3.2.2 State Grants**

Funds disbursed by the State directly to units of local government, nonprofits, and to individuals for specific purposes.

## **3.3 Addressing Delegated Purchasing Authority**

In general, purchasing authority is delegated to the agencies without BPW approval as follows:

- Small Procurements (up to \$50,000);
- Emergency Procurements;
- Sole Sources \$100,000 and below;\* and
- Most other procurements \$200,000 and under, except for single bids/proposals that exceed \$50,000 on competitive procurements.\*

\*Control Agency approval may be required.

Guidance on Delegated Authority can be found through the following web links:

<https://procurement.maryland.gov/wp->

<content/uploads/sites/12/2019/11/DGSOSPAgencyDelegation.pdf>

<https://procurement.maryland.gov/wp-content/uploads/sites/12/2020/04/DGS-OSP-BPWApprovalAuthorityChart.pdf>

<https://procurement.maryland.gov/osp-bpw-submission/>

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<sup>23</sup> Where State funding applies, MDOT and its transportation business units must also comply with the MDOT MBE Program Manual, which is incorporated by reference into COMAR pursuant to COMAR 11.01.10.01.

[http://www.mdot.maryland.gov/Office%20of%20Minority%20Business%20Enterprise/Resources\\_Information/4.8.15%20MBE%20Manual%202014%20Amendments.pdf](http://www.mdot.maryland.gov/Office%20of%20Minority%20Business%20Enterprise/Resources_Information/4.8.15%20MBE%20Manual%202014%20Amendments.pdf)

## 3.4 Selecting the Solicitation Method

### 3.4.1 Small Procurement (SP) Categories (COMAR 21.05.07.04)

Procurements which do not exceed \$50,000 in price are termed “Small Procurements” (SP).<sup>24</sup> All State agencies have authority to make awards of SP contracts, regardless of the method of source selection, i.e., competitive, sole source, or emergency procedures. Note that procurements may not be artificially divided in order to use the SP method and circumvent requirements applicable to procurements exceeding \$50,000. In all SPs, competition should be sought to the extent practical considering factors such as availability of vendors, dollar value of the procurement, cost of administering the procurement, and time available to make the procurement including delivery time. See COMAR 21.05.07.06I for record retention requirements application to SPs.

Contract requirements and other information on SP can be found here:

<http://www.dsd.state.md.us/comar/SubtitleSearch.aspx?search=21.05.07.%2a>

#### Inclusion of Minority, Women, Veteran-owned and Small Businesses

Certified MBEs, VSBEs and small businesses should be contacted in addition to any other prospective vendors to solicit bids/offers.

Any SP may be designated as an SBR procurement.

#### Category I – (\$1 to \$5,000 range)

A procurement up to \$5,000 is a Category I SP, which can be awarded solely at the discretion and authority of an authorized purchaser, including procurement officers and/or designated Corporate Purchasing Card (CPC) holders. It is encouraged that purchasers/procurement officers seek more than one price quote and solicit quotes from certified minority-owned, veteran-owned and small businesses.

In accordance with BPW Advisory 1998-1, purchases made under this category should be paid by using a CPC. <http://bpw.maryland.gov/Pages/adv-1998-1.aspx>

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<sup>24</sup> DGS and MDOT are authorized for construction contracts up to \$100,000. SFP 13-109.

CPC purchases must be made consistent with the “Corporate Purchasing Card Program Policy and Procedures Manual” found on the Comptroller’s “Forms and Manuals” page.

[http://compnet.comp.state.md.us/General\\_Accounting\\_Division/State\\_Agencies/Forms\\_and\\_Manuals.shtml](http://compnet.comp.state.md.us/General_Accounting_Division/State_Agencies/Forms_and_Manuals.shtml)

### **Category II – (\$5,000+ to \$15,000 range)**

A procurement exceeding \$5,000 up to \$15,000 is a Category II SP. Procurement officers should obtain responsive bids or acceptable offers from at least two vendors by oral or written solicitation. Awards shall be made to the most favorable or evaluated bid price or most advantageous offer, as specified in the solicitation. This solicitation can be in person, or by phone, fax, mail, bid board notice, electronic (email/website) notice, advertising in a publication such as a newspaper or trade journal, etc. The solicitation information should be consistently described to all prospective bidders or offerors; i.e., the same information should be provided to all prospective bidders or offerors. All Category II SP contracts must be in writing.

*Best Practice Tip: Prepare a written description of what is needed and provide that information to all prospective bidders or offerors, either by reading over the telephone or sending a written request.*

*Best Practice Tip: Obtain either the lowest feasible bid or the best possible offer from as many prospective bidders/offerors as reasonably possible.*

*Best Practice Tip: Use the “Quick Quote” function in eMMA to solicit specific prospective bidders or offerors or all available prospective bidders or offerors in eMMA for the requested product code to obtain either the lowest feasible bid or the best possible offer. If eMMA is used to publish the solicitation, the award should also be published in eMMA.*

There is no required minimum time frame; at the discretion of the procurement officer, the prospective vendors can be contacted and asked for an immediate response or given a few hours or days to provide a response.

### **Category III – (\$15,000+ to \$50,000 range)**

A procurement exceeding \$15,000 up to \$50,000 is a Category III SP. Procurement officers should obtain responsive bids or acceptable offers from at least two vendors by written

solicitation. Awards shall be made to the most favorable bid price or most favorable evaluated bid price or most advantageous offer, as specified in the solicitation. All Category III SP contract awards must be in writing. Additional Category III SP requirements include:

1. There must be a notice of the procurement opportunity in eMMA at least three days before bids/offers are due.
2. There must be a written solicitation.

*Best Practice Tip: Obtain either the lowest feasible bid or the best possible offer from as many prospective bidders/offerors as reasonably possible.*

*Best Practice Tip: Procurement opportunities published on eMMA should also have the award published on eMMA to close out the project and use other contracting features available in the eProcurement system to eventually include reporting and invoicing.*

### **3.4.2 Competitive Sealed Bidding (CSB)**

Competitive sealed bidding (CSB) is the procurement method used where the contract is awarded to the responsible bidder submitting a responsive bid with the most favorable bid price.<sup>25</sup>

Whenever a procurement is based on CSB, a procurement officer shall seek bids by issuing an Invitation for Bids (IFB). An IFB shall include the following:

- Detailed specifications of the goods or services to be procured; and
- Whether the contract will be awarded based on the most favorable bid price<sup>26</sup> or the most favorable evaluated bid price.

If the contract will be based on evaluated bid price, the IFB must specify the objective measurable criteria by which the most favorable evaluated bid price will be determined.

For an IFB, the time required to identify a successful bidder is relatively short may be only six to nine months from conception to contract award. Without a detailed technical evaluation, comparison of bids submitted in response to an IFB is generally done expeditiously. The

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<sup>25</sup> COMAR 21.05.02

<sup>26</sup> The most favorable bid is not necessarily the apparent lowest bid because other factors, e.g., preferences, responsiveness of the bid or bidder's responsibility, may affect the bid.

procurement officer opens the bids in public, examines them for compliance, and confirms that the successful bid is responsive, and the successful bidder is responsible and meets minimum qualifications, if any, and determines that there are no exceptions from the requirements of the work specified.

### **3.4.3 Multi-Step Competitive Sealed Bidding (MS-IFB)**

Multi-step competitive sealed bidding (MS-IFB) is a variation of competitive sealed bidding by which each bidder submits an unpriced technical offer, sample, or both to be evaluated by the procurement officer to confirm if it is acceptable under the criteria set forth in the IFB (Phase One). After the Phase One evaluation is complete, the procurement officer opens only the price submissions for those offers that have been deemed acceptable (Phase Two).

The technical offers, samples, or both are submitted in a separate sealed envelope from the sealed price submission. Price submissions may be requested at the same time as the technical offers or requested only from the acceptable offerors. If price submissions are requested at the same time as technical offers, pricing must remain sealed until the public opening.

The technical review is a pass or fail determination based upon the contents of the bidder's technical offer and the bidder's responsibility. Clarifications of the technical offer may be requested of the bidder(s). If the procurement officer deems the bidder's technical offer not acceptable, the price submission remains unopened and shall be returned to the bidder upon request, after the procurement has been concluded.

All technical offers deemed acceptable will have their price submissions publicly opened by the procurement officer at a designated time and place. The responsible bidder that submits the lowest responsive bid that is deemed technically acceptable is recommended for award of the contract.

### **3.4.4 Competitive Sealed Proposals (CSP)**

Competitive sealed proposals (CSP) is the procurement method used where a contract is awarded based upon the best value to the State. A contract procured by the CSP method is awarded to the responsible offeror whose proposal is determined to be the most advantageous to the State, considering the price and the evaluation factors set forth in the request for proposals.<sup>27</sup>

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<sup>27</sup>COMAR 21.05.03.03(F)

Whenever a procurement is based on CSPs, a procurement officer will seek proposals by issuing a Request for Proposals (RFP). The CSP method allows the State the ability to choose the best solution in light of both the technical and financial proposals submitted by offerors. Those proposals are independently evaluated by a committee that advises the procurement officer in determining the most advantageous offer.

The method works well for procurements when price alone cannot adequately determine the best outcome. See COMAR 21.05.03.01. It allows for discussion and clarifications with offerors about their proposals and for BAFOs (best and final offers) whereby offerors can modify their offers to reflect their best prices or any changes to the scope of work. It is perhaps the most flexible procurement method available, but it may entail a longer procurement process because of the necessity of establishing a committee and the process of evaluating proposals.

### **3.4.5 Master Contracts**

Master contracting is a procurement method available to a Designated Procurement Unit that provides for the qualification of bidders and offerors for the procurement of services, supplies, or commodities. Awards for work are made through a secondary competition process. Following the award of the Master Contract, an agency may then issue a secondary competition solicitation to the Master Contractors. Master contracting streamlines the traditional CSB or CSP procurement method in order to achieve cost and/or administrative efficiencies for the State.

Secondary competition solicitations must be issued to all Master Contractors prequalified by the State to provide the specific goods or services requested (functional areas). Secondary competition is solicited in one of three forms, as defined for use in a given Master Contract:

1. Task Order Request for Proposal (TORFP);
2. Purchase Order Request for Proposal (PORFP); or
3. Request for Resumes (RFR).

#### 3.4.5.1 TORFP

A TORFP is generally used where there is a scope of work for products and/or services that require Master Contractors to submit a complete solution, which is then evaluated for the best value to the State. TORFP procedure follows the general rules of CSP. The TORFP, like CSP, establishes the scope, additional terms and conditions, qualifications and instructions for responding offerors, and the evaluation criteria by which award will be made.

The successful Master Contractor under the TORFP is awarded a Task Order Agreement, which may not exceed the period of performance or unit prices of the reference Master Contract. TORFPs may include renewal options, and awards may be made to more than one Master Contractor, if indicated in the TORFP. TORFP procedures may include the use of Pre-Proposal Conferences, Question & Answer periods, Reading/Bid Rooms, Oral Presentations, Cures, Clarifications, Discussions, Negotiations, BAFOs, and Debriefings.

#### 3.4.5.2 PORFP

A PORFP is generally used when desired products/services are readily available at a fixed price, typically as defined in a catalog or price sheet of the Master Contract. PORFP procedure follows the general rules of CSB. The PORFP, like CSB, defines the list of items desired, delivery terms and conditions, qualifications of and instructions for responding offerors, and generally award is based on lowest price technically acceptable.

The successful Master Contractor under the PORFP is awarded a Purchase Order, which may not exceed the period of performance or ceiling value of the reference Master Contract. PORFPs may include renewal options and/or optional quantities, and award may be made to more than one Master Contractor, if indicated in the PORFP.

#### 3.4.5.3 RFR

An RFR is generally used when the need for a temporary labor resource is required. RFRs require Master Contractors to submit resumes for qualified candidates in response to a specific Scope of Work. Resumes are evaluated, candidates interviewed to determine the candidate who provides the best value to the State. RFRs establish a scope of work, additional terms and conditions, qualifications of and instructions for responding offerors, and the evaluation criteria by which awards will be made.

The successful Master contractor under the RFR is awarded a Task Order Agreement, which may not exceed the period of performance or ceiling value of the reference Master Contract. RFRs may include renewal options, and awards may be made to more than one Master Contractor, if indicated in the RFR.

### **3.4.6 Sole Source Procurement**

A Sole Source procurement is not permissible unless the required service/equipment/product is available from only a single source. See COMAR 21.05.05. Examples are as follows:

- (1) When only one source exists which meets the requirements (e.g., proprietary items);
- (2) When the compatibility of equipment, accessories, or replacement parts is the paramount consideration (e.g., original equipment manufacturer - OEM);
- (3) When a sole vendor's item is needed for trial use or testing (e.g., pilot project);
- (4) When a sole vendor's item is to be procured for resale; or
- (5) When certain public utility services are to be procured and only one source exists.

The procurement officer must determine that a competitive source selection method cannot be used because there is only one available source for the contract. If there is reasonable doubt about one source, competition should be solicited.

A procurement agency recommending contract award based on the sole source method must first determine if the proposed price is fair and reasonable using either a price analysis or a cost analysis.<sup>28</sup> The procurement officer should conduct negotiations, as appropriate, as to price, delivery, and terms.

The procurement officer, after obtaining the approval of the agency head or designee and all other approvals required by law or regulation, may award a contract without competition to the sole source vendor.

The determination and the basis for using the sole source must be in writing. The procurement officer may document the need, duration, pricing, effectiveness and why no other vendor is suitable or acceptable to meet the need of the agency.

The procurement agency must publish notice of award in eMMA not more than 30 days after the execution and approval of the contract. This requirement does not apply to sole source procurements that fall within the small procurement regulations set forth in COMAR 21.05.07.

The procurement officer must maintain a record of all sole source procurements by fiscal year.

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<sup>28</sup> See BPW Advisory 2016-1, <https://bpw.maryland.gov/Pages/adv-2016-1.aspx>

Additional justification for sole source contracts may include:

- Continuity of Care: to provide continuity of human or social services care to current third-party clients;
- Situational: under *limited circumstances* when only one vendor has the practical ability to meet the State's requirements (seek Control Agency guidance);
- Bridge: to continue work under an expired or void or voidable contract to allow time to conduct a new competitive procurement; and
- Single Bids treated as sole sources per COMAR 21.05.02.20, allowing for negotiations of price, delivery, and terms, as appropriate.

### **3.4.7 Intergovernmental Cooperative Purchasing Agreements (ICPA)**

ICPAs are entered into by at least one governmental entity<sup>29</sup>. The preferred form of intergovernmental cooperative purchasing is when participating governmental entities aggregate their common requirements for purposes of maximizing economies of scale when soliciting bids or proposals. See COMAR 21.05.09.

A primary procurement unit may participate in, conduct, sponsor, or administer an ICPA. The agency can initially sponsor or participate in an ICPA if the agency procurement officer issues a determination in writing that includes: (1) sufficient evidence that the ICPA provide cost savings to the State or promote administrative efficiencies or intergovernmental cooperation, and (2) a statement that the ICPA is in the best interest of the State, and is not intended to evade the purposes of Division II. If the primary procurement unit sponsors an ICPA, the solicitation must contain all clauses, terms, and conditions required under State procurement law and the contract is awarded in the same manner as a State contract, including any other required approvals. If the State is a named participant in the ICPA, the solicitation should be published on eMMA.

The use of ICPAs should not be used as a means to evade the purposes set forth under COMAR 21.01.01.03 or SFP § 13-110.

The documentation to support the written determination for approval may include at a minimum: pricing, market research, why the item is needed, the intended purpose, cost savings, efficiencies, length of the contract, and proof that the contract was competitively bid. Many ICPAs require

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<sup>29</sup> See COMAR 21.05.09.01.B (1)

the agency to complete a Participating Addendum and all must include the State's Mandatory Contract Terms and Conditions.

The procurement officer, after obtaining the approval of the agency head or designee and all other approvals (BPW if over \$200,000) required by law or regulation, may award the contract.

Notice of award must be published in eMMA by the procurement agency not more than 30 days after the approval and execution of the contract; and the primary procurement unit shall post the determination on the primary procurement unit's website.

### **3.4.8 Noncompetitive Negotiated Procurements of Human, Social or Educational Services**

When a procurement is required to provide human, social, or educational services, the procurement officer must consider the most appropriate procurement method for acquiring these services, with the preferred method being CSPs.

However, if it is determined that two or more sources for human, social, or educational services are available, but because there is an absence of effective competition, it is not expected that the available sources will respond to an IFB or CSP, COMAR 21.05.12.04 allows these selected types of services to be procured under the noncompetitive negotiated procurement method, as follows:

- (a) An employer in a program of "On-the-Job" training for employment and training purposes;
- (b) Group foster care services for children or adults under a negotiated rate system adopted by regulation; or
- (c) The following services for the mentally ill:
  - (i) Residential rehabilitation services;
  - (ii) Community rehabilitation services (psychosocial); or
  - (iii) Therapeutic group home services for children and adolescents.

Prior to entering into a noncompetitive negotiated procurement, the director of the program must submit a request to the procurement officer justifying the need to enter into the contract(s). Upon approval of the justification by the procurement office, the procurement officer will seek approval from the Agency Head (or designee) to continue with this procurement method. Once approval is given, the procurement officer with assistance from the program will develop a

Request for Expressions of Interest (REOI) notifying vendors that the agency seeks to use this procurement method. The REOI includes a scope of work developed by the program that includes the programmatic requirements; a request for proof that the prospective vendor is qualified to perform the requested services; any performance measures that will be used; and if a contract is expected to exceed \$50,000, a statement to that effect.

The REOI shall be published for a minimum of 10 days before the written Expressions of Interest are due. Notice shall be sent to all potential providers including advocacy organizations. When a contract is expected to exceed \$50,000, the REOI shall be published on eMMA.

As a need for the services arises, the procurement officer may:

- Conduct discussions with one or more responsible service providers that previously submitted an expression of interest; and
- Award a contract to a provider if the procurement agency head or designee, on the basis of discussions or past experience with the provider, determines that an award will be in the State's best interest.

In the course of a particular noncompetitive negotiated procurement, the procurement officer should give responsible service providers that submitted acceptable or potentially acceptable expressions of interest fair and equal treatment with respect to discussions.

Notice of any award, regardless of amount, under this regulation shall be published in eMMA.

### **3.4.9 Emergency and Expedited Procurements<sup>30</sup>**

#### **3.4.9.1 Emergency Procurements**

An emergency procurement in excess of \$50,000 is permitted when a CSB or CSP procurement method cannot be used because of an emergency circumstance. An “Emergency” is defined as a sudden and unexpected occurrence or condition which agency management reasonably could not foresee that requires an action to avoid or to mitigate serious damage to public health, safety, or

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<sup>30</sup> SFP §13-108; COMAR 21.05.06

welfare.<sup>31</sup> Emergency procurements are limited to the procurement of only the types and quantities of items necessary to avoid or to mitigate such damage.

A procurement officer may award an emergency contract or make an emergency contract modification only with the approval of the agency head or designee. Otherwise, the process for conducting an emergency procurement is similar to a Category I or II SP, allowing oral or written solicitation, and no requirement for posting a solicitation on eMMA. Despite the hastened timing of the procurement, the agency must obtain as much competition as is possible and practicable.

Following an emergency award, the procurement officer must:

- Publish a notice of award in eMMA not more than 30 days after the execution and approval of the contract;
- Make a record of the emergency procurement, including the required information set forth in COMAR 21.05.06.02D(2); and
- Prepare and forward a report of the emergency procurement to the BPW and the appropriate Control Agency within 45 days of the emergency contract award or modification.

#### **3.4.9.2 Expedited Procurements**

The Maryland Port Commission and the Maryland Aviation Administration are the only procuring entities authorized to conduct expedited procurements. An expedited procurement in excess of \$50,000 is permitted when a CSB or CSP procurement cannot be used because urgent circumstances require expedited action, and the action is in the public interest and outweighs the benefits of both CSB and CSP.

Prior to conducting an expedited procurement, the procurement officer must:

- Make a written determination, signed by the agency head or designee that explains why the expedited procurement best serves the public interest and why the need outweighs the benefits of a competitive source selection; and

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<sup>31</sup> COMAR 21.01.02.01B

- Receive approval from the BPW, via an item submitted for approval on the BPWs' Agenda that details the expected impact upon the State if the procurement is not made on an expedited basis, including lost revenues if applicable.

Competitive solicitation of bids or offers is the preferred method of making an expedited procurement, and may include public notice and direct solicitation. Noncompetitive source selection is permitted due to time constraints or another reason that precludes use of competitive solicitation.

Following an expedited procurement award, the procurement officer must:

- Publish a notice of award in eMMA not more than 30 days after the execution and approval of the contract;
- Make a record of the expedited procurement, including the required information set forth in COMAR 21.05.06.03E (2); and
- Prepare and forward a report of the expedited procurement award to the BPW for inclusion on the Department of Transportation's action agenda within 30 days of the expedited contract award.

#### **3.4.10 Architectural Services and Engineering Services (A/E)**

In addition to having its own section of COMAR<sup>32</sup> and being applicable to only the Department of Transportation and the Department of General Services, A/E procurement also has the distinction of being a “modified” version of the RFP process. While the A/E firms are asked to respond with technical proposals as a result of the RFP issued, there are additional steps in some cases, and in all cases the financial proposal is handled differently than in traditional RFPs.

The major steps of the A/E procurement process are as follows:

- a. Advertisement of Expression of Interest (EOI) – the agency issues a notice to the public via eMMA that a contracting opportunity exists at the agency and requests that firms respond with their EOI. The EOIs typically contain information requested as part of the notice, and this information is then used by the agency to produce a reduced candidate list

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<sup>32</sup> COMAR 21.12

(RCL). Once the RCL is prepared, those firms making the RCL are issued the RFP and are asked to submit technical proposals.

NOTE: The EOI is an optional step under current law. If the agency desires, or if it is in the best interests of the State, the agency can proceed to advertise a notice that essentially directly issues the RFP to the public, much like a traditional RFP.

- b. Review of Technical Proposals – the agency reviews the technical proposals, again, much like a traditional RFP, and determines the overall rankings of the offerors. Depending on the circumstances presented in the advertised notice, the top ranked firm or firms are then invited to submit a price proposal. This varies from the traditional RFP process, in which you would have received the sealed price proposals from the offerors at the time that the technical proposals were submitted.
- c. Price Proposals – the price proposals are received and reviewed against the engineer's estimate for the project to determine if the pricing is fair and reasonable. Negotiations are typically held at this point if there are questions or concerns about the price proposal, as opposed to the BAFOs that would be requested in a traditional RFP process.

The A/E COMAR section has provisions for contracts over \$200,000 and for contracts under \$200,000. The slight differences in process allow for the faster completion of the procurement of contracts under \$200,000.

A/E contracts can either be project specific, or they can be indefinite quantity contracts, where the agency awards the contract to a consultant or consultants, and work assignments are issued under the contract in accordance with the scope and terms of the contract.

### **3.4.11 Public Private Partnerships (P3)**

A Public Private Partnership (P3) is a method for delivering public infrastructure assets using a long-term, performance-based agreement between an authorized agency and a private entity where appropriate risks and benefits can be allocated in a cost-effective manner between the contractual partners. In a P3, the private entity performs functions normally undertaken by the government, but the government agency remains ultimately accountable for the public infrastructure asset and its public function. The State may retain ownership in the public infrastructure asset and the private entity may be given additional decision-making rights in

determining how the asset is financed, developed, constructed, operated, and maintained over its life cycle.

The State agencies authorized to implement a P3 are the DGS, MDOT (for public infrastructure assets of any of its modal administrations), the Maryland Transportation Authority, the USM, MSU, SMCM, and Baltimore City Community College.

In general, an authorized agency may establish a P3 and execute an agreement in connection with any public infrastructure asset for which the authorized agency is responsible. Per the controlling statute<sup>33</sup>, authorized agencies are to adopt regulations and establish process for the development, solicitation, evaluation, award, and delivery of a P3. Regulations and processes for P3s are still in progress.

Prior to issuing a public notice of solicitation for a P3, a pre-solicitation report concerning the proposed P3 must be submitted to the Comptroller, State Treasurer, budget committees, and the Department of Legislative Services, as required in statute. After the review and comment period on the pre-solicitation report, and before issuing the public notice of solicitation, the authorized agency must request the BPWs to officially designate the public infrastructure asset as a P3 and approve the solicitation method.

## **3.5 Planning the Solicitation**

### **3.5.1 Timelines**

When planning any procurement, consideration should be given to the time required to perform the necessary steps of the procurement. See the Timelines and Checklists for CSB and CSP Procurement Methods.<sup>34</sup>

IFB: Generally 6 to 9 months.

MS-IFB: Generally 9 to 12 months.

RFP: Generally 12 to 18 months.

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<sup>33</sup> SFP §10A-201(b)

<sup>34</sup> See the “Timelines & Checklists for CSB & CSP Procurement Methods” link on the Maryland Procurement Staff webpage: <https://procurement.maryland.gov/procurement-staff/>

The foregoing timelines are only guidelines. In deciding when to start a procurement, if the procurement is subject to review by a Control Agency, the procurement officer should account for extra time that may be required for review and approval by the Control Agency prior to release.

When structuring automatic reminders of when to begin a new procurement, many procurement officials use 18-months, 12-months, or 9-months based on the classification of a solicitation.

*Best Practice Tip: Always start EARLY.*

### **3.5.2 Selecting the Evaluation Committee Members**

When an evaluation committee is desired for a procurement, the optimal number of voting members is three. The procurement officer may utilize subject matter experts, technical advisors or consultants who are not members of the evaluation committee.

Individuals should be selected to serve on an evaluation committee based upon their expertise and experience with the subject matter, varied perspectives, absence of any prejudices or conflicts of interest, and availability to commit the necessary time and attention to their responsibilities.

### **3.5.3 Evaluation Committee Members' Role and Responsibilities**

The procurement officer should confirm that each member of the evaluation committee is able to perform the following roles and responsibilities to conduct the initial evaluation:

- Maintain confidentiality throughout the procurement;
  - Do not disclose to anyone that you are an evaluation committee member;
  - Restrict communication regarding the procurement to the evaluation committee and procurement officer;
  - The procurement officer is to be the sole point of communication with offerors;
  - Limit communication with current contractors to management of the existing contract;
- Attend evaluation committee meetings;
- Read the RFP and all proposals received;
- Participate in discussions regarding the merits of the proposals ;

- Identify items in the proposals that need to be clarified, supplemented or addressed and review offeror responses;
- Conduct reference checks, as needed;
- Participate in oral discussions with offerors, as appropriate or necessary;
- Determine strengths and deficiencies of each proposal;
- Independently rank technical proposals and financial proposals;
- Finalize overall proposal rankings; and
- Make award recommendation to the procurement officer.

## 4. Solicitation Preparation

### 4.1 Drafting the Solicitation

Once an agency has identified a need, the work of drafting the solicitation can begin. Start with the State's most current template for the procurement method selected. If a previous solicitation is available, the procurement officer may refer to the scope of work content from that solicitation, including any subsequent amendments or contract modifications, as a starting point for drafting the new solicitation. The procurement officer may consider any feedback provided by the vendor community during the previous procurement.

#### 4.1.1 Procurement Officer Determinations

Depending on the procurement method selected, the procurement officer may need to write a determination justifying the use of that method. A determination is defined as a written procurement decision by a public official or employee that is based on written findings, and is typically a separate document, which is retained in a procurement file.<sup>35</sup> For each of the following procurement methods, refer to the indicated COMAR section for specifics on what to include in the respective determination.

Procurement Method	COMAR Requirement
Sole Source	COMAR 21.05.05.02B
Emergency <i>(While not technically a "determination," the basis and justification of an emergency procurement must be included in its record.)</i>	COMAR 21.05.06.02.D.2(a)
Expedited <i>(For Use by MPA and Maryland Aviation Administration only)</i>	COMAR 21.05.06.03.A.1(a) and C
Intergovernmental Cooperative Purchasing <i>(This determination is made by a Primary Procurement Unit: STO, DGS, MDOT, or MPA as authorized. Typically, an agency sends the basis for the determination to the Primary Procurement Unit, which is then reviewed and adopted by the Primary Procurement Unit.</i>	COMAR 21.05.09.04

<sup>35</sup> See COMAR 21.01.02.01(34)

#### **4.1.2 Minimum Qualifications**

Given that “effective and broad-based competition” is one of the principal policies and purposes of Maryland’s procurement regulations (see COMAR 21.01.01.03.G), deciding who enters that competition by setting Minimum Qualifications must be carefully considered.

In general, Minimum Qualifications speak to base characteristics of a bidding or proposing entity such as experience, licensure, and certifications that are necessary for a bidder or offeror to perform the contract. Minimum Qualifications should be objectively evidenced by specific proof.

- For example, a Minimum Qualification that requires “extensive experience” in a particular area may not only be difficult to quantify but also difficult to prove because offerors’ ideas of “extensive” may differ drastically from each other and from those of the soliciting agency.
- On the other hand, requiring two years of experience within the last five years of providing food service to a minimum of 500 individuals per year could be objectively documented by one or more references.

Another consideration in writing Minimum Qualifications is stating who can satisfy them.

Typically, the bidder or offeror is expected to meet the Minimum Qualifications. However, the solicitation may state that Minimum Qualifications can be met by subcontractors, subsidiaries, parent companies, or attributing the experience of individuals to a new firm.

With regard to Minimum Qualifications, the procurement officer should consider the following:

- Are Minimum Qualifications appropriate for the solicitation;
- Are the Minimum Qualifications written in a way that does not overly restrict competition;
- Are the Minimum Qualifications drafted as pass/fail requirements limiting subjective interpretation;
- Do the Minimum Qualifications state the minimum amount of experience rather than the preferred amount of experience;
- Do the specifications apply Minimum Qualifications to the proposing entity and not the proposing entity’s staff where possible; and
- Consider the procurement method before establishing Minimum Qualifications:

- For RFPs, Minimum Qualifications may not be necessary where an RFP allows an agency to weigh the experience and capabilities of each offeror during the evaluation process. In fact, the State RFP template specifically includes “Offeror Qualifications and Capabilities” as one of the evaluation criteria. Offerors with less experience or capability would receive a lower ranking in this category than offerors with more, so it is often not necessary to limit the pool of offerors at the outset when ultimately the best offerors will receive a higher technical evaluation. (However, Minimum Qualifications may be necessary where the Minimum Qualification is a mandatory component of the work to be performed, e.g., the vendor or its key personnel must have license, certification, or permit to perform the scope of work.)
- For IFBs, Minimum Qualifications assist in determining responsibility.<sup>36</sup> Unlike RFPs, IFBs have no evaluation component, so Minimum Qualifications often are appropriate to ensure that bidders are capable of performance and serve as the primary mechanism for making that determination. To that end, the Minimum Qualifications should be written such that the requirement and associated proof objectively demonstrate the bidder’s ability to perform under the contract.

#### **4.1.3 Best Practices for Drafting Specifications**

- Start the drafting process early enough to allow careful consideration of requirements, including those that have been published before, and ample time for review, updates, and revisions;
- Write clear, concise, unambiguous specifications so both the State and contractor operate under the same set of expectations during contract performance;
- Use terms consistently throughout the solicitation document;
  - For example, the word “assessment” should not be used in one place while “test” is used in another and “examination” is used elsewhere when all refer to the same contract activity; and
  - A related best practice is defining the terms used in a solicitation such that there is no dispute during contract performance regarding their meaning; and
- Avoid using passive voice in writing the solicitation;
  - For example the following sentence: “The assessment will be completed by June 30 of each contract year.” In this example, it is unclear whom the actor is or who

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<sup>36</sup> See COMAR 21.01.02.01(77) for definition of “responsible.”

is responsible for completing the assessment. A sentence in active voice, by contrast, discloses the actor: “The Contractor shall complete the assessment by June 30 of each contract year.”

#### **4.1.4 State Agency Subject Matter Experts - Security, Insurance, and Auditing**

State procurement typically requires contractors to comply with various physical and information technology security measures, insurance levels, and independent auditing requirements. Deciding when these provisions are appropriate often requires the expertise of colleagues within the State. For example, the standard IT security requirements in the State procurement templates may merit revisions or additions, with assistance from the experts within DOIT. Choosing the appropriate types and amounts of insurance may require the input of the STO. Deciding whether an independent audit of operational controls is required based on the contractor’s access to personally identifiable information, protected health information, or information critical to an agency’s mission, may be a question for internal auditors within DBM. For more information regarding specific questions and state contracts, an agency may contact its Control Agency procurement analyst.

#### **4.1.5 Program Guidance - Program Personnel Input**

In crafting specifications, an agency should capture the input and comments of the State’s program personnel for the contract. In some agencies, the program personnel will provide an initial draft of the scope of work; in others, program requirements are discussed with procurement officials, who ultimately write the specifications. In all cases, obtaining the feedback and input of the program personnel for the contract is critical. A procurement officer should ask the program personnel about best practices within the industry that may translate into specifications for the solicitation. If the procurement has been done before, the procurement officer may also want to ask what program needs have changed since the last procurement and what could be done better this time. Upon incorporating changes to the specifications based on program personnel comments and input, key program personnel should review a final draft of the specifications before publication.

#### **4.1.6 Technical Evaluation Criteria Order of Importance**

For RFPs, an agency must consider the relative importance of each technical proposal evaluation criteria. In the State’s RFP template, these criteria are listed in descending order of importance. While the template criteria and their ordering are appropriate for some solicitations, they may need to be adjusted for others.

#### **4.1.7 Weighting of Technical vs. Financial Factors**

The RFP must state the relative importance of technical versus financial factors.<sup>37</sup>

Typically, equal weighting of offerors' technical and financial proposals provides the procurement officer with the most flexibility in determining the overall ranking of proposals to ascertain the best value award recommendation.

The RFP may give greater weight to technical factors when the quality of the technical proposal and the services to be provided under the scope of work support such a finding. The agency must then conduct a cost-benefit analysis to determine whether the higher cost to the State is justified by the added value of purchasing the more expensive option.

Conversely, the RFP may give financial factors greater weight than technical factors when pricing is paramount and the type of services to be provided under the scope of work support such a weighting.

#### **4.1.8. Contract Performance Tools**

Listed below are some contract performance tools available to a procurement officer. Consult your procurement analyst, Assistant Attorney General (AAG), and other relevant resources to determine inclusion of these measures in a specific solicitation.

##### **A. Payment and Performance Bonds**

A performance bond is a contract surety bond, which guarantees that a contractor will fulfill its contractual obligations under a project. The bond is put in place as a protection for the project owner and the State in case the contractor does not perform.

A payment bond is a contract surety bond, which guarantees that a contractor will pay its subcontractors, material suppliers or laborers for the work and materials provided in accordance with the agreement made between the two parties.

Performance and payment bonds are required for construction projects over \$100,000.

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<sup>37</sup> COMAR 21.05.03.02.A(2)

## **B. Bid Bonds**

A bid bond is issued as part of the solicitation process by the bidder or offeror to the State to provide a guarantee that the winning bidder or offeror will execute the contract under the terms of its bid or proposal.

When issuing bid, performance and payment bonds for non-construction projects, see BPW Advisory 1996-3.

## **C. Performance Guarantees**

A Performance Guarantee is issued by an insurance company or bank to a contractor to guarantee the full performance of the contract according to the plans and specifications.

## **D. Liquidated Damages**

Liquidated damages are damages whose amount the parties designate during the formation of a contract for the injured party to collect as compensation upon a specific breach of the contract. Liquidated damages are included when actual damages may be difficult to ascertain. Such damages should be reasonably proximate to the loss the State is anticipated to incur as a result of such breach.

A solicitation with an MBE participation goal must contain a liquidated damages provision.<sup>38</sup>

## **E. Incentives**

A solicitation may include provisions to incentivize achievement of performance goals through stipends or bonuses, or impose service level credits in connection with performance failures. In the absence of specific disincentives or service level credits, the contract should include provisions to protect the State in the event of nonperformance.

### **4.1.9 Bid Form/Financial Proposal Form**

When preparing the Bid Form for an IFB or the Financial Proposal Form for a RFP, best practices are to utilize an Excel worksheet that provides the procurement officer the ability to lock down cells and set up formulas to calculate the Total Bid Price or the Total Evaluated Price based on the unit prices entered by the bidders or offerors. This allows the procurement officer

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<sup>38</sup> SFP 14-303 (b) (6) and COMAR 21.07.01.14. See also [https://goma.maryland.gov/Documents/MBE\\_Toolkit/Liquidated\\_Damages\\_Guideline.pdf](https://goma.maryland.gov/Documents/MBE_Toolkit/Liquidated_Damages_Guideline.pdf)

to confirm that all prices were entered by the bidder or offeror and limits errors on the submissions.

*Best Practice Tip: Test your Bid or Financial Proposal forms prior to posting the solicitation by entering prices in the unlocked cells to be utilized by the bidders or offerors to make sure the calculations/formulas are correct in the locked cells, and by trying to enter data in the cells with the formulas to ensure they are locked.*

When requesting prices on the Bid Forms and the Financial Proposal Forms, each line on the price form should match a specific deliverable in the scope of work. Historical data from previous contracts for the goods and services is often used to calculate usage needs and requirements for the new contract.

## 4.2 Using Third Party Consultant Contracts

*Do you need to contract with an Industry/Subject Matter Expert?*

In drafting a complex solicitation and conducting the associated procurement in which the State may not have the subject matter expertise, an agency may consider procuring a consultant with knowledge in that particular field. Engaging such a consultant or consulting firm provides access to industry standards, emerging best practices, financial trends, market familiarity and informed analyses that may benefit a procurement project. Consultants may assist with drafting the specifications, responding to vendor questions, and assisting with the evaluation of offeror proposals, among other tasks. If an agency chooses to engage a consultant to assist with a procurement, it should also require the consultant to execute a Non-Disclosure Agreement and Conflict of Interest Affidavit. Consultants retained by the State to assist with the drafting of the solicitation or assisting in the selection for award are prohibited from submitting a proposal or assisting another in submitting a proposal for the subject solicitation or working for the selected awardee for a period of time.<sup>39</sup>

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<sup>39</sup> SFP § 13-212.1

## 4.3 Procurement Review Group

The Procurement Review Group (PRG) is a standing group within each agency, established by the head of that agency, charged with reviewing solicitations, task orders solicitations, proposed sole-source contracts, and contract renewal options expected to exceed \$200,000 in order to maximize opportunities for MBE<sup>40</sup> and VSBE participation on State procurement contracts. For some agencies, small business reserve designations or preferences are also determined at PRG.

### 4.3.1 Setting Minority Business Enterprise (MBE) Participation Goals

The participants of the MBE PRG must include the agency chief or senior procurement official and the MBE Liaison officer and may also include the procurement officer and program representatives. These members should work together as a team to review the scope of work and subcontracting opportunities using projected line item estimates. BPW Advisory 2001-1 <http://www.bpw.maryland.gov/Pages/adv-2001-1.aspx> Section E provides the review and assessment guidelines to be implemented by the PRG. Once the MBE participation goal is established, the PRG must determine if subgoals apply based on GOSBA Guidelines.

GOSBA's website is home to an online MBE Toolkit which includes a Sample PRG Template in Word, a Sample PRG Template in Excel, and an MBE Program Subgoal Worksheet. The toolkit is available at <https://gomdsmallbiz.maryland.gov/Pages/Reporting-Tool-MBE.aspx> under "MBE Program Resources".

### 4.3.2 Setting Veteran-Owned Small Business Enterprise (VSBE) Participation Goals

VSBE goal setting may use a PRG process similar to the MBE PRG goal setting process. An agency must determine the potential for VSBE participation for each contract. See BPW Advisory 2012-1 <http://www.bpw.maryland.gov/Pages/adv-2012-1.aspx>.

### 4.3.3 Review of Solicitations & Task Orders \$25M and Above by GOSBA

For any procurement solicitation or task order that is expected to result in an award valued over \$25 million, the agency must submit the solicitation or TORFP and PRG documentation to GOSBA for review and approval prior to publication, per a 2014 Directive and reconfirmed in

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<sup>40</sup> Or the DBE Program for USDOT assisted contracts.

an Executive Memorandum dated April 10, 2019. This is in addition to any review and approval required by a Control Agency.

## **4.4 Review and Approval Process**

### **4.4.1 Agency Internal Review and Approval**

Once the solicitation is drafted, a procurement officer will need to obtain necessary internal approvals. These approvals may include sign off by one's supervisor or Agency Head (or designee), but in all events should follow the internal approval procedures established by each agency.

### **4.4.2 Office of the Attorney General (OAG) Review**

Sending the draft solicitation to an agency's assigned AAG for review is a best practice following internal approval of a solicitation. An AAG must review the contract that results from the solicitation for legal form and sufficiency prior to execution by the State. The solicitation and its attachments are incorporated by reference as part of the contract; therefore, it is best to have the AAG review and provide advice before publishing a solicitation to confirm the solicitation meets legal requirements and minimize possible issues with the specifications.

### **4.4.3 Control Agency Review and Approval**

If a solicitation is expected to exceed an agency's delegated approval threshold, an agency must receive the appropriate Control Agency's review and approval before its publication. Control Agency review should occur as soon as possible after completion of all internal approvals and AAG review to allow the Control Agency a reasonable time to review.<sup>41</sup> Control Agency review may take several weeks depending on the complexity of issues to be addressed and the time an agency needs to address those issues for clarity and sufficiency of the scope of work; associated pricing forms; Minimum Qualifications if any; evaluation weighting; SBR, MBE, and VSBE participation goals and subgoals, if any; vendor direct solicitation lists; and vendor response time, among other things.

### **4.4.4 Department of Human Services (DHS) Hiring Agreement Review and Approval**

A hiring agreement is an agreement between a contractor and DHS by which the contractor agrees to give potential candidates identified by DHS first priority to fill job openings on the

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<sup>41</sup> See COMAR 21.02.03.02.C (6).

contractor's State contract. The procurement officer submits a "Determination Request Form" and the scope of work for the solicitation to the DHS Hiring Agreement Office for approval to include a hiring agreement in the solicitation or receive a waiver.

*Best Practice Tip: Any solicitation that includes Key Personnel requirements should be considered to include a Hiring Agreement.*

#### **4.4.5 Procurement of Banking, Investment and Other Financial Services**

STO is delegated the authority to procure banking, investment and other financial services.<sup>42</sup> Any agency seeking to procure these types of services should contact STO with the scope of work describing the services required. STO may: (1) Allow the requesting agency to use an existing contract previously procured under STO authority to provide the needed services; (2) Allow the procurement to proceed under STO authority (it would conduct the procurement on behalf of the requesting agency); or (3) Issue a waiver allowing the requesting agency to proceed with acquiring services through that agency's procurement office. If STO does not issue the waiver, the requesting office cannot move forward with its solicitation.

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<sup>42</sup> Per COMAR 21.02.01.04(E)

## 5. Solicitation

### 5.1 Public Advertisement and Notice

#### 5.1.1 eMaryland Marketplace Advantage (eMMA)

Maryland conducts the majority of its procurements through eMMA, the online procurement system that provides vendors with access to State procurement information. Through eMMA, vendors have the ability to:

- Complete the Small Business Reserve (SBR) self-certification;
- Receive notice of bid opportunities;
- Search for contracting opportunities;
- Submit some bids electronically; and
- Obtain some bid results online.

The procurement officer is responsible for publishing all solicitations in excess of \$15,000 in eMMA.

*Note: It is recommended the procurement officer print the confirmation of the published solicitation, as well as the entire solicitation for the procurement file.*

#### 5.1.2 Bid Express (Construction)

For some MDOT State Highway Administration (SHA) construction and maintenance solicitations, vendors are required to register and utilize Bid Express. Bid Express is a web-based service for electronic bidding (e-Bidding) that allows vendors to submit bids securely from any computer, download contract documents, and immediately receive any addenda to an advertisement. The State gets instant bid tabs, ranked results and can export reports.

#### 5.1.3 Direct Solicitation Notices – Email

Open solicitations or notices of the availability of bids or proposals may be emailed to all known potential bidders or offerors for the purpose of securing competition. Notices of availability should indicate where and when bids or proposals are due (closing date), and generally describe the commodity, service, or construction desired, and may contain other appropriate information, including the link to eMMA to obtain the solicitation.

*Best Practice Tip: Direct Solicitation Notices should be emailed to all known potential vendors obtained through market research, direct requests from vendors, previous incumbents, MBEs, VSBEs, or other sources. A list of all vendors directly solicited should be maintained in the procurement file for future reference.*

#### **5.1.4 Agency Website and Bid Board**

Open solicitations may be posted on the agency's website. In addition, announcements of the availability of solicitations (usually the Key Information Summary Sheet from the solicitation) may be posted on a bulletin board (displayed in an area to which the public has access).

#### **5.1.5 Publications and Trade Associations**

An agency may publish a solicitation notice in "Contract Weekly" or "Contract Weekly Online" and any newspaper, periodical, or trade journal to reach potential bidders or offerors.

### **5.2 Pre-Bid/Proposal Conference**

The purpose of the pre-bid/proposal conference is to explain the procurement process to vendors including review of the specification and requirements, explaining how to complete required submission documents such as MBE and VSBE participation forms, and answering any questions vendors may have about the procurement. If a pre-bid/proposal conference is to be held, notification should be included in the Key Information Summary Sheet of the solicitation. Pre-bid/proposal conferences are required for solicitations with MBE goals; however, it is helpful to have a pre-bid/proposal conference for all solicitations. Considerations for setting up a pre-bid/proposal conference:

- **Timing of Meetings** – A good time frame for the pre-bid conference is 7 to 14 working days after issuance of the solicitation. Any pre-bid/proposal conference should be held long enough after the solicitation has been issued to allow vendors time to become familiar with the contents, but sufficiently before the bid or proposal due date to allow dissemination and consideration of the pre-bid/proposal conference information in preparation of bids or proposals.
- **Site Visits** – The solicitation may provide vendors with the opportunity to visit the

State's facility/location prior to submission of bids or proposals in order to provide a fuller understanding of the requirements and/or the site's conditions. This is usually done in conjunction with the pre-bid/proposal conference.

- **State Attendees** – Pre-bid/proposal conferences should be conducted by the procurement officer or designee to explain the procurement requirements. State program experts may attend to explain the scope of work. MBE liaison officers could be called upon to provide information about the MBE requirements.
- **Content & Procedures/Best Practices** – The procurement officer should highlight important sections of the solicitation, which may include the Key Information Summary Sheet including due dates, minimum qualifications including required licensing and certifications if any, the particular documents that must be submitted with the bid or proposal, the format and packaging of the bid or proposal, socio-economic programs that apply to the solicitation, insurance or auditing requirements, and the evaluation process.
- **Outline/Script for Conference** – A script with talking points is very helpful to cover all important sections of the solicitation. Do not read the entire solicitation word for word; however, some sections may be read in order to emphasize their importance.
  - a. MBE Instructions Script - if the MBE cannot attend, this script should be read by the procurement officer; and
  - b. Amendments - any changes to specifications or to the scope of work will be published as an Amendment and supersede the original published provision(s). Any amendments issued prior to the pre-bid/proposal conference should be discussed.
- **Record Keeping** – When a pre-bid/proposal conference is held in connection with a procurement that is expected to exceed \$100,000, the procurement officer must ensure that a written record of the conference is prepared as soon as practicable and that the record is sent to all vendors who were sent a solicitation or who are known by the procurement officer to have obtained the solicitation.
- **Sign In Sheets** – Vendors should sign in or provide a business card for the attendance sheet. This document should provide space for vendors to note if they are a small, minority or veteran-owned business. The attendance sheet should be published on

eMMA and the agency's website/bid board along with the written summary of the conference.

- **Questions and Answers** – The agency may provide vendors with an opportunity to submit written questions and requests for clarification. Establishing a deadline for submitting questions allows the agency sufficient time to develop responses and amendments, if necessary. The agency should individually number each question or clarification and its response. The bid/proposal due date may need to be extended if there are relevant questions and receiving the answers close to the bid or proposal due date would compromise a vendor's ability to modify its bid or proposal based on the answers. Vendor questions and answers will be provided to all prospective vendors through eMMA and the agency's website/bid board. Procurement officers should allow time for and encourage vendor questions during the conference in order to receive vendor feedback that may identify any issues requiring amendments to the solicitation. These questions should be followed up with the procurement officer's written answer.

*Best Practice Tip: The question deadline should be at least seven days prior to the bid or proposal due date. Depending on the complexity of the procurement, the deadline for questions could be a longer period prior to the bid/proposal due date.*

- **Americans with Disabilities Act (ADA)** – Accommodations should be made for individuals with disabilities as stated in the solicitation's Pre-Bid/Proposal Conference Response form (Attachment A) as is practicable.

### 5.3 Procurement Officer and Vendor Communications

#### Procurement Officer - Sole Point of Contact

Prior to contract award, the procurement officer is the sole point of contact for purposes of the solicitation, including any inquiries from vendors, State officials, or members of the public. Any State officials, including members of an evaluation committee that receive questions or comments regarding the procurement should direct those questions or comments to the procurement officer. Likewise, any correspondences or notices regarding the procurement, including answers to questions or amendments to the solicitation, are to be issued and published only by the procurement officer.

## Permissible Disclosures<sup>43</sup>

Before bid opening:

- A. Bids shall remain sealed; and
- B. The State may not disclose the name of a bidder.

Before the closing date for proposals, a procurement officer may not disclose the name of a person who has submitted a proposal.

After issuing the solicitation and before making a recommendation for contract award, a procurement officer may disclose to a person outside the Executive Department only:

- A. Whether a decision has been made regarding a solicitation; and
- B. Information that is available to the public under the Public Information Act.<sup>44</sup>

Before awarding a procurement contract based on competitive sealed proposals, the State may not disclose the contents of a proposal to any person other than a person responsible for evaluating or reviewing the proposal.

## Responding to Vendor Questions

For any questions received regarding the procurement, the procurement officer should respond in writing as accurately and completely as practicable. In preparing a response, the procurement officer should consult with State subject matter experts as needed. Questions and responses shall be issued to all vendors known to have received the solicitation and published on eMMA with sufficient time for the answers to be taken into consideration in preparation of a bid or proposal, unless the question pertains solely to a particular vendor (e.g. how do I log into my eMMA account?).

Any response that deviates from what is provided in the solicitation shall be accompanied by a published amendment. If any question raised issues about the solicitation that would require an amendment, the procurement officer should also consider extending the bid or proposal due date in an amendment.

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<sup>43</sup> COMAR 21.05.01.05

<sup>44</sup> Public Information Act, MD. Code Ann, General Provisions Article, Title 4.

### Record of Solicitation Inquiries<sup>45</sup>

After issuing the solicitation and before contract award, a procurement officer shall record and include in the procurement file the following information from any inquiry originating from any source outside the Executive Branch:

- A. The date and time of the inquiry;
- B. The name and affiliation of the person making, or initiating the inquiry; and
- C. The substance and nature of the inquiry.

## **5.4 Amending the Solicitation**

Following publication, a procurement officer may find it necessary or prudent to amend the solicitation. Amendments typically result from changes or clarifications to requirements. Some of these changes may follow vendor questions during the question and answer period. Procurement officers should give due consideration to vendor comments and questions in determining whether amending a solicitation is appropriate.

For bids, amendments always occur before the bid due date and should allow sufficient time for a bidder to acknowledge and accommodate the amendment in its bid. For proposals, amendments typically issue before proposals are due. However, an amendment may be issued after a proposal due date, in which case it is distributed to only those offerors who proposed in response to the solicitation. In such cases, a procurement officer must ensure the following: 1) the amendment is not so substantive that it would have changed a potential offeror's decision whether to propose and 2) offerors can adjust their pricing if necessary to account for the amendment via a subsequent request for pricing, for example, a Best and Final Offer. An amendment of sufficient magnitude and substance that is considered by the agency after receipt of proposals, may result in cancellation and reissuance of the solicitation.

## **5.5 Accepting a Revision or Withdrawal to a Vendor's Submitted Response**

Before bid or proposal submission due date, a bidder or offeror may modify or withdraw its bid or proposal.<sup>46</sup> After bid or proposal submission due date, a request by the bidder for a

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<sup>45</sup> COMAR 21.05.01.06

<sup>46</sup> COMAR 21.05.02.09.

modification or withdrawal is late and may not be considered.<sup>47</sup> As per COMAR, there are limited exceptions that may be considered and require written OAG approval.

A bid or proposal may be withdrawn before the bid or proposal submission due date.

Bidders may be permitted to withdraw a low bid if a mistake is clearly evident on the face of the bid but the intended correct bid is not similarly evident or the bidder submits proof which clearly and convincingly demonstrates a mistake was made.<sup>48</sup>

When, before an award has been made, it appears from a review of a proposal that a mistake has been made, the offeror should be asked to confirm the proposal. If the offeror alleges a mistake, the procedures in COMAR 21.05.02.12 are to be followed.<sup>49</sup>

The procurement officer should consult with their AAG about requests to modify or withdraw bids or proposals.

## 5.6 Cancelling the Solicitation

After solicitations are posted to eMMA, the agency may elect to cancel the invitation for bids or request for proposals under certain circumstances. All solicitations issued by any procuring agency should include language stating that a solicitation may be cancelled as provided in regulation.

- **Cancellation Before Opening Bids or Proposals** – With approval of Department head or designee, the procurement officer may cancel a solicitation when it is determined that this action is fiscally advantageous to the State or otherwise in the State's best interest due to reasons outlined in COMAR 21.06.02.02(B)(1). The following steps are applicable to such a cancellation:
  - a. Documentation - Procurement officer shall document the basis for the decision to

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<sup>47</sup> COMAR 21.05.02.10.

<sup>48</sup> COMAR 21.05.02.12.

<sup>49</sup> COMAR 21.05.03.03.E

cancel the solicitation in a procurement officer's determination. This determination and any associated backup documentation should be included in the procurement file.

- b. Notice to Vendors - The procurement officer shall issue a notice of cancellation to all vendors that identifies the solicitation (including reference #), briefly explains the reason for cancellation, and if appropriate, explains that opportunity will be given to compete on any re-solicitation or similar future procurements.
- c. Disposition of unopened bids/proposals - All bids or proposals received should be returned unopened to the vendors after the procurement has been concluded and any bid/proposal materials unable to be returned to the vendors should be destroyed (shredded).
- d. eMMA - The procurement shall be cancelled in eMMA and an electronic notification will go out automatically to all bidders/offerors that were originally notified of the solicitation.

- **Rejection of All Bids or Proposals After Opening** – With approval of Department head or designee, the procurement officer may reject all bids or proposals when it is determined that this action is fiscally advantageous or otherwise in the State's best interest due to reasons outlined in COMAR 21.06.02.02(C)(1). The following steps are applicable when all bids or proposals are rejected:
  - a. Documentation - Procurement officer shall document the basis for the decision to cancel the solicitation in a procurement officer's determination. This determination and any associated backup documentation should be included in the procurement file.
  - b. Notice to Vendors - The procurement officer shall issue a notice of rejection of all bids or proposals to all vendors that submitted bids or proposals, that identifies the solicitation (including reference #), briefly explains the reason for rejection of all bids or proposals, and if appropriate, explains that opportunity will be given to compete on any re-solicitation or similar future procurements.
  - c. Disposition of opened bids/proposals - All bids or proposals that have been opened should be retained in the procurement file. Unopened financial proposals may be

returned after the procurement has been concluded, at the request of the vendor.

d. eMMA - The procurement must be cancelled in eMMA and an electronic notification will go out automatically to all bidders or offerors that were initially notified of the solicitation.

## 5.7 Receiving Vendors' Responses

When solicitations are posted to eMMA, the solicitation should clearly state the date, time, place and method (example: electronic submission) for delivery of the bid or proposal to the procurement officer. Late bids or proposals may not be considered.

- **Registration of Receipt of Bids/Proposals** – All bids and proposals must be received by the procurement officer at the location and by the time and date cutoff indicated in the solicitation.
  - a. Storage - All bids and proposals received prior to the due date shall remain unopened and be stored in a secure location by State procurement personnel from receipt until bid or proposal opening date and time.
  - b. Bidder/Offeror Confidentiality - The procuring agency's staff shall not disclose the identity of bidders or offerors prior to bid opening or proposal award.
  - c. eMMA - All electronic submissions via eMMA shall be stored in the system until bid opening occurs within eMMA.
- **Late Bids and Proposals** – Any bid or proposal received after the time and date set for receipt of bids must be considered late and may not be considered for award. Aside from exceptions outlined below, late bids, late modifications or late withdrawals shall not be considered.<sup>50</sup>
  - a. State Personnel Exception - An exception may be made for late bids or proposals or withdrawals received prior to contract award that were late due to the action or

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<sup>50</sup> COMAR 21.05.02.10, 21.05.03.02(F)

inaction of State procurement personnel. Any exception of a late bid, proposal or withdrawal must be approved in writing by the Office of the Attorney General.

b. Late Modification to a Successful Bid or Proposal - Any late modification to a successful bid that make its terms more favorable to the State may be considered.

Acceptance of late modifications must be approved in writing by the Office of the Attorney General.<sup>51</sup>

c. Documentation - The procurement officer shall keep a record of each request for late bid acceptance, modification or withdrawal in the procurement file.

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<sup>51</sup>COMAR 21.05.02.10(B)

## **6. Review and Evaluation Process**

### **6.1 Opening Vendors' Sealed Responses**

#### **6.1.1 Invitation for Bids (IFB) - Public Bid Opening**

All bids received by the bid due date and time must be opened publicly at the time, date and place specified in the IFB. It is recommended that two State employees attend the public bid opening. One employee can read the bids aloud and the second one can record and tabulate the bids on the bid abstract. The opened bids shall be available for public inspection of the non-confidential portion of the bids at a reasonable time after bid opening. The contract will be awarded to the lowest priced responsive bid from a responsible bidder after all required approvals.

#### **6.1.2 Multi-Step Invitation for Bids (MS-IFB)**

Technical Offers are opened in the presence of at least two State employees. The procurement officer may request bidders to clarify elements of their technical offers through, for example, demonstrations or site visits. After the technical offers have been determined to be acceptable or not acceptable, price bids of the accepted technical offers will be publicly opened. The contract will be awarded to the lowest priced responsive bid from a responsible bidder after all required approvals.

#### **6.1.3 Request for Proposals (RFP)**

After the proposal due date, all technical proposals must be opened in the presence of at least two State employees. A register of proposals shall be prepared that identifies each offeror. The financial proposals should be stored by the procurement officer unopened in a secure location until the appropriate time to open (see Section 6.7). After conducting an initial review of the technical submissions, the procurement officer should distribute the technical proposals to the evaluation committee. If the procurement officer determines that a technical proposal is not reasonably susceptible of being selected for award or an offeror is not responsible, the procurement officer should so notify the offeror. If the financial proposal was a paper submission, the procurement officer should return it unopened after the procurement has been concluded. If the financial proposal was in electronic format, the procurement officer should not open it.

## 6.2 Conducting Initial Review

### 6.2.1 Responsiveness of Bids (for IFBs only)

The responsiveness of the bid is determined by whether it conforms to the specifications. A bid is not responsive and may not be considered for award when it contains a material deficiency, including one that affects price, quality, or quantity of goods or services as well as qualifications, deviations and exceptions. A non-responsive bid cannot be cured. (Also see Section 6.3.)

### 6.2.2 Verifying MBE and VSBE Forms for Accuracy

If the bidder or offeror has not identified the specific MBE commitment at the time of submission, the procurement officer may determine that the bid is not responsive or the proposal is not reasonably susceptible for award.

If the bidder or offeror has not identified the specific VSBE commitment at the time of submission, the procurement officer may determine that the bid is not responsive or the proposal is not reasonably susceptible for award.

In either case, if there is a potential issue with an MBE or VSBE form, the procurement officer should contact their MBE or VSBE Liaison officer and Assistant Attorney General.

### 6.2.3 Meeting Minimum Qualifications

If there are minimum qualifications in the solicitation, verify that the minimum qualifications have been met by the bidder or offeror. If a minimum qualification has not been met and is considered a matter of responsibility, the procurement officer may seek clarification of the qualification.

### 6.2.4 Check Technical Proposals for Pricing Information and Exceptions

Technical proposals should not contain any pricing information or financial proposal documentation. However, sometimes offerors include such information in the technical proposal despite being instructed not to. If such information is included in the technical proposal, the procurement officer should remove or redact all such pricing information in the proposals before distributing packets to the evaluation committee members. Common sections where this may occur are in the Economic Benefits section and in the MBE and VSBE Affidavits or Forms. In

addition, any exceptions taken by an offeror should be addressed as soon as possible. Procurement officers should consult with their AAGs regarding any exceptions taken.

#### **6.2.5 Responsibility of Bidders and Offerors**

To be eligible to enter into a contract with the State, a bidder or offeror must be “responsible,” which is defined as having “the capability in all respects to perform fully the contract requirements, and the integrity and reliability that shall assure good faith performance.”<sup>52</sup> A bidder or offeror (person or business) or its principals that have been debarred or suspended are prohibited from contracting with the State.<sup>53</sup> A recommended awardee must be registered and in good standing with the State Department of Assessments and Taxation (SDAT) and the Comptroller’s Office must certify that the recommended awardee is in good standing and current in payment of all taxes owed.<sup>54</sup> In the absence of such registration and certification, a bidder or offeror may be deemed to be non-responsible. (See Section 6.10.)

Types of information that may support the bidder or offeror’s responsibility include any required certification or licenses, financial statements, references, current or past litigation, etc. The procurement officer may consult with subject matter experts to review and interpret the information, e.g., internal auditors reviewing financial statements. Extremely low-priced bids or proposals may call into question the bidder or offeror’s capability or reliability to perform the contractual requirements.

The determination of responsibility is an ongoing evaluation that may include information obtained beyond the initial IFB or RFP submissions, such as public information searches. Prior to making a determination of responsibility, the bidder or offeror should be given the opportunity to provide clarification or cure any alleged deficiencies.

### **6.3 Vendor’s Revisions or Cures to Proposals**

6.3.1 Some irregularities or mistakes in bids or proposals may be fatal and may not be corrected or cured, e.g., late submissions, errors in properly completing the MBE affidavit/forms, failure to submit a bid bond. (Also see Section 6.10.2.)

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<sup>52</sup> COMAR 21.01.02.01B(77)

<sup>53</sup> <http://bpw.maryland.gov/Pages/debarments.aspx>

<sup>54</sup> [www.dat.maryland.gov](http://www.dat.maryland.gov)

6.3.2 A minor irregularity is “one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation in a bid or proposal from the exact requirement of the solicitation, the correction or waiver of which would not be prejudicial to other bidders or offers.” COMAR 21.06.02.04A.

“The defect or variation in the bid or proposal is immaterial and inconsequential when its significance as to price, quantity, quality or delivery is trivial or negligible when contrasted with the total cost or scope of the procurement.” COMAR 21.06.03.04B.

In response to a minor irregularity, the procurement officer must allow the bidder or offeror to correct its bid or proposal, or in the alternative, may waive the deficiency. COMAR 21.06.02.04C.

6.3.3 The procurement officer should notify a bidder or offeror of identified irregularities or mistakes as soon as possible. It is within the procurement officer’s discretion to determine the amount of time for cure responses.

## **6.4 Technical Proposal Evaluation Process - Competitive Sealed Proposals Only**

### **6.4.1 Evaluation Overview**

Technical and Financial proposals shall be evaluated independently. The evaluation of the technical proposals must be based on the evaluation factors set forth in the RFP and in accord with the relative importance of each evaluation factor.<sup>55</sup> Factors not specified in the RFP may not be considered.

### **6.4.2 Reviewing the Technical Proposals**

After conducting the initial technical proposal review to verify the responsibility of the offeror and to ensure that all required items have been submitted with the technical proposal, the procurement officer and members of the evaluation committee should begin a more thorough review of each technical proposal. Following are a list of general guidelines for evaluation committees in their review of technical proposals:

- At the first evaluation committee meeting, the procurement officer should provide

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<sup>55</sup> COMAR 21.05.03.02.A(2)

guidance to the evaluation committee members (evaluators) of their roles in the process and their commitment to attend all evaluation meetings, oral presentations, in order to make a final award recommendation.

- The procurement officer should ensure that the evaluation committee has all materials needed to perform the evaluation (e.g., copies of all proposals, the RFP, RFP Amendments and Q&A's) and should be available to answer any questions the committee may have. During committee meetings, the procurement officer should provide guidance, control discussions, and provide real time direction regarding what the committee can and cannot consider and evaluate in its deliberations. The committee's focus must be on the RFP, the evaluation criteria, and the offerors' proposals.
- The procurement officer and all evaluators must read all proposals. Evaluators cannot divide the proposals with each member reading certain ones and reporting his/her impressions back to the others.
- The evaluators should base their evaluations on their first-hand observations and analyses of each proposal and independently identify strengths and deficiencies to rank each proposal. A proposal that simply meets the RFP requirements generally has neither a strength nor a deficiency. A strength may be something identified that exceeds the RFP requirements, while a deficiency may be a less desirable solution.
- In making the final award recommendation, the procurement officer guides the evaluation committee to come to a consensus.

#### **6.4.3 Methods of Evaluation**

As the CSP process is focused on determining the best value for the State, there are subjective elements to the evaluation of technical proposals and the eventual recommendation of award (in comparison to CSB procurements in which award is based on the lowest-priced, responsive bid, requiring a more objective analysis).

The procurement officer may wish to consult with their supervisor and appropriate Control Agency for guidance on selecting the appropriate evaluation method for their procurement.

The procurement officer's award recommendation memo should explain the basis for the recommendation along with the actual differences in technical proposal quality between the proposals, including a listing of the identified significant technical strengths and deficiencies for each proposal and the evaluation committee's individual rankings and the final consensus rankings.

#### **6.4.3.1 Numerical Rankings**

Numerical ranking is the most widely used evaluation method in the State for CSP procurements. Under this method, technical proposals are ranked individually for each of the technical criteria, based on identified strengths and deficiencies in each offeror's technical proposal, up to the total number of proposals that remain reasonably susceptible of being selected for award. So if three proposals remain, each proposal is ranked 1, 2, or 3 for each of the technical criteria<sup>56</sup>, and then an overall consensus technical ranking of 1, 2, or 3 is identified for each proposal.

#### **6.4.3.2 Adjectival Ratings**

Adjectival rating is another evaluation method, where instead of a ranking number being assigned to the technical criteria and overall technical proposal rankings, a descriptive adjective or code is assigned. An example could be a range of terms such as “Excellent,” “Good,” “Acceptable,” “Weak,” and “Unacceptable.” Sometimes each of these terms includes a further description of how the term is to be applied when evaluating proposals (e.g., “Excellent = a thorough response that exceeds the RFP requirements in all ways and contains no deficiencies”). Under this method, technical proposals are rated individually for each of the technical criteria based on identified significant strengths and deficiencies in each offeror's technical proposal applying a descriptive rating term to each proposal.

#### **6.4.3.3 Scoring/Points/Percentages**

The use of points, scoring systems, or assigning of percentages for technical criteria and overall rankings is sometimes used in an attempt to remove subjectivity from the CSP evaluation and award recommendation process. The rationale is usually that by letting a mathematical formula determine the award recommendation, subjectivity is minimized in the evaluation process, and evaluators and offerors are better able to determine the magnitude of technical differences between proposals. However, the establishment of the particular mathematical formula to be used, the delegation of points to the technical and financial criteria, and the eventual assignment of points by the evaluation committee all still require subjective analysis and determination. The RFP should define the mathematical formula to be used, the delegation of points per criteria, and describe how evaluators will assign points to these criteria (identifying particular sections of the RFP scope of work and proposal responses where points may be awarded).

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<sup>56</sup> If the evaluation committee has identified a specific technical criterion that is satisfied equally by more than one offeror, the committee members may desire to give the same ranking to those proposals in that criterion. However, the procurement officer should guide the committee to differentiate between technical solutions where possible.

## **6.5 Offeror Discussions - Competitive Sealed Proposals Only**

### **6.5.1 Discussions**

Discussions<sup>57</sup> include opportunities for qualified offerors to amend, supplement, or clarify their proposals (i.e. cures), oral presentations, as well as Best and Final Offer (BAFO) discussions.

Qualified offerors include only those offerors that are responsible and whose proposals are initially classified as being reasonably susceptible of being selected for award. Qualified offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions, negotiations, and clarification of proposals.

Note that for all discussions, the existence and identity of other offerors, or information from another offeror's proposal may not be disclosed, and any oral clarification shall be confirmed in writing and become part of the offeror's proposal.

### **6.5.2 Oral Presentations**

As stated in the RFP, all offerors that remain reasonably susceptible of being selected for award after the initial review of proposals may be invited to provide an oral presentation to discuss their technical proposal. Oral presentations are an opportunity for offerors to present their teams, provide demonstrations, highlight the strengths of their proposal, ask questions about the procurement process, and answer any questions the evaluation committee and procurement officer may have. As noted above, any oral clarification or supplement provided by an offeror at an oral presentation should be confirmed in writing so as to be incorporated into the technical proposal.

These presentations will typically be scheduled after the evaluation committee and procurement officer have had time to perform a complete review of the technical proposals, noting any initial issues with the proposals that may need to be cured. Any issues raised by the evaluation committee or procurement officer during an oral presentation should also be provided to the offeror in writing via a cure letter as detailed below.

### **6.5.3 Cure Letters**

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<sup>57</sup> COMAR 21.05.03.03.C

For any issues noted in an offeror's technical proposal by the evaluation committee or procurement officer, including identification of technical proposal deficiencies, flaws, incomplete proposal elements, exceptions, responsibility concerns, or even proposal items that simply need to be clarified further, the procurement officer should send written notice to the offeror with the issues enumerated to obtain a cure for the deficiency or request further clarification or proposal supplementation. These cure letters are an opportunity for offerors to revise and supplement their proposals and attempt to minimize identified proposal deficiencies. Responses must be in writing and are incorporated into the offeror's technical proposal.

Cure letters should identify each specific issue and deficiency to be addressed in an individual offeror's proposal and provide the due date for the requested response. The cure letter should not reference or include elements from another offeror's proposal to request that this offeror propose a similar element.

#### **6.5.4 Technical Best and Final Offers (Tech. BAFO)**

The procurement officer may request a technical best and final offer<sup>58</sup> (BAFO) from offerors to confirm in writing all substantive clarifications of, or changes in, their technical proposals made in the course of discussions. The technical BAFO should be conducted prior to finalizing the evaluation of technical proposals and before opening financial proposals. Each BAFO request after the first requires its own written determination explaining the need for the additional request, to be signed by the agency head or designee.

After cure letter responses or technical BAFOs are received, the procurement officer should consider rejecting any proposal deemed not reasonably susceptible of being selected for award, if any substantive requirement is still not met in the offeror's technical proposal. The procurement officer may also send a follow-up cure letter noting the continued proposal deficiency, or identifying additional deficiencies. If after subsequent cure letters the offeror is still deemed not reasonably susceptible of being selected for award, then the offeror's proposal should be rejected and the offeror notified of the reasons for the proposal rejection.

#### **6.5.5 Amendments after Receipt of Proposals**

If the State wishes to add or change a requirement to an RFP's scope of work, based on information received during the proposal evaluation process, an RFP amendment should be

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<sup>58</sup> COMAR 21.05.03.03 D

issued to all offerors remaining in competition to allow those offerors to supplement their proposals to meet the new or changed requirement. If the amendment would likely change the competitive landscape, then the State should consider cancelling the procurement and re-soliciting.

## **6.6 Final Technical Proposal Evaluation - Competitive Sealed Proposals Only**

### **6.6.1 Overall Technical Consensus**

The final technical proposal evaluation meeting occurs after all:

- Written proposals have been thoroughly reviewed;
- Oral presentations, if requested, have been conducted; and
- Cure letters have been issued and responses and any technical BAFOs have been received.

Once these actions have been completed, the procurement officer and the evaluation committee determine the rankings/ratings/scores based on the individual technical criteria, and then finalize the technical evaluation with an overall consensus ranking/rating/score for each technical proposal using the individual technical criteria weightings as described in the RFP.

### **6.6.2 Final Qualification of Proposals**

After technically ranking/rating/scoring all proposals, the procurement officer and evaluation committee should consider the following questions in technically qualifying proposals and determining which proposals remain reasonably susceptible of being selected for award prior to opening the financial proposals:

- If this offeror would perform the contract for free, would you select it?
- If this were the only offeror, would you contract with it?

If the consensus answers to these questions are “no”, this proposal should be determined not qualified; either the proposal is not reasonably susceptible of being selected for award or the offeror is not responsible. Accordingly, the proposal should be eliminated; the offeror notified; and the associated financial proposal should not be opened.

## **6.7 Opening of Financial Proposals - Competitive Sealed Proposals Only**

After the technical proposal evaluation is completed, all proposals classified as reasonably susceptible of being selected for award move on to the next procurement evaluation stage: the opening of the financial proposals.

As with the opening of the technical proposals, any financial proposals that are opened shall be opened in the presence of at least two State employees. It is recommended that the financial proposals be opened in the presence of the evaluation committee, and documented in the procurement file.

### **Evaluation and Ranking**

The financial proposal evaluation and ranking is usually a quick and straightforward process where the RFP financial proposal model calculates a single, bottom-line total evaluated price. Financial proposals that are complex may require expert analysis to assist with the financial evaluation. The financial proposals are ranked according to their total evaluated price with the lowest price ranked highest and so on.

## **6.8 Requests for Financial Best and Final Offers (BAFO) - Competitive Sealed Proposals Only**

### **6.8.1 Discussions**

As noted in Section 6.5, discussions<sup>59</sup> include opportunities for qualified offerors to amend, supplement, or clarify their proposals through cures, oral presentations, as well as BAFO discussions in limited circumstances. Qualified offerors include only those offerors that remain responsible and whose proposals are initially classified as being reasonably susceptible of being selected for award. Qualified offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions, negotiations, and clarification of proposals.

Note that for all discussions, the existence and identity of other offerors, or information from another offeror's proposal may not be disclosed, and any oral clarification shall be confirmed in writing and become part of the offeror's proposal.

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<sup>59</sup> COMAR 21.05.03.03.C

### **6.8.2 Best and Final Offers (BAFOs)**

When in the best interest of the State, the procurement officer may invite qualified offerors to revise their initial financial proposals by submitting BAFOs.<sup>60</sup> The primary objective is to get better pricing after the initial financial proposals have been opened; however, a BAFO may also provide an opportunity to clarify any remaining uncertainties with the proposals and correct any mistakes or exceptions taken in the financial proposals. Note that when the RFP has been amended in a manner that could affect the financial proposals, a BAFO opportunity should be extended to all qualified offerors. In addition, an agency may request a BAFO to cure an error by one or more offerors on the financial proposal. All offerors must be afforded the same opportunity for discussions and amendment of their proposals.

As discussed earlier, if before an award has been made, it appears that an offeror has made a mistake in its proposal, the offeror should be asked to confirm its proposal. If the offeror is able to correct the mistake, it should be allowed to do so through the BAFO process. Otherwise, reference COMAR 21.05.02.12 “Mistakes in Bids.”<sup>61</sup>

The procurement officer may determine that more than one round of BAFOs is in the best interest of the State. Each BAFO request after the first requires its own written determination explaining the need for the additional request, to be signed by the agency head or designee.

Except for real property leases, any additional offeror discussions at this stage in the procurement, after opening of financial proposals and before award, require a BAFO request to all remaining qualified offerors. Real property lease CSP procurements allow for further discussions and negotiations to obtain the best lease terms.

## **6.9 Final Evaluation – Determining Best Value - Competitive Sealed Proposals Only**

### **6.9.1 Classification of Proposals<sup>62</sup>**

The proposals may be classified as reasonably susceptible of being selected for award or not reasonably susceptible of being selected for award (in comparison to bids being classified as

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<sup>60</sup> COMAR 21.05.03.03.D

<sup>61</sup> COMAR 21.05.03.03.E

<sup>62</sup> COMAR 21.05.03.03.B

responsive or non-responsive in CSB procurements). If a proposal is classified as not reasonably susceptible of being selected for award or the offeror is determined by the procurement officer to be not responsible, the offeror shall be notified and its proposal rejected.

In order for a proposal to be considered reasonably susceptible of being selected for award, the evaluation committee and procurement offeror should be willing and prepared to recommend award of a contract at some price level to any qualified offeror. Conversely, if the evaluation committee and procurement officer are not willing to recommend award of a contract to a specific offeror at any price level, that offeror should be determined to be not qualified. The offeror should be deemed not responsible, the proposal should be deemed not susceptible of being selected for award, or both.

### **6.9.2 Best Value Determination**

Determining best value requires weighing the strengths and deficiencies of the technical proposals in relation to the pricing in the financial proposals. The RFP will prescribe the evaluation method used, the criteria used to rank, rate or score proposals, as well as the weighting to be afforded to technical and financial proposals. The three options are:

1. Technical and financial factors receive equal weight;
2. Technical factors receive greater weight than financial factors; or
3. Financial factors receive greater weight than technical factors.

The proposal that is recommended for contract award will always be the overall highest ranked, rated or scored proposal from the combined technical and financial proposal best value determination. This proposal will be determined to be the most advantageous offer to the State.

### **6.9.3 Evaluation Committee Recommendation**

During the final evaluation committee meeting, the procurement officer documents the evaluation committee rankings, ratings or scoring (depending on the evaluation method used, as detailed in the RFP) of all qualified proposals, the evaluation committee's consensus recommended selection for award, and the strengths and deficiencies of all proposals based on the RFP evaluation criteria. A proposal's strengths and deficiencies should be based on specific references to the technical proposal using the evaluation criteria detailed in the RFP, and not comparisons to other proposals. The procurement officer's documentation from the evaluation committee will be used to support both the award recommendation and the debriefing process.

The procurement officer then decides whether to accept the evaluation committee's recommendation. While the procurement officer's recommendation is often in consensus with that of the evaluation committee recommendation, there may be instances in which the procurement officer disagrees with the evaluation committee's recommendation. In such instances, the procurement officer should work with the evaluation committee to determine the reasons for the differences in opinion, and attempt to ensure that all proposal elements are being interpreted in a similar manner. If a consensus is still unable to be reached, the procurement officer should document the differences of opinion in the procurement file. It is the duty of the procurement officer to make the final award recommendation, taking into account the evaluation committee's recommendation.

#### **6.9.4 Final Award Recommendation<sup>63</sup>**

The procurement officer shall make a determination recommending contract award to the responsible offeror whose proposal is determined to be the most advantageous to the State, considering price and evaluation factors set forth in the RFP.

The procurement officer should follow its agency's internal policies for required approval by the agency head or designee of award recommendation.

### **6.10 State Finalizes Selection of Successful Vendor(s)**

#### **6.10.1 Notice to Recommended Awardee**

The procurement officer should provide notice to the successful bidder/offeror that it is recommended for award. At this time, the procurement officer is responsible for obtaining the required number of original contracts, signed only by the recommended awardee, as well as the contract affidavit and other required documents, such as any MBE, VSBE, bonds, or insurance documentation. The cover letter transmitting those documents to the successful bidder/offeror should encourage the successful bidder/offeror to return those documents within the period of time specified in the solicitation, generally five days for the contract and contract affidavit or 10 days if MBE and VSBE documents are required.

Failure by the recommended awardee to respond in a timely manner may result in the

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<sup>63</sup> COMAR 21.05.03.03.F

bidder/offeror being determined to be not responsible, and the award recommendation may go to the next bidder/offeror in line. This step requires a new award recommendation and notice to the next recommended awardee.

### **6.10.2 Reviewing Additional MBE or VSBE Documents, if applicable**

After the recommended awardee and its subcontractors submit the additional required MBE documentation, the procurement officer should review and compare these documents to the original MBE forms submitted with the bid/proposal.

#### *A. MBE “72-hour Rule”*

Sometimes, after bid/proposal submission, but before contract execution, the recommended awardee becomes aware that an MBE intended to be included as a subcontractor is unavailable or ineligible to participate as an MBE. In that event, the recommended awardee has 72 hours to notify the procuring agency. The procurement officer, in consultation with the agency's MBE liaison officer, is authorized to permit an amendment to the MBE schedule, if the recommended awardee has provided in writing a satisfactory justification in accordance with COMAR 21.11.03.12.

#### *B. Approving or Denying a Waiver Request*

If the recommended awardee requested a full or partial MBE waiver, the procurement officer would request that the recommended awardee submit its documentation supporting the waiver request. The procurement officer in consultation with the MBE liaison officer would review the documentation and make a determination whether the recommended awardee made a good faith effort to try to obtain MBE subcontractor participation and grant or deny the waiver. The procurement officer must grant the waiver if the recommended awardee provides a reasonable demonstration of good faith efforts to achieve the goal(s). The procurement officer must obtain sign off by the agency head or designee and forward a copy of the waiver determination to the Governor's Office of Small, Minority, and Women Business Affairs. See COMAR 21.11.03.11.

### **6.10.3 Assistant Attorney General Sign-off for Legal Sufficiency of the Contract**

Upon receipt of the recommended awardee's signed contracts, the procurement officer should examine them to see that all requisite signatures and documentation have been provided. Send the entire package of contract documents, including attachments, to the agency's AAG for review and sign-off for legal sufficiency. This sign-off is required before any other approvals may be obtained.

#### **6.10.4 Verification of Good Standing with the State Department of Assessments & Taxation (SDAT) and Comptroller's Office**

Before final contract approval (see Section 7.1), the procurement officer must verify through SDAT that the recommended awardee is a company registered to do business in the State and is in good standing. In addition, the procurement officer must obtain through the Comptroller's Office a tax clearance number. In the event that a deficiency is noted by either agency, the recommended awardee may be given the opportunity to correct any defect.

Failure by the recommended awardee to correct any deficiency in a timely manner may result in the bidder/offeror being determined to be not responsible, and the award recommendation may go to the next bidder/offeror in line.

#### **6.10.5 Confirmation of Non-Debarment**

To confirm continuing eligibility of the recommended awardee to receive a contract, before final contract approvals, the procurement officer should confirm the recommended awardee made no relevant disclosures on the Bid Proposal or Contract Affidavits and again check the debarment list on the BPW website.<sup>64</sup>

#### **6.10.6 Notice of Award Recommendation<sup>65</sup>**

After the recommended awardee has provided all required signed contract documentation and all verification and confirmations have occurred, the procurement officer shall provide notice to all remaining offerors of the recommendation for award prior to final approval of the contract. The notice of award recommendation should include the ranking table with the technical, financial and overall rankings, including the total evaluated financial price, of all reasonably susceptible offers. (This is the information that would be publically disclosed in a BPW agenda item.) The notice should also include the opportunity to request a debriefing.

### **6.11 Unsuccessful Offeror Debriefings - Competitive Sealed Proposals Only**

Unsuccessful offerors may submit a written request within a reasonable time for a debriefing to the procurement officer. Debriefings shall be provided at the earliest possible time after the

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<sup>64</sup> <http://bpw.maryland.gov/Pages/debarments.aspx>

<sup>65</sup> COMAR 21.05.03.03.G

procurement officer receives a request for a debriefing and before the contract award is presented to the agency head or designee or BPW for approval.

Debriefings are to be limited to discussion of only that particular unsuccessful offeror's proposal; discussion of another offeror's proposal is not permitted. The debriefing may not include discussion or dissemination of the individual evaluation committee members' thoughts, notes, or individual rankings. Debriefings are to be factual and consistent with the evaluation of that unsuccessful offeror's proposal and shall provide information on areas in which the unsuccessful offeror's technical proposal was deemed weak or deficient. A debriefing affords offerors an opportunity to learn how to improve.

Finally, a summary of each debriefing shall be included in the procurement file.

## 7. Award Process

### 7.1 Final Approvals

There may be several approvals that are required when the procurement officer is ready to move forward with a contract award, as well as approval from a procurement Control Agency and the BPW when the contract value exceeds a specified level. A final funding certification is also required.<sup>66</sup>

#### 7.1.1 Agency Contract Approvals

- A. *Small Procurements*: Under State law, procurement units may award small procurements up to \$50,000 without approval from a procurement Control Agency or the BPW.<sup>67</sup> However, the regulations governing small procurements require different contract award documentation depending on the value of the small procurement.<sup>68</sup>
  
- B. *Emergency Contracts*: An agency may award a contract or contract modification exceeding \$50,000 without approval from a procurement Control Agency or the BPW on the basis of an emergency, in order to avoid or mitigate serious damage to public health, safety, and welfare as defined in regulation.<sup>69</sup> Emergency awards are required to be reported to the BPW within 45 days after contract award or modification.

#### 7.1.2 Control Agency Approvals

Procurement Control Agencies are delegated specific levels of procurement and contracting authority by the BPW via regulations.<sup>70</sup> For procurement actions above the small procurement threshold and up to the BPW's delegated levels of procurement and contracting authority, the Control Agency shall review and approve the agencies' procurement action, and then submit to the BPW a monthly report summarizing those procurement actions. These reports are known as Procurement Agency Activity Reports (PAAR).<sup>71</sup>

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<sup>66</sup> COMAR 21.03.03.01

<sup>67</sup> SFP §13-109

<sup>68</sup> COMAR 21.05.07

<sup>69</sup> COMAR 21.05.06.02

<sup>70</sup> COMAR 21.02.01.04

<sup>71</sup> COMAR 21.02.01.05B

### **7.1.3 BPW Approvals**

All procurement actions that exceed the delegated procurement and contracting authority from the BPW must be submitted for approval on a BPW Action Agenda Item.<sup>72</sup> The BPW meets approximately every two weeks to review and approve these procurement action recommendations as well as other items under the BPW's authority. Plan for BPW agenda submissions to the controlling agency at least two months prior to the anticipated contract notice to proceed.

Note that if an agency has a pending protest or appeal of a protest decision on a procurement contract award recommendation, and that agency wishes to move forward with approval of the contract in the face of protest or appeal, that agency must provide information related to the protest or appeal in the BPW Action Agenda Item. In addition, the agency must detail why execution of the contract without delay is necessary to protect substantial State interests.<sup>73</sup> The procuring agency shall notify the Maryland State Board of Contract Appeals (MSBCA) of its intent to award a contract pending protest or appeal.<sup>74</sup>

### **7.1.4 FMIS – ADPICS, R\*STARS**

**Financial Management Information System (FMIS)** is the official accounting system of record for the State comprised of accounting, purchasing and inventory, and reporting applications.

**Relational Standard Accounting and Reporting System(R\*STARS)** is the State's accounting system which controls the appropriations, disbursements and receipts of state funds. There are various accounting functions integrated into RSTARS: Budgeting, Fixed Asset Accounting, Cost Allocation, Document Tracking, General Ledger Accounting, Revenue Expenditure Accounting, Project and Grant Accounting, 1099 Processing, Federal and State Liability Offset, and Payment Processing.

**Advanced Purchasing Inventory Control System (ADPICS)** automates many of the activities related to procurement, receiving, payables, and inventory functions. ADPICS provides a comprehensive set of reports and online inquiries that are used to present procurement and

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<sup>72</sup> COMAR 21.02.01.05

<sup>73</sup> COMAR 21.10.02.11

<sup>74</sup> COMAR 21.10.02.11A(2)

inventory data maintained by the system. ADPICS reports include table listing and security reports as well as procurements, payables, and inventory reports.

Two auxiliary Reporting Systems exist in addition to the standard ADPICS and R\*STARS reports. FOCUS/ADHOC is a reporting system that provides end-user access to R\*STARS and ADPICS data from a single mainframe repository site. The intent is not to replace the existing FMIS standard reports, but rather enhance the end-user's capabilities by adding another level of information retrieval to what is already a comprehensive assortment of standard reports. Currently, the FOCUS/ADHOC database contains a large subset of data from the two applications. Users can view data from R\*STARS and ADPICS systems in one FOCUS session (depending on their security clearance).

## 7.2 Execution of the Contract

A procuring agency shall not sign (execute) a contract until all necessary approvals are received. After all necessary approvals have been obtained, including sign-off as to legal form and sufficiency, agency head or designee approval, Control Agency and BPW approvals when necessary, and certification by the appropriate fiscal authority as to the availability of funds, the signed contract from the successful bidder or offeror is to be executed by the procuring agency with the appropriate department authority's signature.<sup>75</sup>

The bidder or offeror is now the contractor. This final action constitutes contract award and may be accompanied by a Notice to Proceed (NTP) letter to the contractor. The contractor should also be sent an original fully executed contract.

Finally, the procurement file should be compiled with all required documentation, including an original fully executed contract.<sup>76</sup>

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<sup>75</sup> COMAR 21.05.03.03F. See also COMAR 21.03.03.01 re: Fund Certification; COMAR 21.03.02 re: Form and Legal Sufficiency

<sup>76</sup> COMAR 21.05.01.07

### 7.3 Publication on eMMA

After a contract is entered into, the procurement agency shall publish notice of its award in eMMA not more than 30 days after execution and approval of the contract, not including SP awards.<sup>77</sup>

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<sup>77</sup> COMAR 21.05.02.16, 21.05.03.03G, 21.05.04.04, 21.05.05.04A, 21.05.06.03E(1)

## **8. Contract Administration Process**

The contract has been executed. The contract monitor should be familiar with the mandatory terms and conditions and contract requirements in the scope of work in order to oversee contract performance. The procurement officer along with the contract monitor and program staff set-up a kick-off meeting to discuss everyone's role in completing the requirements of the contract.

If issues and problems arise during the contract administration phase, all parties to the contract must understand their rights and obligations under the contract and how to approach difficult situations and resolve problems. Any issues or problems that arise should be identified as soon as possible and communicated to all parties to obtain a resolution.

### **8.1 Kick-off Meeting with Procurement Officer, Contract Monitor, Program staff, and Contractor**

#### **8.1.1 Conduct a Kick-Off Meeting**

This meeting is led by the procurement officer to turn over the contract to the contract monitor. The Agenda for this meeting typically includes a discussion of:

- The scope of work, schedule of deliverables, MBE and VSBE commitments and pricing for invoicing.
- The specifications, terms and conditions to clarify performance and payment.
- The relevant policies and procedures, especially for making changes to the contract that must go through the procurement officer.
- The need for written modifications and open communication between all parties.
- The reporting requirements.
- Any specific pressing issues key to the success of the subject contract.

At the completion of the meeting, any meeting notes should be kept in the contract file by the contract monitor. (See 8.1.2 below.)

#### **8.1.2 Set-up a Contract File**

The contract monitor should keep a contract administration file apart from the procurement officer's procurement file. The location and contents of the file should be readily available to the

agency procurement and contracting leadership to ensure continued contract monitoring during staff transitions.

The contract administration file contains information to demonstrate contractor performance.

The contract administration file should contain the following documentation:

- Executed contract and Notice to Proceed;
- Copies of task orders issued;
- Copies of insurance documentation;
- All correspondence, including letters, emails, phone call notes, status reports, schedules, and any other communications;
- Justification (notes to file) detailing decisions including stop work orders or claims;
- Information on change orders or other modifications;
- Copies of invoices; and
- Close-out related documents.

### **8.1.3 Develop a Contract Monitor Work Summary**

As a best practice, the contract monitor may want to create a work summary to readily monitor the contractor's performance of milestones during the contract. The summary could include: target dates (schedules); performance obligations (what is considered success); review and acceptance/rejection of deliverables; invoicing (pricing); and reporting requirements.

## **8.2 Contract Performance**

### **8.2.1 Manage Contract Compliance**

The contract monitor should ensure contractor compliance in all aspects of the contract requirements. Some requirements to be monitored are:

- Quality, quantity, and timeliness of performance and deliverables;
- Reporting;
- MBE participation goals and sub-goals;
- VSBE participation goals;
- Any ongoing contractor certifications; and
- Ongoing insurance verification.

## **8.2.2 Corrective Action Plans**

If the contract monitor identifies any deficiencies in a contractor's performance, the contract monitor in consultation with the procurement officer and the MBE Liaison officer where applicable, may request a corrective action plan from the contractor. The procurement officer should provide a draft cure notice for internal and AAG review before release. If the deficiencies are considered material, the contract monitor and procurement officer may require a corrective action plan prior to imposing liquidated damages or performance guarantees, based upon the requirements of the contract.

## **8.2.3 Assessing Liquidated Damages or Performance Guarantees**

A contract may contain a liquidated damages provision, performance guarantees or service level credits in connection with contractor performance failures or shortfalls. The solicitation document incorporated into the contract will define how and when these are applicable. However, all contracts with MBE participation goals must have a liquidated damage provision that applies if the contractor fails to comply in good faith with the MBE laws or pertinent terms of the contract consistent with guidance issued by GOSBA.<sup>78</sup> The procurement officer should contact their AAG before utilizing any of these tools.

## **8.2.4 Applying Bonds**

Before taking any action in relation to submitting a claim on a bond held by the State, consult with your AAG to ensure that everything is done properly.

### **8.2.4.1 Bid Bonds**

Examples of when a claim on a bid bond can arise include where the bidder refuses to enter into the contract, or after the bidder is awarded the contract, if the surety declines the issuance of the performance bond.

### **8.2.4.2 Performance Bonds**

Performance bond claims arise when the contractor is in default of the contract's terms and conditions.

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<sup>78</sup> COMAR 21.11.03.10(E).

### **8.2.4.3 Payment Bonds**

Payment bond claims arise when the contractor fails to pay its subcontractors.

### **8.2.5 Contract Claims**

A contract claim is a complaint by a contractor or by a procurement agency relating to a dispute in connection with a procurement contract.<sup>79</sup> The filing of a claim and responding to a contractor's claim require significant coordination with the procurement agency's legal team.

Generally, the process when the State files a claim is as follows:

1. State must issue written notice of claim to the contractor.<sup>80</sup>
2. Within 30 days of receipt of written notice of claim, the contractor must submit a written response.<sup>81</sup>
3. If the contractor fails to submit a response, provides an inadequate response, or denies the claim or the relief sought in whole or in part, and the claim is not otherwise settled, the State must issue a final decision on the claim.<sup>82</sup>
4. Within 30 days of receipt of the final decision, the contractor may file a written notice of appeal to the MSBCA.<sup>83</sup>

Generally, the process when a contractor files a claim is as follows:

1. The contractor must issue a written notice of claim with the appropriate procurement officer within 30 days after the basis for the claim is known or should have been known, whichever is earlier.<sup>84</sup>
2. The contractor must timely submit the claim to the appropriate procurement officer.<sup>85</sup>
3. Unless otherwise resolved, the State must issue a final decision on the claim. The final decision must be reviewed and approved by the reviewing authority, typically the agency head or designee, preferably after consultation with the AAG.<sup>86</sup>

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<sup>79</sup> COMAR 21.10.04 provides specific guidance on how to process a contract claim.

<sup>80</sup> COMAR 21.10.04.05(A) identifies requirements for the notice of claim.

<sup>81</sup> COMAR 21.10.04.07 identifies requirements for the contents of the response.

<sup>82</sup> COMAR 21.10.04.08(C) identifies requirements for the content of the final decision.

<sup>83</sup> COMAR 21.10.05 identifies the appeal process.

<sup>84</sup> COMAR 21.10.04.02 (A)

<sup>85</sup> COMAR 21.10.04.02(B) identifies requirements for the timing and content of the claim.

<sup>86</sup> COMAR 21.10.04.04(B) identifies requirements for the content of the final decision; and COMAR 21.10.04.04(C) identifies specific timing provisions applicable in the context of claims under construction contracts.

4. Within 30 days of receipt of the final decision, the contractor may file a written notice of appeal to the MSBCA.<sup>87</sup>

### **8.2.6 Termination for Default (for Cause)**

The Termination for Default provision is a mandatory provision for all procurement contracts.<sup>88</sup> This provision allows the State to terminate a contract when the contractor fails to perform its contractual obligations. This provision allows the State to terminate the contract but does not provide the same right to the contractor. While a contractor may submit a contract claim against the State, as described above, it cannot terminate the contract.

Termination for Default is a powerful provision, the exercise of which may have significant legal and operational consequences. The procurement officer should seek guidance from their AAG before exercising this right.

### **8.2.7 Termination for Convenience**

Even when no event of default exists, the State has the right to terminate “for convenience” if such termination is in the State’s best interest.<sup>89</sup> Similar to the Termination for Default provision, the Termination for Convenience provision is a unilateral State right. Exercising the State’s right to terminate a contract for convenience may have significant legal and operational consequences. Accordingly, the procurement officer should seek guidance from their AAG prior to exercising such right.

## **8.3 Payment for Accepted Goods and Services<sup>90</sup>**

### **8.3.1 Invoicing**

In order to receive payment for goods or services provided under a State contract, the contractor must submit a Proper Invoice to the contracting agency.

A “Proper Invoice” is defined as a bill, written document, or electronic transmission, readable by the agency, provided by a vendor requesting an amount that is due and payable by law under a written procurement contract for property received or services rendered.<sup>91</sup> The Proper Invoice

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<sup>87</sup> COMAR 21.10.05 identifies the appeal process.

<sup>88</sup> COMAR 21.07.01.11.

<sup>89</sup> COMAR 21.07.01.12.

<sup>90</sup> COMAR 21.06.09

<sup>91</sup> COMAR 21.06.09.01C

must include the following information, without error: (a) the contractor's federal employer identification number or Social Security number, (b) the procurement contract or purchase order number or another adequate description of the procurement contract; and (c) any documentation required by regulation or the procurement contract.<sup>92</sup>

Review of invoices received, including timing and procedures for processing, is governed by regulation.<sup>93</sup>

### **8.3.2 Prompt Payment**

Unless payment is deferred, delayed, or set-off per regulations, payment under a State contract must be made within 30 days after the day payment becomes due under the contract, or if later, after the day on which the agency receives a Proper Invoice.<sup>94</sup>

### **8.3.3 Interest on Late Payments**

“Late Payment” means any amount that is due and payable by law under a written procurement contract, without deferral, delay, or setoff per regulations, and remains unpaid more than 45 days after an agency receives a Proper Invoice.<sup>95</sup>

The State is required to pay interest on late payments if a contractor submits an invoice for late payment interest within 30 days after the date of the State's payment of the amount on which the interest accrued, and a contract claim has not been filed.<sup>96</sup>

## **8.4 Contract Renewal Options and Modifications**

### 8.4.1 Contract Renewal Options

“Option” means the unilateral right of the State under a contract to extend the contract for an additional period of time, or to purchase delimited additional goods or labor, or to purchase materials or facilities that have been leased.<sup>97</sup>

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<sup>92</sup> COMAR 21.06.09.02

<sup>93</sup> COMAR 21.06.09.04

<sup>94</sup> COMAR 21.06.09.05

<sup>95</sup> COMAR 21.06.09.01A

<sup>96</sup> COMAR 21.06.09.06

<sup>97</sup> COMAR 21.01.02.01(61)

A valid contract option is one where the State alone holds the power to exercise the option and the option price is fixed in, or is objectively ascertainable under the terms of the original contract. This principle applies to options to extend the period of performance, as well as to other types of options such as extra quantities, add/deduct alternates, etc.

The exercise of a contract option must be approved and awarded before the initial term, or any previously-awarded option term, expires. A contract, which has expired, may not be reinstated through modification, or the exercise of options.

See BPW Advisory 1998-3 Contract Options for additional information.

<http://www.bpw.state.md.us/Pages/adv-1998-3.aspx>

#### 8.4.2 Contract Modifications

“Contract modification” means any written alteration in the specifications, delivery point, date of delivery, contract period, price, quantity, or other provision of any existing contract, whether accomplished in accordance with a contract provision, or by mutual action of the parties to the contract. It includes change orders, extra work orders, supplemental agreements, contract amendments, or reinstatements.<sup>98</sup>

A contract modification to a delegated contract that individually increases or decreases the contract value by more than \$50,000 must be submitted to the BPW on an Action Agenda for approval.

Any modification to a delegated contract that causes the overall value of the contract to exceed \$200,000 (or appropriate lesser amount for capital equipment, sole source, or competitive procurements when a single bid or proposal was received) must be brought to the BPW on an Action Agenda for approval.

Any proposed modification, notwithstanding the value of the modification, that would materially change the scope of a delegated contract must be brought to the BPW on an Action Agenda for approval.

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<sup>98</sup> COMAR 21.01.02.01(26)

As a general rule, goods or services that are outside the scope of a contract must be procured through one of the source selection methods prescribed in COMAR Title 21 (for example, sole source; CSB; CSP) rather than by modifying an existing contract. To determine whether a proposed modification is outside the scope of an existing contract, consider whether the modification could have affected the competition at the time the original solicitation issued.

Procurement officers and contract monitors should seek guidance from the AAG when deciding if proposed work may be accomplished through a contract modification or requires a new contract action.

See BPW Advisory 1995-1 Contract Modifications for additional information.

<http://www.bpw.state.md.us/Pages/adv-1995-1.aspx>

## 8.5 Re-procurement Plans

When there is an anticipated ongoing need for the goods or services provided by a contract beyond the term of the current contract, the procurement officer should begin working on a timeline to begin the next procurement. Refer to Manual Section 3.5 for Planning the Solicitation. A new contract with an anticipated ongoing need for goods or services that does not contain renewal options should be accompanied by a re-procurement plan when submitted for approval. A contract that contains renewal options should include a re-procurement plan when the final renewal option is submitted for approval. For a contract with renewal options that may not be exercised, the decision to re-procure for goods or services or exercise the renewal option must be determined early enough to allow ample time to conduct the re-procurement.

Planning for complex procurements or those historically requiring extra time because of protests, transition periods, or cancellations will warrant earlier re-procurement planning.

*Best Practice Tip: Document desired changes for the next iteration of the solicitation in the procurement file of the existing contract.*

## **8.6 Contract Close Out/Transition**

A procurement officer should take steps to prepare for the end of a contract and, if necessary, the transition from an outgoing contractor to an incoming one. Among these steps, reviewing the contract documents to ensure the contractor has satisfied its obligations and to note any end-of-contract responsibilities are essential to preparing for the end of a contract. The new contract may provide a for a start-up period by the incoming contractor to obtain documents, data files, testing, etc. from the outgoing contractor or the State before commencing performance of the new contract.

### **8.6.1 Prohibition of a Non-Compete Clause**

The procurement officer should be aware of any language in the current contract prohibiting a contractor from having non-compete agreements with its employees. The State's prohibition of non-compete clauses would allow an incoming contractor to hire the personnel of an outgoing contractor, which may help ensure a successful transition of services between contractors.

### **8.6.2 Record Retention**

A procurement officer must also be mindful of record retention obligations of both the procurement officer and the contractor relative to the expiring contract, which may survive the contract expiration. The contractor's obligations can be found in the contract, COMAR, and, if applicable, other contract documents such as the solicitation. In addition, the procurement officer's retention obligations are drawn from various reporting and auditing requirements.

## **9. Reference Links**

### **9.1 eMaryland Marketplace Advantage – FAQs, Quick Reference Guides (QRGs) and Training Modules for Buyers and Vendors**

<https://procurement.maryland.gov/emma-faqs/>

<https://procurement.maryland.gov/emma-qrgs/>

<https://procurement.maryland.gov/training/>

### **9.2 FMIS - ADPICS/RSTARS - Reference Manual and Training**

<https://doit.maryland.gov/support/Pages/ FMIS.aspx>

<http://doit.net.md.gov/servdesk/Pages/TrainingDocs.aspx>

<http://doit.net.md.gov/servdesk/Pages/TrainingVideoList.aspx>

### **9.3 Maryland Procurement Portal (Procurement.Maryland.gov website)**

<https://procurement.maryland.gov/>

### **9.4 BPW Advisories - Debarment/Suspensions list**

<http://www.bpw.state.md.us/Pages/advisories.aspx>

<http://www.bpw.state.md.us/Pages/debarments.aspx>

### **9.5 COMAR**

<http://www.dsd.state.md.us/comar/SearchTitle.aspx?scope=21>

### **9.6 SFP**

<https://advance.lexis.com/container?config=00JAA1NTM5MzBmZC02MTg2LTQzMmEtYmI5Yy0yZW EwYzA1OGEwNTYKAFBvZENhdGFsb2fdgr2eooaZj7MpSZGOIwWq&crid=a88bbb8b-e635-43b3-a2dd-557f87548f0a>

### **9.7 MSBCA website**

<https://msbca.maryland.gov/>

## **9.8 GOSBA website**

<https://gomdsmallbiz.maryland.gov/Pages/default.aspx>

## **9.9 MCE website**

<https://mce.md.gov/>

## **9.10 BISM website**

<https://www.bism.org/>

## **9.11 MD WORKS website**

<http://www.mdworks.com/>