

PROCUREMENT GUIDELINES

**OF THE
NIAGARA FRONTIER TRANSPORTATION AUTHORITY,
THE
NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC.,
THE
GREATER BUFFALO-NIAGARA REGIONAL TRANSPORTATION
COUNCIL
AND THE
NIAGARA INTERNATIONAL TRANSPORTATION TECHNOLOGY
COALITION**

Effective April 23, 2012
By Resolution of the Board
of Directors

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SCOPE

Set forth herein are comprehensive guidelines established for the purpose of governing the procurement of goods and services by the Niagara Frontier Transportation Authority, the Niagara Frontier Transit Metro System, Inc. (the "Authority"), the Greater Buffalo-Niagara Regional Transportation Council ("GBNRTC") and the Niagara International Transportation Technology Coalition ("NITTEC").

INTENT

It is the Authority's intent to implement and strictly enforce Procurement Guidelines that encourage and promote open competition; ensure fairness and equity in the procurement process; and result in the acquisition of goods and services at fair and reasonable prices.

DEFINITIONS

1. ADVERTISEMENT:

- A. The publication of a Notice of Procurement Opportunity in any of the following forums, as is appropriate: newspapers of general circulation in Erie and Niagara County; regional, state, national and international trade journals and magazines; newsletters, MBE/WBE/DBE publications and the Authority website.
- B. The dissemination of a Notice of Procurement Opportunity to three (3) or more potential bidders, proposers, or suppliers by telephone, in writing or by e-mail.
- C. Any or all methods of advertisement as are herein defined may be utilized as is necessary and appropriate to promote competition under the guidelines.

2. ALLOWABLE INDIRECT COSTS:

Those costs generally associated with overhead that cannot be specifically identified with a single project or contract and are considered reasonable and allowable under specific State contract or allowability limits.

3. BOARD:

The Authority Board of Commissioners.

4. COMPETITIVE RANGE:

All proposals that are determined to have a reasonable chance of being selected for award based upon price and other factors as stated in the Notice of Procurement Opportunity or Request for Proposals ("RFP").

5. CONTRACT FOR GOODS OR SERVICES:

Any authorized written agreement; including contracts, purchase orders, letter agreements or memoranda of understanding, which creates a mutually binding legal relationship, which obligates the seller to furnish products, services or public work, and the buyer to pay for same.

6. CONTRACTOR:

Any person, firm or entity obligated to sell, furnish, provide or render goods or services to the Authority pursuant to a contract including sellers, consultants, vendors, suppliers and construction contractors.

7. COST-REIMBURSEMENT (CR) TYPE CONTRACT:

A general compensation arrangement which requires the Authority to pay the Consultant a fixed fee plus all allowable actual costs (as established by predetermined cost principles and rates) provided such costs and fee do not exceed the final negotiated contract price, as incurred by the Consultant in performing the "agreed to" Scope of Work.

8. DISADVANTAGED BUSINESS ENTERPRISE (DBE):

Small business concern as defined pursuant to Section 3 of the Small Business Act: (a) which is at least fifty-one percent (51%) owned by one or more socially and economically disadvantaged individuals or, in the case of a publicly-owned business, at least fifty-one percent (51%) of the capital stock of which is owned by one or more socially and economically disadvantaged individual; (b) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

9. DISCRIMINATORY JURISDICTION

Any other country, nation, province, state or political subdivision thereof which employs a preference or price distorting mechanism to the detriment of or otherwise discriminates against a New York state business enterprise in the procurement of goods and services by the same or a non-governmental entity influenced by the same, as defined in section 2879 of the Public Authorities Law.

10. DISCUSSION:

Discussion is defined as any oral or written communication between the Authority and an offeror, other than communication conducted for the purpose of minor clarification whether or not initiated by the Authority, that (1) involves information essential for determining the acceptability of a proposal, or (2) provides the offeror an opportunity to revise or modify its proposal.

11. EMERGENCY:

Danger or threat of harm to life, health, safety, environment or property which requires immediate preventative action. Emergency is a subcategory of "Sole Source".

12. **EXIGENCY:**

Prospect of interruption to or obstruction of the NFTA's efficient operation or adequate provision of service, arising from an unforeseen circumstance. Exigency is a subcategory of "Sole Source".

13. **FIRM-FIXED-PRICE (FFP) TYPE CONTRACT:**

A general compensation arrangement which places the risk of performance for a lump sum on the contractor, regardless of the actual costs incurred by the contractor. The only allowable adjustments to the lump sum contract price are those arising from authorized changes in scope of services or changes in specifications.

14. **FOREIGN BUSINESS ENTERPRISE:**

A business enterprise, including a sole proprietorship, partnership or corporation, which offers for sale, lease or other form of exchange, goods sought by the Authority and which are substantially produced outside New York State, or services, other than construction services, sought by the Authority which are substantially performed outside New York State. For purposes of construction services, foreign business enterprise shall mean a business enterprise which has its principal place of business outside New York state.

15. **LABOR SURPLUS AREA FIRM:**

A business entity which performs substantially in a labor surplus area (a geographical area as is defined by the U.S. Department of Labor as an area of concentrated unemployment, underemployment or labor surplus).

16. **MINORITY BUSINESS ENTERPRISE (MBE):**

Any business enterprise which is at least fifty-one percent (51%) owned by, or in the case of a publicly owned business, at least fifty-one percent (51%) of the common stock or other voting interests of which is owned by minority group members, and such ownership interest is real, substantial and continuing. The minority ownership must have and exercise the authority to independently control the business decisions of the entity. The enterprise must also be authorized to do business in New York State, be independently owned and operated, and not be dominant in its field. For the purposes of these guidelines "minority group member" shall have the meaning set forth in § 2879(3) of the Public Authorities Law.

17. **NEGOTIATION:**

Procurement by evaluation of proposals in the competitive range on the basis of pre-established and published selection criteria which criteria may be evaluated with price as a factor.

18. **NEW YORK STATE CONTRACT REPORTER:**

A publication of procurement opportunities printed for the New York State Economic Development Bureau pursuant to the New York State Economic Development Law.

19. NOTICE OF PROCUREMENT OPPORTUNITY:

A written or verbal communication which shall identify the proposed procurement action and the terms of pursuing the opportunity.

20. PROCUREMENT:

The acquisition by the Authority, of products, services, or public works by purchase, excepting:

- A. the purchase of periodicals, reference materials, treatises or professional research tools;
- B. the payment of fees or tuition associated with continuing education courses, training courses, conferences, seminars and symposiums;
- C. expenditures governed by the NFTA's "Travel Policy and Guidelines";
- D. the purchase of advertising space or advertising time in any medium; and
- E. the purchase of catering services.

21. PRODUCT:

Equipment, materials and supplies.

22. PUBLIC WORK:

The construction, demolition, repair, rehabilitation, restoration or maintenance of any building, roadway, structure, fixture, facility or improvement owned by or leased to the Authority.

23. PURCHASE:

The receipt of products, services or public works by the Authority, in exchange for money, property or other valuable consideration including like-kind trades.

24. QUALIFICATIONS BASED PROCUREMENT:

A competitive procurement method under which competitors' qualifications are evaluated on the basis of pre-established and published selection criteria and negotiations are conducted with only the most qualified offeror. Price shall not be considered as a factor in determining the most qualified offeror.

25. RESPONSIBLE:

A potential contractor is responsible if it can demonstrate that it has the ability to perform successfully under the terms of the proposed contract, taking into account the offeror's technical and financial capability.

26. RESPONSIVE:

A bid is responsive if it complies with the terms of the solicitation in all material respects, and it is completed, executed and submitted in accordance with the instructions in the solicitation.

27. SEALED BIDDING:

A competitive procurement method under which a contract is awarded to the lowest priced responsive, responsible bidder.

28. SERVICES:

A professional, consulting, technical, or other service, including but not limited to legal, testing, accounting, bookkeeping, secretarial, management consulting, audit, investment banking, planning, training, statistical research, insurance, advertising, public relations, architectural, engineering, appraisal, janitorial, surveying, housekeeping and waste disposal, performed for a fee, commission or other compensation.

29. SINGLE BID:

Two or more competitive bids are solicited and only one bid is received. A Single Bid is a subcategory of "Sole Source".

30. SINGLE SOURCE:

The goods or services to be procured are available from only one responsible source; or no other goods or services will satisfy the NFTA's requirements; or prior state, federal or Board approval has been granted. Single Source is a subcategory of "Sole Source".

31. SMALL PURCHASE:

The acquisition of goods or services having an actual price less than Fifty Thousand Dollars (\$50,000). See, Article 14.

32. SMALL PURCHASE FORMAL BIDDING:

A "small purchases" method of procuring goods or services under \$50,000.00, based upon competitive selection following the publication of a notice of procurement opportunity in the New York State Contract Reporter and the acceptance of sealed bids or proposals. See, Article 14.

33. SMALL PURCHASE INFORMAL BIDDING:

A small purchases method of procuring goods or services under \$15,000, based upon competitive selection which may be made on the basis of written or telephonic quotes and in accordance with the guidelines set forth in Article 14(C).

34. SOLE SOURCE

A general category of awards where competition is waivable, or is not feasible under the circumstances. The included subcategories are: single bid; exigency; expediency, and single source.

35. SOLICITATION:

The process by which the Authority contacts prospective vendors, suppliers or consultants to provide notice of a procurement opportunity and invite the submission of quotes, bids, proposals or statements of qualifications.

36. TERM CONTRACT:

A competitively procured contract based on qualifications, that allows the NFTA, at its discretion, to retain the services of the term consultant or term contractor, on a project-by-project basis, subject to pre-negotiated terms and conditions.

37. TIED-BID:

The receipt of two or more equally low, responsive bids from responsible bidders. See, Article 6 (D).

38. TIME AND MATERIAL (T & M) CONTRACT:

A general compensation arrangement which provides for a fixed rate including overhead and profit, and material paid for at cost plus handling charges.

39. WOMEN-OWNED BUSINESS ENTERPRISE (WBE):

Any business enterprise which is at least fifty-one percent (51%) owned by, or in the case of a publicly-owned business, at least fifty-one percent (51%) of the common stock or other voting interests of which is owned by citizens or permanent resident aliens who are women, and such ownership interest is real, substantial and continuing. Women business owners must have and exercise the authority to independently control the business decisions of the entity. The enterprise must also be authorized to do business in New York State, be independently owned and operated, and not be dominant in its field.

GUIDELINES

ARTICLE 1. BOARD APPROVAL

Board approval is required for:

- (A) All Contracts for Goods or Services in the actual or estimated value of Fifty Thousand Dollars (\$ 50,000) or more; or
- (B) Contracts where performance is to continue for a period in excess of one (1) year.

ARTICLE 2. BUY AMERICA

(A) **FEDERAL REQUIREMENTS:** Procurements which include federal funds are subject to federal "Buy America" requirements. Generally, this means that steel, iron, and/or manufactured products which are incorporated in public works or product purchases are to have been produced in the United States, unless a waiver has been granted by a federal agency or the project is subject to a general waiver (See, 49 CFR 661.7 App. A). General waivers have been established for microcomputer equipment, including software, and purchases for less than \$100,000. Rolling stock must have a 60% domestic content and final assembly must take place in the United States.

(B) **STATE REQUIREMENTS:**

- (i) Product purchase contracts involving an estimated expenditure in excess of \$50,000.00 shall require that to the extent such products are made of, fabricated from, or contain steel components that such steel components are produced or made in whole or substantial part in the U.S., its territories or possessions, except in the procurement of motor vehicles and automobile equipment assembled in Canada in conformity with the "Automotive Products Trade Act of 1965" or any amendments thereto.
- (ii) Public work projects in excess of \$100,000.00 shall require that all structural steel, reinforcing steel or other major steel items to be incorporated in the project shall be produced or made in whole or substantial part in the U.S., its territories or possessions.
- (iii) By resolution of the Board of Commissioners these state provisions may be waived if it is determined that such provisions would result in unreasonable costs or that such steel products or steel components cannot be produced or made in the U.S. in sufficient and reasonably available quantities or of satisfactory quality or design.

ARTICLE 3. FOREIGN BUSINESS ENTERPRISES

In the event of the award of a Contract for the Goods or Services from a Foreign Business Enterprise in an amount equal to or greater than one million dollars, simultaneously with notifying the successful bidder or proposer, the NFTA shall notify the NYS Commissioner of Economic Development of the pending award. The pending Contract for Goods or Services shall not be entered into until at least fifteen days have elapsed. However, this provision does not apply to Contracts for Goods or Services awarded on an emergency or exigency basis or where a waiver of this requirement has been obtained from the NYS Commissioner of Economic Development.

The notification to the NYS Commissioner of Economic Development shall include the name, address and telephone and facsimile number of the Foreign Business Enterprise, a brief description of the goods or services to be obtained, the amount and term of the proposed Contract for Goods or Services, and the name of the individual at the Foreign Business Enterprise or acting on behalf of the same who is principally responsible for the proposed Contract for Goods or Services.

Pursuant to section 2879 of the Public Authorities Law, the Authority shall not enter into a Contract for Goods or Services with a Foreign Business Enterprise which has its principal place of business located in a Discriminatory Jurisdiction contained on the list prepared by the NYS Commissioner of Economic Development pursuant to subdivision 6 of section 165 of the State Finance Law. The provisions of this subparagraph may be waived by the Executive Director if the Executive Director determines in writing that it is in the best interests of the Authority to do so. The Executive Director shall deliver each such waiver to the NYS Commissioner of Economic Development.

ARTICLE 4. PERFORMANCE SECURITY AND BONDING REQUIREMENTS

(A) Bid Security

All Public Work contracts equal to or in excess of Fifty Thousand Dollars (\$50,000) shall require bid security equal to ten percent (10%) of the bid price. Bid security may be in the form of a bid bond, certified check or other guaranteed negotiable instrument or letter of credit.

The bid security of the bidders submitting the three lowest bids will be retained until execution of the contract or until a maximum of 180 days after bid opening, whichever is sooner. Bid security of the remaining bidders will be returned within ten calendar days after the bid opening date.

In the event of neglect or refusal on the part of the successful bidder to execute the contract and furnish evidence of insurances within ten (10) days after written notification of notice of intent to award the contract, and furnish the Performance Security and Labor and Material Payment Bond within three (3) days after receipt of the executed contract, the entire bid security shall be forfeited to and retained by the Authority as liquidated damages for such neglect or refusal.

Bid security is not mandated for product contracts.

(B) Performance Security

All Public Work contracts of Ten Thousand (\$10,000) Dollars or more, shall require a performance bond or certified check or other guaranteed negotiable instrument or letter of credit guaranteeing the contractor's faithful performance.

Performance security is not mandated for product contracts.

In instances where a performance bond is offered, the bond shall be in the amount of the contract and be issued by a duly incorporated entity authorized to guarantee the faithful performance of contracts and to do business in the State of New York as a surety.

(C) Letter of Credit

A letter of credit used as bid or performance security should be an irrevocable letter of credit issued by a bank or financial institution of B-rating or better, as determined by Moody's and Standard & Poors, signed by an authorized representative of the issuing institution and naming the Authority as beneficiary. The letter of credit must state that an amount representing at least ten percent (10%) of the bid price is available to be drawn on unconditionally by the Authority under the expressed terms and conditions. These terms and conditions including the location at which the Authority can draw the funds, an effective date, and expiration date should be clearly stated in the letter of credit.

(D) Labor And Material Payment Bonds

All Public Work contracts, regardless of amount, shall require Labor and Material Payment Bonds in an amount equal to the contract amount.

(E) Maintenance Bonds

All Public Work contracts, regardless of amount, shall require as a minimum, a one (1) year Maintenance Bond, which period shall commence as of the date of Final Acceptance. The Maintenance Bond shall be in the full contract amount.

(F) Waiver

- (1) Bid and Maintenance Bond requirements may be waived prior to bid date by the Executive Director or his designee for cause. In instances where such bonds are not required payment shall be withheld until full and complete performance has been accomplished under the terms of the contract.
- (2) Performance Security and Labor and Material Payment Bonds may be waived by the Executive Director or his designee, prior to the bid date, in accordance with State Finance Law § 137(1), provided that the aggregate amount of the Contract is under One Hundred Thousand Dollars (\$100,000.00) and that the Authority retains twenty percent from each progress payment or estimate until the entire contract work has been completed and accepted, at which time the Executive Director or his designee may authorize, pending the payment of the final estimate, the release of up to seventy-five percent of the retained percentage.

ARTICLE 5. PREVAILING WAGE RATES

Certain Public Work contracts may be subject to the payment of prevailing wage rates, regardless of the dollar amount of the contract. It shall be the responsibility of the Procurement Department and/or the Engineering Department to obtain the applicable prevailing wage rates for the particular procurement and ensure that the rates are included in the bid solicitation.

The Procurement and Engineering Departments are encouraged to contact the Legal Department for assistance in the event they are uncertain as to the applicability of prevailing rates to a particular procurement.

ARTICLE 6. SEALED BIDDING

- (A)** Sealed bidding is the preferred procurement method for acquisitions of Fifteen Thousand Dollars (\$15,000) or more where the following factors are present:
- (i) The contract will be based upon a complete, adequate and realistic specification or purchase description and/or an itemized bid proposal;

- (ii) Two (2) or more responsible bidders are willing and able to compete effectively for the award;
- (iii) A fair and reasonable award can be made principally on the basis of price; and
- (iv) The procurement lends itself to an FFP-type contract.

(B) Sealed bidding is not required when:

- (i) The purchase is under \$15,000 and an Informal; small purchase procurement procedure is being followed;
- (ii) An emergency or exigency exists which renders delay impermissible;
- (iii) A single source has been validated;
- (iv) A single bid has been validated;
- (v) Federal or state authorization for non-competitive negotiations has been obtained;
- (vi) A modification or amendment to a contract is justified;
- (vii) The procurement lends itself to a CR-type contract; or
- (viii) A resolution adopted by a vote of at least two-thirds of the Members in attendance at a meeting of the Board states that the Board has determined that it is not in the best interest of the Authority to advertise for bids.

(C) Minimum requirements for sealed bidding include:

- (i) the preparation of an independent estimate prior to bid opening;
- (ii) the "advertisement" of an Invitation For Bids (IFB) or a synopsis of a procurement action;
- (iii) the acceptance of sealed bids;
- (iv) the public opening of sealed bids;
- (v) the preparation of a written bid analysis; and
- (vi) the award of a FFP type contract to the lowest priced responsive, responsible bidder.

(D) In the event of a tied-bid, the contract shall be awarded based upon the following descending order of priorities:

- (i) Small businesses which are "labor surplus area firms".
- (ii) Other small businesses.
- (iii) Other businesses that are also "labor surplus area firms".
- (iv) Other businesses (i.e., DBEs, WBEs & MBEs).
- (v) If two or more bidders still remain equally eligible after application of the above order of priority, award shall be made by a drawing by lot limited to those bidders. If time permits, the bidders involved shall be given an opportunity to attend the drawing. The drawing shall be witnessed by at least three persons, and the contract file shall contain the names and addresses of the witnesses and the person supervising the drawing.

ARTICLE 7. SEALED BIDDING_(Two-Step Variation)

(A) The two-step sealed bidding method may be appropriate in instances where the specification is "functional" or performance based and there may exist a variety of acceptable technical approaches.

- (i) Step one consists of the request for, submittal, evaluation, and "discussion" (optional) of a technical proposal. For purposes of two-step sealed bidding, this

includes engineering approach, special manufacturing processes and special testing techniques. No pricing is considered in step one. Discussions may be conducted for clarification of questions relating to technical requirements.

- (ii) Step two consists of the submission of sealed price bids by those who submitted acceptable technical proposals in step one. Each bidder's price shall be based on its own technical proposal. If an award is made, a FFP-type contract is awarded to the lowest priced responsive, responsible bidder.

ARTICLE 8. NEGOTIATION

- (A) Procurement by Negotiation is the preferred procurement method for acquisitions of Fifteen Thousand Dollars (\$15,000) or more where one (1) or more of the following factors are present:

- (i) The desired goods or services cannot be precisely defined, described or standardized.
- (ii) The desired end product is conceptual in nature.
- (iii) A CR type contract is contemplated.
- (iv) Discussions concerning the technical aspects and price negotiation are intended.
- (v) Offerors are to be given the opportunity to revise the price or technical aspects of their proposal.
- (vi) Price alone cannot be the determinative factor in award. Quality, qualifications, performance data, or other contractual factors are to be considered in selecting the most advantageous offering.
- (vii) Artistic or aesthetic values supersede price as primary selection criteria.

- (B) **Procurement by Negotiation is not required when:**

- (i) The purchase is under \$15,000 and an Informal; small purchase procurement procedure is being followed;
- (ii) An emergency or exigency exists which renders delay impermissible;
- (iii) A single source award or single bid award is validated;
- (iv) Federal or state authorization for noncompetitive procurement has been obtained;
- (vi) A resolution adopted by a vote of at least two-thirds of the Members in attendance at a Meeting of the Board states that the Board has determined that it is impractical to advertise for competitive proposals or it is not in the best interest of the Authority to do so; or
- (vii) a modification or amendment to a contract is justified.

- (C) **Minimum requirements for Negotiation include:**

- (i) The solicitation of statements of qualifications (SOQ) and/or the advertisement of a Request for Proposals (RFP) a minimum of 21 days shall be allowed for the preparation of proposals and the setting of the proposal due date;
- (ii) In the event that an SOQ is advertised, preparation of a preselection list of the best qualified consultants, based on the experience and qualification data supplied by the consultants. Generally, the preselection list may consist of 3 to 5 consultants. If technical proposals were solicited in conjunction with the advertisement, all consultants who submitted responsive proposals must be included for evaluation.
- (iii) The acceptance of sealed proposals;
- (iv) The evaluation of the proposals on the basis of published selection criteria;
- (v) The published selection criteria shall be as follows:

- (a) Professional Services; 40% qualifications and experience, 30% technical criteria and 30% cost.
 - (b) Revenue Generating and Other Services; 20% qualifications and experience, 30% technical criteria and 50% cost.
 - (c) Technical/Operation Sensitive Services; 20% qualifications and experience; 40% technical criteria and 40% cost.
 - (d) Specialty Vehicles, Equipment and Technical Products; 20% qualifications and experience, 50% technical criteria and 30% cost.
 - (vi) The preparation of an independent estimate before opening the sealed proposal;
 - (vii) Proposals within the "competitive range" are identified and discussions are held with each proposer;
 - (viii) Best and final offers (BAFOs) may be requested of all proposers determined to be within the competitive range or on the short-list; and
 - (ix) The Authority evaluates BAFOs and awards either a FFP-type or a CR-type contract to the proposer whose BAFO is most advantageous to the Authority.
- (D)** If so stated in the RFP, selection may be based on the basis of the original proposals, without discussions with any offeror. However, in the event discussions are conducted with any one offeror, discussions **must** then be conducted with all offerors in the competitive range.

ARTICLE 9. QUALIFICATIONS-BASED PROCUREMENT

- (A)** This method is required in procuring architectural, engineering and certain related services whenever state or federal funds will or may be used. There are differences between the Federal Aviation Administration and Federal Transit Administration as to what services are required to be procured in this manner, so reference should be made to the most current version of FAA Advisory Circular 150/5100-14D, FTA Advisory Circular 4220.1F or New York State law for guidance.
- (B) Minimum requirements for a qualifications based procurement include:**
- (i) Empanelling of the selection board, consisting of usually at least three qualified members. If the intended procurement is for a GBNRTC, or NITTEC study either a GBNRTC, or NITTEC, study manager or the GBNRTC, or NITTEC, Executive Director shall be included on the Selection Board, as is appropriate for the scope of the study. The selection board shall be prepared to evaluate qualifications, proposals, potential consultants (i.e., conduct interviews and inquiries as required), and make recommendations. Where a GBNRTC, or NITTEC, study may not be in the direct interest of the Authority, the Selection Board may include representatives from outside agencies which have an interest in the study.
 - (ii) Development by the selection board, of the selection criteria and the evaluation system to be used in preparing a preselection list of consultants, and in determining the final selection.
 - (iii) The solicitation of qualifications by either advertisement of a Request For Qualifications (RFQ) or by requiring qualifications as part of a Request For Proposals (RFP) advertisement. A minimum of 21 calendar days shall be allowed for the preparation of proposals and the setting of the proposal due date.
 - (iv) In the event that an RFQ is advertised, preparation of a preselection list of the best qualified consultants, by the selection board, based on the experience and qualification data supplied by the consultants. If technical proposals were solicited in conjunction with the advertisement, all consultants who submitted proposals must be included for evaluation. Generally, the preselection list may consist of 3 to 5 consultants.

- (v) Notification to the unsuccessful consultants who expressed an interest.
- (vi) Solicitation of sealed technical proposals from each of the consultants.
- (vii) The selection board, at its option may conduct interviews, presentations, and/or discussions. If this option is elected, interviews, presentations, and/or discussions must be held with each consultant who has submitted a technical proposal if the initial solicitation was by way of RFQ. If not, interviews, presentations, and/or discussions must be held with each consultant in the competitive range in accordance with the evaluation of the technical proposals.
- (viii) Evaluation of technical proposals and experience and qualification data based upon published selection criteria of which price shall not be a factor, rank and identify most qualified Consultant.
- (ix) Initiate discussions with the most qualified, acceptable proposer to develop and agree upon the "Scope of Work." Thereafter, the Authority prepares its Engineer's Estimate and requests the cost proposal of the most qualified, acceptable proposer.
- (x) Upon completion of the Engineer's Estimate the selection board shall open and review the cost proposal. Thereafter, negotiations are undertaken.
- (xi) If a fair and reasonable price cannot be reached with the most qualified, acceptable proposer, negotiations are commenced with the next most qualified and acceptable proposer. The cost proposal of the next most qualified proposer may be requested **only after** negotiations with the most qualified proposer have been formally terminated. This process shall be repeated until the successful negotiation of a fair and reasonable contract price for an acceptable proposal from a qualified proposer is reached, or until the procurement is discontinued;
- (xii) In accordance with the requirements of New York Public Authorities Law §2879(3)(b)(iv) the NFTA will not refuse to negotiate with a professional firm solely because the ratio of the "Allowable Indirect Costs" to direct labor costs of the professional firm or the hourly rate in any labor category of the professional firm exceeds a limitation generally set by the Authority in the determination of the reasonableness of the estimated cost of services to be rendered by the professional firm, but rather the Authority should also consider the reasonableness of cost based on the total estimated cost of the service of the professional firm which should include, among other things, all the direct labor costs of the professional firm for such services, plus all "allowable indirect costs," other direct costs, and negotiated profit of the professional firm. A professional firm is defined for the purpose of this subparagraph as any legal entity permitted by law to practice the professions of architecture, engineering or surveying.
- (xiii) Submittal of written and documented recommendation for award by the selection board to the Board of Commissioners when required. In addition, the GBNRTC, or NITTEC, studies documentation of the Selection Board's recommendation for award will be maintained at the GBNRTC, or NITTEC, offices and will be available to interested parties.

ARTICLE 10. OPTIONS

An option is a unilateral right in a contract by which, for a specified time, the Authority may acquire additional equipment, supplies, or services than originally procured. An option may also extend the term of the contract. An option must be evaluated as part of the original contract award. In addition, for procurements funded by the Federal Transit Administration, a cost and price analysis must be conducted at the time of exercise of the option in order to ensure that the option price is still fair and reasonable.

ARTICLE 11. NEW YORK STATE CONTRACT REPORTER

All procurements of goods or services having an actual or estimated value of Fifteen Thousand Dollars (\$15,000) or more shall be published in **THE NEW YORK STATE CONTRACT REPORTER (NYSCR)**. The Notice of Procurement opportunity shall appear in the **NYSCR** at least fifteen (15) business days prior to the Bid or Proposal due date. However, advance publication shall not be required under emergency or exigency conditions, or when an expediency action has been adopted by the Board, or if the procurement is being resolicited within 45 business days after the date bids or proposals were originally due.

At the time a determination of intent to award a procurement contract is made, the following information shall be submitted for publication in NYSCR:

For procurement contracts obtained through the

Sealed Bidding process, the result of the bid opening including the names of bidding firms and the amounts bid by each;

For procurement contracts obtained through the Negotiation and/or Qualification-Based processes, the names of firms submitting proposals and the proposal selected as the best value offer; and

For all other procurement contracts, the name of the proposed awardee.

ARTICLE 12. SOLE-SOURCE AWARDS

(A) A sole source award shall not be justified on the basis of:

- (i) A lack of advance planning by the initiating department; or
- (ii) Concerns related to the amount of funds available (i.e., funds will expire) to the NFTA for the acquisition of supplies or services.

(B) A sole-source award is justified under circumstances limited to the following:

- (i) A validated "Single Bid";
- (ii) Emergency (Article 23);
- (iii) Exigency (Article 23);
- (iv) Expediency (waiver of competition, for cause, by a two-thirds vote of the Board of Commissioners) (Article 24); or
- (v) A validated "Single Source" (Article 12[D]).

A cost or price analysis must be prepared for all sole source awards in accordance with FTA guidelines.

(C) A single bid is not validated for purposes of sole source award until NFTA staff:

- (i) canvasses all, or in the alternative, three (3) or more prospective bidders from whom bids were solicited to learn the causes for the lack of bidding activity;
- (ii) evaluates and documents the responses;
- (iii) reconsiders its requirements and specifications;
- (iv) makes findings supporting the need for the original requirements and the sufficiency of the specifications, and that the single bidder is responsive and responsible or that the proposer is qualified and the proposal is acceptable; and
- (v) conducts a price or cost analysis to establish that the bid price is fair and reasonable. The cost analysis shall verify the proposed cost data, the projections of the data and the evaluation of specific elements of cost and profit.

- (D) A single source is not validated for purposes of a sole source award until NFTA staff investigates and documents one (1) or more of the following circumstances:
- (i) The proposed source is the original manufacturer and the terms and conditions of a viable warranty would be violated by the installation of unauthorized parts or components in existing equipment, machinery, vehicles, or systems, or "servicing" by uncertified or unauthorized personnel, and there are no other sources from which authorized parts or components or servicing from certified or authorized personnel may be obtained;
 - (ii) The proposed source possesses exclusive, limited rights in data, patent rights, copyrights, secret processes, or the control of basic raw material;
 - (iii) The proposed source is the provider under an existing "term contract" (see, Definitions) and the procurement constitutes a subaward thereunder.
 - (iv) Prior approval by a State or Federal funding Agency.
 - (v) The Executive Director has determined, in accordance with a standardization program adopted by the NFTA, that only specified makes and models of technical equipment and parts will satisfy the NFTA's needs for additional units or replacement items and only one (1) source is available;
 - (vi) The goods or services are available through an existing contract which had been awarded through a competitive procurement method and a price or cost analysis establishes that the price is fair and reasonable.
- (E) All eligible contracts for the purchase of goods or services which are to be awarded on a single source basis, sole source basis or pursuant to any other method of procurement that is not a competitive procurement and where the aggregate consideration under the contract may reasonably be valued in excess of \$1,000,000 and eligible amendments to contracts previously approved by the Comptroller where the value of the amendment is 10% or more of the contract amount previously approved by the Comptroller are subject to the prior review and approval of the New York State Comptroller. Please refer to section 2979-a of the Public Authorities Law and Part 206 to 2 N.Y.C.R.R. for relevant definitions and the process to be followed.

NOTE: With the exception of awards made under Articles 12(D)(i), (ii), (iii) the aggregate value of single source, unadvertised awards to any one firm or person shall not exceed Fifty Thousand Dollars (\$50,000) per year, absent Board approval.

ARTICLE 13. CONTRACT TYPES

- (A) A Firm Fixed Price (FFP) type contract should be used where there are no substantial uncertainties relating to cost, performance or schedule (Lump Sum and Unit Price contracts are examples of FFP-Type Contracts).
- (B) Cost-Reimbursement (CR) type contracts are generally appropriate for qualifications-based procurements and Negotiated procurements based on a Scope of Services rather than detailed Specifications.
- (C) Cost Plus Percentage of Cost type contracts, and Cost Plus Percentage of Construction Cost type contracts are prohibited.
- (D) Time and Material (T&M) contracts are permitted only:
 - (i) After a determination that no other compensation arrangement is suitable; and

- (ii) The contract or purchase order contains a price ceiling that the contractor exceeds at its own risk; and
- (iii) All labor and equipment rates (including overhead and profit), are predetermined and set forth in the contract and materials are to be paid for at cost.

ARTICLE 14. SPECIFICATIONS

- (A) To permit the preparation and evaluation of bids on a common basis, specifications shall present a clear and accurate description of the desired technical requirements for materials, products or services. Further, the specifications shall state the criteria by which the Authority shall determine whether the requirements have been satisfied.
- (B) The specifications shall reflect the NFTA's actual needs and shall not contain features which unduly restrict competition.
- (C) A "brand name or equal" description may be used when:
 - (i) It is impractical or uneconomical to make an accurate description of technical requirements; or
 - (ii) An adequate or more detailed description could not be provided, other than by inspection and analysis, in time for the procurement; and
 - (iii) The specification clearly sets forth the salient physical and functional characteristics of the brand name product which are essential to the Authority's minimum requirements and will be used to evaluate proposed or equal substitutions; and
 - (iv) The specification includes the complete common generic identification of the "brand name" product, together with applicable model, make or catalog number, and address of the company.
- (D) Or equal substitutions should be considered for acceptance where the Authority determines that the proposed substitution is equal in all material respects to the brand-name product. Or equal substitutions should not be rejected on the basis of minor differences in design, construction or features which do not affect the suitability of the products for their intended use.
- (E) Prior to developing acquisition specifications Authority staff shall conduct a study of the market place to determine market availability to satisfy the intended acquisition. If a specification is in any way restrictive, a needs analysis must be prepared establishing justification for the specifications. Also, a market analysis must be prepared to document the efforts made in identifying the available market place.

ARTICLE 15. SMALL PURCHASES

- (A) Small purchase acquisitions do not require Board approval unless the term of such acquisition will continue in excess of one year.
- (B) **Formal Bidding**

Contracts for goods or services equal to or in excess of Fifteen Thousand Dollars (\$15,000), but less than Fifty Thousand Dollars (\$50,000) may be awarded by the Executive Director or his designee, upon satisfaction of the following minimum requirements:

- (i) Publication of a notice of procurement opportunity in the NEW YORK STATE CONTRACT REPORTER (NYSCR), and either advertisement of a notice of procurement opportunity in any other appropriate forum, or dissemination of a notice of procurement to at least three (3) potential offerors by telephone or in writing.
- (ii) Dissemination of detailed information regarding the proposed procurement, including but not limited to, terms and conditions of the contractual relationship and the scope of services to all interested potential offerors.
- (iii) Receipt of competitive bids or proposals pursuant to sealed bidding procedures or Negotiation procedures, as is applicable.
- (iv) Examination of OGS NYS Commodity Index to determine whether the procurement may be obtained from that source on terms advantageous to the NFTA.
- (v) Documentation of the procedures followed and report of same including identification of the budget line item, to the Executive Director or his designee.

(C) Informal Bidding.

Contracts for goods or services for less than Fifteen Thousand Dollars (\$15,000) may be awarded by the Executive Director, his designee, or for less than Five Thousand Dollars (\$5,000) may be awarded by the General Counsel, the Chief Financial Officer, any General Manager or Director, the Executive Director of the GBNRTC or the Executive Director of NITTEC, or their designee (note, that any such delegation must be in writing), upon satisfaction of the following minimum requirements:

- (i) If appropriate, examination of OGS NYS Commodity Index to determine whether the procurement may be obtained from that source on terms advantageous to the Authority.
- (ii) At least three (3) written or telephonic quotes must be solicited for purchases equal to or over Three Thousand Dollars (\$3,000) and under Fifteen Thousand Dollars (\$15,000). Purchases up to Three Thousand Dollars (\$3,000) may be made without quotes, if the procurement manager or her designee considers the prices to be fair and reasonable.
- (iii) For each, procurement records shall be maintained which set forth: the names and addresses of the contractors or vendors solicited; the terms and prices quoted; whether the goods or service may be procured under the OGS NYS Commodity Index, and if so, the price.
- (iv) In the case of procurements of Three Thousand Dollars (\$3,000) or more, if three (3) or more quotations cannot be obtained because there is not a sufficient number of suppliers able to meet the purchase requirements (including timely delivery), such facts shall be set forth in writing.
- (v) Approval of a small purchase contract award shall not be granted unless and until the foregoing written information has been reviewed and found to be acceptable. Approval may be indicated by dated signature authorization by the Executive Director or the authorized individual.
- (vi) Price Lists or catalogs may be used in obtaining three (3) or more quotes.

(D) A written confirmation of the successful contractor's quotation, including price and relevant contract terms shall be obtained in the case of verbal quotes or offers, prior to award.

(E) In the event a "Single Source" or "Single Bid" selection is the subject of a Small Purchase under \$15,000, authorization for the purchase must come from the Executive Director.

ARTICLE 16. FEDERAL, STATE AND COUNTY CONTRACT LISTS

The State Office of General Services contract prices and County contract prices are deemed competitive prices. Contracts may be awarded based on the state or county contract price without additional competitive procedures. The United States General Services Administration (GSA) has identified specific contracts that the NFTA is authorized to use. Contracts may be awarded based on the federal contract price when allowed by the GSA. If the contract price available through the federal, state or county price lists is lower than the lowest bid price after sealed bidding, formal bidding, or informal bidding, the bids shall be rejected and a contract awarded based upon the federal, state or county contract price.

ARTICLE 17. FUNDING

- (A) In all cases where contracts are being funded by state or federal funds, applicable regulations of the state or federal authorities governing the award of such contracts shall be observed.
- (B) The Federal Aviation Administration and the Federal Transit Administration each have specific criteria for the procurement of Design-Bid-Build and Design-Build contracts. Please refer to the relevant Advisory Circular for specific requirements.
- (C) The Federal Aviation Administration and the Federal Transit Administration each prohibit the use of in-State or local geographical preferences, with the exception of architectural and engineering services.
- (D) The Federal Aviation Administration and the Federal Transit Administration require a cost analysis or a price analysis in connection with every procurement action.
- (E) The Federal Transit Administration requires the use of Part 31 of the Federal Acquisition Regulations with respect to pricing issues.
- (F) The Federal Transit Administration has specific rules governing advance payments and progress payments. Advance payment are prohibited. Progress payments are permitted provided that title has been obtained. Please refer to FTA Circular 4220.1F.
- (G) No contract shall be awarded or obligation incurred for any purpose which involves the expenditure of money, in excess of the monies appropriated and available in the Authority's budgets for said purpose, except as otherwise authorized by the Board.

ARTICLE 18. PROFESSIONAL SERVICE CONTRACTS

- (A) The following guidelines apply to the procurement of consulting or professional services such as legal, audit, planning, testing, accounting, architectural, engineering or surveying services, except to the extent that the procurement of such services are governed by state or federal regulations.
- (B) Professional service contracts which do not exceed Fifty Thousand Dollars (\$50,000) and will not involve services to be rendered in excess of one (1) year may be awarded following either the Formal Bidding or Informal Bidding Small Purchase guidelines set forth under Article 14, as is appropriate.

- (C) The selection of professional service contractors shall be on a competitive basis, except that the Board may waive competition by a two-thirds vote of the Members in attendance at a Meeting of the Board, if it is in the Best Interests of the Authority to do so. The standard of "Best Interest of the Authority" may, but need not be based upon one or more of the following criteria for the selection of professional service contractors:
- (i) Confidentiality;
 - (ii) Specialized expertise or unusual qualifications or services are obtainable from one source only;
 - (iii) Historical relationship with the Authority, the continuation of which will result in some economy advantage to the Authority and will avoid duplication of costs;
 - (iv) Specialized knowledge;
 - (v) Lack of responsible competition, as validated pursuant to Article 11, supra;
 - (vi) Nature, magnitude or complexity of services required;
 - (vii) Lack of resources, support staff, specialized facilities or equipment;
 - (viii) Short term or infrequent need for services; and
 - (ix) Selection which is necessary as a result of emergency or exigency conditions.

ARTICLE 19. DISADVANTAGED BUSINESS ENTERPRISES/MINORITY WOMEN BUSINESS ENTERPRISES

- (A) It is the desire of the Board to promote and assist participation by DBEs, MBEs, WBEs and to facilitate a fair share of the awarding of contracts thereto.
- (B) An updated list of all DBE certified firms in New York State may be obtained from the New York State Unified Certification Program website at www.biznet.nysucp.net. A directory of MWBE certified firms may be obtained from the New York State MWBE website at www.nylovesmwbe.ny.gov. The Procurement Department shall be responsible for referencing such lists prior to the publication of a notice of procurement opportunity or informal solicitation to determine the availability of certified DBE, MBE and WBE entities.
- (C) The Director, EEO/Diversity Development shall ensure that the Authority establishes appropriate goals for participation by minority or women-owned business enterprises in procurement contracts awarded by the Authority and for the utilization of minority and women-owned enterprises as subcontractors and suppliers by entities having procurement contracts with the Authority. Statewide numerical participation target goals shall be established by the Authority based on the findings of the 2010 disparity study.
- (D) Every effort will be made to achieve the MWBE goals assigned to projects. The Authority's procurement solicitation documents shall include MWBE goals as appropriate. These documents are advertised and posted on the Authority's website. MWBE utilization will be monitored and reported by the EEO/Diversity Development Department with assistance from the Engineering and Procurement Departments.

ARTICLE 20. CONFIDENTIALITY AND CONFLICTS OF INTEREST

- (A) Authority staff engaged in the procurement process shall ensure that proprietary information submitted by bidders and proposers, and source selection information, including the number or identity of offerors is not disclosed to any unauthorized person.

In the event a request for such confidential information is made, the Office of General Counsel shall determine the appropriateness of disclosure.

- (B) No procurement contracts shall be entered into with former commissioners, officers or employees of the Authority except to the extent permitted by Section 73 of the Public Officers Law and the NFTA Board of Commissioners' Code of Ethics.
- (C) No procurement contracts shall be awarded to a firm to:
 - (i) Prepare the work statement/specifications for purchase of supplies or a proposed public work when the firm is affiliated with another company whose business is related to the pending procurement. (In order to ensure objective contractor performance and eliminate any unfair competitive advantage, a contractor that develops or drafts specifications for a particular procurement shall be excluded from competing for and performing work under the directly ensuing procurement, unless the initial design contract was awarded under a competitive selection process); or
 - (ii) Perform a study or work effort concerning a certain organization, technical field or geographic area when the firm has a business relationship or common interest with the organization, field or area to be studied.
- (D) The files for procurement contracts covered by Section 139-k of the State Finance Law must include the required information regarding persons or organizations retained to attempt to influence the procurement process. Any contacts that reasonably appear to be an attempt to influence the procurement process by persons or organizations other than those identified in the bid or proposal documents shall be recorded as required by Section 139-k of the State Finance Law.

ARTICLE 21. MINIMUM CONTRACT REQUIREMENTS

- (A) The following types of provisions shall be contained in all goods and services contracts, except that any of the provisions listed which are inapplicable or unnecessary because of the nature or duration of the services to be performed, or goods to be supplied, the location or locations where they are to be performed or supplied, or the type of the compensation being paid, therefore, need not be included:
 - (i) Description of services or goods or the scope and extent of contract work;
 - (ii) Compensation, delineating the contract price and method of payment or the rates and fees upon which compensation shall be based;
 - (iii) Time for performance or date of completion, including when appropriate, dates for completion of significant tasks; the Authority shall not enter into any contract for rolling stock or replacement parts with a period of performance exceeding five years inclusive of options;
 - (iv) Liability of contractor; indemnification of Authority;
 - (v) Reports of contractor;
 - (vi) Ownership of plans, drawings or other products of the performance of the service;
 - (vii) No assignments or subcontracts without the express prior written consent of the Authority;
 - (viii) Maintenance of records, accounts;
 - (ix) Rights of inspection and audit of books and records;
 - (x) Insurance requirements;

- (xi) Termination;
- (xii) Monitoring of the performance of services;
- (xiii) The extent of subcontracting and sub- consulting agreements;
- (xiv) Contract modification or change order requirements;
- (xv) Notice of Claim/Disputes;
- (xvi) Use of Authority's supplies, facilities or property.
- (xvii) Use of Authority's personnel, and certification of key personnel and facilities necessary to accomplish the work within the time required; and
- (xviii) All provisions required to be included in the contracts of the Authority by federal, state or local laws, ordinances, codes, rules or regulations, including when appropriate, notice to the Contractor that the proposed procurement action will be subject to state and/or federal funding regulations and approval.

ARTICLE 22. CONTRACT MODIFICATIONS, CHANGE ORDERS AND SUPPLEMENTAL AGREEMENTS

- (A) Change orders, supplemental agreements or other contract modifications which alter a procurement contract shall be approved by either the Board, the Executive Director, the General Counsel, the Chief Financial Officer, the Executive Directors of GBNRTC and NITTEC, a General Manager, or Director as is appropriate and as is limited by the levels of authorization outlined in Article 11, Small Purchases.
- (B) The Authority shall perform a cost analysis unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or on the basis of prices set by law or regulation.
- (C) Profit shall be negotiated as a separate element, taking into consideration:
 - (i) complexity of the work,
 - (ii) the risk borne by the contractor,
 - (iii) the contractor's investment,
 - (iv) the degree of subcontracting,
 - (v) the contractor's past performance, and
 - (vi) industry profit rates for similar work.
- (D) Any change order, supplemental agreement or other contract modification shall contain a justification assuring that the proposed action is an appropriate alternative, under the circumstances, to a competitive procurement.
- (E) The Federal Transit Administration prohibits cardinal changes, defined as significant changes in contract work that cause major deviations from the original purpose of the work or the intended method of achievement, or cause revisions of contract work so extensive, significant, or cumulative that, in effect, the contractor is required to perform very different work from that described in the original contract. Please refer to FTA Circular 4220.1F for further information.

ARTICLE 23. EMERGENCY OR EXIGENCY

- (A) The General Counsel, Chief Financial Officer, Executive Directors of GBNRTC and NITTEC and General Managers and Directors, or their designee, are authorized to declare an emergency or exigency and to make awards not to exceed Four Thousand Nine Hundred Ninety-Nine Dollars (\$4,999), per occurrence, and shall report same to the Executive Director at the earliest opportunity, as described in part (E), below. The delegation of this authority must be in writing and the designee must report directly to the authorized individual.
- (B) In the event the authorization limit set forth in Paragraph 23(A) will be exceeded, the General Counsel, Chief Financial Officer, Executive Directors of the GBNRTC and NITTEC, Directors or General Managers shall contact the Executive Director or in his absence the Chairman of the Board. The Executive Director is authorized to declare an emergency or exigency and to make awards not to exceed Fifty Thousand Dollars (\$50,000), per occurrence and shall report same to the Chairman at the earliest opportunity, as described in part (E), below.
- (C) In the event the authorization limit set forth in Paragraph 23(B) will be exceeded, the Executive Director shall contact the Chairman of the Board, or in his absence, the Vice Chairman of the Board. The Chairman (or if applicable, the Vice Chairman), is authorized to declare an emergency or exigency and to make awards which may exceed Fifty Thousand Dollars (\$50,000).
- (D) In the event the final contract amount owed is equal to or greater than Fifty Thousand Dollars (\$50,000), the individual responsible for declaring the emergency or exigency shall prepare and submit a "DECLARATION OF EMERGENCY/EXIGENCY REPORT" to the Executive Director for submittal to the Board at the earliest possible Board Meeting. At a minimum, the "DECLARATION REPORT" shall set forth the following information:
- (i) A description of the emergency or exigent circumstances, or the unforeseen circumstance.
 - (ii) A description of the perceived damages or threat of harm or loss, or the perceived interruption to or obstruction of operation or provision of service.
 - (iii) A description of the preventative action taken.
 - (iv) A listing of all NFTA personnel involved in the response or the occurrence.
 - (v) An explanation of the steps taken to procure goods or services and the rationale for the award and procurement decisions made by the individual.
 - (vi) Identification of the source of funds used to pay for the response.
 - (vii) A request for Board ratification of the response to the Emergency or Exigency.
- (E) In the event the final contract amount is less than Fifty Thousand Dollars (\$50,000), the individual responsible for declaring the emergency or exigency shall prepare and submit a "DECLARATION OF EMERGENCY/EXIGENCY REPORT" to the Executive Director at the earliest possible time, documenting the information outlined in sections (D) (i) through (vi), above.

ARTICLE 24. EXPEDIENCY

- (A) The provisions of this article shall be implemented under special and limited circumstances as determined by a two-third's vote of the Members in attendance at a Meeting of the Board, based on the best interests of the Authority upon request by staff seeking Board Waiver of one or more procurement guidelines. The criteria for

establishing best interests of the Authority for the purposes of this Article may be found at Article 18(C).

- (B) The request shall include but not be limited to the following:
 - (i) Statement of objective and rationale for expediency;
 - (ii) Course of action outlining:
 - a. step-by step procedure to accomplish the objective;
 - b. specific guideline waiver request(s);
 - c. Justification and anticipated benefit to the Authority.
 - (iii) Request for authorization to proceed.

ARTICLE 25. WAIVER OF COMPETITION PURSUANT TO SECTION 2879 OF THE PUBLIC AUTHORITIES LAW

Pursuant to section 2879 of the Public Authorities Law the Board may waive competition for the purchase of goods or services from small business concerns or those certified as minority or women-owned business enterprises, or goods or technology that are recycled or remanufactured, in an amount not-to-exceed \$200,000.00. Such a waiver may only be granted for non-federally funded purchases and shall require a two-thirds vote of the Members in attendance at a Meeting of the Board.

ARTICLE 26. RECORDS RETENTION

Procurement records shall be retained in accordance with the New York State Records Retention Manual.

Every procurement file shall contain, at a minimum, records detailing:

- (A) the rationale for the method of procurement,
- (B) the rationale for the selection of contract type,
- (C) reasons for contractor selection or rejection, and
- (D) the basis for the contract price.

ARTICLE 27. PROCUREMENT REPORTING

(A) The Procurement Department shall ensure that on an annual basis, the Authority shall prepare, approve and make publicly available, a report summarizing the Authority's procurement activity for the period of the report. The report shall include a listing of all contracts of Five Thousand Dollars (\$5,000), or more, the selection process used to select such contractors, and the status of existing procurement contracts.

(B) On an annual basis the Office of General Counsel shall prepare and submit for Board approval a report on Procurement Contracts. This report shall include a copy of the existing guidelines, an explanation of the guidelines and any amendments thereto since the last annual report. This report may be made a part of any other reports that the Authority is required to make.

- (C) This information shall be submitted annually through the New York State Public Authorities Data Report to the New York State Division of Budget, and copies thereof to the New York State Department of Audit and Control, the Senate Finance Committee, the Assembly Ways and Means Committee and the Executive Officers and Legislatures of Erie and Niagara Counties.

ARTICLE 28. PROCUREMENT PROTOCOL

The primary objective of procurement is to ensure and foster economy, efficiency and effectiveness in the acquisition of goods and services. To achieve these goals it is essential that all of the participants in the procurement process have a clear understanding of their roles and responsibilities. Set forth in this Article is a general outline of the various departmental functions to be fulfilled in the procurement process. The Procurement Department maintains a comprehensive written procurement systems manual based on these concepts.

(A) Procurement Department:

- (i) The Procurement Department shall be responsible for conducting the following minimum pre-procurement planning activities on at least an annual basis:
- (a) Forecasting the price and availability of items and materials for User Departments.
 - (b) Developing a purchasing schedule for IFBs and RFPs.
 - (c) Establishing purchasing goals and objectives.
- (ii) The functions of the Procurement Department shall be to:
- (a) Analyze the marketplace to determine the status of competition, technological developments, the impact of the economy on potential vendors, labor conditions, and changes in pricing or delivery methods.
 - (b) Communicate and coordinate with similarly situated procurement departments to explore joint purchasing arrangements and to share marketplace information.
 - (c) Analyze User Department procurement requisitions to ensure the proper authorizations are present, and that the procurement is tailored to meet the Authority's needs and is not unnecessary or duplicative. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives and any other appropriate analysis to determine the most economical approach.
 - (d) Prepare invitation for bids, requests for proposals, informal solicitations, and notices of procurement opportunity, as needed.
 - (e) Administer the acquisition process, including: ensuring adequate advertisement of the notice of procurement opportunity; surveying sources; serving as contact for potential contractors; and accepting, opening, evaluating, and tabulating bids;
 - (f) Remain current and in compliance with applicable federal and state laws.
 - (g) Maintain Vendors files.
 - (h) Maintain all support documentation including small purchases procurement authorization, small purchase tabulation and solicitation summary, single bid/proposal validation reports and single source validation report.

(B) User Department (The department in need of and requesting the procurement of goods or services):

- (i) It shall be the responsibility of each User Department to evaluate its projected procurement needs on an annual basis, and to undertake and coordinate procurement planning activities with the Procurement Department, annually.
- (ii) For the procurement of any product or service of Fifteen Thousand Dollars (\$15,000), or more, the User Department shall prepare a written requisition and submit same to the Procurement Department a minimum of three (3) months prior to the desired delivery, bid opening, performance, or proposal due date. For purchases under Fifteen Thousand Dollars (\$15,000), the requisitions shall be submitted to the Procurement Department ten (10) days in advance. The requisition shall serve as the mechanism by which the User Department communicates its specific procurement need to the Procurement Department and it represents the beginning of the procurement process.
- (iii) The requisition shall include the following elements:
 - (a) Properly completed form per the NFTA's Requisition Procedures; and
 - (b) Budget; including proposed funding source by designation of the account funding code, estimated cost and basis for estimated cost; and
 - (c) Specifications; completed in accordance with Article 13.
- (iv) The User Department is responsible for managing the final contract and/or purchase order in accordance with NFTA Procedure 2-01-01.

(C) Engineering Department:

- (i) The Engineering Department shall serve as the User Department for major public work projects.
- (ii) The preparation and submittal of a requisition shall be required for public work projects which have been developed or identified under Board authorization or which have received state or federal funding approval.

(D) Internal Audit:

The Internal Audit Department shall have responsibility for evaluating the adequacy and effectiveness of internal controls governing the procurement process, for providing cost analysis services upon the request of the Procurement Department and for conducting any necessary audits, such as those required by the federal Buy America Act.

(E) Office of General Counsel:

The Office of General Counsel shall provide interpretations of the procurement guidelines, advice to the User and Procurement Departments on statutory and regulatory compliance and assist in the Board Agenda process for awards requiring Board approval. All issues regarding disqualification and/or release of a low bidder must be reviewed by the Office of General Counsel prior to a decision being made.

(F) EEO/Diversity Development Department

The Office of EEO/Diversity Development shall develop DBE and MWBE goals. EEO/Diversity Development will monitor DBE and MWBE participation for federal and state funded projects. The EEO/Diversity Development Department will also report DBE and MWBE utilization to appropriate federal and state agencies.

ARTICLE 29. EVALUATING RESPONSIVENESS AND RESPONSIBILITY

(A) Factors which should be considered by the Authority in evaluating responsiveness should include the following considerations:

- (i) Has all required information been provided?
- (ii) Does the bid contain mistakes?
- (iii) Has bidder failed to commit to a firm price?
- (iv) Are there unacceptable qualifications or conditions tied to the bid?
- (v) Has the bid been prepared in accordance with the bidding instructions?
- (vi) Are unacceptable provisions included in the bid?
- (vii) Has the bidder altered or limited any of the contract or solicitation provisions?
- (viii) Has the bidder offered non-conforming products or services?
- (ix) Has the bidder failed to acknowledge amendments to the IFB issued by the Authority?

Note that the foregoing list is not exhaustive. Minor deviations which are immaterial and do not effect quantity, quality or delivery, may be waived by the Authority if such waiver does not prejudice or affect the relative standing of the bidders.

(B) In evaluating the responsibility of an apparent low bidder or proposed subcontractor, the Authority may consider, among other factors, whether the subjects' record with the Authority or other owners includes or demonstrates:

- (i) Being listed on a federal or state debarred contractors list.
- (ii) Poor prior performance on an Authority contract.
- (iii) Lack of: adequate expertise; prior experience with comparable projects; or financial resources necessary to perform the work outlined in the contract in timely, competent and acceptable manner. Evidence of such factors may include failure to submit satisfactory evidence of insurance, surety bonds, or financial responsibility; or a history of terminations for cause.
- (iv) Engagement in criminal conduct in connection with any other government contracts or the conduct of business activity that involves such crimes as extortion, racketeering, bribery, fraud, bid-rigging and embezzlement.
- (v) Grave disregard for the safety of employees, State personnel, or members of the public. Consideration will be given to whether employees who will be assigned to work on the project are properly trained and whether the equipment to be used is safe and functioning properly.
- (vi) Willful noncompliance with the State's Labor Laws regarding prevailing wage and supplement payment requirements, including consideration of any pending violations.
- (vii) Disregard for other State Labor Laws, including child labor, proper and timely wage payments and unemployment insurance laws.
- (viii) Violations of the State Workers' Compensation Law including failure to provide proof of proper workers' compensation or disability coverage.
- (ix) Violations of the State's Environmental Conservation Law or violations of any other federal or State environmental statutes.
- (x) The failure to abide by State and federal statutes and regulations regarding efforts to solicit and utilize disadvantaged, minority and women-owned business enterprises as potential sub-contractors.
- (xi) The submission of a bid which is mathematically or materially unbalanced.
- (xii) The submission of a bid which is so much lower than the Authority's confidential engineer's estimate that it appears unlikely that the contractor will be able to complete the project satisfactorily at the price bid.

- (xiii) The presentation of false or misleading statements or any other issue that raises serious questions about the responsibility of the bidder or proposed subcontractor.

ARTICLE 30. SPLIT PROCUREMENTS

The splitting of procurements for the purpose of circumventing the requirements of more complex procurement procedures or a higher level of authority or decision-making is prohibited.

ARTICLE 31. UPDATING, MONITORING AND CONTROL OF PROCUREMENT GUIDELINES AND PROCEDURES

- (A) The Procurement Department and the Office of General Counsel shall ensure that the Procurement Guidelines and Procedures are submitted to the Board for review, updating (if deemed necessary), and re-authorization, on an annual basis.
- (B) The Department of Internal Audit shall develop and implement a program to monitor the Authority's compliance with the Procurement Guidelines and Procedures.
- (C) The Procurement Department shall develop and implement a control system to ensure that the Guidelines and procedures are being followed.

ARTICLE 32. UTILITIES, SURPLUS AND SECOND-HAND SUPPLIES

- (A) Utilities and utility services such as telephone, water, electric power and natural gas (except for those utilities and utility services which are competitively procured), may be purchased upon the authorization of the CFO or her designee without Board approval, provided that the cumulative dollar amount for such purchases for the year is within the amounts budgeted for such utilities or services, as approved by the Board.
- (B) The Authority may purchase surplus and second-hand supplies, materials or equipment from the Federal Government, the State of New York or any political subdivision, municipality, or district without advertising or the solicitation of bids, proposals or quotations, however, purchases involving an expenditure of Fifty Thousand Dollars (\$50,000) or more shall require Board Approval.

ATTACHMENT “A”

CODE OF ETHICS

NFTA will assure that ethical conduct is maintained by adhering to the following requirements:

1. No employee, officer, commissioner, or agent of the Authority shall participate in the selection, or in the award or administration of a contract, if a conflict of interest real or apparent would be involved. Such a conflict would arise when:
 - a) The commissioner, officer, employee, or agent,
 - b) Any member of his * immediate family,
 - c) His partner, or
 - d) An organization that employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award.
2. The NFTA's, commissioners, officers, employees, or agents will neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub agreements.
3. Rule with respect to conflicts of interest. No commissioner, officer or employee of the Authority should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.
4. **Standards:**
 - a) No commissioner, officer or employee of the Authority should:
 - (i) Accept other employment which will impair his independence of judgment in the exercise of his official duties.
 - (ii) Accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority.
 - (iii) Disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.
 - (iv) Use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.
 - (v) Engage in any transaction as representative or agent of the NFTA with any business entity in which he has a direct or indirect financial interest that might reasonably tend to conflict with the proper discharge of his official duties.
 - (vi) By his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.
 - (b) A commissioner, officer or employee of the Authority should:
 - (i) Abstain from making personal investments in enterprises which he has reason to believe may be directly involved in decisions to be made by him or which will

* For editorial convenience, this use of the masculine personal pronoun is deemed gender neutral throughout this document.

ATTACHMENT "A"

otherwise create substantial conflict between his duty in the public interest and his private interest.

- (ii) Endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.
- (c) Anyone involved in the negotiation of contracts shall ensure that all statements, communications and representations to contractor representatives are accurate and truthful.
- (d) Great care must be exercised to ensure the proper recording and charging of all costs to the appropriate account, regardless of the status of the budget for that account. The falsification of time reports or other cost records will not be tolerated. Every supervisor is responsible for assuring that the work time of employees is recorded promptly and charged accurately.
- (e) No employee may submit or concur in the submission of any claims, bids, proposals or any other document that is false, fictitious or fraudulent.
- (f) Great care must be exercised by supervisors to avoid placing, or seemingly to place, pressure on subordinates which might cause them to deviate from acceptable norms of conduct.
- (g) The purchase of supplies, materials, and services from suppliers, vendors, contractors and subcontractors must be done in a manner that preserves the integrity of our procurement process based on the bid process.
- (h) Laws and regulations regarding entertainment, gifts and payments may be somewhat complicated. For this reason, questions regarding specific policies should be referred to Authority's Ethics Officer.
- (i) Employees should report any instance in which they are offered money, gifts, or anything else of value by a supplier or prospective supplier or contractor of the Authority to the Authority's Ethics Officer.
- (j) Every employee is charged with the duty to preserve the Authority's assets, property, plant and equipment.

5. Violations:

In addition to any penalty contained in any other provision of law any such commissioner, officer or employee who shall knowingly and intentionally violate any of the provisions of this section may be subject to disciplinary action, suspended, or removed from office or employment in the manner provided by contract, law, or established employment policies.

ATTACHMENT "B"

PROTEST PROCEDURES

The Protest Procedures set-forth herein apply to both sealed bids and negotiated procurements.

1. Pre-Bid/Proposal Opening Protests. If a bidder/proponent can demonstrate that the Contract Documents issued by the Authority are unduly exclusionary and restrictive or that federal, state or local laws or regulations have been violated during the course of the procurement, then the bidder/proponent may seek a review by the Executive Director or his appointed representative, at 181 Ellicott Street, Buffalo, New York 14203. Protests shall be clearly identified as Protests and submitted in writing as early as possible but no later than five (5) business days before bid/proposal opening. Within four (4) business days after receipt of a pre-bid/proposal protest, the Executive Director shall make one of the determinations listed in paragraph (3).

2. Post-Bid/Proposal Opening Protests. A protest to the acceptance or rejection of any or of all offers or bids to a contract, or to the award thereof, or to any such action proposed or intended by the Authority must be received in writing by the Executive Director no later than five (5) business days after the protesting party first learned, or reasonably ought to have learned, of the action or the proposed or intended action to which he/she protests.

3. In the event the protestor alleges that the Executive Director or the representative appointed by the Executive Director to serve as Decision-Maker for the particular protest, engaged in improper conduct during the subject procurement, the General Counsel shall serve as the Decision-Maker. In the event it has been alleged that the General Counsel has engaged in improper conduct during the subject procurement, either the Executive Director or the Director of Engineering shall serve as the Decision-Maker.

4. Rulings on Protests. Within four (4) business days, the Executive Director shall render one of the following determinations:

- (a) Protest is overruled.
- (b) Protest is substantiated. Executive Director shall issue instructions to remedy issues relating to the protest.
- (c) Procurement activity is suspended until written notification by the Executive Director:

The determination shall be in writing and shall provide at a minimum a general response to each material issue raised in the protest. All documents submitted by the Protestor and/or Authority Staff and reviewed by the Decision-Maker in the reaching of a determination shall form and be retained by the Authority as the formal record of the dispute resolution process.

The issuance of the foregoing determination is the Authority's final decision of the dispute.

All interested parties shall be notified of any protests that are filed. The Authority shall refrain from awarding a contract within five (5) business days of the date of a decision rendered by the Executive Director regarding a protest, unless the Authority determines that:

- (i) The items to be procured are urgently required.
- (ii) Delivery or performance will be unduly delayed by failure to make a prompt award.
- (iii) Failure to make a prompt award will otherwise cause undue harm to the Authority or the federal government.

ATTACHMENT "B"

5. Protestor's Appeal to Federal or State Agencies. In the event federal or state funds are participating in the procurement, then the protestor may seek a review by the appropriate funding agency. The Federal Transit Administration will only consider a protest if the Authority (a) does not have protest procedures, (b) has not complied with its protest procedures, or (3) has not reviewed the protest when given the opportunity to do so. The Federal Transit Administration will exercise discretionary jurisdiction over those appeals involving issues important to the Federal Transit Administration's overall public transportation program.

Protestors shall file such a protest in accordance with the requirements set forth below, not later than five (5) business days after a final decision is rendered under the Authority's protest procedure. In instances where the protestor alleges that the Authority failed to make a final determination on the protest, protestors shall file a protest with the appropriate agency not later than five (5) business days after the protestor knew or should have known of Authority's failure to render a final determination on the protest.

CRITERIA and STANDARDS GOVERNING COMMERCIAL ADVERTISING

1. All advertising placed in the Metro system should reflect a high level of good taste, decency and community standards in copy and art. All advertising should harmonize with the environment of its placement.
2. All advertising should be truthful and comply with the spirit and letter of all applicable laws and regulations of the various jurisdictions into which it is introduced. All copy and art should avoid conveying derisive, exaggerated, distorted, deceptive or offensive impressions.
3. Advertising promoting contests should insure the contest is being conducted with fairness to all entrants and complies with all applicable laws and regulations.
4. Testimonials should be authentic and should honestly reflect the response of the person making them. The advertising sales contract provides for the indemnification of Metro against any action by any person quoted or referred to in any advertisement placed in the Metro system.
5. Medical products or treatments should be presented in a restrained and inoffensive manner to the general public.
6. Advertisers should take special care to avoid illustrations or references that disregard normal safety precautions.
7. Advertising offering premiums or gifts should avoid representations that would enlarge the value of the item in the minds of the viewers.

ATTACHMENT "C"

8. Use of Metro graphics or representations in advertising is subject to approval by the proper officials of Metro.
9. No implied or declared endorsement of any product or service by Metro is permitted.
10. Metro reserves the right to reject or remove any advertising that it deems to be not in good taste and decency and not in the public interest.
11. Items or references which might be objectionable to a substantial segment of the community should be avoided. For example, advertising depicting or referring to an undesirable social behavior or which might be offensive because of racial or religious references should be avoided. Copy which might be contrary to the best interest of the transit system and harmful to the users of the system will not be acceptable.

ATTACHMENT "C"

CRITERIA and STANDARDS GOVERNING PUBLIC SERVICE ADVERTISING

Public Service Advertising proposed to be posted in any of the equipment or facilities of Metro will be such:

1. The advertisement will be non-commercial, non-partisan politically and not designed to influence legislation. Advertising will be accepted only from not-for-profit organizations, corporations or government agencies, philanthropic or cultural organizations whose activities would be of interest or benefit to a majority of the area population.
2. That the advertisement must meet the same guidelines governing commercial advertising.
3. The purpose of the project be such that the advertising methodology can help achieve its objectives and goals.
4. That the action message shall have region-wide appeal, significance and applicability.
5. That the project be of sufficient seriousness and public importance to warrant the use of public service advertising space.
6. That the sponsoring organization be classified as a tax exempt organization by the Internal Revenue Services or that specific activity, or event, being promoted by the "for-profit" organization be in and of itself "non-profit" in nature.
7. That the name of the sponsoring organization, either as it appears on the document granting tax-exempt status, or by the name generally recognized by the public as determined by the Contracting Officer, may be required to be identified on the advertisement. If the name of the sponsoring organization is not a part of the message itself, a "sponsored by" line may be required that, in the judgment of the Contracting Officer, is of a type size and type style to be easily identifiable and readable by the public.
8. That public service space will not be granted to any organization that, in the last twelve months, has purchased, or is purchasing, commercial advertising space or time in any media for the general subject campaign or promotion.
9. That the advertisement involves monies (fund-raising, admission fees, donations and other methods of compensation) must clearly identify the nature of the appeal (e.g. if donations are to be sought, whether the collection will be voluntary or if the donation is a required admission fee must be explained).
10. That in advertisements where a phone number or an address is given a written explanation must be furnished to the Contracting Officer as a condition of the approval, which document will state exactly what is intended to happen to an individual when he or she either calls the number listed, writes to, or stops by the address given.
11. That the sponsoring organization shall pay the applicable labor cost for installation and removal of the subject message as charged by the Authority's advertising contractor and approved by the Contracting Officer. That, prior to installation, the camera-ready artwork, graphics, photographs be submitted to the Contracting Officer for approval.
12. The advertising is subject to approval by the Metro director of public relations and advertising and the advertising contractor. Public service advertising will be

ATTACHMENT “C”

accepted on a space-available basis only. The advertisement will be posted only for such period of time as the advertisement space remains available and is not required for commercial advertisement. The public service advertiser will indemnify and hold harmless Metro and the advertising contractor from any and all claims brought as a result of the display of the advertisement.