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| Town of estancia |
| PROCUREMENT POLICY |
| POLICIES AND PROCEDURES MANUAL |
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| **RESOLUTION NO. 2016-10** |

EFFECTIVE DATE:

07-05-2016

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**PROCUREMENT POLICY & PROCEDURES**

1. **SCOPE:** This policy pertains to all procurement initiated by or on behalf of the Town of Estancia (Town), including those initiated by its volunteer fire and EMT departments when there is a use of public monies involved. All departments involved in procuring items of tangible personal property, services, or construction shall adhere to attendant federal and state laws and regulations and Town policies.

1.1 **Administration:** The responsibility for administration of this policy shall be under the Clerk Treasurer, who shall serve as the Chief Procurement Officer (CPO) and have the responsibility and authority to insure that all provisions of law and this policy are adhered to through the procurement process established by the Town.

2. **AUTHORITY AND REFERENCES:** The State Procurement Code (Code), sections 13-1-21 through 13-1-199 NMSA 1978, and applicable OMB circulars, federal, state and local government laws, regulations, and guidelines, and Town policy.

3. **OBJECTIVE:**

3.1 The purpose of the Code and this policy are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public monies and to provide safeguards for maintaining a procurement system of quality and integrity.

3.2 The Town must comply with any requirement imposed by federal and state law and regulations, Town policy, and the terms of federally-funded grants. Compliance with the standards promulgated in OMB circulars, the Code, and this policy that govern procurement will ensure that procurement practices are acceptable.

3.3 The objective of this policy is to have the force and effect of law to implement, interpret, or make policy, specifically as it applies to federal procurement law and the Code, and the purposes stated therein.

4. **DEFINITIONS:**

4.1 Most of the terms that appear in this policy are defined in the Code.

4.2 In this policy the following definitions may also apply:

4.2.1 “Chief Procurement Officer (CPO)” means the person with the responsibility and authority to insure that all provisions of law and this policy are adhered to through the procurement process established by the Town.

4.2.2 “Determination” means the written documentation of a decision of the CPO including findings of fact to support a decision. A determination becomes part of the procurement file to which it pertains.

4.2.3 “User agency” means any of the Town Departments or entities providing services on behalf of the Town.

4.2.4 “Area” means Torrance County, New Mexico.

4.2.5 “Policy” as used in this document also infers “local regulation” or “regulation” as used in the Code (Section 13-1-80 NMSA 1978).

4.2.5 "Electronic" includes electric, digital, magnetic, optical, electronic or similar medium.

4.2.6 “Best Obtainable Total Price” means the price of the item or service to be procured, plus the cost of any delivery charge, mileage, staff time, and or vehicle usage needed to acquire the item or service.

5. **APPLICATION OF PROCUREMENT LAW:** When a procurement involves the expenditure of federal funds, the procurement shall be conducted in accordance with mandatory applicable federal law and regulations.  When mandatory applicable federal law or regulations are inconsistent with the provisions of the Procurement Code or this policy, compliance with federal law or regulations shall be considered to be compliance with the Procurement Code. (Section 13-1-30 NMSA 1978).

6. **CENTRALIZATION OF PROCUREMENT ACTIVITY:**

6.1 **Purchasing Office:** The Purchasing Office for the Town is the Clerk Treasurer’s Office. The Chief Procurement Officer (CPO) of the Town shall oversee and coordinate all procurement for the Town.

6.2 **Chief Procurement Officer:** The Clerk Treasurer serves as the Chief Procurement Officer for the Town.

6.3 **Cooperative Procurement:** Nothing in this section should be interpreted as limiting the ability of the Town to make procurements under existing contracts or enter into cooperative procurement agreements.

7. **INSPECTION OF PUBLIC RECORDS:** The inspection of public records is governed by the Inspection of Public Records Act, Sections 14-2-1 through 14-2-12 NMSA 1978. To the extent that any provision of this rule conflicts with the Inspection of Public Records Act, as interpreted by the courts of this state, that act shall control. Furthermore, no obligation to keep data confidential which is contained in this rule is intended to create any liability that would not otherwise exist under state law.

8. **DOLLAR AMOUNTS:** Whenever a dollar amount appears in this policy, such amount is exclusive of applicable gross receipts tax.

9. **INDEMNIFICATION AND INSURANCE:**

9.1 **Tort Liability:** Except as provided for in the Tort Claims Act, Sections 41-4-1 through 41-4-27 NMSA 1978, no contract governed by this policy shall contain any provision whereby the Town agrees to indemnify or provide tort liability insurance for any contractor. The indemnification and insurance provision of contracts provided for in the Tort Claims Act shall be approved in writing by the Town’s legal counsel before they become effective.

9.2 **Other Risks:** No contract governed by this policy shall contain any provision whereby the Town agrees to indemnify or provide a contractor with insurance for non-tort risks unless the provision has been approved in writing by the Town legal counsel.

9.3 **Contract Provisions Void:** Any indemnification or insurance provision in any contract executed in violation of this section shall be void and of no effect.

10. **SEVERABILITY:** If any provision of this policy, or any application thereof, to any person or circumstance, is held invalid, such invalidity shall not affect any other provision or application of this policy which can be given effect with the invalid provision or application.

11. **EXEMPTIONS FROM PROCUREMENT THROUGH THE CODE** (Section 13-1-98 NMSA 1978): The provisions of this policy and the Code shall not apply to:

11.1 Procurement of items of tangible personal property or services by the Town from a state agency, a local public body or external procurement unit except as otherwise provided in Sections 13-1-135 through 13-1-137 NMSA 1978;

11.2 Printing or duplicating contracts involving materials that are required to be filed in connection with proceedings before administrative agencies or state or federal courts;

11.3 Purchases of publicly provided or publicly regulated gas, electricity, water, sewer and refuse collection systems;

11.4 Purchases of books and periodicals from the publishers or copyright holders thereof;

11.5 Travel or shipping by common carrier or by private conveyance or to meals and lodging;

11.6 Minor purchases not exceeding $5,000 consisting of magazine subscriptions, conference registration fees and other similar purchases where prepayments are required;

11.7 The issuance, sale and delivery of public securities pursuant to the applicable authorizing statute with the exception of bond attorneys and general financial consultants;

11.8 Contracts with professional entertainers;

11.9 Contracts and expenditures for litigation expenses in connection with proceedings before administrative agencies or state or federal courts, including experts, mediators, court reporters, process servers and witness fees, but not including attorney contracts;

11.10 Purchases of advertising in all media, including radio, television, print and electronic.

12. **APPLICATION – COMPETITIVE SEALED BIDS:** The following provisions of this section apply to any procurement made by competitive sealed bids.

12.1 **Competitive Sealed Bids Required:** All procurement shall be achieved by competitive sealed bids except procurement achieved pursuant to the following methods:

12.1.1 Competitive sealed proposals - see section 15 of this policy;

12.1.2 Small purchases – see section 16 of this policy;

12.1.3 Sole source procurement – see section 17 of this policy;

12.1.4 Emergency procurement – see section 18 of this policy; and

12.1.5 Procurement under existing contracts – see section 19 of this policy.

12.2 **Invitation for Bids (IFB):**

12.2.1 **General –** The invitation for bids (IFB) is used to initiate competitive sealed bid procurement. The IFB shall include the following:

1. the specifications for the services, construction or items of tangible personal property to be procured;
2. all contractual terms and conditions applicable to the procurement;
3. the term of the contract and conditions or renewal or extension, if any;
4. instructions and information to bidders, including the location where bids are to be received and the date, time and place of the bid opening;
5. a notice that the IFB may be canceled and that any and all bids may be rejected in whole or in part when it is in the best interest of the Town;
6. a notice that reads substantially as follows: ***“The Procurement Code, Sections 13-1-28 through 13-1-199 NMSA 1978, imposes civil and misdemeanor criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for bribes, gratuities and kick-backs”;*** and
7. required federal certifications – see section 27 of this policy, if applicable.

12.3 **Incorporation by reference:** The IFB may incorporate documents by reference, provided that the IFB specifies where such documents can be obtained.

12.4 **Evaluation Criteria:** The IFB shall set forth the evaluation criteria that will be used to determine acceptability such as inspection, testing, quality, workmanship, deliver and suitability for a particular purpose. Those criteria such as discounts, transportation costs and total or life cycle costs that will affect the bid price shall be objectively measurable. No criteria may be used in bid evaluation that is not set forth in the IFB.

12.5 **Bid Form:** The IFB shall provide a form which shall include space in which the bid price shall be inserted and which the bidder shall sign and submit along with all other necessary submissions. Only original bids with original signatures, delivered in a sealed envelope to the location where bids are to be received by the date and time shown in the bid will be accepted for consideration. Oral, telephonic, or electronic bids are invalid and shall not be considered.

12.6 **Bid Samples and Descriptive Literature:**

12.6.1 “Descriptive literature” means information available in the ordinary course of business that shows the characteristics, construction or operation of an item.

12.6.2 “Bid sample” means a sample furnished by a bidder that shows the characteristics of an item offered in a bid.

12.6.3 Bid samples or descriptive literature may be required when it is necessary to evaluate required characteristics of the item bid.

12.6.4 Bid samples, when required, shall be furnished free of expense to the Town and prior to the time set for the opening of bids. Samples not destroyed or mutilated in testing will be returned upon request by mail, express or freight, collect. Each sample must be labeled to clearly show the bid number and the bidder’s name.

12.7 **Bidding Time:** Bidding time is the period of time between the date of distribution of the IFB and the time and date set for receipt of bids. In each case, bidding time shall be set to provide bidders a reasonable time to prepare their bids. In no case shall the bidding time be shorter than the time required for publication under the following section.

12.8 **Public Notice, Publication:** The IFB or notice thereof shall be published not less than ***ten (10) calendar days*** prior to the date set for the opening of bids. The IFB or notice must be published once in at least one newspaper of general circulation in the Area.

12.8.1 These requirements of publication are in addition to any other procedures that may be adopted by the Town to notify prospective bidders that bids will be received including but not limited to posting on the Town web site.

12.8.2 **Bidder Lists:** The CPO shall send copies of the notice of IFB involving the expenditure of more than $30,000 to those businesses which have signified in writing an interest in submitting bids for particular categories of items of tangible personal property, construction and services and which have paid any required fees (Section 13-1-104B NMSA 1978).

12.8.3 **Public Availability:** A copy of the IFB shall be made available for public inspection at the Purchasing Office.

12.9 **Pre-Bid Conferences:** Pre-bid conferences may be conducted to explain the procurement requirements. They shall be announced to all prospective bidders known to have received the IFB. The conference should be held long enough after the IFB has been issued to allow the bidders to become familiar with it, but sufficiently before the bid opening to allow consideration of the conference results in preparing their bids. Nothing stated at the pre-bid conference shall change the IFB unless a change is made by written amendment as provided in this policy.

12.10 **Amendments to the Invitation for Bids:**

12.10.1 **Form:** An amendment to the IFB shall be identified as such and shall require that bidders acknowledge its receipt. The amendment shall refer to the portions of the IFB it amends.

12.10.2 **Distribution:** Amendments shall be sent to all prospective bidders known to have received the IFB.

12.10.3 **Timeliness:** Amendments shall be distributed within a reasonable time to allow prospective bidders to consider them in preparing their bids. If the time and date set for receipt of bids will not permit such preparation, the time shall be increased to the extent possible in the amendment or, if necessary, by telegram, telephone or by other electronic means and confirmed in the amendment.

12.10.4 **Use of Amendments:** Amendments should be used to:

1. make any changes in the IFB such as changes in quantity, purchasing descriptions, delivery schedules, and opening dates;
2. correct defects or ambiguities; or
3. furnish to other bidders information given to one bidder if such information will assist the other bidders in submitting bids or if the lack of such information would prejudice the other bidders.

12.11 **Pre-Opening Modification or Withdrawal of Bids:**

12.11.1 **Procedure:** A bid may be modified or withdrawn by a bidder prior to the time set for bid opening by delivering written or telegraphic notice to the location designated in the IFB as the place where bids are to be received.

12.11.2 **Records:** All documents relating to the modification or withdrawal of bids shall be made a part of the appropriate procurement file.

12.12 **Late Bids, Late Withdrawals and Late Modifications:**

12.12.1 **Definition:** Any bid or any withdrawal or modification of a bid received after the time and date for opening of bids at the place designated for opening is late.

12.12.2 **General Policy:** No late bid, late modification, or late withdrawal will be considered unless received before contract award, **and** unless the bid, modification, or withdrawal would have been timely but for the action or inaction of the Chief Procurement Officer.

12.12.3 **Records:** All documents relating to late bids, late modifications or late withdrawals shall be made a part of the appropriate procurement file.

12.13  **Bid Opening:**

12.13.1 **Receipt:** Upon its receipt, each bid and modification shall be time-stamped but not opened and shall be stored in a secure place until the time and date set for bid opening.

12.13.2 **No Bids Received:** If no bids are received or if all bids received are rejected in accordance with the provisions of sections 19 and 20 of this policy, a new IFB shall be issued. If upon re-bidding with no change in specifications from the first IFB, the bids received are unacceptable, or if no bids are secured, the Chief Procurement Officer may purchase (i.e., as opposed to procure) the items of tangible personal property, construction or services in the open market at the best obtainable price.

12.13.3 **Opening and Recording:** Bids and modifications shall be opened publicly

in the presence of one or more witnesses at the time and place designated in the IFB. The name of each bidder, the amount of each bid and each bid item, if appropriate, the names and addresses of the required witnesses, and such other relevant information as may be specified by the CPO, shall be recorded. The record shall be open for public inspection. Each bid, except those portions for which a bidder has made a written request for confidentiality, shall also be open to public inspection. Any data which a bidder believes should be kept confidential shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the non-confidential portion of the bid. Prices and makes and models or catalogue numbers of the items offered, deliveries, and terms of payment shall be publicly available at the time of bid opening regardless of any designation to the contrary.

12.14 **Mistakes in Bids:**

12.14.1 **Consideration for Award:** Bids shall be unconditionally accepted for consideration for award without alteration or correction, except as authorized in sections 12 through 14 of this policy and the Procurement Code. Prime contractor and subcontractors are required to be registered as provided in Section 13-4-13.1 NMSA 1978. A bid submitted by a prime contractor that is not registered in accordance with that section **shall not be considered** for award. A bid submitted by a registered prime contractor that includes any subcontractor that is not registered in accordance with that section may be considered for award following substitution of a registered subcontractor for any non-registered subcontractor in accordance with Section 13-4-36 NMSA 1978 (Section 13-1-105 NMSA 1978).

12.14.2 **General Principles:** Correction or withdrawal of a bid because of an inadvertent, non-judgmental mistake in the bid requires careful consideration to protect the integrity of the competitive bidding system, and to assure fairness. If the mistake is attributable to an error in judgment, the bid may not be corrected. Bid correction or withdrawal by reason of a non-judgmental mistake is permissible but only to the extent authorized in sections 12 through 14 of this policy.

12.14.3 **Mistakes Discovered Before Opening:** A bidder may correct mistakes discovered before bid opening by withdrawing or correcting the bid as provided in subsection 12.11 of this policy.

12.14.4 **Confirmation of Bid:** When the CPO knows or has reason to conclude that a mistake has been made in the low bid; the CPO should request the low bidder to confirm the bid. Situations in which confirmation should be requested include obvious apparent errors on the face of the low bid or a bid unreasonably lower than the other bids submitted. If the low bidder alleges a mistake; the bid may be corrected or withdrawn if the conditions set forth in subsection 12.14.5 are met.

12.14.5 **Mistakes Discovered After Opening:** This subsection sets forth procedures to be applied in three situations in which mistakes in bids are discovered after the time and date set for bid opening:

a) **Technical Irregularities:** Technical irregularities are matters of form rather than substance evident from the bid document, or insignificant mistakes that can be waived or corrected without prejudice to other bidders; that is, when there is no effect on price, quality or quantity. The CPO may waive such irregularities or allow the low bidder to correct them if either is in the best interest of the Town. Examples include the failure of the low bidder to:

1. return the number of signed bids required by the IFB;
2. sign the bid, but only if the unsigned bid is accompanied by other material indicating the low bidder’s intent to be bound; or
3. acknowledge receipt of an amendment to the IFB, but only if: it is clear from the bid that the low bidder received the amendment and intended to be bound by its terms; or the amendment involved had no effect on price, quality or quantity.

b) **Mistakes Where Intended Correct Bid is Evident:** If the mistake and the intended correct bid are clearly evident on the face of a bid document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of a bid document are typographical errors, errors in extending unit prices, transposition errors and arithmetical errors. It is emphasized the mistakes in unit prices cannot be corrected.

c) **Mistakes Where Intended Correct Bid is Not Evident:** A low bidder alleging a material mistake of fact which makes the bid non-responsive may be permitted to withdraw the bid if:

1. a mistake is clearly evident on the face of the bid document but the intended correct bid is not; or
2. the low bidder submits evidence which clearly and convincingly demonstrates that a mistake was made.

d) **Written Determination:** When a bid is corrected or withdrawn, or a correction or withdrawal is denied, the CPO shall prepare a written determination showing that the relief was granted or denied in accordance with this section.

12.15 **Bid Evaluation and Award:**

12.15.1 **General:** A contract solicited by competitive sealed bids shall be awarded with reasonable promptness by written notice to the lowest responsible bidder. The IFB shall set forth the requirements and criteria that will be used to determine the lowest responsive bid. No bid shall be evaluated for any requirement or criterion that is not disclosed in the IFB. Contracts solicited by competitive sealed bids shall require that the bid amount ***exclude*** the applicable state gross receipts tax but that the Town shall be required to pay the tax including any increase in the tax becoming effective after the contract is entered into. The tax shall be shown as a separate amount on each billing or request for payment made under the contract.

12.15.2 **Product Acceptability:** The IFB shall set forth all evaluation criteria to be used in determining product acceptability. It may require the submission of bid samples, descriptive literature, technical data or other material. It may also provide for accomplishing any or all of the following prior to award:

1. inspection or testing of a product for such characteristics as quality or workmanship;
2. examination of such elements as appearance, finish, taste or feel; or
3. other examinations to determine whether it conforms to other purchase description requirements.

12.15.3 **Purpose of Acceptability Evaluation:** An acceptability evaluation is not conducted for the purpose of determining whether one bidder’s item is superior to another’s but only to determine that a bidder’s offering is acceptable as set forth in the IFB. Any bidder’s offering which does not meet the acceptability requirements shall be rejected as non-responsive.

12.15.4 **Brand-Name or Equal Specification:**  Where a brand-name or equal specification is used in a solicitation, the solicitation shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance, and characteristics desired and is not intended to limit or restrict competition. When bidding an ***“or equal”*** item, the burden of persuasion is on the supplier or manufacturer which has not been specified to convince the CPO that its product is, in fact, equal to the one specified. The CPO is given the responsibility and judgment for making a final determination on whether a proposed substitution is an “or equal” item.

12.15.5 **Determination of Lowest Bidder:** Following determination of product acceptability as set forth in this section, if any is required, bids will be evaluated to determine which bidder offers the lowest cost to the Town in accordance with the evaluation criteria set forth in the IFB. Only objectively measurable criteria that are set forth in the IFB shall be applied in determining the lowest bidder. Examples of such criteria include, but are not limited to, discount, transportation costs, and total-cost-of-ownership or life-cycle formulas. Evaluation factors need not be precise predictors of actual future costs, but to the extent possible the evaluation factors shall be reasonable estimates based upon information the Town has available concerning future use.

1. **Prompt Payment Discounts:** Prompt payment discounts shall not be considered in computing the low bid. Such discounts may be considered after award of the contract.
2. **Trade Discounts:** Trade discounts shall be considered in computing the low bid. Such discounts may be shown separately, but must be deducted by the bidder in calculating the unit price quoted.
3. **Quantity Discounts:** Quantity discounts shall be included in the price of an item. Such discounts may not considered where set out separately unless the IFB so specifies.
4. **Transportation Costs:** Transportation costs shall be considered in computing the low bid. Such costs may be computed into the bid price or be listed as a separate item.
5. **Total or Life-Cycle Costs:** Award may be determined by total or life-cycle costing if so indicated in the IFB. Life-cycle cost evaluation may take into account operative, maintenance and money costs, other costs of ownership and usage and resale or residual value, in addition to acquisition price, in determining the lowest bid cost over the period the item will be used.
6. **Energy Efficiency:** Award may be determined by an evaluation consisting of acquisition price plus cost of energy consumed over a projected period of use.

12.15.6 **Restrictions:** Nothing in subsection 12.15 of this policy shall be deemed to permit contract award to a bidder submitting a higher quality item than designated in the IFB unless the bidder is also the lowest bidder as determined under subsection 12.15.5. Further, except as provided in the subsection, this policy does not permit negotiations with any bidder or disclosing bid amounts to another bidder prior to award. If the lowest responsive bid has otherwise qualified, and if there is no change in the original terms and conditions, the lowest responsible bidder may negotiate with the purchaser (this exception applies only to purchases and does not apply to procurements generally) for a lower total bid to avoid rejection of all bids for the reason that the lowest bid was up to ten percent higher than budgeted project funds. Such negotiation shall not be allowed if the lowest bid was more than ten percent over budgeted project funds.

12.15.7 **Documentation of Award:** Following award, a record showing the basis for determining the successful bidder shall be made a part of the procurement file.

12.15.8 **Publicizing Awards:** Written notice of award shall be sent to the successful bidder. Notice of award shall also be posted on the Town web site.

12.16 **Statutory Preferences (Statutory preferences to be applied in determining low bidder):** New Mexico law provides certain statutory preferences to resident businesses, resident manufacturers and for recycled content goods (Sections 13-1-21 and 13-1-22 NMSA 1978). The statute further provides a preference to resident construction contractors (Section 13-4-1 through 13-4-3 NMSA 1978) which must be applied in determining the lowest bidder.

12.17 **Identical Low Bids:**

12.17.1 **Definition:** Identical low bids are low responsive bids, from responsible bidders, which are identical in price after the application of preferences referred to in this policy and which meet all the requirements and criteria set forth in the IFB.

12.17.2 **Award:** When two or more identical low bids are received, the CPO may:

1. award pursuant to the multiple source award provisions of Sections 13-1-153 and 13-1-154 NMSA 1978;
2. award to a resident business if the identical low bids are submitted by a resident business and a non-resident business;
3. award to a resident manufacturer if the identical low bids are submitted by a resident manufacturer and a resident business;
4. award to a bidder offering recycled content goods if the identical low bids are for recycled content goods and virgin goods;
5. award by lottery to one of the identical low bidders; or
6. reject all bids and re-solicit bids or proposals for the required services, construction or items of tangible personal property.

13. **MULTI-STEP SEALED BIDS:**

13.1 **General:** Multi-step bidding is a variant of the competitive sealed bidding method. This method may be utilized when the CPO makes a determination that it is impractical initially to prepare specifications to support an award based on price, or that specifications are inadequate or are too general to permit full and free competition without technical evaluation and discussion.

13.2 **Phased Process:** Multi-step bidding is a phased process which combines elements of both the competitive sealed bid and the competitive sealed proposal method, seeking necessary information or unpriced technical offers in the initial phase; and regular competitive sealed bidding, inviting bidders who submitted technically acceptable offers in the initial phase, to submit competitive sealed price bids on the technical offers in the final phase. The contract shall be awarded to the lowest responsible bidder. If time is a factor, the CPO may require offerors to submit a separate sealed bid during the initial phase to be opened after the technical evaluation.

13.3 **Public Notice:** Whenever multi-step sealed bids are used, public notice for the first phase shall be given in accordance with subsection 12.8 of this policy. Public notice is not required for the second phase.

14. **PAYMENTS FOR PURCHASES:** [Contract clause] All contracts resulting from an invitation for bids shall contain a clause allowing for late payment charges against the contracting agency in the amount and under the conditions set forth in Section 13-1-158 NMSA 1978. For purchases funded by state or federal grants to the Town, payments shall be tendered to the contractor within five (5) working days of receipt of funds from the funding agency.

15. **APPLICATION – COMPETITIVE SEALED PROPOSALS:**

15.1 **General:** Except as provided in subsections 15.2 and 15.3 of this section, the provisions of this section apply to any procurement made by competitive sealed proposals.

15.2 **Architects, Engineers, Landscape Architects and Surveyors:** The provisions of this section do not apply to the procurement of professional services of architects, engineers, landscape architects, and surveyors for local public works projects. When procuring such professional services for local public works projects, the Town shall comply with Sections 13-1-66.1, 13-1-120 through 13-1-124 NMSA 1978, competitive sealed qualifications-based proposals.

15.3 **Professional Services:** “Professional services” are defined in Section 13-1-76 NMSA 1978. This section acknowledges the difficulty of any attempt made to recognize and list each and every service that could conceivably fall within the definition of “professional services.” Instead, the statute provides in relevant part that “…other persons or businesses providing similar professional services to those listed may be designated as such by a determination issued by the CPO.” In instances where “…other person or businesses providing similar professional services…” as cited in Section 13-1-76 NMSA 1978, is not clearly defined, contractors shall submit a written request to the Chief Procurement Officer for issuance of a determination and a finding that the service is to be designated as a professional service.

15.4  **General Discussion:**

15.4.1 **Use of Competitive Sealed Proposals:** Except as provided in Section 13-1-119.1G NMSA 1978 for procuring professional services or a design-and-build project delivery system, or when the CPO with the approval of the Mayor makes a determination that the use of competitive sealed bidding for items of tangible personal property or services is either not practicable or not advantageous to the Town, procurement shall be effected by competitive sealed proposals. (Section 13-1-111 NMSA 1978).

15.4.2 **Definitions:** The words “practicable” and “advantageous” are to be given ordinary dictionary meanings. The term “practicable” denotes what may be accomplished or put into practical application. “Advantageous” denotes a judgmental assessment of what is in the Town’s best interest. The use of competitive sealed bids may be practicable, that is, reasonably possible, but not necessarily advantageous, that is in the Town’s best interest.

15.4.3 **Proposals Offer Flexibility:** The key element in determining advantageousness is the need for flexibility. The competitive sealed proposal method differs from the competitive sealed bid method in two important ways:

1. it permits discussions with competing offerors and changes in their proposals including price; and
2. it allows comparative judgmental evaluations to be made when selecting among acceptable proposals for award of a contract.

15.4.4 **Determination by Category:** The CPO may make determinations by category of services or items of tangible personal property that it is either not practicable or not advantageous to procure specified types of service or items of tangible personal property by competitive sealed bids, in which case competitive sealed proposals shall be utilized. The CPO may modify or revoke such determinations at any time.

15.5 **Request for Proposals (RFP):**

15.5.1 **Initiation:** The request for proposals (RFP) is used to initiate competitive sealed proposal procurement. The Town shall follow published guidelines and procedures issued by the CPO from development stage through award of RFP-based procurements. At a minimum the RFP shall include the following:

1. the specifications for the services or items of tangible personal property to be procured;
2. all contractual terms and conditions applicable to the procurement;
3. instructions concerning the submission and response to questions;
4. the term of the contract and conditions of renewal or extension, if any;
5. instructions and information to offerors, including date, time and place where proposals are to be received and reviewed;
6. all of the evaluation factors and the relative weights to be given to the factors in evaluating proposals;
7. a statement that discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award, but that proposals may be accepted without such discussions;
8. a notice that the RFP may be canceled and that any and all proposals may be rejected in whole or in part when it is in the best interest of the Town;
9. a notice that read substantially as follows: ***“The Procurement Code, Sections 13-1-28 through 13-1-199 NMSA 1978, imposes civil and misdemeanor criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for bribes, gratuities and kick-backs”;*** and
10. required federal certifications – see section 27 of this policy, if applicable.

15.5.2 **Incorporation by Reference:** The RFP may incorporate documents by reference, provided that the RFP specifies where such documents can be obtained.

15.5.3 **Form of Proposal:** The manner in which proposals are to be submitted, including any forms for that purpose, should be designated in the RFP.

15.5.4 **Proposal Preparation Time:** Fifteen (15) to thirty (30) calendar days between the date if issue and the proposal due date is the recommended minimum proposal preparation time. A longer preparation time may be required for complex procurements or for procurements that require substantial offeror resources to prepare an acceptable proposal.

15.5 **Public Notice:** The Purchasing Office shall give public notice of the RFP in the same manner as provided in subsection 12.8 of this policy. It is further provided that subsection 12.8.2. of this policy does not apply to a solicitation of a professional service contract unless the value of the contract will exceed $30,000, or unless the value of the contract for architects and engineers will exceed $25,000, or unless the value of the contract for landscape architects and surveyors will exceed $5,000 (Section 13-1-125B NMSA 1978).

15.6 **Pre-Proposal Conferences:** Pre-proposal conferences may be conducted in accordance with subsection 12.9 of this policy. Any such conference should be held prior to submission of initial proposals.

15.7 **Amendments to the Request for Proposals:**

15.7.1 **Prior to Submission of Proposals:** Prior to submission of proposals, amendments to the RFP may be made in accordance with subsection 12.10 of this policy.

15.7.2 **After Submission of Proposals:** After submission of proposals, amendments to the RFP shall be distributed only to short-listed offerors. The short-listed offerors shall be permitted to submit new proposals or to amend those submitted. If, in the opinion of the CPO, a contemplated amendment will significantly change the nature of the procurement, the RFP shall be canceled in accordance with Sections 20 & 21 of this policy, and a new RFP issued.

15.8 **Modification or Withdrawal of Proposals:** Proposals may be modified or withdrawn prior to the established due date in accordance with subsection 12.11 of this policy. The established due date is either the time and date announced for receipt of proposals or receipt of modifications to proposals, it any; or, if discussions have begun, it is the time and date by which best and final offers must be submitted by short-listed offerors.

15.9 **Late Proposals, Late Modifications and Late Withdrawals:** Any proposal, withdrawal or modification received after the established due date at the place designated for receipt of proposals is late. See section 15.8 of this policy for the definition of “established due date”. Such a proposal, withdrawal, or modification may be considered only in accordance with section 12.12 of this policy.

15.10 **Receipt and Opening of Proposals:**

15.10.1 **Receipt:** Proposals and modifications shall be time-stamped upon receipt and held in a secure place until the established due date. See section 15.8 of this policy for the definition of “established due date”.

15.10.2 **Opening:** Proposals shall ***not*** be opened publicly and shall not be open to public inspection until after an offeror has been selected for award of a contract. An offeror may request in writing nondisclosure of confidential data. Such data shall accompany the proposal and shall be readily separable from the proposal in order to facilitate eventual public inspection of the non-confidential portion of the proposal.

15.11 **Evaluation of Proposals:**

15.11.1 **Evaluation Factors:** The evaluation shall be based on the evaluation factors and the relative weights set forth in the RFP.

15.11.2 **Evaluation Committee:** The Clerk Treasurer shall appoint an evaluation committee prior to the due date for receipt of proposals, unless the Governing Body chooses to appoint an evaluation committee. This size of the committee should be manageable and may include both user and technical support representatives.

15.11.3 **Classification of Proposals:** For the purpose of conducting discussions under subsection 15.13 of this policy, proposals shall be initially classified as:

1. responsive;
2. potentially responsive, that is, reasonably susceptible of being made responsive; or
3. non-responsive.

15.11.4 **Disqualification:** Non-responsive proposals are disqualified and eliminated from further consideration. A written determination in the form of a letter must be sent promptly to the disqualified offeror setting forth the grounds for the disqualification, and made a part of the procurement file.

15.12 **Proposal Discussion and Negotiations with Individual Offerors:**

15.12.1 **Discussions Authorized:** Discussions may be conducted with responsible offerors who submit acceptable or responsive, potentially acceptable or potentially responsive proposals. Discussions shall be conducted by the CPO or the evaluation committee as a whole body. Individual discussions by committee members except as otherwise permitted in this subsection are prohibited.

15.12.2 **Purposes of Discussions:** Discussions are held to clarify technical or other aspects of the proposals.

15.12.3 **Conduct of Discussions:** If during discussion there is a need for any substantial clarification or change in the request for proposals, the request for proposals shall be amended to incorporate such clarification or change. Any substantial oral clarification of a proposal shall be reduced to writing by the offeror. Proposals may be accepted and evaluated without such discussion. This is not an opportunity for the offerors to amend the substance of their proposals.

15.12.4 **Short List:** All responsible offerors who submit acceptable proposals are eligible for the short list. However, if numerous acceptable proposals have been submitted the CPO may rank the proposals and select the highest ranked proposals for the short list. Those responsible offerors who are selected for the short list are the “short-listed offerors” or “finalist offerors”.

15.12.5 **Competitive Negotiations:** Competitive negotiations may be held among the short -listed offerors to:

1. promote understanding of the Town’s requirements and short-listed offerors’ proposal; and
2. facilitate arriving at a contract that will be most advantageous to the Town taking into consideration the evaluation factors set forth in the RFP.

Except for circumstances and situations otherwise approved by the CPO, negotiations of the relevant terms and conditions as well as any other important factors in an RFP and proposed contract are negotiated prior to award of a contract, not after the award.

15.12.6 **Conduct of Competitive Negotiations:** Short-listed offerors shall be accorded fair and equal treatment with respect to any negotiations and revisions of proposals. The CPO should establish procedures and schedules for conducting negotiations. If during discussions there is a need for any substantial clarification of or change in the RFP, the RFP shall be amended to incorporate such clarification or change. Any substantial oral clarification of a proposal shall be reduced to writing by the short-listed offeror.

15.13 **Disclosure:** The contents of any proposal ***shall not*** be disclosed so as to be available to competing offerors during the negotiation process and prior to award.

15.14 **Best and Final Offers:**  The CPO may establish a common date and time for short-listed or finalist offerors to submit best and final offers. Best and final offers shall be submitted only once; provided, however, the CPO may make a written determination that it is in the Town’s best interest to conduct additional discussions or change to Town’s requirements and require another submission of best and final offers. Otherwise, no discussion of or changes in the best and final offers shall be allowed prior to award. Short-listed offerors shall also be informed that if they do not submit a notice of withdrawal or another best and final offer, their immediately previous offer will be construed as their best and final offer.

15.15 **Mistakes in Proposals:**

15.15.1 **Modification or Withdrawal of Proposals:** Proposals may be modified or withdrawn as provided in subsection 15.9 of this policy.

15.15.2 **Mistakes Discovered After Receipt of Proposals:** This subsection sets forth procedures to be applied in four situations in which mistakes in proposals are discovered after receipt of proposals.

1. **Confirmation of Proposal:** when the CPO knows or has reason to conclude before award that a mistake has been made, the CPO should request the offeror to confirm the proposal. If the offeror alleges mistake, the proposal may be corrected or withdrawn during any discussions that are held or if the conditions set forth in subsection 15.15.3 are met.
2. **During Negotiations; Prior to Best and Final Offers:** Once negotiations are commenced or after best and final offers are requested, any short-listed or finalist offeror may freely correct any mistake by modifying or withdrawing the proposal until the time and date set for receipt of best and final offers.

15.15.3 **Technical Irregularities:** Technical irregularities are matter of form rather than substance evident from the proposal document, or insignificant mistakes that can be waived or corrected without prejudice to other offerors; that is, when there is no effect on price, quality or quantity. If discussions are not held or if best and final offers upon which award will be made have been received, the CPO may waive such irregularities or allow an offeror to correct them if either is in the best interest of the Town. Examples include the failure of an offeror to:

1. return the number of signed proposals required by the RFP;
2. sign the proposal, ***but only if*** the unsigned proposal is accompanied by other material indicating the offeror’s intent to be bound; or
3. acknowledge receipt of an amendment to the RFP, but only if it is clear from the proposal that the offeror received the amendment and intended to be bound by its terms or the amendment involved had no effect on price, quality or quality.

15.15.4 **Correction of Mistakes:** If discussions are not held, or if the best and final offers upon which award will be made have been received, mistakes shall be corrected to the intended correct offer whenever the mistake and the intended correct offer are clearly evident on the face of the proposal, in which event the proposal may not be withdrawn.

15.15.5 **Withdrawal of Proposals:** If discussions are not held, or if the best and final offers upon which award will be made have been received, an offeror alleging a material mistake of fact which makes a proposal non-responsive may be permitted to withdraw the proposal if:

1. the mistake is clearly evident on the face of the proposal but the intended correct offer is not; or
2. the offeror submits evidence which clearly and convincingly demonstrates that a mistake was made.

15.15.6 **Determination Required:** When a proposal is corrected or withdrawn, or the correction or withdrawal is denied under subsections 15.15.5 of this policy, the CPO shall prepare a written determination showing that the relief was granted or denied in accordance with this section.

15.16 **Public Inspections:**

15.16.1 **General:** After award, any written determinations made pursuant to this policy, the evaluation committee report and each proposal, except those portions for which the offeror has made a written request for confidentiality, shall be open to public inspection. Confidential data is normally restricted to confidential financial information concerning the offeror’s organization and data that qualifies as a trade secret in accordance with the Uniform Trade Secrets Act, Sections 57-3A-1 to 57-3A-7 NMSA 1978. The price of products offered or the cost of services may not be designated as confidential information.

15.16.2 **Confidential Data:** If a request is received for disclosure of data, for which an offeror has made a written request for confidentiality, the purchasing office shall examine the offeror’s request and make a written determination that specifies which portions of the proposal should be disclosed. Unless the offeror takes legal action to prevent the disclosure, the data will be so disclosed. After award the proposal shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data.

15.17 **Payments for Purchases [Contract Clause]:** All contracts resulting from a request for proposals shall contain a clause allowing for late payment charges against the Town in the amount and under the conditions set forth in Section 13-1-158 NMSA 1978. For purchases funded by state or federal grants to the Town, payments shall be tendered to the contractor within five (5) working days of receipt of funds from the funding agency.

16. **APPLICATION – SMALL PURCHASES:** The provisions of this section apply to the procurement of nonprofessional services, construction or items of tangible personal property having a value not exceeding $30,000 and to the procurement of professional services having a value not exceeding $30,000, except procurement for architects, engineers, landscape architects and surveyors, see subsection 16.3.1. The methods of procurement set forth in subsections 16.2 through 16.4 of this policy provide alternatives to the competitive sealed bid and competitive sealed proposal methods of procurement. If the procurement methods set forth in subsections 16.2 through 16.4 of this policy are not used, the competitive sealed bid or competitive sealed proposal methods shall apply.

16.1  **Division of Requirements:** Procurement requirements shall not be artificially divided so as to constitute a small purchase under this section.

16.2  **Small Purchases of Items of Tangible Personal Property, Construction and Nonprofessional Services:**

16.2.1 **Quotation to be Obtained:** Insofar as it is practical for small purchases of nonprofessional services, construction, or items of tangible personal property, written, oral, or electronic quotations are to be recorded and placed in the procurement file as set for below:

1. **$999.99 or Less:** Purchases shall be made according to the ***best obtainable total price*** from phone quotes from three (3) vendors or catalogues.
2. **$1,000.00 to $2,499.99:** Purchases shall be made according to the ***best obtainable total price*** provided at least three (3) businesses shall be solicited using bona fide ***phone*** quotations from a vendor or catalogue. These quotations are required to be recorded on a procurement quotation form and made part of the procurement file.
3. **$2,500.00 to $9,999.99:** Purchases shall be made according to the ***best obtainable total price*** provided at least three (3) bona fide ***written*** quotations from different vendors and catalogues have been obtained for such purchases. These quotations are required to be recorded on a procurement quotation form and made a part of the procurement file.
4. **$10,000.00 to $29,999.99:** Purchases shall be made according to the ***best obtainable total price*** provided at least three (3) bona fide ***written*** quotations are obtained from vendors or catalogues. The CPO may, in unique circumstances, waive request for quotation procedures and require three (3) bona fide phone quotations. Any purchase ***over $10,000*** requires approval by the Board of Trustees.
5. **$30,000 and Above:** All purchases exceeding $30,000 require formal bid procedures as set forth in this policy.

16.2.2 **Disclosure:** Prior to award, the contents of any response to a quotation shall not be disclosed to any other business from which the same request for quotation is also being solicited.

16.2.3 **Bidders List:** Although publication is not required, the purchasing office shall send copies of the notice, request for quotes, or informal invitation for bids involving the expenditure of more than **$10,000** but not exceeding **$30,000** to those businesses which have signified in writing an interest in submitting bids for particular categories of items of tangible personal property, construction, or services, and which have paid any required fees.

16.2.4 **Award:** Award shall be made to the business offering the lowest acceptable quotation.

16.2.5 **Records:** The names of the businesses submitting quotations and the date and the amount of each quotation shall be recorded and maintained as a public record.

16.3 **Small Purchases of Professional Services:**

16.3.1 **Application:** The CPO may procure professional services: having a value not exceeding **$30,000;** for the services of architects and engineers having a value not exceeding **$25,000;** and for landscape architects and surveyors having a value not exceeding **$5,000,** in accordance with the following subsections. In the case of architects, engineers, landscape architects and surveyors, the value shall not include applicable state and local gross receipts tax.

16.3.2 **Examination of Offeror List:** Before contacting any business, the purchasing office is encouraged to examine the office’s current list of potential offerors, if any. The purchasing office is encouraged to contact a least three businesses from the list for written or oral offers before selecting a contractor.

16.3.3 **Negotiations:** The purchasing office shall negotiate a contract for the required services at a fair and reasonable price to the Town.

16.3.4 **Disclosure:** If more than one business is contacted, the contents of the written or oral offer of one business shall not be disclosed to another business until award is made. Award in this context means the final required signature on the contract(s) resulting from the procurement.

17. **APPLICATION – SOLE SOURCE PROCUREMENTS:** The provisions of this section apply to all sole source procurements unless emergency conditions exist as defined in subsection 18 of this policy.

17.1 **Sole Source Procurement of Items of Tangible Personal Property, Construction and Nonprofessional Services:**

17.1.1 **Conditions for Use:** A contract may be awarded without competitive sealed bids or competitive sealed proposals, regardless of the estimated cost, when the CPO, employing due diligence, determines, in writing, that:

1. there is only one source for the required service, construction or item of tangible personal property;
2. the service, construction or item of tangible personal property is unique and this uniqueness is substantially related to the intended purpose of the contract; and
3. other similar services, construction or items of tangible personal property cannot meet the intended purpose of the contract.

In cases of reasonable doubt, competition should be solicited.

17.1.2 **Request by User Agency:** Any request by a user agency that procurement be restricted to one potential contractor shall be accompanied by a written explanation as to why no other will be suitable or acceptable to meet the need. The written explanation shall be made upon a form provided by the purchasing office.

17.1.3 **Posting:**  Prior to award of a sole source contract, the purchasing office shall post the information required by statute on the Town of Estancia website for a period of no less than thirty (30) days.

17.1.4 **Negotiations:** The purchasing office shall conduct negotiations, as appropriate, as to price, delivery, and quantity, in order to obtain the price most advantageous to the Town.

17.2 **Records of Sole Source Procurement:** The purchasing office shall maintain records of sole source procurements for a minimum of three (3) years – see section 31. The record of each such procurement shall be a public record and shall contain:

1. the contractor’s name and address;
2. the amount and term of the contract;
3. a listing of the services, construction or items of tangible personal property procured under the contract; and
4. the justfication for the procurement method which shall include any written determinations and written approvals.

18. **APPLICATION – EMERGENCY PROCUREMENTS:** The section applies to any procurement made under emergency conditions that will not permit other source selection methods to be used.

18.1 **Definition of Emergency Conditions:** An emergency condition is a situation which creates a threat to public health, welfare, safety or property such as may arise by reason of floods, epidemics, riots, equipment failures or similar events. The existence of the emergency condition creates an immediate and serious need for services, construction or items of tangible personal property that cannot be met through normal procurement methods and the lack of which would seriously threaten:

1. the functioning of government;
2. the preservation or protection of property; or
3. the health or safety of any person.

18.2  **Scope of Emergency Procurement:** Emergency procurements shall be limited to those services, construction, or items of tangible personal property necessary to meet the emergency. Such procurement shall not include the purchase or lease- purchase of heavy road equipment.

18.3 **Authority to Make Emergency Procurements:** The purchasing office may make or authorize others to make emergency procurements when an emergency condition arises, provided that emergency procurements shall be made with such competition as is practicable under the circumstances.

18.4 **Procedure:** The procedure used shall be selected to assure that the required services, construction, or items of tangible personal property are procured in time to meet the emergency. Given this constraint, such competition as is practicable shall be obtained.

18.5 **Written Determination Required:** A written determination of the basis for the emergency procurement shall be included in the procurement file.

18.6 **Records of Emergency Procurement:** The purchasing office shall maintain records of emergency procurements for a minimum of three (3) years – see section 31. The record of each such procurement shall be a public record and shall contain:

1. the contractor’s name and address;
2. the amount and term of the contract;
3. a listing of the services, construction or items of tangible personal property procured under the contract; and
4. the justification for the procurement method.

18.7 **Posting:** Within three (3) days of an emergency procurement contract, the purchasing office shall post the information required by statute on the Town of Estancia website for a period of no less than thirty (30) days.

19. **PROCUREMENT UNDER EXISTING CONTRACTS AUTHORIZED:** The purchasing office may contract for services, construction, or items of tangible personal property without the use of competitive sealed bids or competitive sealed proposals as follows:

1. At a price equal to or less than the contractor’s current state supply contract (as listed on NM General Services Department), providing the contractor has indicated in writing a willingness to extend the contract’s pricing, terms, and conditions to the Town and providing the purchase order adequately identifies the contract relied upon; or
2. With a business which has a current price agreement with the Town’s purchasing office, Cooperative Education Services (CES), or the State Purchasing Division of the General Services Department for the item, services or construction meeting the same standards and specifications as the items to be procured, if the following conditions are met:
3. the total quantity purchased does not exceed the quantity which may be purchased under the applicable price agreement; and
4. the purchase order adequately identifies the price agreement relied upon.

19.1 **Copies of Contracts and Price Agreements:** The purchasing office shall retain for public inspection and for the use of auditors, a copy of each contract or current price agreement relied upon to make purchases without seeking competitive bids.

19.2 **Used Items:** As defined in Section 13-1-155 NMSA 1978, the purchasing office, when procuring ***used*** items of tangible personal property the estimated cost of which exceeds $5,000, shall request bids as though the items were new, adding specifications that permit used items under conditions to be outlined in the bid specifications, including but not limited to:

1. requiring a written warranty for at least ninety (90) days after date of delivery, and
2. a “certificate of working order” by an independent qualified mechanic or appraiser.

19.3 **Trade-In or Exchange of Used Items:** As defined in section 13-1-156 NMSA 1978, the purchasing office, when ***trading in or exchanging used*** items of tangible personal property the estimate value of which exceeds $5,000 as part- payment on the procurement of new items of tangible personal property, shall:

1. Have an ***independent*** appraisal made of the items to be traded in or exchanged. The appraisal shall be in writing, shall be made part of the procurement file, and shall be a public record. The invitation for bids or request for proposals shall contain notice to prospective bidders or offerors of the description and specifications of the items to be traded in or exchanged, the appraised value of the items to be traded in or exchanged, and the location where the items to be traded in or exchanged may be inspected; or
2. Have two (2) written quotes for purchase of the property at a specified price:
3. award shall be based upon the net bid. Bidders or offerors shall compute their net bid or offer by deducting the appraised value or highest quote of the items to be traded in or exchanged from the gross bid or offer on the new items of tangible personal property to be procured;
4. if an amount offered in trade is less than the appraised value or the highest quote but is found to be a fair reflection of the current market, representative of the condition of the items of tangible personal property and in the best interest of the Town, the bid or offer may be accepted; and
5. documentation of the terms of acceptance shall be in writing, shall be made a part of the procurement file and shall be a public record.

20. **CANCELLATION OF SOLICITATIONS OR REJECTION OF BIDS OR PROPOSALS:** The provisions of sections 20 and 21 of this policy shall govern the cancellation of any solicitations whether issued by the purchasing office under competitive sealed bids, competitive sealed proposals, small purchases or any other source selection method, and rejection of bids or proposals in whole or in part.

20.1 **Policy:** Any solicitation may be canceled or any or all bids or proposals may be rejected in whole or in part when it is in the best interest of the Town.

20.2 **Cancellation of Solicitations or Rejection of All Bids or Proposals:**

20.2.1 **Prior to Opening:** As used in this section, “opening” means the date set for opening of bids or receipt of proposals.

a) Prior to opening, a solicitation may be canceled in whole or in part when the purchasing office makes a written determination that such action is in the Town’s best interest for reasons including but not limited to:

1. the services, construction or items of tangible personal property are no longer required;
2. the user agency can no longer reasonably expect to fund the procurement; or
3. proposed amendments to the solicitation would significantly change the nature of the procurement.

b) When a solicitation is canceled prior to opening, notice shall be sent to all businesses solicited. The notice shall:

1. identify the solicitation;
2. briefly explain the reason for cancellation; and
3. where appropriate, explain that an opportunity will be given to compete on any re-solicitation or any future procurement of similar services, construction or items of tangible personal property.

20.2.2 **After Opening:**

a) After opening but prior to award, all bids or proposals may be rejected In whole or in part when the purchasing office makes a written determination that such action is in the Town’s best interest for reasons including but not limited to:

1. all of the bids and proposals are non-responsive;
2. the services, construction or items of tangible personal property are no longer required;
3. ambiguous or otherwise inadequate specifications were part of the solicitation;
4. the solicitation did not provide for consideration of all factors of significance to the recipients/sub-recipients;
5. prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
6. all otherwise acceptable bids or proposals received are at clearly unreasonable prices; or
7. there is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive or may have been submitted in bad faith.

b) A notice of rejection should be sent to all businesses that submitted bids or proposals and it shall conform to subsection 20.2.1.a of this section.

21. **REJECTION OF INDIVIDUAL BIDS OR PROPOSALS:**

21.1 **Reasons for Rejection:**

21.1.1 **Bids:** As used in this section, “bid” includes both competitive sealed bids and small purchase quotations. Reasons for rejecting a bid shall include but are not limited to:

1. the business that submitted the bid is non-responsible as determined under section 22 of this policy;
2. the bid is non-responsive; or
3. the service, construction or item of tangible personal property offered in the bid is unacceptable by reason of its failure to meet the requirements of the specifications, permissible alternates, or other criteria set forth in the IFB.

21.1.2 **Proposals:** as used in this section, “proposal” includes both competitive sealed proposals and small purchase offers. Unless the solicitation states otherwise, proposals need not be unconditionally accepted without alteration or correction and a user agency’s stated requirements may be revised or clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include but are not limited to:

1. the business that submitted the proposal is non-responsible as determined under section 23 of this policy;
2. the proposal is non-responsive; or
3. the proposed price is clearly unreasonable; or
4. the proposal failed to adequately address one or more material mandatory requirements as set forth in the request for proposals.

21.1.3 **Written Determination Required:** The purchasing office shall prepare a written determination that contains the reasons for the rejections of an individual bid or proposal. The determination shall be made a part of the procurement file.

21.2 **“All or None” Bids:** When the term “all or none” is used:

21.2.1 **By the Purchaser in a Solicitation:** A solicitation may require bidders to submit bids or offers on all items listed in the solicitation or may identify certain groups of items in which all items must be bid. If the solicitation is properly so limited, a bidder’s failure to bid all items identified as ***“all or none”*** items may render the bid non-responsive.

21.2.2 **By the Bidder or Offeror and Not the Purchaser:** If the bidder restricts acceptance of the bid, or a portion thereof, by such statement as ***“all or none”***, the bidder has ***“qualified”*** the offer which may render the bid non-responsive.

21.2.3 In instances as stated above, such a bid or offer may be accepted only if the purchasing office issues a determination setting forth the basis for accepting the bid or offer or offer as being in the best interest of the Town. Also, in both instances, the bid or offer is only eligible for award if it is the overall low bid for the item(s) so restricted.

22. **RECEIPT, INSPECTION, AND ACCEPTANCE OR REJECTION OF DELIVERIES:** The Town or user agency is responsible for inspecting and accepting or rejecting deliveries.

1. The Town or user agency shall determine whether the quantity is as specified in the purchase order or contract;
2. The Town or user agency shall determine whether the quality conforms to the specifications referred to or included in the purchase order or contract;
3. If inspection reveals that the delivery does not meet or conform to the quantity or quality specified in the purchase order or contract, the Town or user agency shall notify the vendor that the delivery has been rejected and shall order the vendor to promptly make a satisfactory replacement or supplementary delivery;
4. In case the vendor fails to comply, the user agency shall promptly file a purchasing complaint with the purchasing office. Also, in case the vendor fails to comply, the Town shall have no obligation to pay for the nonconforming items of tangible personal property;
5. If the delivery does conform to the quantity and quality specified in the purchase order or contract, the user agency shall certify to the purchasing office that delivery has been completed and is satisfactory. This may be done by signing and dating a shipping document, receipt, or similar document.

22.1 **Summary:** Notwithstanding the requirements of section 22 of this policy, if, after delivery and acceptance of goods, the goods or a portion thereof are later found to be non-conforming to the specifications referred to or included in the purchase order or contract, such acceptance does not waive any rights or remedies which are otherwise granted to the buyer in accordance with other applicable laws of New Mexico.

23. **RESPONSIBILITY OF BIDDERS AND OFFERORS:** A determination of responsibility or non-responsibility shall be governed by this section 23.

23.1 **Standards of Responsibility:**

23.1.1 **Standards for Bidders:** Factors to be considered in determining whether the standard of responsibility has been met include whether a bidder has:

1. submitted a responsive bid;
2. adequate financial resources, production or service facilities, personnel, service reputation and experience to make satisfactory delivery of the services, construction, or items of tangible personal property described in the IFB;
3. a satisfactory record of performance;
4. a satisfactory record of integrity;
5. qualified legally to contract with the Town; and
6. supplied all necessary information and data in connection with any inquiry concerning responsibility.

23.1.2 **Standards for Offerors:** Factors to be considered in determining whether the standard of responsibility has been met include whether an offeror has:

1. submitted a responsive proposal;
2. adequate financial resources, production or service facilities, personnel, service reputation and experience to make satisfactory delivery of the services, construction, or items of tangible personal property described in the proposal;
3. a satisfactory record of performance;
4. a satisfactory record of integrity;
5. qualified legally to contract with the Town; and
6. supplied all necessary information and data in connection with any inquiry concerning responsibility.

23.1.3 **Ability to Meet Standards:** A bidder or offeror may demonstrate the availability of adequate financial resources, production or service facilities, personnel and experience by submitting, upon request:

1. evidence that the bidder of offeror possesses the necessary items;
2. acceptable plans to subcontract for the necessary items; or
3. a documented commitment from or explicit arrangement with a satisfactory source to provide the necessary items.

23.2 **Inquiry by CPO:** Before awarding a contract, the CPO must be satisfied that the bidder or offeror is responsible. Therefore, a bidder or offeror shall supply information and data requested by the CPO concerning the responsibility of the bidder or offeror. The unreasonable failure of a bidder or offeror to promptly supply information or data in connection with such an inquiry is grounds for a determination that the bidder or offeror is not responsible.

23.2.1 **Determination Required:** If a bidder or offeror who otherwise would have been awarded a contract is found to be non-responsible, a written determination setting forth the basis of the finding shall be prepared by the purchasing office. The written determination shall be made part of the procurement file and a copy of the determination shall be sent to the non-responsible bidder or offeror.

24. **APPLICABILITY – PROTESTS:** The provisions of this section apply to all protests filed with the purchasing office.

24.1 **Right to Protest:** Any bidder or offeror who is aggrieved in connection with a solicitation or award of a contract may protest to the CPO through the purchasing office.

24.2 **Filing of Protest:**

24.2.1 **Protest Must be Written:**  Protests must be in writing and addressed to the CPO.

24.2.2 **Contents:** The protest shall:

1. include the name and address of the protestant;
2. include the solicitation number;
3. contain a statement of the grounds for protest;
4. include supporting exhibits, evidence or documents to substantiate any claim unless not available within the filing time, in which case, the expected availability date shall be indicated; and
5. specify the ruling requested from the CPO.

24.2.3 **Pleadings:** No formal pleading is required to initiate a protest, but protests should be concise, logically arranged and direct.

24.2.4 **Time Limit:** Protests shall be submitted within fifteen calendar days after knowledge of the facts or occurrences giving rise to the protest. Any person or business that has been sent written notice of any fact or occurrence is presumed to have knowledge of the fact or occurrence.

24.3 **Procurements after Protest:** In the event of a timely protest as defined in this section, the purchasing office shall not proceed further with the procurement unless the office makes a written determination that the award of the contract is necessary to protect substantial interests of the Town. Such written determination should set forth the basis for the determination. As used in this section, the point in time in which a contract is awarded is that point at which a legally enforceable contract is created unless the context clearly requires a different meaning.

Procurement shall not be halted after a contract has been awarded merely because a protest has been filed. After a contract has been awarded, the purchasing office may, at its sole discretion, halt procurement in exceptional circumstances or for good cause shown.

24.4 **Protest Procedure:** Upon the filing of a timely protest, the purchasing office shall give notice of the protest to the contractor if award has been made. If no award has been made, notice shall be given to all bidders or offerors who appear to have a substantial and reasonable prospect of receiving an award if the protest is denied.

The protestant and every business that received notice pursuant to this section will automatically be parties to any further proceedings before the purchasing office. In addition, any other person or business may move to intervene at any time during the course of the proceedings. Intervention will be granted upon a showing of a substantial interest in the outcome of the proceedings. Interveners shall accept the status of the proceedings at the time of their intervention; in particular, they must abide by all prior rulings and accept all previously established time schedules. The purchasing office and all employees thereof are not parties to the proceedings.

The CPO may take any action reasonably necessary to resolve a protest. Such actions may include but are not limited to the following:

1. issue a final written determination summarily dismissing the protest;
2. require parties to produce for examination information or witnesses;
3. require parties to express their positions on any issues in the proceedings;
4. require parties to submit legal briefs on any issues in the proceeding;
5. establish procedural schedules;
6. regulate the course of the proceedings and the conduct of any participants;
7. receive, exclude or limit evidence;
8. take official notice of any fact that is among the traditional matters of official or administrative notice;
9. conduct hearings; and
10. take any action reasonably necessary to compel discovery or contract the conduct of parties or witnesses.

24.4.1 **Protest Discovery:** Upon written request of any party, or upon his or her own motion, the CPO may require parties to comply with discovery requests.

24.5 **Protest Hearings:** Hearings will be held only when the CPO determines that substantial material factual issues are present that cannot be resolved satisfactorily through an examination of written documents in the record. Any party may request a hearing, but such requests shall be deemed denied unless specifically granted.

Hearings, when held, should be as informal as practicable under the circumstances, but the CPO has absolute discretion in establishing the degree of formality for any particular hearing. In no event is the CPO required to adhere to formal policies of evidence or procedure.

24.6 **Resolution:** The CPO shall promptly issue a written determination relating to the protest. The determination shall:

1. state the reasons for the action taken; and
2. inform the protestant of the right to judicial review of the determination pursuant to Section 13-1-183 NMSA 1978.

A copy of the written determination shall be sent immediately by certified mail, return receipt requested, to each of the parties.

24.7 **Relief:**

24.7.1 **Prior to Award:** If, after an award has been made, the CPO makes a written determination that a solicitation or award of a contract is in violation of law, then the solicitation or proposed award shall be canceled.

24.7.2 **After Award:**

1. **No Fraud or Bad Faith:** If, after an award has been made, the CPO makes a written determination that a solicitation or award of a contract is in violation and law and that the business awarded the contract has not acted fraudulently or in bad faith:
2. the contract may be ratified, affirmed or revised to comply with law, provided that a written determination is made that doing so is in the best interest of the Town; or
3. the contract may be terminated and the business awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract plus a reasonable profit prior to termination.
4. **Fraud or Bad Faith:** If, after an award the CPO makes a written determination that a solicitation or award of a contract is in violation of law and that the business awarded the contract has acted fraudulently or in bad faith, the contract shall be canceled.
5. **Relief Not Allowed:** Except as provided in subsection 24.7.2A, the CPO shall not award money damages or attorneys’ fees.

24.8 **Motion for Reconsideration:**

24.8.1 **Motion:** A motion for reconsideration of a written determination issued pursuant to this policy may be filed by any party or by any user agency involved in the procurement. The motion for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification of the determination is deemed warranted, specifying any errors of law made or information not previously considered.

24.8.2 **When to File:** A motion for reconsideration shall be filed not later than seven calendar days after receipt of the written determination.

24.8.3 **Response to Motion:** The CPO shall promptly issue a written response to the motion for reconsideration. A copy of the written response shall be sent immediately by certified mail, return receipt requested, to each of the parties.

24.9  **Designee:**

24.9.1 **Designation:** At any point during a protest proceeding, the CPO may appoint a designee as defined in Section 13-1-51 NMSA 1978 to preside over the proceeding. The designee will have all the powers described in section 24 of this policy except the power to issue a written determination under section 24.6 of this policy. The designee only has authority to recommend a resolution to the CPO under subsection 24.6 of this policy.

24.9.2 **Who May be Designated:** Any person not directly involved in the procurement may serve as designee.

24.9.3 **Recommended Written Determination:** A designee shall present a recommended written resolution to the CPO and mail a copy to each of the parties. No party may appeal from the recommended resolution of the designee.

24.9.4 **Action by the CPO:** The CPO shall approve, disapprove or modify the recommended resolution of the designee in writing. Such approval, disapproval or modification shall be the written determination required by section 24.6 of this policy. Any party may file a motion for reconsideration of the written determination pursuant to section 24.8 of this policy.

24.10 **Final Determination:**

24.10.1 **No Motion for Reconsideration:** In those proceedings in which no motion for reconsideration is filed, the written determination issued to subsection 24.6 of this policy shall be the final determination for purposes of the time limits for seeking judicial review under Section 13-1-183 NMSA 1978.

24.10.2 **Motion for Reconsideration:** In those proceedings in which a motion for reconsideration is filed, the written response to the motion issued pursuant to subsection 24.8 of this policy shall be the final determination for purposes of the time limits for seeking judicial review under Section 13-1-183 NMSA 1978.

24.11 **Copies of Communications:**

24.11.1 **Copies to be Provided to Parties:** Each party to a protest proceeding shall certify that it has provided every other party with copies of all documents or correspondence addressed or delivered to the CPO.

24.11.2 **Ex-Parte Communications:** No party shall submit any ex-parte material, evidence, explanation, analysis or advice to the CPO whether written or oral,regarding any matter at issue in a protest.

24.11.3 **Counting Days:** In computing any period of time prescribed in section 24 of this policy, the day of the event from which the designated period of time begins to run shall be included unless it is a Saturday, Sunday or legal holiday, in which event, the period shall run to the end of the next business day.

25. **PROCUREMENT OVERSIGHT:** The Town and its user agencies shall conduct and document oversight to ensure compliance with the procurement standards established in applicable federal regulation, OMB circulars, the State Procurement Code, and this policy.

25.1 **Procurement System:** The Town and its user agencies shall maintain an administration system that ensures that contractors, sub-recipients and vendors perform in accordance with the terms, conditions and specifications of their awards. Such system shall include the maintenance of records sufficient to detail the significant history of the procurement. These records shall include but are not limited to rationale for method of procurement, selection of agreement type, awardee selection or rejection, and the basis for the agreement price.

25.2 **Contract Awards:** The Town and its user agency shall adhere to applicable OMB circulars and the Code in selecting and awarding contracts, grants, and sub-grants.

26. **PERFORMANCE AND PAYMENT BONDS:**

26.1 **Performance and (Labor and Material) Payment Bonds:** Pursuant to Section 13-4-18 NMSA 1978, performance and payment bonds are required if the construction contract is over $25,000. The bonds may be required if a project is under $25,000 at the Town’s sole and complete discretion. If a contractor fails to deliver the required bonds, the contractor’s bid shall be rejected; its bid security shall be enforced to the extent of actual damages. See Section

13-4-18A(1) & (2) for approved listing of bonding companies.

26.2 **Bonding of Subcontractors:** A subcontractor shall provide a performance and payment bond on a public works building project if the subcontractor’s contract for work to be performed on a project is $50,000 or more (Section 13-1-21 NMSA 1978).

27. **NON-DISCRIMINATION:** Federal grant recipients, sub-recipients, contractors and subcontractors shall comply with the non-discrimination and equal opportunity provisions of the Enabling Act, including Title VI of the Civil Rights Act of 1964 as amended; Section 504 of the Rehabilitation Act of 1973 as amended; the Age Discrimination Act of 1975 as amended; Title IX of the Education Amendments of 1972 as amended; the Americans with Disabilities Act of 1990 and any amendments thereto; and all applicable requirements imposed pursuant to regulations implementing those laws. The applicable federal funding agency and the state administrative entity reserve the right to seek judicial enforcement of this assurance.

28. **RESTRICTIONS AND CERTIFICATIONS:** The Town and its contractors and subcontractors shall comply with: the Drug-Free Workplace Act of 1998 (Pub L. 100-690, Title V, Sub Title D); Federal Restrictions on Lobbying (20 CFR 93.100); restrictions on the use of funds involving sectarian activities; and certification regarding debarment, suspension and voluntary exclusion-lower tier covered transactions (29 CFR 98 OMB Circular A-133, and Executive Order 12549); certification regarding conflict of interest; tobacco-free certification, if applicable; and Town policy.

29. **UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND CONTRACTS:** Contractors shall comply with the appropriate Uniform Administrative Requirements for Grants and Contracts as promulgated in the Federal Common Rule, including but not limited to OMB Circulars A-87, A-102 and A-122.

30. **NON-EXPENDABLE SUPPLIES AND PROPERTY:** Any non-expendable supplies and property referred to as tangible personal property in this policy acquired using Town funds and valued over $5,000 is a fixed asset of the Town. Department Heads shall notify the purchasing office when authorized items over $5,000 are purchased and received so the item can properly be tagged and added to fixed assets. Department Heads shall notify the purchasing office of the purchase of items under $5,000 so they can be added to the department’s inventory.

31. **SALE OR LEASE OF REAL PROPERTY:** The selling or leasing of real property ; and the sale, exchange and gift of property is governed by other statutory requirements and ***not*** by the Code or this policy, but are governed by Sections 13-6-1 through 13-6-4 NMSA 1978.

32. **RECORDS RETENTION:** The purchasing office shall be responsible for retention of all procurement records. The records shall be retained for a period of a minimum of 3 years from the date of final payment under the contract. Records shall be retained beyond the 3 year period if audit findings have not been resolved, an independent audit is pending completion or if requested by the state administrative entity or applicable funding authority or required for pending litigation. In such cases, records shall be retained until such audit findings or litigation is resolved. Contracts associated with grant funding shall be retained for 6 years.

33. **PERSONAL USE PROHIBITED:** A Town employee, public officer, or volunteer is prohibited from making purchases under Town procurement for the purpose of personal or private use.

34. **INTERPRETATIONS:** Any supplements, revisions, or substantive changes to this policy shall be through supplemental resolution approved by the Town Board of Trustees. The provisions of this policy shall be held to be minimum requirements. Whenever the requirements of this policy are at variance with the requirements of any other lawfully adopted rules, regulation or laws, the more restrictive or that imposing higher a standard shall govern.

35. **USE OF CONFIDENTIAL INFORMATION PROHIBITED:** It is unlawful for any state agency or local public body employee or former employee knowingly to use confidential information for actual or anticipated personal gain or for the actual or anticipated personal gain of any other person.

36. **PENALTIES:** Any person, firm or corporation that knowingly violates any provision of the Procurement Code [§13-1-28 NMSA 1978] is subject to a civil penalty of not more than one thousand dollars ($1,000) for each procurement in violation of any provision of the Procurement Code. The attorney general or the district attorney in the jurisdiction in which the violation occurs is empowered to bring a civil action for the enforcement of any provision of the Procurement Code. Any penalty collected under the provisions of this section shall be credited to the Town general fund.

Violation of this policy may subject a Town employee to disciplinary action, including but not limited to suspension, demotion, or termination, subject to the Town Personnel Policy.