MISSISSIPPI
STATE PERSONNEL BOARD

# Personal Services Contract Review Board

## Rules and Regulations

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# CHAPTER 1 – PURPOSE OF BOARD AND REGULATION DEVELOPMENT

## 1-101 GENERAL PROVISIONS

### 1-101.01 Purpose of the Personal Service Contract Procurement Regulations

In 1997, the Mississippi Legislature established the Personal Service Contract Review Board (hereinafter "PSCRB"), and authorized it to "[p]romulgate rules and regulations governing the solicitation and selection of contractual services personnel . . . ." Miss. Code Ann. § 25-9-120 (3)(a) (1972, as amended). The purpose of the *Personal Service Contract Review Board Rules and Regulations* is to set forth rules and regulations, along with other pertinent information, that agencies should follow in the procurement of personal services. The policies and procedures set forth herein apply only to those agencies which fall under the authority of the PSCRB. With the exception of the Mississippi Department of Transportation, agencies under the authority of the PSCRB include those agencies under the authority of the Mississippi State Personnel Board (hereinafter "MSPB"). See Appendix A. This manual is intended to be a comprehensive presentation of regulations relative to obtaining personal service contracts pursuant to Mississippi Code Annotated § 25-9-120. Further, it shall serve as a source of information for contractors, instructing them as to the proper procedures that must be followed in doing business with the State of Mississippi.

### 1-101.02 Interpretation of Regulations

#### 1-101.02.01 Interpretation, Purposes and Policies

These regulations shall be construed and applied to promote the underlying purposes and policies, which are:

(a) to simplify, clarify, and modernize the regulations governing contracting for personal service by agencies of the State of Mississippi;

(b) to permit the continued development of procurement policies and practices;

(c) to provide for increased public confidence in the procedures followed in the public procurement for personal services contracts;

(d) to ensure the fair and equitable treatment of all persons who deal with the procurement system of this State for personal service contracts;

(e) to provide increased economy in the State of Mississippi procurement activities and to maximize to the fullest extent practicable the purchasing value of public funds of the State;

(f) to foster effective broad-based competition with the free enterprise system; and,

(g) to provide safeguards for maintenance of a procurement system of quality and integrity.

### 1-101.02.02 Singular-Plural and Gender Rules

In these regulations, unless the context requires otherwise:

(a) words in the singular number include the plural, and those in the plural include singular; and,

(b) words of a particular gender include any gender and the neuter, and when the sense so indicates, words of the neuter gender may refer to any gender.

### 1-101.03 Purpose and Implementation of these Regulations

These regulations, issued by the Mississippi Personal Service Contract Review Board (hereafter sometimes referred to as the Board), establish policies, procedures, and guidelines relating to the procurement, management, and control of personal and professional services, as applicable, under the authority of these regulations. These regulations are designed to achieve maximum practicable uniformity throughout the State. Hence, implementation by and within Mississippi agencies shall be consistent with these regulations and any other regulations required by the funding source which may be more stringent.

## 1-102 SUPPLEMENTARY GENERAL PRINCIPLES OF LAW APPLICABLE

Subject to principles of law and equity, these regulations will govern the creation and administration of service contracts.

## 1-103 REQUIREMENT OF GOOD FAITH

These regulations require all parties involved in the negotiation, performance or administration of Mississippi contracts to act in good faith.

## 1-104 APPLICATION OF THE REGULATIONS

These regulations shall apply to every expenditure of public funds irrespective of source; however, in the event of a conflict, the guidelines of a grant, a gift, or self-generated funds shall prevail. Violation of these regulations shall carry such penalties as may be applicable under state law.

## 1-105 SEVERABILITY

If any provision of these regulations or any application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provision or application of these regulations which can be given effect without the invalid provision or application, and to this end the provisions of these regulations are declared to be severable.

## 1-106 DURATION

These regulations, when approved by the PSCRB as authorized by Mississippi Code Annotated § 25-9-120 (1972, as amended), shall be in effect as written until amended or repealed by the PSCRB.

## 1-201 DEFINITIONS

The words defined in this section shall have the meaning set forth below whenever they appear in the regulations, unless:

(a) the context in which they are used clearly requires a different meaning; or,

(b) a different definition is prescribed for a particular chapter or provision.

### 1-201.01 Definition of Terms Used in the Regulations

(a) **Agency** shall be defined as any state board, commission, committee, council, department or unit thereof created by the constitution or statutes if such board, commission, committee, council, department, unit or the head thereof is authorized to appoint subordinate staff by the constitution or statute, except a legislative or judicial board, commission, committee, council, department or unit thereof, Institutes of Higher Learning and the Mississippi Department of Transportation.

(b) **Agency Head** means the person in charge of an Agency whether that person's title is Director, Executive Director, Commissioner, etc. The term "Agency Head" shall also encompass a designee duly appointed by the Agency Head.

(c) **Board** shall mean the Personal Service Contract Review Board.

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

(e) **Change Order** means a written order signed by the Procurement Officer directing the contractor to make changes which the changes clause of the contract authorizes the Procurement Officer to order without the consent of the contractor.

(f) **Consultant** means the person holding the position as Contract Analyst with the PSCRB.

(g) **Contract** means all types of agreement for the procurement of services, regardless of what they may be called.

(h) **Contract Modification** means any written alteration in contract requirements, deliverables, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract.

(i) **Contractor** means any person having a contract with a governmental body.

(j) **Data** means recorded information, regardless of form or characteristic.

(k) **Day** means calendar day, unless otherwise specified.

(l) **Designee** means a duly authorized representative of a person holding a superior position.

(m) **Employee** means an individual who performs services for a governmental body by virtue of an employee/employer relationship with the governmental body.

(n) **May** denotes the permissive.

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

(p) **Procurement** means buying, purchasing or otherwise acquiring any services. It also includes all functions that pertain to the obtaining of any services, including description of requirements, selection and solicitation of sources, preparation and award of contract and all phases of contract administration.

(q) **Procurement Officer** means any agency personnel duly authorized to enter into and administer contracts and make written determinations with respect thereto. The term also includes an authorized agency representative acting within the limits of authority.

(r) **Purchasing Agency** means any governmental body which is authorized by regulations to enter into contracts.

(s) **Regulation** means a governmental body's statement, having general or particular applicability and future effect, designed to implement, interpret, or prescribe law or policy, or describing organization, procedure, or practice requirements, which has been promulgated in accordance with the Mississippi Administrative Procedures Law, Mississippi Code Annotated §§ 24-43-1 *et seq.* (1972, as amended).

(t) **Services** mean the furnishing of labor, time, or effort by a contractor, not usually involving the delivery of a specific end product other than that which is incidental to the required performance.

(u) **Shall** denotes the imperative.

(v) **SPAHRS** means the State Payroll and Human Resources System or any other state accounting system that replaces SPAHRS.

## 1-301 PUBLIC ACCESS TO PROCUREMENT INFORMATION

Procurement information shall be public record to the extent provided in Mississippi Code Annotated §§ 25-61-1 *et seq.* (1972, as amended), except as noted in 1-301.01 of these regulations.

### 1-301-01 Release of Information Regarding Bid Results

Subject to the provisions of the Mississippi Public Records Act, Mississippi Code Annotated §§ 25-61-1 *et seq*. (1972, as amended), disclosure of bid information by contracting agencies shall be as follows:

(a) Information pertaining to the results of any bid may be reviewed subsequent to the time of the bid opening by any business or person who submitted bids on the particular transaction. The contracting agency may restrict the availability of the bids or proposals prior to bid opening or contract award so as to improve the efficiency of the evaluation and award process.

(b) Businesses or persons not participating in the process will not be permitted access to any applicable file until after an award is made. After the award is made, all information and documents applicable to the awarded contract shall be made available to any business or person; provided, however, no information specified by a participant and approved by the procurement officer as proprietary information shall be available to any business or person without a written request.

(c) When an agency receives a request to release confidential information, the agency shall give the owner of this information reasonable time to obtain a court order protecting the information as confidential. If the agency receives a court order pursuant to Mississippi Code Annotated § 25-61-9 (1972, as amended) within this time, it must then notify the requestor that the information is protected by court order and cannot be furnished.

(d) A contracting agency may restrict bid result document review to the premises of the agency at any time during normal working hours. No agency is compelled to copy or duplicate any bid record for any person or business; however, if an agency agrees to copy or duplicate such record, it may charge a reasonable fee in compliance with written procedures adopted by the agency.

## CHAPTER 2 – ORGANIZATION

### 2-101 CREATION AND MEMBERSHIP OF THE MISSISSIPPI PERSONAL SERVICE CONTRACT REVIEW BOARD

During the 1997 Regular Session, the Mississippi Legislature enacted legislation creating the Personal Service Contract Review Board. Mississippi Code Annotated § 25-9-120 (1972, as amended) provides that the PSCRB is to be composed of the Mississippi State Personnel Board Executive Director; the Executive Director of the Department of Finance and Administration, or his designee; the Commissioner of Corrections, or his designee; the Executive Director of the Mississippi Department of Wildlife and Fisheries, or his designee; and the Executive Director of the Department of Environmental Quality, or his designee. The MSPB Executive Director shall be chairman and shall preside over the meetings of the PSCRB.

### 2-102 POLICY AND PROCEDURE

The Board shall annually elect a vice-chairman, who shall serve in the absence of the chairman. No business shall be transacted, including adoption of rules or procedure, without the presence of a quorum of the Board. Three (3) members shall be a quorum. No action shall be valid unless approved by the chairman and two (2) other of those members present and voting, entered upon the minutes of the Board and signed by the chairman. Necessary clerical and administrative support for the Board shall be provided by the MSPB. Minutes shall be kept of the proceedings of each meeting, copies of which shall be filed on a monthly basis with the Legislative Budget Office.

### 2-103 AUTHORITY AND DUTIES OF THE PERSONAL SERVICE CONTRACT REVIEW BOARD

The PSCRB has the following powers and responsibilities as delineated in Mississippi Code Annotated § 25-9-120(3)(a) through (i) (1972, as amended):

(a) Promulgate rules and regulations governing the solicitation and selection of contractual services personnel including personal and professional services contracts for any form of consulting, policy analysis, public relations, marketing, public affairs, legislative advocacy services or any other contract that the board deems appropriate for oversight, with the exception of any personal service contracts entered into for computer or information technology-related services governed by the Mississippi Department of Information Technology Services, any personal service contracts entered into by the Mississippi Department of Transportation, and any contract for attorney, accountant, auditor, physician, dentist, architect, engineer, veterinarian and utility rate expert services. Any such rules and regulations shall provide for maintaining continuous internal audit covering the activities of such agency affecting its revenue and expenditures as required under Section 7-7-3(6)(d) of the Mississippi Code Annotated (1972, as amended).

(b) Approve all personal and professional services contracts involving the expenditures of funds in excess of One Hundred Thousand Dollars ($100,000);

(c) Develop standards with respect to contractual services personnel which require invitations for public bid, requests for proposals, record keeping and financial responsibility of contractors. The Personal Service Contract Review Board may, in its discretion, require the agency involved to advertise such contract for public bid, and may reserve the right to reject any or all bids;

(d) Prescribe certain circumstances whereby agency heads may enter into contracts for personal and professional services without receiving prior approval from the PSCRB. The PSCRB may establish a preapproved list of providers of various personal and professional services for set prices with which state agencies may contract without bidding or prior approval from the board.

(e) To provide standards for the issuance of requests for proposals, the evaluation of proposals received, consideration of costs and quality of services proposed, contract negotiations, the administrative monitoring of contract performance by the agency and successful steps in terminating a contract;

(f) To present recommendations for governmental privatization and to evaluate privatization proposals submitted by any state agency;

(g) To authorize personal and professional service contracts to be effective for more than one (1) year provided a funding condition is included in any such multiple year contract;

(h) To request the State Auditor to conduct a performance audit on any personal or professional service contract;

(i) Prepare an annual report to the Legislature concerning the issuance of personal service contracts during the previous year, collecting any necessary information from state agencies in making such report.

**2-103.01 Procurement Regulations**

Regulations shall be promulgated with approval of the PSCRB in accordance with authority granted under Mississippi Code Annotated § 25-9-120 (1972, as amended).

**2-103.02 Discretionary Authority**

The PSCRB shall have the discretion to grant exceptions to these regulations when it is determined that it is in the best interest of the State to do so.

### 2-103.03 Amendment to the Regulations

These regulations may be amended by the Board as authorized in Mississippi Code Annotated § 25-9-120 (1972, as amended).

## 2-104 CONTINOUS INTERNAL AUDIT REQUIRED

In conformity with Mississippi Code Annotated §§ 7-7-3(6)(d) and 25-9-120(3) (1972, as amended), each state agency shall, through its governing board or executive head, maintain a continuous internal audit covering the activities of such agency affecting its revenues and expenditures for personal and professional services contracts. Each agency shall further maintain an internal system of pre-auditing claims, demands, and accounts against the agency to adequately ensure that only valid claims, demands, and accounts will be paid.

# CHAPTER 3 - SOURCE SELECTION AND CONTRACT FORMATION

## 3-101 CONTRACTING PROCEDURES

### 3-101.01 Definition of Terms Used in this Chapter

(a) **Award** is the acceptance by an agency of a bid or proposal submitted by a vendor with the intention of entering into a contract for services.

(b) **Bid** shall be defined as an offer submitted by a prospective contractor in response to an Invitation for Bid.

(c) **Capability** as used in Section 3-101.01 (r) (Definitions, Responsible Bidder or Offeror), means capability at the time of award of the contract.

(d) **Contract Worker**, for purposes of these regulations, is a worker under contract with the State who meets the requirements for a contract worker under the Internal Revenue Code. (See Appendix C)

(e) **Cost analysis** is the evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.

(f) **Cost Data** is information concerning the actual or estimated cost of labor, material, overhead, and other cost elements which have been actually incurred or which are expected to be incurred by the contractor in performing the contract.

(g) **Cost-Reimbursement Contract** means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with contract terms and the provisions of these regulations, and may receive a fee.

(h) **Discussions**, as used in the source selection process, means an exchange of information or other manner of negotiation during which the offeror and the State may alter or otherwise change the conditions, terms, and price of the proposed contract. Discussions may be conducted in connection with competitive sealed proposals, sole-source, and emergency procurement; discussions are not permissible in competitive sealed bidding (except to the extent permissible in the first phase of multi-step sealed bidding).

(i) **Fixed Price Contract** means a contract providing for a firm price, or a price that may be adjusted only in accordance with contract clauses providing for revision of the contract price under stated circumstances.

(j) **Invitation for Bid** means all documents, whether attached or incorporated by reference, utilized for soliciting bids.

(k) **Net-of-Fee Contract** means a contract in which there is no expenditure of state funds from any funding source (state, federal or other).

(l) **Prequalification for Inclusion on Bidders Lists** means determining in accordance with Section 3-402 (Prequalification of Suppliers) that a prospective bidder or offeror satisfies the criteria established for being included on the bidders list.

(m) **Price Analysis** is the evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.

(n) **Price Data** is factual information concerning prices, including profit, for supplies services, or construction substantially similar to those being procured. In this definition, "prices" refer to offered or proposed selling prices, historical selling prices, and current selling prices of such items. This definition refers to data relevant to both prime and subcontract prices.

(o) **Proposal** is the document submitted by the offeror in response to a Request for Proposal to be used as the basis for negotiations for entering into a contract. A proposal is usually requested in cases where the selection of a contractor is to be made on the basis of the performance that is offered rather than on that of price alone and may require an outline of details such as the vendor's qualifications and experience and the identification of problems and proposed solutions in addition to details of price.

(p) **Purchase Description** means the words used in a solicitation to describe the services to be purchased and includes the statement of work or deliverables attached to, or made a part of, the solicitation.

(q) **Request for Proposal** means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.

(r) **Responsible Bidder or Offeror** means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance.

(s) **Responsive Bidder or Offeror** means a person who has submitted a bid which conforms in all material respects to the Invitation for Bid or the Request for Proposal.

(t) **Solicitation** means an Invitation for Bid, a Request for Proposal, a request for quotations, or any other document issued by the State for the purpose of soliciting bids or proposals to perform a state contract.

(u) **Suppliers**, as used in Section 3-402 (Prequalification of Suppliers), means prospective bidders or offerors.

### 3-101.02 Exemptions Not Requiring Approval

By authority of the Mississippi Legislature, service contracts of $100,000 or less do not require approval of the PSCRB. Contracts which do not exceed $100,000 shall follow the procedures set forth in Section 3-204 (Small Purchases). The following are exempt from the purview of the PSCRB in accordance with Mississippi Code Annotated § 25-9-120(3)(a) (1972, as amended) and as determined by the PSCRB:

(a) Accountant;

(b) Dentist;

(c) Actuary;

(d) Engineer;

(e) Architect;

(f) Physician;

(g) Attorney;

(h) Utility rate expert services;

(i) Auditor;

(j) Veterinarian; and,

(k) Any contracting authority exempt by State statute (Miss. Code Ann. § 25-9-120 (1972, as amended)) including, but not limited to-

1) computer or information technology related services governed by the Mississippi Department of Information Technology Services;

2) personal service contracts entered into by the Mississippi Department of Transportation; and,

3) contracts for equipment repairs governed by Mississippi Code Annotated § 31-7-13 (1972, as amended).

If any agency determines that the vendor is performing licensed or certified duties, the agency should document its determination.

### 3-101.03 Personal Liability

Mississippi Code Annotated § 31-7-57 (1972, as amended), holds state employees personally liable if they authorize or make a solicitation or award of a contract in violation of law.

### 3-101.04 Contract Workers

The PSCRB's authority over contracts for contract workers is the same as its authority over contracts for independent contractors.

### 3-101.05 Net-of-fee Contracts

Net-of-fee contracts do not involve expenditures of state funds; they do not come under PSCRB purview. An agency should maintain for its file a written determination that a contract is net-of-fee.

## 3-102 GENERAL PROVISIONS

### 3-102.01 Extension of Time for Bid or Proposal Acceptance

After opening bids or proposals, the Procurement Officer may request bidders or offerors to extend the time during which the State may accept their bids or proposals, provided that, with regard to bids, no other change is permitted. The reasons for requesting such extension shall be documented.

### 3-102.02 Only One Bid or Proposal Received, No Bid Received

#### 3-102.02.1 One Bid Received

If only one responsive bid is received in reply to an Invitation for Bid (including multi-step bidding), an award may be made to the single bidder if the Procurement Officer finds that the price submitted is fair and reasonable, and that either the other prospective bidders had reasonable opportunity to respond, or there is not adequate time for re-solicitation. Otherwise, the bid may be rejected pursuant to the provisions of Section 3-301.04 (Cancellation of Solicitation; Rejection of all Bids or Proposals) and:

(a) the bid may be re-advertised and new bids or offers may be solicited;

(b) the proposed procurement may be canceled;

(c) if the Procurement Officer determines in writing that the need for the supply or service continues, but that the price of the one bid is not fair and reasonable and there is not time for resolicitation or resolicitation would likely be futile, the procurement may then be conducted under Section 3-205 (Sole-Source Procurement) or Section 3-206 (Emergency Procurement), as appropriate.

### 3-102.02.2 One Proposal Received

If only one proposal is received in response to a Request for Proposal, the Procurement Officer may either make an award in accordance with the procedures set forth in Section 3-203 (Competitive Sealed Proposals) or, if time permits, re-solicit for the purpose of obtaining competitive sealed proposals.

### 3-102.02.3 No Bid or Proposal Received

If no bid or proposal is received in response to an Invitation for Bid:

(a) the bid may be re-advertised and new bids or offers may be solicited;

(b) the proposed procurement may be canceled; or,

(c) an emergency procurement may be made in compliance with Section 3-206.

## 3-102.03 Alternative Bids or Proposals

If alternate bids or proposals are allowed, the solicitation shall state that such bids or proposals shall be accepted and the solicitation shall specify their treatment.

## 3-102.04 Procuring Services Offered by Governmental Entities Not Under Purview of the PSCRB

Agency requirements may be fulfilled by procuring services performed incident to the State's own programs. The Agency Head shall determine in writing whether such services meet the agency's requirements and whether the price represents a fair market value for such services. When such procurements are made from other governmental entities, the private sector need not be solicited; however, these contracts shall still be submitted for approval to the PSCRB.

### 3-102.04.1 Contracts Between Two State Agencies Under Purview of the PSCRB

Contracts between two state agencies, both under PSCRB purview (see Appendix A), do not require PSCRB approval. However, the contracts should still be entered into SPAHRS.

## 3-102.05 Bid and Performance Bonds for Service Contracts

Bid and performance bonds or other security may be required for service contracts as the Agency Head deems advisable to protect the interest of the State. Any such requirements must be set forth in the solicitation. Bid or performance bonds should not be used as a substitute for a determination of bidder or offeror responsibility. Mississippi Code Annotated § 31-5-51 (1972, as amended) sets forth bonding requirements applicable to construction contracts and may be considered when establishing any such requirements for service contracts. An agency may not specify a specific company or insurance agency from which bonds should be

purchased. If the requirement for a bid or performance bond is included in the procurement, it cannot be waived.

### 3-102.06 Conditioning Bids or Proposals Upon Other Awards Not Acceptable

Any bid or proposal which is conditioned upon receiving award of both the particular contract being solicited and another Mississippi contract shall be deemed non-responsive and not acceptable.

### 3-102.07 Lists of Contract Specifications or Deliverables

All contracts for services shall include a list of contract specifications or deliverables. These may be incorporated from the scope of work included in the solicitation of bids or proposals. This list should be used as evaluation criteria when monitoring contract performance in accordance with Section 4-102 of these regulations. The description of services to be performed should be result oriented, not procedure oriented, and should at a minimum include:

(a) what service is to be performed;

(b) when the service is to be performed;

(c) how frequently the service is to be performed;

(d) where the service is to be performed;

(e) how much the service will cost; and,

(f) why the service is necessary.

### 3-102.08 Offerors Qualified To Transact Business

Offerors must be in compliance with Mississippi Code Annotated § 79-4-15.01 (1972, as amended) regarding authorization to transact business in Mississippi.

## 3-103 UNSOLICITED OFFERS

### 3-103.01 Definition

An unsolicited offer is any offer other than one submitted in response to a solicitation.

### 3-103.02 Processing of Unsolicited Offers

The Procurement Officer or Agency Head shall follow the provisions of this section in considering an unsolicited offer. If an award is made, the agency shall notify PSCRB that the award was the result of an unsolicited offer.

### 3-103.03 Conditions for Consideration

To be considered for evaluation, an unsolicited offer:

(a) must be in writing;

(b) must be sufficiently detailed to allow a judgment to be made concerning the potential utility of the offer to the State;

(c) must be unique or innovative to State use;

(d) must demonstrate that the proprietary character of the offering warrants consideration of the use of sole-source procurement; and,

(e) may be subject to testing.

### 3-103.04 Evaluation

The unsolicited offer shall be evaluated by the Agency Head to determine its utility to the State and whether it would be to the State's advantage to enter into a contract based on such offer. If an award is to be made on the basis of such offer, the sole-source procedures in Section 3-205 (Sole-Source Procurement) shall be followed.

### 3-103.05 Confidentiality

Subject to the provisions of the Mississippi Public Records Act, Mississippi Code Annotated §§ 25-61-1 *et seq*. (1972, as amended), any written request for confidentiality of data contained in an unsolicited offer that is made in writing shall be honored. If an award is made, confidentiality of data shall be agreed upon by the parties. If agreement cannot be reached on confidentiality, the State may reject the unsolicited offer.

## 3-104 NOVATION/BUYOUT OR CHANGE OF NAME

### 3-104.01 No Assignment

No contract requiring PSCRB approval is transferable or otherwise assignable without the prior approval of the PSCRB; however, a contractor may assign monies receivable under a contract after due notice to the State and the contracting entity, and with the approval of the PSCRB.

### 3-104.02 Recognition of a Successor in Interest – Novation

When, in the best interest of the State, a successor in interest may be recognized in a novation agreement, the transferor and the transferee must agree that:

(a) the transferee assumes all of the transferor's obligations;

(b) the transferor waives all rights under the contract as against the State; and,

(c) unless the transferor guarantees performance of the contract by the transferee, the transferee shall, if required, furnish a satisfactory performance bond.

### 3-104.03 Change of Name

When a contractor requests to change the name in which it holds a contract with the State, the agency shall, upon receipt of a document indicating such change of name (for example, an amendment to the articles of incorporation of the corporation), enter into an agreement with the requesting contractor to effect the change. The agreement changing the name shall specifically indicate that no other terms and conditions of the contract are changed.

## 3-201 METHOD OF SOURCE SELECTION

Unless otherwise authorized by law, all Mississippi contracts for professional and personal services shall be procured using one of the following methods:

(a) Section 3-202, Competitive Sealed Bidding;

(b) Section 3-203, Competitive Sealed Proposals;

(c) Section 3-204, Small Purchases;

(d) Section 3-205, Sole-Source Procurement; or,

(e) Section 3-206, Emergency Procurement.

## 3-202 COMPETITIVE SEALED BIDDING

### 3-202.01 General Provisions

(a) **Conditions for Use:** Contracts shall be awarded by competitive sealed bidding when a determination is made that this method is the best suited for a particular service.

(b) **Invitation for Bid:** An Invitation for Bid shall be issued and shall include a purchase description and all contractual terms and conditions applicable to the procurement.

(c) **Public Notice:** When the amount of the contract is anticipated to be more than $100,000, public notice must be given in accordance with Section 3-202.06.

(d) **Bid Opening:** Bids shall be opened publicly in the presence of one of more witnesses at the time and place designated in the Invitation for Bid. The name of each bidder shall be recorded. The amount of each bid and such other relevant information as may be specified by regulation may be recorded; the record and each bid shall be open to public inspection as provided in Section 1-301.01 (Release of Information Regarding Bid Results).

(e) **Bid Acceptance and Bid Evaluation:** Bids shall be unconditionally accepted without alteration or correction, except as authorized in these regulations. Bids shall be evaluated based on the requirements set forth in the Invitation for Bid, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable where possible. The Invitation for Bid shall set forth the evaluation criteria to be used. No criteria may be used in an evaluation that is not set forth in the Invitation for Bid.

(f) **Correction or Withdrawal of Bids; Cancellation of Awards:** Correction or withdrawal of inadvertently erroneous bids (before or after award), or cancellation of awards or contracts based on erroneous bids shall be permitted in accordance with these regulations. After bid opening, no changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition shall be permitted. Except as otherwise provided herein, all decisions to permit the correction or withdrawal of bids or to cancel awards or contracts based on bid mistakes shall be supported by written determination made by the Agency Head with the approval of the PSCRB.

(g) **Award:** The contract shall be awarded with reasonable promptness by written notice to the lowest responsible bidder whose bid meets the requirements and criteria set forth in the Invitation for Bid.

(h) **Multi-Step Sealed Bidding:** When it is considered impractical to initially prepare a purchase description to support an award based on price, an Invitation for Bid may be issued requesting the submission of unpriced offers to be followed by an Invitation for Bid limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.

### 3-202.02 Application

The provisions herein apply to every procurement made by competitive sealed bidding, including multi-step bidding.

### 3-202.03 The Invitation for Bid

#### 3-202.03.1 Use

The Invitation for Bid is used to initiate a competitive sealed bid procurement.

#### 3-202.03.2 Content

The Invitation for Bid shall include the following:

(a) instructions and information to bidders concerning bid submission requirements, including:

(1) the time and date set for receipt of bids,

(2) the address of the office to which bids are to be delivered,

(3) the maximum time for bid acceptance by the State, and,

(4) any other special information;

(b) the purchase description, evaluation factors, delivery or performance schedule, and such inspection and acceptance requirements as are not included in the purchase description; and,

(c) the contract terms and conditions, including warranty and bonding or other security requirements.

**3-202.03.3 Incorporation by Reference**

The Invitation for Bid may incorporate documents by reference provided that the Invitation for Bid specifies where such documents can be obtained.

**3-202.03.4 Acknowledgment of Amendments**

The Invitation for Bid shall require the acknowledgment of the receipt of amendments issued.

**3-202.04 Bidding Time**

Bidding time is the period of time between the date of distribution of the Invitation for Bid and the time and date set for receipt of bids. In each case, bidding time will be set to provide bidders a reasonable time to prepare their bids.

**3-202.05 Bidder Submissions**

**3-202.05.1 Bid Form**

The Invitation for Bid shall provide a form to be signed by the bidder and which shall include a space for insertion of the bid price.

**3-202.05.2 Facsimile Bids**

The Invitation for Bid may state that facsimile bids will be considered whenever they are delivered sealed at the designated office by the time and date set for receipt of bids. For a bid to be acceptable when transmitted by a facsimile machine, it shall have been faxed to an off-site location and delivered sealed to the agency prior to the time and date set for the bid opening. Such facsimile bids shall contain specific reference to:

(a) the Invitation for Bid;

(b) the items, quantities, and prices for which the bid is submitted;

(c) the time and place of delivery; and,

(d) a statement that the bidder agrees to all terms, conditions, and provisions of the Invitation for Bid.

Prior to an award being made, submission of an original bid shall be required.

## 3-202.06 Public Notice

### 3-202.06.1 Distribution

Invitations for Bids or Notices of Availability of Invitations for Bids shall be mailed or otherwise furnished to a sufficient number of bidders to promote competition. Notices of Availability shall indicate where, when, and for how long Invitations for Bids may be obtained, generally describe the service desired, and may contain other appropriate information.

### 3-202.06.2 Publication

Every Invitation for Bid for services in excess of $100,000 shall be publicized in the legal notices section of a newspaper published in the county or municipality in which the agency is located or in electronic format specified by the PSCRB. Publication should be made at the time the IFB is issued. Additionally, the agency may publicize in a newspaper of general circulation in the area pertinent to the procurement, in industry media, or in a government publication designed for giving public notice.

### 3-202.06.3 Content of Advertisement

When composing the advertisement to appear in the legal notice section of the newspaper, the intent is to promote competition. Prospective bidders should be given as much information as possible in the confined space.

***The following is a suggested guide for a legal advertisement:***

*The (name of the agency) will accept sealed bids until (time of bid opening), (day of the week), (month), (date), (year) for the purpose of purchasing the following: (name of service to be procured), (bid file number). Detailed specifications may be obtained by contacting (name of contact person) at (telephone number), (electronic address), or at (physical mailing address).*

### 3-202.06.4 Advertising Time

Advertising time is the period of time between the date of publication of the advertisement and the time and date set for the receipt of bids. Advertisement for bids shall be published

once each week for two consecutive weeks with the second notice being published on or after the seventh ($7^{th}$) calendar day after publication of the first notice. For electronic publication the advertising time shall be concurrent with a newspaper publication for two (2) consecutive weeks.

***Example:*** *If the first publication is June 1st, the second publication cannot be before June 8th.*

The date set for the bid opening for services shall not be less than seven (7) working days (as opposed to calendar days) after the last notice appears in the newspaper.

***Note:*** *There must be seven (7) full working days between the date the last notice appeared and the date that bids or proposals are opened. This does not include weekends or holidays. Also, the date on which the last notice runs is not included in the calculation of days. The last day of this period will be included unless the last day is a Saturday, Sunday, or legal holiday, in which case the period lasts until the end of the next day which is not a Saturday, Sunday, or legal holiday.*

#### *3-202.06.4.1 Required Letters of Intent*

*The date for submission of a letter of intent, if required in the procurement, shall also be not less than seven (7) full working days after the last notice appears in the newspaper.*

### 3-202.06.5 Public Availability

A copy of the Invitation for Bid shall be made available for any interested party at the location noted in the published notice.

### 3-202.07 Pre-Bid Conferences

Pre-bid conferences may be conducted to explain the procurement requirements. The conference shall be announced to all prospective bidders known to have received an Invitation for Bid. The conference should be held long enough after the Invitation for Bid has been issued to allow bidders to become familiar with it but sufficiently before bid opening to allow consideration of the conference results in preparing bids. Nothing stated at the pre-bid conference shall change the Invitation for Bid unless a change is made by written amendment as provided in Section 3-202.08 (Amendments to Invitations for Bids). A summary of the conference shall be supplied to all prospective bidders known to have received an Invitation for Bid. If a transcript is made, it shall be of public record.

### 3-202.08 Amendments to Invitations for Bids

#### 3-202.08.1 Form

Amendments to Invitations for Bids shall be identified as such and shall require that the bidder acknowledge receipt thereof. The amendment shall reference the portions of the Invitation for Bid it amends.

#### 3-202.08.2 Distribution

Amendments shall be sent to all prospective bidders known to have received an Invitation for Bid.

#### 3-202.08.3 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, such time shall be increased, to the extent possible, either in the amendment or, if necessary, by electronic means (e-mail), facsimile, or telephone and then confirmed in the amendment.

***Note: Amendments should be used to:***

*(a) make any changes in the Invitation for Bid such as changes in quantity, purchase descriptions, delivery schedules, and opening dates;*

*(b) correct defects or ambiguities; or,*

*(c) 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. Any such information when not given to all bidders shall be cause for rejecting all bids.*

### 3-202.09 Pre-Opening Modification or Withdrawal of Bids

Bids may be modified or withdrawn by written notice received in the office designated in the Invitation for Bid prior to the time and date set for bid opening.

#### 3-202.09.1 Disposition of Bid Security

If a bid is withdrawn in accordance with this section, the bid security, if any, shall be returned to the bidder.

### 3-202.09.2 Records

All documents relating to the modification or withdrawal of bids shall be made a part of the procurement file.

## 3-202.10 Late Bids, Late Withdrawals, and Late Modifications

### 3-202.10.1 Definition

Any bid received after the time and date set for receipt of bids is late. Any withdrawal or modification of a bid received after the time and date set for opening of bids at the place designated for opening is late.

### 3-202.10.2 Treatment

No late bid, late modification, or late withdrawal will be considered unless receipt would have been timely but for the action or inaction of agency personnel directly involved with the procurement activity.

### 3-202.10.3 Notice

Bidders submitting late bids which shall not be considered for award shall be so notified as soon as practicable.

### 3-202.10.4 Records

Records equivalent to those required in Subsection 3-202.9.2 (Pre-Opening Modification or Withdrawals of Bids, Records) shall be made and kept for each late bid, late modification, or late withdrawal.

## 3-202.11 Receipt, Opening, and Recording of Bids

### 3-202.11.1 Receipt

Each bid and modification received shall be date-stamped or time/date stamped but not opened and shall be stored in a secure place until the time and date set for bid opening.

### 3-202.11.2 Opening and Recording

Bids and modifications shall be opened publicly, in the presence of one or more witnesses, at the time, date, and place designated in the Invitation for Bid. The name of each bidder, the bid price, and such other information as is deemed appropriate by the Procurement Officer, shall be read aloud or otherwise made available. Such information may be recorded at the time of bid opening; that is, the bids may be tabulated or a bid abstract made. If a record is made, the names of required witnesses shall also be recorded. The opened bids shall be available for inspection by participants except to the extent the bidder designates trade

secrets or other proprietary data to be confidential as set forth in Subsection 3-202.11.3 below. Material so designated shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid. Prices of the services offered, deliveries, and terms of payment shall be publicly available at the time of bid opening regardless of any designation to the contrary. Bids shall be available for inspection at any time subsequent to the awarding of the contract. Inspection shall be in compliance with Section 1-301.01 (Release of Information Regarding Bid Results).

#### 3-202.11.3 Confidential Data

The Procurement Officer shall examine the bids to determine the validity of any requests for nondisclosure of trade secrets and other proprietary data identified in writing. If the parties do not agree as to the disclosure of data, the Procurement Officer shall inform the bidders in writing within five working days what portions of the bid will be disclosed. The bids shall be open to inspection as set forth in Section 1-301.01 (Release of Information Regarding Bid Results) subject to any continuing prohibition on the disclosure of confidential data.

### 3-202.12 Mistakes in Bids

#### 3-202.12.1 General Provision

Correction or withdrawal of a bid because of an inadvertent, nonjudgmental 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 nonjudgmental mistake is permissible, but only to the extent it is not contrary to the interest of the State or the fair treatment of other bidders.

#### 3-202.12.2 Mistakes Discovered Before Opening

A bidder may correct mistakes discovered before the time and date set for bid opening by withdrawing or correcting the bid as provided in Section 3-202.09 (Pre-Opening Modification or Withdrawal of Bids).

#### 3-202.12.3 Confirmation of Bid

When the Procurement Officer knows or has reason to conclude that a mistake has been made, such officer should request the bidder to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. If the bidder alleges a mistake, the bid may be corrected or withdrawn if the conditions set forth in Subsections 3-202.12.4 through 3-202.12.6 of this section are met.

### 3-202.12.4 Mistakes Discovered After Bid Opening But Before Award

This subsection sets forth procedures to be applied in three situations described herein in which mistakes in bids are discovered after the time and date set for bid opening but before award.

#### 3-202.12.4.1 Minor Informalities

Minor informalities 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, the effect on price, quantity, quality, delivery, or contractual conditions is negligible. The Procurement Officer shall waive such informalities or allow the bidder to correct them depending on which is in the best interest of the State. Examples include the failure of a bidder to:

(a) return the number of signed bids required by the agency in the Invitation for Bid;

(b) sign the bid, but only if the unsigned bid is accompanied by other material indicating the bidder's intent to be bound; or,

(c) acknowledge receipt of an amendment to the Invitation for Bid, but only if it is clear from the bid that: the bidder received the amendment and intended to be bound by its terms; or, the amendment involved had a negligible effect on price, quantity, quality, or delivery.

#### 3-202.12.4.2 Mistakes Where Intended Correct Bid is Evident

If the mistake and the intended correct bid are clearly evident on the bid document, the bid shall be corrected on the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the bid document are typographical errors, errors in extending unit prices, and arithmetical errors.

#### 3-202.12.4.3 Mistakes Where Intended Correct Bid is Not Evident

A bidder may be permitted to withdraw a low bid if:

(a) a mistake is clearly evident on the bid document, but the intended correct bid is not similarly evident; or,

(b) the bidder submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made.

### 3-202.12.5 Mistakes in Bids Discovered After Award

Mistakes shall not be corrected after award of the contract except where the PSCRB or the Agency Head makes a written determination that it would be unconscionable not to allow the mistake to be corrected.

### 3-202.12.6 Determinations Required

When a bid is corrected or withdrawn, or correction or withdrawal is denied, under Subsections 3-202.12.4 or 3-202.12.5 of this section, the Procurement Officer or the Agency Head shall prepare a written determination showing that the relief was granted or denied in accordance with these regulations, except that the Procurement Officer shall approve the determination required under Subsection 3-202.12.4.1 as to minor informalities. The written determination shall become a part of the agency's procurement file.

## 3-202.13 Bid Evaluation and Award

### 3-202.13.1 General

The contract is to be awarded to the lowest responsible bidder whose bid meets the requirements and criteria set forth in the Invitation for Bid. *See* Section 3-202(g) (Competitive Sealed Bidding, Award) of these regulations. The Invitation for Bid shall set forth the requirements and criteria which will be used to determine the lowest responsive bidder. No bids shall be evaluated for any requirement or criterion that is not disclosed in the Invitation for Bid.

### 3-202.13.2 Service/End Product Acceptability

The Invitation for Bid shall set forth any evaluation criterion to be used in determining acceptability. It may require the submission of descriptive literature, technical data, or other material. It may also provide for accomplishing any of the following prior to award:

(a) inspection or testing of a product prior to award for such characteristics as quality or workmanship;

(b) examination of such elements as appearance, finish, taste, or feel; and/or,

(c) other examinations to determine whether it conforms with any other purchase description requirements.

The acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another but only to determine that a bidder's offering is acceptable as set forth in the Invitation for Bid. Any bidder's offering which does not meet the acceptability requirements shall be rejected as non-responsive.

### 3-202.13.3 Determination of Lowest Bidder

Following determination of acceptability as set forth in Subsection 3-202.13.2 (Service/End Product Acceptability), if determination of acceptability is required, bids will be evaluated to determine which bidder offers the lowest cost to the State in accordance with the evaluation criteria set forth in the Invitation for Bid. Only objectively measurable criteria which are set forth in the Invitation for Bid shall be applied in determining the lowest bidder.

Examples of such criteria include, but are not limited to, guaranteed buy back and ownership or life-cycle cost formulas. Evaluation factors need not be precise predictors of actual future costs, but to the extent possible such evaluation factors shall be reasonable estimates based upon information the State has available concerning future use, and shall treat all bids equitably.

### 3-202.13.4 Restrictions

Nothing in this section shall be deemed to permit a contract award to a bidder submitting more comprehensive services than that designated in the Invitation for Bid if such bidder is not also the lowest bidder as determined under Subsection 3-202.13.3 (Determination of Lowest Bidder) of this section. Further, negotiations are not permitted with any bidder.

## 3-202.14 Low Tie Bids

### 3-202.14.1 Definition

Low tie bids are low responsive bids from responsible bidders that are identical in price, including cash discounts offered for prompt payment, and which meet all the requirements and criteria set forth in the Invitation for Bid.

### 3-202.14.2 Award

The prime criterion for making an award where tie bids are involved shall be in compliance with Mississippi Code Annotated §§ 31-7-15(1) and 31-7-47 (1972, as amended), *i.e.*, that resident vendors shall be given preference over nonresident vendors. An award shall not be made by drawing lots, except as set forth below, or by dividing business among identical bidders. In the discretion of the Agency Head, award shall be made in any permissible manner that will discourage tie bids. If no permissible method will be effective in discouraging tie bids, and a written determination is made so stating, award may be made by drawing lots. In such case, those bidders involved shall be invited to attend the procedure.

### 3-202.14.3 Records of Tie Bids

Records should be made of all Invitation for Bid on which tie bids are received showing at least the following information:

(a) the identification number of the Invitation for Bid;

(b) the service; and,

(c) a listing of all bidders and the prices submitted.

A copy of each such record shall be sent to the PSCRB.

**3-202.15 Documentation of Award**

Following award, a record showing the basis for determining the successful bidder shall be made a part of the agency's procurement file.

**3-202.16 Publicizing Award**

Written notice of award shall be sent to the successful bidder. Notice of award shall be made available to the public.

**3-202.17 Multi-Step Sealed Bidding**

**3-202.17.1 Definition**

Multi-step sealed bidding is a two-phase process consisting of the following:

(a) First phase – a technical phase composed of one or more steps in which bidders submit unpriced technical offers to be evaluated by the State; and,

(b) Second phase – in which those bidders whose technical offers are determined to be acceptable during the first phase have their price bids considered.

Multi-step bidding is designed to obtain the benefits of competitive sealed bidding by the awarding of a contract to the lowest responsive, responsible bidder and at the same time obtain the benefits of the competitive sealed proposals procedure through the solicitation of technical offers and the conduct of discussions to evaluate and determine the acceptability of technical offers.

**3-202.17.2 Conditions for Use**

The multi-step sealed bidding method may be used when it is not practical to prepare initially a definitive purchase description which will be suitable to permit an award based on price. Multi-step sealed bidding may, therefore, be used when it is considered desirable:

(a) to invite and evaluate technical offers to determine their acceptability to fulfill the purchase description requirements;

(b) to conduct discussions for the purposes of facilitating understanding of the technical offer and purchase description requirements and, where appropriate, obtain supplemental information, permit amendments of technical offers, or amend the purchase description;

(c) to accomplish subsections (a) and (b) of this section prior to soliciting priced bids; and,

(d) to award the contract to the lowest responsive and responsible bidder in accordance with the competitive sealed bidding procedures.

**3-202.18 Pre-Bid Conferences in Multi-Step Sealed Bidding**

Prior to the submission of unpriced technical offers, a pre-bid conference as contemplated by Section 3-202.07 (Pre-Bid Conferences) may be conducted by the Procurement Officer. The Procurement Officer may also hold a conference of all potential bidders in accordance with Section 3-202.07 at any time during the evaluation of the unpriced technical offers.

**3-202.19 Procedure for Phase One of Multi-Step Sealed Bidding**

**3-202.19.1 Form**

Multi-step sealed biding shall be initiated by issuance of an Invitation for Bid in the form required by Section 3-202.03 (The Invitation for Bid), except as hereinafter provided. In addition to the requirements set forth in Section 3-202.03, the multi-step sealed bid shall state:

(a) that unpriced technical offers are requested;

(b) whether priced bids are to be submitted at the same time as unpriced technical offers (if they are, such priced bids shall be submitted in a separate sealed envelope);

(c) that it is a multi-step sealed bid procurement, and priced bids will be considered only in the second phase and only from those bidders whose unpriced technical offers are found acceptable in the first phase;

(d) the criteria to be used in the evaluation of the unpriced technical offers;

(e) that the State, to the extent the Procurement Officer finds necessary, may conduct oral or written discussions of the unpriced technical offers;

(f) that bidders may designate those portions of the unpriced technical offers which contain trade secrets or other proprietary data which are to remain confidential, subject to Mississippi Code Annotated §§ 25-61-9 and 7-23-1 (1972, as amended); and,

(g) that the item being procured shall be furnished in accordance with the bidder's technical offer as found to be finally acceptable and shall meet the requirements of the Invitation for Bid.

### 3-202.19.2 Amendments to the Invitation for Bid

After receipt of unpriced technical offers, amendments to the Invitation for Bid shall be distributed only to bidders who submitted unpriced technical offers, and they shall be permitted to submit new unpriced technical offers or to amend those already submitted.

If, in the opinion of the Procurement Officer, a contemplated amendment will significantly change the nature of the procurement, the Invitation for Bid shall be canceled in accordance with Section 3-301.04 (Cancellation of Solicitation; Rejection of all Bids or Proposals) and a new Invitation for Bid issued.

### 3-202.19.3 Receipt and Handling of Unpriced Technical Offers

Unpriced technical offers shall not be opened publicly but shall be opened in front of two or more agency procurement officials. Subject to the provisions of the Mississippi Public Records Act, Mississippi Code Annotated §§ 25-61-1 *et seq*. (1972, as amended), such offers shall not be disclosed to unauthorized persons. Bidders may request nondisclosure of trade secrets and other proprietary data identified in writing.

### 3-202.19.4 Evaluations of Unpriced Technical Offers

The unpriced technical offers submitted by bidders shall be evaluated solely in accordance with the criteria set forth in the Invitation for Bid. The unpriced technical offers shall be categorized as:

(a) acceptable;

(b) potentially acceptable – that is, reasonably susceptible of being made acceptable; or,

(c) unacceptable.

The Procurement Officer shall record in writing the basis for finding an offer unacceptable and make it part of the agency procurement file. The Procurement Officer may then initiate Phase Two of the procedure if, in the Procurement Officer's opinion, there are sufficient acceptable unpriced technical offers to assure effective price competition in the second phase without technical discussions. If the Procurement Officer finds that there are not sufficient acceptable unpriced technical offers, he shall issue an amendment to the Invitation for Bid or engage in technical discussions as set forth in Subsection 3-202.19.5 below.

### 3-202.19.5 Unpriced Technical Offers – General Discussion

The Procurement Officer may conduct discussions with any bidder who submit an acceptable or potentially acceptable technical offer. During the course of such discussions, the Procurement Officer shall not disclose any information derived from one unpriced technical offer to any other bidder. Once discussions are begun, any bidder who has not been notified that its offer has been found unacceptable may submit supplemental information amending

its technical offer at any time until the closing date established by the Procurement Officer. Such submission may be made at the request of the Procurement Officer or upon the bidder's own initiative. The Procurement Officer shall keep a record of the date, place, and purpose of any such meeting and those attending and make it part of the agency procurement file.

### 3-202.19.6 Notice of Unacceptable Unpriced Technical Offer

When the Procurement Officer determines a bidder's unpriced technical offer to be unacceptable, such offeror shall not be afforded an additional opportunity to supplement the offer.

## 3-202.20 Procedure for Phase Two of Multi-Step Sealed Bidding

### 3-202.20.1 Initiation

Upon completion of Phase One, the Procurement Officer shall either:

(a) open priced bids submitted in Phase One (if priced bids were required to be submitted) from bidders whose unpriced technical offers were found to be acceptable; or,

(b) invite each acceptable bidder to submit a priced bid, if priced bids were not submitted.

### 3-202.20.2 Conduct of Phase Two

Phase Two shall be conducted as any other competitive sealed bid procurement except:

(a) no public notice need be given of this invitation to submit priced bids because such notice was previously given;

(b) after award, the unpriced technical offer of the successful bidder shall be disclosed as follows:

1) the Procurement Officer shall examine written requests of confidentiality for trade secrets and proprietary data in the technical offer of such bidder to determine the validity of any such requests;

2) if the parties do not agree as to the disclosure of data, the Procurement Officer shall inform the bidder in writing what portions of the unpriced technical offer will be disclosed, in which case the bidder may withdraw his offer in order to protect the trade secret or proprietary data;

3) unless withdrawn, such technical offer shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data in accordance with Mississippi Code Annotated §§ 25-61-92 and 79-23-1 (1972, as amended);

(c) unpriced technical offers of bidders who are not awarded the contract shall not be open to public inspection unless the Agency Head determines in writing that public inspection of such offers is essential to assure confidence in the integrity of the procurement process; provided, however, that the provisions of Subsection 3-202.20.2(b) of this section shall apply with respect to the possible disclosure of trade secrets and proprietary data.

The provisions of this section regarding disclosure and nondisclosure are subject to the provisions of the Mississippi Public Records Act, Mississippi Code Annotated §§ 25-61-1 *et seq*. (1972, as amended).

***Note:*** *The obligation to keep data confidential is not intended to create any liability that would not otherwise exist under state law.*

### 3-202.21 Mistakes During Multi-Step Sealed Bidding

Mistakes may be corrected or bids may be withdrawn during Phase One at any time. During Phase Two, mistakes may be corrected or withdrawal permitted in accordance with Section 3-202.12 (Mistakes in Bids).

## 3-203 COMPETITIVE SEALED PROPOSALS

### 3-203.01 General Provisions

(a) **Conditions for Use:** When, under regulations approved by the PSCRB, the Agency Head determines that the use of competitive sealed bidding is either not practicable or not advantageous to the State, a contract may be entered into by competitive sealed proposals.

(b) **Request for Proposal:** Proposals shall be solicited through a Request for Proposal.

(c) **Public Notice:** Adequate public notice of the Request for Proposal shall be given in the same manner as provided in Section 3-202.01(c) and 3-202.06 (Competitive Sealed Bidding, Public Notice).

(d) **Receipt of Proposals:** Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. The agency shall prepare and keep a Register of Proposals which shall be open for public inspection after contract award. The Register of Proposals shall indicate the name of all vendors submitting proposals.

(e) **Evaluation Factors:** The Request for Proposal shall state the relative importance of price and other evaluation factors in terms of important, very important, and critical.

(f) **Discussions with Responsible Offerors and Revisions to Proposal:** If provided in the Request for Proposal and as set forth in these regulations, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible to being selected for award. The discussions shall be for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. In conducting

discussions, there shall be no disclosure of any information derived from competing offers. Offerors should be accorded fair and equal treatment with respect to any opportunity for discussion. Revision of proposals may be permitted after submissions and prior to award for the purpose of obtaining best and final offers.

(g) **Award:** Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the State taking into consideration price and the evaluation factors set forth in the Request for Proposal. No other factors or criteria shall be used in the evaluation.

### 3-203.02 Application

The provisions of this section apply to every procurement of personal or professional services made by competitive sealed proposals.

### 3-203.03 Conditions for Use of Competitive Sealed Proposals

#### 3-203.03.1 "Practicable" Distinguished from "Advantageous"

As used in Section 3-203.01 (Competitive Sealed Proposals, Conditions for Use), the words "practicable" and "advantageous" are to be given ordinary dictionary meanings:

(a) **practicable** means what may be accomplished or put into practical application; and,

(b) **advantageous** means a judgmental assessment of what is in the State's best interest. Competitive sealed bidding may be practicable but not necessarily advantageous; that is, not in the State's best interest.

#### 3-203.03.2 General Discussion

If competitive sealed bidding is not practicable, competitive sealed proposals should be used. If competitive sealed bidding is practicable, it must then be determined whether competitive sealed bidding is advantageous. If competitive sealed bidding is determined not to be advantageous, competitive sealed proposals should be used.

##### 3-203.03.2.1 Flexibility vs. Finality

(a) Flexibility: The key element in determining advantageousness is the need for flexibility vs. the need for finality. The competitive sealed proposals method differs from competitive sealed bidding in that competitive sealed proposals:

1) permit discussions with competing offerors and changes in their proposals including price; and,

2) allow comparative judgmental evaluations to be made when selecting among acceptable proposals for award of the contract.

(b) Finality: Another important difference between competitive sealed proposals and competitive sealed bidding is the finality of initial offers. Under competitive sealed proposals, alterations in the nature of a proposal and in prices may be made after proposals are opened. Such changes are not allowed under competitive sealed bidding (except to the extent allowed in the first phase of multi-step sealed bidding). Therefore, unless it is anticipated that a contract can be awarded solely on the basis of information submitted by bidders at the time of opening, competitive sealed bidding is neither practicable nor advantageous.

**3-203.03.2.2 Evaluation Factors**

Another consideration concerns the type of evaluations needed after offers are received. Where evaluation factors involve the relative abilities of offerors to perform, including degrees of technical or professional experience or expertise, use of competitive sealed proposals is the appropriate procurement method. Additionally, use of competitive sealed proposals is appropriate where the type of need to be satisfied involves weighing artistic and aesthetic values to the extent that price is a secondary consideration. Finally, where the types of services to be performed may require the use of comparative judgmental evaluations to evaluate them adequately, use of competitive sealed proposals is the appropriate method.

**3-203.03.3 When Competitive Sealed Bidding is Not Practicable**

Competitive sealed bidding is not practicable unless the nature of the procurement permits award to a low bidder who agrees by its bid to perform without condition or reservation in accordance with the purchase description, delivery or performance schedule, and all other terms and conditions of the Invitation for Bid. Factors to be considered in determining whether competitive sealed bidding is or is not practicable include:

(a) whether the contract needs to be other than a fixed-price type;

(b) whether oral or written discussions may need to be conducted with offerors concerning technical and price aspects of their proposal;

(c) whether offerors may need to be afforded the opportunity to revise their proposal including price;

(d) whether award may need to be based upon a comparative evaluation as stated in the Request for Proposal of differing price, quality, and contractual factors in order to determine the most advantageous offering to the State (quality factors include technical and performance capability and the content of the technical proposal); and,

(e) whether the primary consideration in determining award may not be price.

### 3-203.03.4 When Competitive Sealed Bidding is Not Advantageous

A determination may be made to use competitive sealed proposals if it is determined that it is not advantageous to the State, even though practicable, to use competitive sealed bidding. Factors to be considered in determining whether competitive sealed bidding is not advantageous include:

(a) if prior procurements indicate that competitive sealed proposals may result in more beneficial contracts for the State; and,

(b) whether the factors listed in Subsections 3-203.03.3(b) through (d) of this section are desirable in conducting a procurement rather than necessary; if they are, then such factors may be used to support a determination that competitive sealed bidding is not advantageous.

***Note:*** *The following is offered as an example of circumstances when formal competitive sealed bidding is "practicable" but not "advantageous."*

*It could be "practicable" to invite competitive sealed bids on a functional specification prepared by the State for services that are highly specialized such as producing job classifications; however, the contract award would likely better serve the State's interest if it were made on the basis of the most advantageous proposal rather than the lowest responsive and responsible bidder. For this reason, it would not be "advantageous" to the State to take competitive sealed bids; that is, the State's specification could conceivably result in an acceptable product, but another could have been obtained more economically and in a form that would better serve the needs of the State. Competitive sealed proposals would also afford the opportunity to discuss design characteristics with the offerors as the discussions proceeded.*

### 3-203.03.5 Determinations to be Made Before Competitive Sealed Proposals May Be Utilized

Before a contract may be entered into by competitive sealed proposals, the Agency Head shall make the following determinations:

(a) that competitive sealed bidding is either not practicable or not advantageous to the State;

(b) that the agency does not have the personnel or resources to perform the services required under the proposed contract, or that the services can be performed more economically by someone other than state personnel;

(c) the nature of the relationship to be established between the using agency and the contractor of the proposed contract; and,

(d) that the using agency has developed and fully intends to implement a written plan for utilizing such services which will be included in the contractual statement of work.

## 3-203.04 Content of the Request for Proposal

### 3-203.04.1 Preparation of the Request for Proposal

The Request for Proposal shall be prepared in accordance with Section 3-203.03 (Conditions for Use of Competitive Sealed Proposals) regarding Invitation for Bid provided that it shall also include:

(a) 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; and,

(b) a statement of when and how price should be submitted.

### 3-203.04.2 Form of the Request for Proposal

The Request for Proposal shall be in the form specified by the Procurement Officer and contain at least the following information:

(a) type of services required;

(b) a description of the work involved;

(c) an estimate of when and for how long the services will be required;

(d) the type of contract to be used;

(e) a date by which proposals for the performance of the services shall be submitted;

(f) a statement that the proposals shall be in writing;

(g) a statement that offerors may designate those portions of the proposals which contain trade secrets or other proprietary data which may remain confidential in accordance with Mississippi Code Annotated §§ 25-61-9 and 79-23-1 (1972, as amended);

(h) a statement of minimum information that the proposal shall contain, including:

(1) the name of the offeror, the location of the offeror's principal place of business and, if different, the place of performance of the proposed contract;

(2) the age of the offeror's business and average number of employees over a previous period of time, as specified in the Request for Proposal;

(3) the abilities, qualifications, and experience of all persons who would be assigned to provide the required services;

(4) a listing of other contracts under which services similar in scope, size, or discipline to the required services were performed or undertaken within a previous period of time, as specified in the Request for Proposal; and,

(5) a plan giving as much details as is practical explaining how the services will be performed.

(i) the factors to be used in the evaluation and selection process and their relative importance. (See Appendix B for sample Request for Proposal.)

**3-203.05 Proposal Preparation Time**

Proposal preparation time shall be set to provide offerors a reasonable time to prepare their proposals.

**3-203.06 Form of Proposal**

The manner in which proposals are to be submitted, including any forms to be used, may be included as part of the Request for Proposal.

**3-203.07 Public Notice**

Public notice shall be given by distributing the Request for Proposal in the same manner provided for distributing an Invitation for Bid under Section 3-202.06 (Public Notice).

**3-203.08 Pre-proposal Conferences**

Pre-proposal conferences may be conducted in accordance with Section 3-202.07 (Pre-Bid Conferences). Any such conference should be held prior to submission of initial proposals.

**3-203.09 Amendments to Requests for Proposals**

Amendments to Requests for Proposals may be made in accordance with Section 3-202.08 (Amendments to Invitations for Bids) prior to submission of proposals. After submission of proposals, amendments may be made in accordance with Section 3-202.19.2 (Procedure for Phase-One of Multi-Step Sealed Bidding, Amendments to the Invitation for Bid).

**3-203.10 Modification or Withdrawal of Proposals**

Proposals may be modified or withdrawn prior to the established due date in accordance with Section 3-202.09 (Pre-Opening Modification or Withdrawal of Bids). For the purposes of this section and Section 3-203.11 (Late Proposals, Late Withdrawals, and Late Modifications) below, the established due date is either the time and date announced for receipt of proposals or

receipt of modifications to proposals, if any; or if discussions have begun, it is the time and date by which best and final offers must be submitted, provided that only offerors who submitted timely proposals may submit best and final offers.

### 3-203.11 Late Proposals, Late Withdrawals, and Late Modifications

Any proposal, withdrawal, or modification received after the established due date is late. See Section 3-203.10 (Modification or Withdrawal of Proposals) for the definition of "established due date." Any proposal, withdrawal, or modification not received at the place designated for receipt of proposals is late. Late proposals, withdrawals, or modifications may only be considered in accordance with Section 3-202.10 (Late Bids, Late Withdrawals, and Late Modifications).

### 3-203.12 Receipt and Registration of Proposals

Proposals shall not be opened publicly but shall be opened in the presence of two or more agency officials. Proposals and modifications shall be date-stamped or time/date-stamped upon receipt and held in a secure place until the established due date.

After the date established for receipt of proposals, a Register of Proposals shall be prepared by the Procurement Officer which shall include for all proposals:

(a) the name of each offeror;

(b) the number of modifications received, if any; and,

(c) a description sufficient to identify the service offered.

The Register of Proposals shall be open to public inspection only after award of the contract. Proposals and modifications shall be shown only to personnel having a legitimate interest in them.

#### 3-203.12.1 Requests for Nondisclosure of Data

If the offeror selected for award has requested in writing the nondisclosure of trade secrets and other proprietary data so identified, the Procurement Officer shall examine the request in the proposal to determine its validity prior to entering negotiations. If the parties do not agree as to the disclosure of data in the contract, the Agency Head shall inform the offeror in writing what portion of the proposal will be disclosed and that unless the offeror withdraws the proposal, the proposal will be so disclosed.

## 3-203.13 Evaluation of Proposals

### 3-203.13.1 Evaluation Factors in the Request for Proposal

The Request for Proposal shall state all of the evaluation factors, including price, and their relative importance.

### 3-203.13.2 Evaluation

The evaluation shall be based on the evaluation factors set forth in the Request for Proposal. Numerical rating systems may be used but are not required. Factors not specified in the Request for Proposal shall not be considered. The following factors shall be listed and shall be considered in conducting the evaluation. The relative importance of these and other factors will vary according to the type of services being procured. The minimum factors are:

(a) the plan for performing the required services;

(b) ability to perform the services as reflected by technical training and education, general experience, specific experience in providing the required services, and the qualifications and abilities of personnel proposed to be assigned to perform the services;

(c) the personnel, equipment, and facilities to perform the services currently available or demonstrated to be made available at the time of contracting;

(d) a record of past performance of similar work; and,

(e) price.

### 3-203.13.3 Classifying Proposals

For the purpose of conducting discussions under Section 3-203.14 (Proposal Discussions with Individual Offerors) below, proposals shall be initially be classified as:

(a) acceptable;

(b) potentially acceptable (that is, reasonable susceptible of being made acceptable); or,

(c) unacceptable.

Offerors whose proposals are unacceptable shall be sent written notification promptly. The notification should state their proposal was deemed unacceptable and should include a specific reason or reasons for it being declared unacceptable.

## 3-203.14 Proposal Discussions with Individual Offerors

### 3-203.14.1 "Offerors" Defined

For the purposes of Section 3-203.01(f) (Competitive Sealed Proposals, Discussion with Responsible Offerors and Revisions to Proposals) and this section, the term "offerors" includes only those businesses submitting proposals that are acceptable or potentially acceptable. The term does not include businesses which submitted unacceptable proposals.

### 3-203.14.2 Purposes of Discussions

Discussions may be held to:

(a) promote understanding of the State's requirements and the offeror's proposals;

(b) facilitate arriving at a contract that will be most advantageous to the State taking into consideration price and the other evaluation factors set forth in the Request for Proposal; and,

(c) determine in greater detail such offeror's qualifications.

### 3-203.14.3 Conduct of Discussions

Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. The Procurement Officer should establish procedures and schedules for conducting discussions. If, during discussions, there is a need for any substantial clarification of or change in the Request for Proposal, the Request for Proposal shall be amended to incorporate such clarification or change. Auction techniques (revealing one offeror's price to another) and/or disclosure of any information derived from competing proposals are prohibited. Any substantial oral clarification of a proposal shall be reduced to writing by the offeror. The Procurement Officer shall keep a record of the date, place, and purpose of meetings and those attending and place same in the agency's procurement file.

### 3-203.14.4 Best and Final Offers

If allowed by the Request for Proposal and if necessary for proper evaluation, the Procurement Officer shall establish a common date and time for the submission of best and final offers. Best and final offers shall be submitted only once; provided, however, the Agency Head may make a written determination that it is in the State's best interest to conduct additional discussions or change the State'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. Offerors shall also be informed that if they do not submit a notice of withdrawal or another best and final offer, their immediate previous offer will be construed as their best and final offer.

## 3-203.15 Mistakes in Proposals

### 3-203.15.1 Modification or Withdrawal of Proposals

Proposals may be modified or withdrawn as provided in Section 3-203.10 (Modification or Withdrawal of Proposals).

### 3-203.15.2 Confirmation of Proposal

When the Procurement Officer knows or has reason to conclude before award that a mistake has been made in a proposal, such officer should request the offeror to confirm that the proposal is correct. If the offeror alleges mistake, the proposal may be corrected if the conditions set forth in Subsection 3-203.15.3 through 3-203.15.5 below are met.

### 3-203.15.3 Mistakes Discovered after Receipt of Proposals but Before Award

This subsection sets forth procedures to be applied in four situations in which mistakes in proposals are discovered after receipt of proposals but before award:

(a) **During Discussions, Prior to Best and Final Offers:** Once discussions are commenced with any offeror or after best and final offers are requested, any 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;

(b) **Minor Informalities:** Minor informalities, unless otherwise corrected by an offeror as provided in this section, shall be treated as they are under competitive sealed bidding. See Section 3-202.12.4 (a) (Mistakes in Bids, Mistakes Discovered After Opening But Before Award);

(c) **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 may be corrected and the intended correct offer considered only if:

(1) the mistake and the intended correct offer are clearly evident on the face of the proposal; or,

(2) the mistake is not clearly evident on the face of the proposal, but the offeror submits proof of evidentiary value which clearly and convincingly demonstrates both the existence of a mistake and the intended correct offer, and such correction would not be contrary to the fair and equal treatment of other offerors.

(d) **Withdrawal of Proposals:** If discussions are not held or if the best and final offers upon which award will be made have been received, the offeror may be permitted to withdraw the proposal if:

(1) the mistake is clearly evident on the face of the proposal and the intended correct offer is not;

(2) the offeror submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made but does not demonstrate the intended correct offer; or,

(3) the offeror submits proof of evidentiary value which clearly and convincingly demonstrates the intended correct offer but to allow correction would be contrary to the fair and equal treatment of the other offerors.

### 3-203.15.4 Mistakes Discovered After Award

Mistakes shall not be corrected after award of the contract except when the Agency Head finds it would be unconscionable not to allow the mistake to be corrected.

### 3-203.15.5 Determinations Required

When a proposal is corrected or withdrawn, or correction or withdrawal is denied under Subsections 3-203.15.3(b), (c), (d), or 3-203.15.4, a written determination shall be prepared and maintained in the agency procurement file showing that relief was granted or denied in accordance with these regulations. The Agency Head shall prepare the determination, except under Subsection 3-203.15.3(b), the determination may be prepared by the Procurement Officer.

### 3-203.16 Award

The Procurement Officer shall make a written determination showing the basis on which the award was found to be most advantageous to the State based on the factors set forth in the Request for Proposal.

### 3-203.17 Publicizing Awards

Written notice of award shall be sent to the successful offeror. Notice of award shall be made available to all participating offerors and the public.

## 3-204 SMALL PURCHASES

Any procurement not exceeding $100,000 may be made in accordance with small purchase procedures provided herein. Procurement requirements shall neither be artificially divided nor shall the extent of the service required be underestimated so as to constitute a small purchase under this section.

### 3-204.01 Application

This section applies to procurements for personal service of $100,000 or less.

## 3-204.02 Authority to Make Small Purchases

### 3-204.02.1 Amount

The Purchasing Agency may use this Regulation if the procurement for services is to be $100,000 or less. If these methods are not used, the other methods of source selection provided in Section 3-201 (Methods of Source Selection) shall apply.

### 3-204.02.2 Available from One Source Only

If the service is available from only one source, the sole-source procurement method set forth in Section 3-205 (Sole-Source Procurement) of these regulations shall be used unless the procurement is a small purchase as specified in Subsection 3-204.04 of this section.

### 3-204.02.3 Division of Requirements

Procurement specifications shall not be artificially divided to avoid using the other source selection methods set forth in Section 3-201 (Methods of Source Selection). Generally, there should only be one contract within an agency per vendor for a particular service type.

## 3-204.03 Small Purchases of Services Greater than $50,000, Not Exceeding $100,000

### 3-204.03.1 Procedure

Insofar as it is practical for small purchases of services greater than $50,000 and not exceeding $100,000, no less than three (3) sources shall be solicited to submit written responses that are recorded and placed in the procurement file. Written responses must be either signed on letterhead or otherwise identifiable to be valid. Written responses shall, at a minimum, contain the following information:

(a) a statement of price;

(b) terms of the agreement;

(c) description of services offered by the contractor to the agency; and,

(d) name, address and telephone number of the offeror.

If this method is used, award shall be made to the business offering the lowest and best bid or proposal. In the event three written responses are not obtained, the agency shall include a memo to the procurement file explaining why this was not accomplished.

### 3-204.03.2 Records

The names of the entities submitting quotations and the date and amount of each quotation shall be recorded and maintained as a public record.

### 3-204.04 Small Purchases of $50,000 or Less

The Agency Head shall adopt operational procedures for making small purchases of $50,000 or less. Such operational procedures shall provide for obtaining adequate and reasonable competition and for making records to properly account for funds and to facilitate auditing of the Purchasing Agency. No approval by the PSCRB is required for these purchases.

## 3-205 SOLE-SOURCE PROCUREMENT

A contract may be awarded for contracts without competition when the Agency Head determines in writing that there is only one source for the required service.

### 3-205.01 Application

The provisions herein apply to all sole-source procurements unless emergency conditions exist as defined in Section 3-206 (Emergency Procurement).

### 3-205.02 Conditions for Use of Sole-Source Procurement

Sole-source procurement is not permissible unless a requirement is available from only a single supplier. The determination as to whether a procurement shall be made as a sole-source shall be made and approved by the Agency Head. Such determination and the basis therefor shall be in writing. The Agency Head may specify the application of such determination and the duration of its effectiveness. In cases of reasonable doubt, competition shall be solicited. Any request by an agency that a procurement be restricted to one potential contractor shall be accompanied by an explanation as to why no other will be suitable or acceptable to meet the need.

### 3-205.03 Negotiation in Sole-Source Procurement

The Agency Head shall conduct negotiations, as appropriate, as to price, delivery, and terms. If the contract amount is greater than $100,000, the contracts must still be forwarded to the PSCRB for approval prior to any services being rendered.

## 3-206 EMERGENCY PROCUREMENT

Notwithstanding any other provision of these Regulations, the Agency Head may make or authorize others to make emergency procurements under emergency conditions as defined in these regulations, provided that such emergency procurement shall be made with such competition as is practicable under the circumstances. A written determination signed by the Agency Head of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The term of an emergency contract shall not exceed one (1) year.

### 3-206.01 Application

The provisions herein apply to every procurement made under emergency conditions that will not permit other source selection methods to be used.

### 3-206.02 Definition of Emergency Conditions

The term "emergency" shall mean any circumstances:

(a) caused by fire, flood, explosion, storm, earthquake, epidemic, riot, insurrection; or,

(b) caused by an inherent defect due to defective construction; or;

(c) when the immediate preservation of order or public health is necessary by reason of unforeseen emergency; or,

(d) when the restoration of a condition of usefulness of any public building, equipment, road or bridge appears advisable; or,

(e) in the case of a public utility when there is a failure of any machine or other things used and useful in the generation, production or distribution of electricity, water or natural gas or in the transportation or treatment of sewage; or,

(f) when the delay incident to obtaining competitive bids could cause adverse impact upon the governing authority or agency, its employees or its citizens.

*See* Miss. Code Ann. § 31-7-1(f) (1972, as amended).

### 3-206.03 Scope of Emergency Procurement

Emergency procurement shall be limited to those services necessary to meet the emergency.

### 3-206.04 Authority to Make Emergency Procurement

Any state agency may make an emergency procurement when an emergency condition arises and the need cannot be met through normal procurement methods; provided, approval by the Agency Head shall be obtained prior to the procurement. The contract should be forwarded to the PSCRB within 10 days of execution for SPAHRS processing, if the contract amount is greater than $100,000.

### 3-206.05 Source Selection Methods

#### 3-206.05.1 General

The procurement procedure used shall be selected to ensure that the required services are procured in time to meet the emergency, but with such competition as is practicable.

### 3-206.05.2 After Unsuccessful Competitive Sealed Bidding

Competitive, sealed bidding is unsuccessful when bids received pursuant to an Invitation for Bid are unreasonable, noncompetitive, or the low bid exceeds available funds as certified by the appropriate fiscal officer, and time or other circumstances will not permit the resolicitation of competitive sealed bids. If emergency conditions exist after an unsuccessful attempt to use competitive sealed bidding, an emergency procurement may be made.

### 3-206.06 Determination of Emergency Procurement

The Procurement Officer shall make a written determination stating the basis of an emergency procurement and for the selection of the particular contractor. Such determination shall be included in the contract justification.

## 3-207 PREAPPROVED VENDOR LISTS

Mississippi Code Annotated § 25-9-120 (1972, as amended) authorizes the PSCRB to, "establish a preapproved list of providers of various personal and professional services for set prices with which state agencies may contract without bidding or prior approval from the board." The PSCRB at its discretion may exercise its authority and establish preapproved vendor lists for use by entities under PSCRB purview. The preapproved vendor lists shall be posted on the PSCRB tab of the MSPB webpage at: http://www.mspb.ms.gov. Use of the preapproved vendor lists is optional.

### 3-207.01 Procedure

The agency should locate the preapproved vendor list for the selected service in the region where the service is to be provided. The agency is encouraged, but not required, to contact the lowest bidder first. Once a vendor is selected, the agency and the vendor should finalize the negotiable terms and prepare a contract. The agency may use a form contract for the selected service drafted by the PSCRB and posted on the website. Use of the PSCRB form contract is strictly optional. The agency may submit a contract it prepares as long as the contract adheres to the required terms and conditions as stated in the IFB or RFP and the PSCRB form contract. Any additional terms or change in non-negotiable terms, such as the scope of services, may result in rejection of the contract.

### 3-207.02 Contract Approval

The agency should submit an unsigned contract along with a SPAHRS report and any other required correspondence in the E-system. The PSCRB staff will review the contract for compliance and will notify the agency if the contract meets the requirements for a staff approval. If the requirements are not met, the contract may require Board approval or it may be rejected and the agency will need to complete a procurement for the services. The agency should submit the executed (signed) approved contract in the PSCRB E-system within ten (10) business days of receipt of notice that the contract is approved.

## 3-301 CANCELLATION OF INVITATIONS FOR BIDS OR REQUESTS FOR PROPOSALS

An Invitation for Bid, a Request for Proposal, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, when it is in the best interest of the State. The reasons shall be made part of the contract file.

### 3-301.01 Scope of this Regulation

The provisions herein shall govern the cancellation of any solicitations whether issued by the State under competitive sealed bidding, competitive sealed proposals or any other source selection method, and the rejection of bids or proposals in whole or in part.

### 3-301.02 Policy

Solicitations should only be issued when there is a valid procurement need unless the solicitation states that it is for informational purposes only. Preparing and distributing a solicitation requires the expenditure of time and funds. Businesses and other entities likewise incur expense in examining and responding to solicitations. Accordingly, although issuance of a solicitation does not compel award of a contract, a solicitation is to be canceled only when there are compelling reasons to believe that the cancellation of the solicitation is in the State's best interest.

### 3-301.03 Cancellation of Solicitation – Notice

Each solicitation issued by the State shall declare that the solicitation may be canceled as provided herein.

### 3-301.04 Cancellation of Solicitation; Rejection of All Bids or Proposals

#### 3-301.04.1 Prior to Opening

(a) As used in this section, "opening" means the date set for opening of bids, receipt of unpriced technical offers in multi-step sealed bidding, or receipt of proposals in competitive sealed proposals.

(b) Prior to opening, a solicitation may be canceled in whole or in part when the Agency Head determines in writing that such action is in the State's best interest for reasons including, but not limited to:

(1) the agency no longer requires the services;

(2) the agency no longer can reasonably expect to fund the procurement; or,

(3) proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable.

(c) When a solicitation is canceled prior to opening, notice of cancellation shall be sent to all businesses solicited.

(d) The notice of cancellation 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 resolicitation or any future procurement of similar services.

**3-301.04.2 After Opening-Prior to Award**

(a) After opening but prior to award, all bids or proposals may be rejected in whole or in part when the Agency Head determines in writing that such action is in the State's best interest for reasons including, but not limited to:

(1) the services being procured are no longer required;

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

(3) the solicitation did not provide for consideration of all factors of significance to the buying entity;

(4) prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;

(5) all otherwise acceptable bids or proposals received are at clearly unreasonable prices; or,

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

(b) A notice of rejection should be sent to all businesses that submitted bids or proposals, and shall conform to Section 3-301.04.1(d).

**3-301.04.3 After Opening – After Award**

After opening and after award, **but prior to signing a contract**, an award may be canceled when the Agency Head determines in writing that such action is in the State's best interest for reasons including, but not limited to:

(a) available funding for the contractual service has been discontinued;

(b) credible evidence has been presented that the procurement was tainted; or,

(c) the solicitation document allows the agency's stated reason for cancellation.

**3-301.04.4 Documentation**

The reasons for cancellation or rejection shall be made a part of the agency's procurement file and shall be available for public inspection.

**3-301.05 Rejection of Individual Bids or Proposals**

**3-301.05.1 General**

This section applies to rejections of individual bids or proposals in whole or in part.

**3-301.05.2 Notice in Solicitation**

Each solicitation issued by the State shall provide that any bid or proposal may be rejected in whole or in part when in the best interest of the State.

**3-301.05.3 Reasons for Rejection**

(a) **Bids.** As used in this section, "bid" means any offer providing pricing submitted in competitive sealed bidding or in the second phase of multi-step sealed bidding, and includes submissions under Section 3-204 (Small Purchases), if no changes in offers are allowed after submission. Reasons for rejecting a bid include but are not limited to:

(1) the business that submitted the bid is non-responsible as determined under Section 3-401.06 (Written Determination of Non-responsibility Required) of this chapter;

(2) the bid is non-responsive; that is, it does not conform in all material respects to the Invitation for Bid, *see* Section 3-202.13.2 (Bid Evaluation and Award, Responsibility and Responsiveness) of this chapter; or,

(3) the supply or service item offered in the bid is unacceptable by reason of its failure to meet the requirements of the specifications or permissible alternates or other acceptability criteria set forth in the Invitation for Bid. *See* Section 3-202.13.2 (Bid Evaluation and Award, Product Acceptability).

(b) **Proposals.** As used in this section, "proposal" means any offer submitted in response to any solicitation for a proposal, including an offer under Section 3-204 (Small Purchases), except a bid as defined in Section 3-301.05.3(a). Unless the solicitation states otherwise, proposals need not be unconditionally accepted without alteration or correction, and the 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 3-401 (Responsibility of Bidders and Offerors);

(2) the proposal ultimately (that is, after any opportunity has passed for altering or clarifying the proposal) fails to meet the announced requirements of the State in some material respect; or,

(3) the proposed price is clearly unreasonable.

### 3-301.05.4 Notice of Rejection

Vendors that have submitted bids or proposals which are rejected shall be promptly notified of the rejection and the reasons therefor.

### 3-301.06 "All or None" Bids or Proposals

Only when provided by the solicitation may a bid or proposal limit acceptance to the entire bid or proposal offering; otherwise, such bids or proposals shall be deemed to be non-responsive. If the bid or proposal is properly so limited, the agency shall not reject part of such bid or proposal and award on the remainder. "All or none" bids shall not be requested unless it is determined that a multiple number of bidders can provide pricing on all items requested. If the "all or none" requirement limits the bidding to the point that only a single responsive bid is received, the PSCRB will not approve the request unless ample justification is presented.

### 3-301.07 Disposition of Bids or Proposals

When bids or proposals are rejected, or a solicitation canceled after bids or proposals are received, the bids or proposals which have been opened shall be retained in the agency's procurement file, or if unopened, returned to the bidders or offerors.

## 3-401 RESPONSIBILITY OF BIDDERS AND OFFERORS

### 3-404.01 General Provisions

(a) **Determination of Non-responsibility:** A written determination of non-responsibility of a bidder or offeror shall be made. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of non-responsibility with respect to such bidder or offeror.

(b) **Right of Nondisclosure:** Information furnished by a bidder or offeror pursuant to this section shall not be disclosed outside of the office of the purchasing agency if so requested by the bidder or offeror, except as might be required by Mississippi Code Annotated §§ 25-61-1 *et seq.* (1972, as amended).

### 3-401.02 Application

A determination of responsibility or non-responsibility shall be made as provided herein.

### 3-401.03 Standards of Responsibility

#### 3-401.03.1 Standards

Factors to be considered in determining whether the standard of responsibility has been met include whether a prospective contractor has:

(a) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;

(b) a satisfactory record of performance;

(c) a satisfactory record of integrity;

(d) qualified legally to contract with the State; and,

(e) supplied all necessary information in connection with the inquiry concerning responsibility.

#### 3-401.03.2 Information Pertaining to Responsibility

The prospective contractor shall supply information requested by the Procurement Officer concerning the responsibility of such contractor. If the contractor fails to supply the requested information, the Procurement Officer shall base the determination of responsibility upon any available information or may find the prospective contractor non-responsible if such failure is unreasonable.

### 3-401.04 Ability to Meet Standards

The prospective contractor may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request:

(a) evidence that such contractor possess such necessary items;

(b) acceptable plans to subcontract for such necessary items; or,

(c) a documented commitment from or explicit arrangement with, a satisfactory source to provide the necessary items.

### 3-401.05 Duty Concerning Responsibility

Before awarding a contract, the Procurement Officer must be satisfied that the prospective contractor is responsible.

### 3-401.06 Written Determination of Non-responsibility Required

If a bidder or offeror who otherwise would have been awarded a contract is found non-responsible, a written determination of non-responsibility setting forth the basis of the finding shall be prepared by the Agency Head. A copy of the determination shall be sent promptly to the non-responsible bidder or offeror. The final determination shall be made part of the agency's procurement file.

## 3-402 PREQUALIFICATION OF SUPPLIERS

Prospective suppliers may be prequalified for particular types of services. Solicitation mailing lists of potential contractors shall include but shall not be limited to such prequalified suppliers.

### 3-402.01 Prequalification

#### 3-402.01.1 General Provision

Prospective contractors may be prequalified for bidder lists, but distribution of the solicitation shall not be limited to prequalified contractors, nor may a prospective contractor be denied award of a contract simply because such contractor was not prequalified. The fact that a prospective contractor has been prequalified does not necessarily represent a finding of responsibility.

## 3-403 COST OR PRICING DATA

### 3-403.01 General Provision

(a) **Contractor Certification:** A contractor shall when requested by the buying entity, except as provided in Subsection 3 of this section, submit cost or pricing data and shall certify that, to the best of its knowledge and belief, the cost or pricing data submitted is accurate, complete, and current as of a mutually determined specified date.

(b) **Price Adjustment:** Any contract, change order, or contract modification under which a contractor certificate is required shall contain a provision that the price to the State, including profit or fee, shall be adjusted to exclude any significant sums by which the State finds that such price was increased because the contractor-furnished cost or pricing data was inaccurate, incomplete, or not current as of the date agreed upon between the parties.

(c) **Cost or Pricing Data Not Required:** The requirements of this section need not be applied to contracts:

(1) where the contract price is based on adequate price competition;

(2) where the contract price is based on established market prices;

(3) where contract prices are set by law or regulations; or,

(4) where it is determined by the Agency Head in writing that the requirements of this section may be waived and the reasons for such waiver are stated in writing.

(d) When it is determined that an offeror or bidder should provide cost or pricing data to justify a bid or proposal, this regulation may be used as a guideline for such negotiation.

**3-403.02 Requirement for Cost or Pricing Data**

The pricing policies which are applicable to contracts of any type and any price adjustments there-under when cost or pricing data are required to be submitted are set forth herein. The provisions herein requiring submission of cost or pricing data do not apply to a contract let by competitive sealed bidding (including multi-step bidding) except as may be provided herein below. Cost or pricing data may be required in support of a proposal when:

(a) any contract expected to exceed $100,000 is to be awarded by competitive sealed proposals or by sole-source procurement;

(b) an emergency procurement is made in excess of $100,000, but such data may be submitted after contract award; or,

(c) the Procurement Officer makes a written determination that the circumstances warrant required submission of cost or pricing data; provided, however, that cost or pricing data shall not be required where the contract award is made pursuant to competitive sealed bidding.

**3-403.03 Meaning of Terms "Adequate Price Competition," "Established Market Prices," and "Prices Set by Law or Regulation"**

The terms "adequate price competition," "established market prices," and "prices set by law or regulation" shall be construed in accordance with the following definitions:

(a) **Adequate Price Competition:** Price competition exists if competitive sealed proposals are solicited and at least two responsible offerors independently compete for the contract to be awarded to the responsible offeror submitting the lowest evaluated price and meeting the requirements of the solicitation. If the foregoing conditions are met, price competition shall be presumed to be "adequate" unless the Procurement Officer determines in writing that such competition is not adequate.

(b) **Established Market Prices:** "Established Market Price" is a current price, established in the usual and ordinary course of trade between buyers and sellers, which can be substantiated from sources which are independent of the contractor and may be an indication of the reasonableness of price. If, despite the existence of an established market

price, and after consultation with the prospective contractors, the Procurement Officer considers that such price is not reasonable, cost or pricing data may be requested.

(c) **Prices Set by Law or Regulation:** The price of a service is set by law or regulation if a governmental body established the price that the offeror or contractor may charge the State and other customers.

## 3-403.04 Submission of Cost or Pricing Data and Certification

### 3-403.04.1 Time and Manner

When cost or pricing data are required, they shall be submitted to the Procurement Officer prior to beginning price negotiations at the time and in the manner prescribed by the Procurement Officer. When the Procurement Officer requires the offeror or contractor to submit cost or pricing data in support of any proposal, such data shall either be actually submitted or specifically identified in writing.

### 3-403.04.2 Obligation to Keep Data Current

The offeror or contractor is required to keep such submission current until the negotiations are concluded or, if applicable, until the contract is expired.

### 3-403.04.3 Time for Certification

The offeror or contractor shall certify as soon as practicable after agreement is reached on price that the cost or pricing data submitted is accurate, complete, and current as of a mutually determined date prior to reaching agreement. Certification shall be made using the certificate set forth in Section 3-403.05 below.

### 3-403.04.4 Refusal to Submit Data

A refusal by the offeror to supply the required data shall be referred to the Agency Head, whose duty shall be to determine in writing whether to disqualify the noncomplying offeror, to defer award pending further investigation, or to enter into the contract. A refusal by a contractor to submit the required data to support a price adjustment shall be referred to the Agency Head who shall determine in writing whether to further investigate the price adjustment, to disallow any price adjustment, or to set the amount of the price adjustment.

## 3-403.05 Certificate of Current Cost or Pricing Data

### 3-403.05.1 Form of Certificate

When cost or pricing data must be certified, a certificate substantially as set forth below shall be included in the agency's contract file along with any award documentation required under these regulations. The offeror or contractor shall be required to submit the certificate as soon as practicable after agreement is reached on the contract price or adjustment.

*CERTIFICATE OF CURRENT COST OR PRICING DATA*

*This is to certify that, to the best of my knowledge and belief, cost or pricing data as defined in Section 3-101.01 of the Mississippi Personal Service Contract Review Board Rules and Regulations submitted, either actually or by specific identification in writing (see Section 3-403.04) to the Procurement Officer in support of …….*, is accurate, complete, and current as of (date) (month) (year)**……*

*This certification includes the cost or pricing data supporting any advance agreement(s) between the offeror and the State of Mississippi which are part of the proposal.*

*Firm*
*Name*
*Title*
*Date of Execution****

--- *(End of Certificate)* ---

* Describe the proposal, quotation, request for price adjustment or other submission involved, giving appropriate identifying number (e.g., RFP No._____ ).

** The effective date shall be a mutually determined date prior to but as close to the date when price negotiations were concluded and the contract price was agreed to as possible. The responsibility of the offeror or contractor is not limited by the personal knowledge of the offeror's or contractor's negotiator if the offeror or contractor had information reasonably available at the time of agreement, showing that the negotiated price is not based on accurate, complete, and current data.

***This date should be as soon after the date when the price negotiations were concluded and the contract price was agreed to as practical.

**3-403.05.2 Representation as to Accuracy of Cost or Pricing Data**

Although the certificate pertains to cost or pricing data, it is not to be construed as a representation as to the accuracy of the offeror's or contractor's judgment on the estimated portion of future costs or projections. It does constitute a representation as to the accuracy of the data upon which the offeror's or contractor's judgment is based. A Certificate of Current Cost or Pricing Data shall not substitute for examination and analysis of the offeror's or contractor's proposal.

**3-403.05.3 Inclusion of Notice and Contract Clause**

Whenever it is anticipated that a Certificate of Current Cost or Pricing Data may be required, notice of this requirement shall be included in the solicitation. If such a certificate is required, the contract shall include a clause giving the State a contract right to a reduction in the price as provided in Section 3-403.06 (Defective Cost or Pricing Data).

### 3-403.05.4 Exercise of Option

The exercise of an option at the price established in the initial negotiation in which certified cost or pricing data was used does not require recertification or further submission of data.

## 3-403.06 Defective Cost or Pricing Data

### 3-403.06.1 Overstated Cost or Pricing Data

If certified cost or pricing data is subsequently found to have been inaccurate, incomplete, or noncurrent as of the date stated in the certificate, the State is entitled to an adjustment of the contract price, including profit or fee, to exclude any significant sum by which the price was increased because of the defective data.

Judgmental errors made in good faith concerning the estimated portions of future costs or projections do not constitute defective data. It is presumed that overstated costs or pricing data increased the contract price in the amount of the defect plus related overhead and profit or fee, therefore, unless there is a clear indication that the defective data was not used or relied upon, the price should be reduced in such amount. In establishing that the defective data caused an increase in the contract price, the Procurement Officer is not expected to reconstruct the negotiation by speculating as to what would have been the mental attitudes of the negotiating parties if the correct data had been submitted at the time of agreement on price.

### 3-403.06.2 Offsetting Understated Cost or Pricing Data

In determining the amount of a downward adjustment, the contractor shall be entitled to an offsetting adjustment for any understated cost or pricing data submitted in support of price negotiations for the same pricing action up to the amount of the State's claim for overstated cost or pricing data arising out of the same pricing action.

### 3-403.06.3 Dispute

If the contractor and the Procurement Officer cannot agree as to the existence of defective cost or pricing data or amount of adjustment due to defective cost or pricing data, the Procurement Officer shall set an amount in accordance with Subsections 3-403.06.1 and 3-403.06.2.

## 3-403.07 Price Analysis Techniques

Price analysis is used to determine if a price is reasonable and acceptable. It involves an evaluation of the prices for the same or similar items or services. Examples of price analysis criteria include but are not limited to:

(a) price submission of prospective bidders or offers in the current procurement;

(b) prior price quotations and contract prices charged by the bidder, offeror, or contractor;

(c) prices published in catalogs or price lists;

(d) prices available on the open market; and,

(e) in-house estimates of cost.

In making such analysis, consideration must be given to any differing terms and conditions.

### 3-403.08 Cost Analysis Techniques

Cost analysis includes the appropriate verification of cost or pricing data, and the use of this data to evaluate:

(a) specific elements of costs;

(b) the necessity for certain costs;

(c) the reasonableness of amounts estimated for the necessary costs;

(d) the reasonableness of allowances for contingencies;

(e) the basis used for allocation of indirect costs;

(f) the appropriateness of allocations of particular indirect costs to the proposed contract; and,

(g) the reasonableness of the total cost or price.

### 3-403.09 Evaluations of Cost or Pricing Data

Evaluations of cost or pricing data should include comparisons of costs and prices of an offeror's cost estimates with those of other offerors and any independent Mississippi price and cost estimates. They shall also include consideration of whether such costs are reasonable and allowable.

## 3-501 TYPES OF CONTRACTS

### 3-501.01 Scope of Regulation

This regulation section contains descriptions of types of contracts and limitations as to when they should be utilized by the State in its procurements.

Subject to the limitations of this section, any type of contract which will promote the best interests of the State may be used. A cost reimbursement contract may be used only when a determination is made in writing that such contract is to be less costly to the State than any

other type of contract or that it is impracticable to obtain the services required except under such a contract.

### 3-501.02 Cost-Plus-a-Percentage-of-Cost Contracting

A cost-plus-a-percentage-of-cost contract is one in which, prior to beginning the work, the parties agree that the fee will be a predetermined percentage of the total cost of the work. Thereby, the more the contractor spends, the greater its fee and the contractor's incentive may, therefore, be to incur cost at the expense of the State and not to economize. Agencies are urged to avoid the use of cost-plus-a-percentage-of-cost contracts.

### 3-501.03 Policy Regarding Selection of Contract Types

#### 3-501.03.1 General

The selection of an appropriate contract type depends on factors such as the nature of the services to be procured, the uncertainties which may be involved in contract performance, and the extent to which the State or the contractor is to assume the risk of the cost of performance of the contract. Contract types differ in degree of responsibility assumed by the contractor.

The objective when selecting a contract type is to obtain the best value in needed services in the time required and at the lowest cost or price to the State. In order to achieve this objective, the Procurement Officer, before choosing a contract type, should review those elements of the procurement which directly affect the cost, time, risk and profit incentive bearing on the performance.

Among the factors to be considered in selecting any type of contract are:

(a) the type and complexity of services being procured;

(b) the difficulty of estimating performance costs such as the inability of the State to develop definitive specifications, to identify the risks to the contractor inherent in the nature of the work to be performed, or otherwise to establish clearly the requirements of the contract;

(c) the administrative costs to both parties;

(d) the degree to which the State must provide technical coordination during the performance of the contract;

(e) the effect of the choice of the type of contract on the amount of competition to be expected;

(f) the stability of material or commodity market prices or wage levels;

(g) the urgency of the requirement; and,

(h) the length of contract performance.

***Note:*** *It is self-defeating for the State to select a type of contract that would place an unreasonable economic risk on the contractor, since such action may tend to jeopardize satisfactory performance of the contract.*

### 3-501.03.2 Use of Contract Types Not Herein Described

The provisions of Section 3-501 describe and define the principal contract types. Any other type of contract may be used provided the Agency Head and the PSCRB determine that such use is in the State's best interest.

## 3-501.04 Types of Fixed-Price Contracts

### 3-501.04.1 General

A fixed-price contract places responsibility on the contractor for the performance of the service in accordance with the contract terms at a price that may be firm or may be subject to contractually specified adjustments. The fixed-price contract is appropriate for use when the extent and type of work necessary to meet requirements can be reasonably specified and the cost can be reasonably estimated. A fixed-price type of contract is the only type of contract that can be used in competitive sealed bidding.

***Note:*** *Fixed-price contracts are preferred for use in procurements and should be used whenever possible; however, when risks are unknown or not readily measurable in terms of costs, the use of such contracts can result in inflated prices and inadequate competition, poor performance, disputes, claims when performance proves difficult, or excessive profits when anticipated contingencies do not occur.*

### 3-501.04.2 Firm Fixed-Price Contract

A firm fixed-price contract provides a price that is not subject to adjustment because of variations in the contractor's cost of performing the work specified in the contract. It should be used whenever prices which are fair and reasonable to the State can be established at the outset. Bases upon which firm fixed prices may be established include:

(a) adequate price competition for the contract;

(b) comparison of prices in similar prior procurements in which prices were fair and reasonable;

(c) establishment of realistic costs of performance by utilizing available cost or pricing data and identifying uncertainties in contract performance; or,

(d) use of other adequate means to establish a firm price.

### 3-501.04.3 Fixed-Price Contract with Price Adjustment

(a) A fixed-price contract with price adjustment provides for variation in the contract price under special conditions defined in the contract. An adjustment would be implied in the authority for change orders as would be applicable to construction contracts.

(b) If the contract permits unilateral action by the contractor to bring about the condition under which a price increase may occur, the contract shall reserve to the State the right to reject the price increase and terminate without cost the future performance of the contract. The contract shall also require that notice of any such price increase shall be given within such time prior to its effective date as is specified in the contract.

## 3-501.05 Definite Quantity and Indefinite Quantity Contracts

### 3-501.05.1 Definite Quantity

A definite quantity contract is a fixed-price contract that provides for delivery of a specified quantity of services either at specified times or when ordered.

### 3-501.05.2 Indefinite Quantity

An indefinite quantity contract is a contract for an indefinite amount of services to be furnished at specified times, or as ordered, that establishes unit prices of a fixed-price type. Generally an approximate quantity or the best information available as to quantity is stated in the solicitation. The contract may provide a minimum quantity the State is obligated to procure and may also provide for a maximum quantity provision that limits the State's obligation to procure.

### 3-501.05.3 Requirements Contracts

A requirements contract is an indefinite quantity contract for services that obligates the State to order all the actual requirements of designated agencies during a specified period of time. The obligation to order the State's actual requirements is limited only by provisions of Mississippi Code Annotated § 31-7-12(1) (1972, as amended). For the protection of the State and the contractor, requirements contracts shall include the following:

(a) A provision which requires the State and any other users named in the solicitation to order their actual requirements of the services covered; however, the State may reserve in the solicitation and in the resulting contract the right to take bids separately if a particular quantity requirement arises which exceeds the State's normal requirements or an amount specified in the contract.

(b) Two exemptions from ordering under the contract occur when:

(1) the Agency Head approves a finding that the supply or service available under the contract will not meet a nonrecurring, special need of the buying entity; and,

(2) services are performed incidental to the State's own programs, such as industries of correctional institutions that can satisfy the need.

## 3-502 MULTI-TERM CONTRACTS

### (a) Specified Period

Unless otherwise provided by law, a contract for services may be entered into for a period of time **not to exceed four (4) years with an option to renew for one year,** provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal period shall be subject to the availability and appropriation of funds.

### (b) Determination Prior to Use

Prior to the utilization of a multi-term contract, it shall be determined in writing by the agency:

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

(2) that such a contract will serve the best interests of the State of Mississippi by encouraging effective competition or otherwise promoting economies in state procurement.

### 3-502.01 Multi-Term Contracts – General

A multi-term contract is appropriate when it is in the best interest of the State to obtain uninterrupted services extending over more than one fiscal period, where the performance of such services involves high start-up costs, or where a changeover of service contractors involves high phase-in/phase-out costs during a transition period.

Special production refers to production for contract performance which requires alteration of the contractor's facilities or operations involving high start-up costs. The contractual obligation of both parties in each fiscal period succeeding the first is subject to the appropriation and availability of funds therefor. The contract shall provide that in the event that funds are not available for any succeeding fiscal period, the remainder of such contract shall be canceled.

### 3-502.02 Conditions for Use of Multi-Term Contracts

A multi-term contract may be used when it is determined in writing by the Procurement Officer that:

(a) the furnishing of long-term services are required to meet needs of the State; and,

(b) a multi-term contract will serve the best interests of the State by encouraging effective competition or otherwise promoting economies in state procurement. The following factors are among those relevant to such a determination:

(1) firms which are not willing or able to compete because of high start-up costs or capital are assured of recouping such costs during the period of contract performance;

(2) lower production costs because of larger quantity or service requirements and substantial continuity of production or performance over a longer period of time can be expected to result in lower unit prices;

(3) stabilization of the contractor's work force over a longer period of time may promote economy and consistent quality; or,

(4) the cost and burden of contract solicitation, award, and administration of the procurement may be reduced.

### 3-502.03 Multi-Term Contract Procedure

#### 3-502.03.1 Solicitation

The solicitation shall state:

(a) the amount of services required for the proposed contract period;

(b) that a unit price shall be given for each service, and that such unit prices shall be the same throughout the contract;

(c) that the multi-term contract will be canceled if funds are not appropriated or otherwise made available to the support continuation of performance in any fiscal period succeeding the first; however, this does not affect either the State's right or the contractor's rights under any termination clause in the contract;

(d) that the Procurement Officer must notify the contractor on a timely basis that the funds are or are not available for the continuation of the contract for each succeeding fiscal period; and,

(e) that a multi-term contract may be awarded and how award will be determined.

#### 3-502.03.2 Award

Award shall be made as stated in the solicitation and permitted under the source selection method utilized.

### 3-502.03.3 Cancellation

(a) "Cancellation," as used in multi-term contracting, means the cancellation of the total requirements for the remaining portion of the contract because funds were not appropriated or otherwise made available. The contract for the fiscal period shall not be canceled. Cancellation results when the Procurement Officer:

(1) notifies the contractor of non-availability of funds for contract performance for any fiscal period subsequent to the first; or,

(2) exercises a cancellation provision of the original contract.

(b) These provisions on cancellation of multi-term contracts do not limit the rights of the State or the contractor under any termination clause of the contract if the contract is terminated pursuant to that clause rather than canceled as provided in this subsection. If a contract is canceled for lack of funding, all obligations due the contractor for the period during which funding was available shall be paid. Cancellation for reasons of non-availability of funding relieves the purchaser of all contractual obligations for any contract period subsequent to the date of cancellation. No contract shall be canceled for lack of funds during a fiscal year period when funds were allocated for such contract.

### 3-502.03.4 Contract Clause

The following clause, or one substantially similar, shall be used by the Purchasing Agency in multi-term contractual agreements:

***Availability of Funds***

*It is expressly understood and agreed that the obligation of the [agency] to proceed under this agreement is conditioned upon the appropriation of funds by the Mississippi State Legislature and the receipt of state and/or federal funds. If the funds anticipated for the continuing fulfillment of the agreement are, at any time, not forthcoming or insufficient, either through the failure of the federal government to provide funds or of the State of Mississippi to appropriate funds or the discontinuance or material alteration of the program under which funds were provided or if funds are not otherwise available to the State, the [agency] shall have the right upon ten (10) working days written notice to the contractor, to terminate this agreement without damage, penalty, cost or expenses to the State of any kind whatsoever. The effective date of termination shall be as specified in the notice of termination.*

***Note:*** *Multi-term contracts, as set forth in this section, should be interpreted to mean a contract having effective dates spanning appropriation periods two or more fiscal years and would obligate the agency to purchase a specified quantity of services over that period.*

## 3-503 MULTIPLE SOURCE CONTRACTING

### 3-503.01 Incremental Award

#### 3-503.01.1 General

An incremental award is an award of portions of a definite quantity requirement to more than one contractor. Each portion is for a definite quantity and sum of the portions is the total definite quantity required. An incremental award may be used only when awards to more than one bidder or offeror for different amounts of the same item are necessary to obtain the total quantity or the required delivery.

#### 3-503.01.2 Intent to Use

If an incremental award is anticipated prior to issuing a solicitation, the State shall reserve the right to make such an award and the criteria for award shall be stated in the solicitation.

#### 3-503.01.3 Determination Required

The Procurement Officer shall make a written determination setting forth the reasons for the incremental award, which shall be made a part of the agency's procurement file.

### 3-503.02 Multiple Award

#### 3-503.02.1 General

A multiple award is an award of an indefinite quantity contract for services to more than one bidder or offeror when the State is obligated to order all of its actual requirements for the specified services from those contractors. The obligation to order the State's actual requirements is limited by Mississippi Code Annotated § 75-2-306 (1972, as amended).

#### 3-503.02.2 Limitations on Use

A multiple award may be made when an award to two or more bidders or offerors for similar services is necessary for adequate delivery. Any multiple awards shall be made in accordance with the provisions of Section 3-202 (Competitive Sealed Bids), 3-203 (Competitive Sealed Proposals), Section 3-204 (Small Purchases), and Section 3-206 (Emergency Procurement), as applicable. Multiple awards shall not be made when a single award will meet the State's needs without sacrifice of economy or service. Awards shall not be made for the purpose of dividing the business, making available product or supplier selection to allow for user preference unrelated to utility or economy, or avoiding the resolution of tie bids. Any such awards shall be limited to the least number of suppliers necessary to meet the valid requirements of using agencies.

### 3-503.02.3 Contract and Solicitation Provisions

All eligible users of the contract shall be named in the solicitation, and it shall be mandatory that the actual requirements of such users that can be met under the contract be obtained in accordance with the contract, provided, that:

(a) the State shall reserve the right to take bids separately if a particular quantity requirement arises which exceeds its normal requirement or an amount specified in the contract;

(b) the State shall reserve the right to take bids separately if the Agency Head approves a finding that the supply or service available under the contract will not meet a nonrecurring special need of the agency; and,

(c) the contract may allow the State to procure services performed, incidental to the State's own programs, such as industries of correctional institutions, when such services satisfy the need.

### 3-503.02.4 Intent of Use

If a multiple award is anticipated prior to issuing a solicitation, the State shall reserve the right to make such an award, and the criteria for award shall be stated in the solicitation.

### 3-503.02.5 Determination Required

The Procurement Officer shall make a written determination setting forth the reasons for a multiple award, which shall be made a part of the agency's procurement file.

***Note:*** *Within these regulations, contract arrangements which establish more than one source of service are either multiple or progressive award contracts. Competitive sealed bidding is the conventional procurement method for establishing such contracts, although competitive sealed proposals, small purchase procedures, and emergency procurements may be used if appropriate as determined in accordance with Section 3-203, Section 3-204, or Section 3-206, respectively.*

## 3-601 RIGHT TO INSPECT FACILITY

The State may, at reasonable times, inspect the place of business of a contractor or any subcontractor which is related to the performance of any contract awarded or to be awarded by the State.

### 3-601.01 Inspection of Facility or Site

Circumstances under which the State may perform inspections include, but are not limited to, inspections of contractor's site in order to determine:

(a) whether the standards set forth in Section 3-401.03 (Standards of Responsibility) have been met or are capable of being met; and,

(b) if the contract is being performed in accordance with its terms.

**3-601.02 Access to Place of Business**

The State may enter a contractor's or subcontractor's place of business to:

(a) inspect services for acceptance by the State pursuant to the terms of a contract;

(b) audit cost or pricing data or audit the books and records of any contractor or subcontractor pursuant to Section 3-602 (Right to Audit Records) of these Regulations; and,

(c) investigate in connection with an action to debar or suspend a person from consideration for award of contracts pursuant to Section 5-101 (Authority to Debar or Suspend).

**3-601.03 Inspection and Testing of Services**

**3-601.03.1 Solicitation and Contractual Provisions**

Mississippi contracts may provide that the State may inspect services at the contractor's or subcontractor's facility and perform the tests to determine whether they conform to solicitation requirements or, after award, to contract requirements and are, therefore, acceptable. Such inspections and tests shall be conducted in accordance with the terms of the solicitation and contract.

**3-601.04 Conduct of Inspections**

**3-601.04.1 Inspectors**

Inspections or tests shall be performed so as not to unduly delay the work of the contractor or subcontractor. The presence or absence of an inspector shall not relieve the contractor or subcontractor from any requirements of the contract.

**3-601.04.2 Location**

When an inspection is made in the place of business of a contractor or subcontractor, such contractor or subcontractor shall provide without charge all reasonable facilities and assistance for the safety and convenience of the person performing the inspection or testing.

**3-601.04.3 Time**

Inspection or testing of services performed at the place of business of any contractor or subcontractor shall be performed at reasonable times.

## 3-602 RIGHT TO AUDIT RECORDS

### (a) Audit of Cost or Pricing Data

The State may, at reasonable times and places, audit the books and records of any person who has submitted cost or pricing data pursuant to Section 3-403 (Cost or Pricing Data) to the extent that such books and records relate to such cost or pricing data. Any person who receives a contract, change order, or contract modification for which cost or pricing data is required, shall maintain such books and records that relate to such cost or pricing data for three years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing.

### (b) Contract Audit

The State shall be entitled to audit the books and records of a contractor or any subcontractor under any negotiated contract or subcontract to the extent that such books and records related to the performance of such contract or subcontract. Such books and records shall be maintained by the contractor for a period of three years from the date of final payment under the prime contract and by subcontractor for a period of three years from the date of final payment under the subcontract, unless a shorter period is otherwise authorized in writing.

### 3-602.01 Statutory Authority to Audit

Pursuant to Mississippi Code Annotated § 25-9-120 (1972, as amended), the PSCRB may request the State Auditor to conduct performance audit on any personal or professional service contract.

### 3-602.02 Auditors; Audit Reports

Audits requested under this subpart shall be performed by the State Auditor's Office. Such audit reports shall be made available to the party audited upon request.

### 3-602.03 Cost or Pricing Data Audit

#### 3-602.03.1 General

The PSCRB may require an audit of cost or pricing data that has been submitted under Section 3-403 (Cost or Pricing Data).

#### 3-602.03.2 Conditions for an Audit

An audit should be required, in respect to the contractor, prospective contractor, subcontractor, or prospective subcontractor, when there is:

(a) a question as to the adequacy of accounting policies or cost systems;

(b) a substantial change in the methods or levels of operation;

(c) previous unfavorable experience indicating doubtful reliability of estimating, accounting, or purchasing methods;

(d) a lack of cost experience due to the procurement of a new supply or service; or,

(e) other evidence that an audit is in the State's best interests as determined by the PSCRB.

***Note:*** *Subject to final determination by the State Auditor, the report should contain the following in respect to the contractor, prospective contractor, subcontractor, or prospective subcontractor:*

*(a) a description of the original proposal and all submissions of cost or pricing data;*

*(b) an explanation of the basis and the method used in preparing the proposal;*

*(c) a statement identifying any cost or pricing data not submitted but examined by the auditor which has a significant effect on the proposed cost or price;*

*(d) a description of any deficiency in the cost or pricing data submitted and an explanation of its effect on the proposal;*

*(e) a statement summarizing those major points where there is a disagreement as to the cost or pricing data submitted; and*

*(f) a statement identifying any information obtained from other sources.*

## 3-602.04 Contract Audit

### 3-602.04.1 Contract Audited

Under the authority of Mississippi Code Annotated § 25-9-120 (1972, as amended), any contract for professional or personal services may be audited when auditing would be appropriate to assure satisfactory performance.

### 3-602.04.2 Conditions for an Audit

The requirement of a contract audit may be warranted when a question arises in connection with:

(a) the financial condition, integrity, and reliability of the contractor or subcontractor;

(b) any prior audit experience;

(c) the adequacy of the contractor's or subcontractor's accounting system;

(d) the number or nature of invoices or reimbursement vouchers submitted by the contractor or subcontractor for payment;

(e) the use of federal assistance funds;

(f) the fluctuation of market prices affecting the contract;

(g) contract performance or measurement of deliverables; or,

(h) any other situation in which the PSCRB finds that such an audit is necessary for the protection of the State's interest, including random audits to ensure compliance with these regulations.

The scope of the audit may be limited by the PSCRB.

***Note:*** *The scope of the report will depend on the scope of the audit ordered; however, the report should contain specific reference to the terms of the contract to which the audited data related and a statement of the degree to which the auditor believes the audited data evidences compliance with those terms.*

### 3-602.05 Retention of Books and Records

#### 3-602.05.1 Relating to Cost and Pricing Data

Any contractor who receives a contract, change order, or contract modification for which cost or pricing data is required under Section 3-403 (Cost or Pricing Data) shall maintain such books and records that relate to such cost or pricing data for three years from the date of final payment under the contract.

#### 3-602.05.2 Relating to State Contracts

Books and records that relate to a state contract, including subcontracts, other than a firm fixed-price contract, shall be maintained:

(a) by a contractor, for three years from the date of final payment under the prime contract; and,

(b) by a subcontractor, for three years from the date of final payment under the subcontract.

## 3-701 FINALITY OF DETERMINATIONS

The determinations required by the following sections are final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law:

(a) Section 3-202(f) (Competitive Sealed Bidding, Correction or Withdrawal of Bids, Cancellation of Awards);

(b) Section 3-203(a) (Competitive Sealed Proposals, Conditions for Use)

(c) Section 3-203(g) (Competitive Sealed Proposals, Award);

(d) Section 3-205 (Sole-Source Procurement);

(e) Section 3-206 (Emergency Procurement);

(f) Section 3-401(a) (Responsibility of Bidders and Offerors, Determination of Non-responsibility);

(g) Section 3-403(c) (Cost or Pricing Data, Cost or Pricing Data Not Required);

(h) Section 3-501 (Types of Contracts); and

(i) Section 3-503(b) (Multi-Term Contracts, Determinations Prior to Use).

## 3-702 REPORTING OF ANTI-COMPETITIVE PRACTICES

When, for any reason collusion or other anti-competitive practices are suspected among any bidders or offerors, a notice of the relevant facts shall be transmitted to the Attorney General.

### 3-702.01 Anti-Competitive Practices

For the purposes of this section, an anti-competitive practice is a practice among bidders or offerors which reduces or eliminates competition or restrains trade. An anti-competitive practice can result from an agreement or understanding among competitors to restrain trade such as submitting collusive bids or proposals, or result from illicit business actions which have the effect of restraining trade, such as controlling the resale price of products or an improper collective refusal to bid. Indications of suspected anti-competitive practices include, but are not limited to, identical bids or proposals, rotated low bids or proposals, sharing of the business, "tie-in" sales, resale price maintenance, and group boycotts.

***Note:*** Bidders and offerors are prohibited by federal and Mississippi law from collectively responding to a solicitation in a manner that controls directly or indirectly the price of a supply, service, or construction item sought. Miss. Code Ann. § 75-21-15 (1972, as amended). This prohibition may extend to such actions establishing any of the following: minimum or maximum prices; uniform list prices; uniform credit terms; uniform discounts; uniform costs and mark-ups; uniform trade-in allowances; specified price differentials between varying grades of the same product, price ranges, price scales or price calculation formulas; and, minimum fee schedules.

### 3-702.02 Independent Price Determination

Every solicitation shall provide that by submitting a bid or offer, the bidder or offeror certifies that the price submitted was independently arrived at without collusion. The agency may require the signing of a separate form which certifies that the price in the bid or offer was arrived at independently.

### 3-702.03 Detection of Anti-Competitive Practices

In order to assist in ascertaining whether or not an anti-competitive practice may have occurred or may be occurring, the Procurement Officer should be alert and sensitive to conditions of the market place and will often find it necessary to study past procurements including, as appropriate, the following:

(a) a study of the bidding history of a commodity or service over a period of time sufficient to determine any significant bidding patterns or changes;

(b) a review of similar Mississippi contract awards over a period of time; and,

(c) consultation with outside sources of information, such as bidders or offerors who have competed for similar Mississippi businesses in the past but who are no longer competing for such business.

### 3-702.04 Identical Bidding and Price Fixing

The term "identical bidding" means the submission by bidders or offerors of the same total price or the same price on a particular line item. The submission of identical bids may or may not signify the existence of collusion.

In seeking to determine whether collusion has taken place, the Procurement Officer should view the identical bids against present and past pricing policies of the bidders or offerors, the structure of the industry involved including comparisons of price, and the nature of the service.

### 3-702.05 Other Anti-Competitive Practices

#### 3-702.05.1 General

The practices which are described in Subsection 3-702.05.2 through Section 3-702.05.6 and which the Procurement Officer suspects might be anti-competitive shall be reported to the PSCRB.

#### 3-702.05.2 Rotated Low Bids or Proposals

Rotated low bids or proposals result where all bidders or offerors participating in the collusive scheme submit bids and by agreement alternate being the lowest bidder or offeror.

To aid in determining whether rotation may be occurring, the Procurement Officer must review past similar procurements in which the same bidders or offerors have participated.

### 3-702.05.3 Sharing of the Business

Sharing of the business occurs where potential bidders or offerors allocate business among themselves based on the customers or territory involved. Thus, a Procurement Officer might discover that a potential bidder or offeror is not participating in a Mississippi procurement because a particular Mississippi agency or a particular territory has not been allocated to such bidder or offeror.

### 3-702.05.4 "Tie-in" sales

"Tie-in" sales are those in which a bidder or offeror attempts to sell one supply or service only upon the condition that the Procurement Officer purchase another particular supply or service.

### 3-702.05.5 Group Boycott

A group boycott results from an agreement between competitors not to deal with another competitor or not to participate in, for instance, a Mississippi procurement until the boycotting competitors' conditions are met by the boycotted competitor or the State. The boycott of a competitor by other competitors may have an effect on the market structure or price of a service needed by the State.

**Note:** *Protecting the principles of competition in public procurement is a difficult and often complex task. A program of communication and cooperation between procurement and legal offices, institutionalized to the extent feasible, is essential in combating anti-competitive practices.*

## 3-703 RETENTION OF PROCUREMENT RECORDS

All procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules by the Department of Archives and History.

## CHAPTER 4 – CONTRACT ADMINISTRATION

## 4-101 MODIFICATION AND TERMINATION OF CONTRACTS FOR SERVICES

The following contract clauses should be used as required by the *Mississippi Personal Service Contract Review Board Rules and Regulations* and at the discretion of the Agency Head. In addition to these clauses, see Appendices D (Required Clauses in Contract for Services), E (Required Clauses in RFP's and IFB's), F (Clauses Available for Use in Service Contracts), and G (Clauses Available for Use in Solicitations for Bids or Proposals) for other clauses.

### 4-101.01 Stop Work Order Clause: Use of clause

The clause set forth in subsection 4-101.01.2 of this section is authorized for use in any fixed-price contract under which work stoppage may be required for reasons such as advancements in the state of the art, production modifications, engineering changes, or realignment of programs.

#### 4-101.01.1 Use of Orders

(a) Because stop work orders may result in increased costs by reason of standby costs, such orders shall be issued only with prior approval of the Agency Head. Generally, use of a stop work order will be limited to situations in which it is advisable to suspend work pending a decision to proceed by the State, and a supplemental agreement providing for such suspension is not feasible. A stop work order may not be used in lieu of the issuance of a termination notice after a decision to terminate has been made.

(b) Stop work orders shall not exceed 90 consecutive days and shall include, as appropriate:

(1) a clear description of the work to be suspended;

(2) instructions as to the issuance of further orders by the contractor for material or services;

(3) guidance as to action to be taken on subcontracts; and,

(4) other instructions and suggestions to the contractor for minimizing costs.

Promptly after issuance, stop work orders shall be discussed with the contractor and should be modified, if necessary, in the light of such discussions.

(c) As soon as feasible after a stop work order is issued:

(1) the contract will be terminated; or,

(2) the stop work order will be canceled or extended in writing beyond the period specified in the order.

In any event, action must be taken before the specified stop work period expires. If an extension of the stop work order is necessary, it must be evidenced by a supplemental agreement. Any cancellation of a stop work order shall be subject to the same Agency Head approval as was required for the issuance of the order.

**4-101.01.2 Stop Work Order Clause (Required)**

***STOP WORK ORDER***

*(1)* ***Order to Stop Work.*** *The Procurement Officer of the [State], may, by written order to the contractor at any time, and without notice to any surety, require the contractor to stop all or any part of the work called for by this contract. This order shall be for a specified period not exceeding 90 days after the order is delivered to the contractor, unless the parties agree to any further period. Any such order shall be identified specifically as a stop work order issued pursuant to this clause. Upon receipt of such an order, the contractor shall forthwith comply with its terms and take all reasonable steps to minimize the occurrence of costs allocable to the work covered by the order during the period of work stoppage. Before the stop work order expires, or within any further period to which the parties shall have agreed, the Procurement Officer shall either:*

*a. cancel the stop work order; or,*

*b. terminate the work covered by such order as provided in the Termination for Default clause or the Termination for Convenience clause of this contract.*

*(2)* ***Cancellation or Expiration of the Order.*** *If a stop work order issued under this clause is canceled at any time during the period specified in the order, or if the period of the order or any extension thereof expires, the contractor shall have the right to resume work. An appropriate adjustment shall be made in the delivery schedule or contractor price, or both, and the contract shall be modified in writing accordingly, if:*

*a. the stop work order results in an increase in the time required for the performance of any part of this contract; or,*

*b. the stop work order results in an increase in the contractor's cost properly allocable to the performance of any part of this contract; and,*

*c. the contractor asserts a claim for such an adjustment within 30 days after the end of the period of work stoppage; provided that, if the Procurement Officer decides that the facts justify such action, any such claim asserted may be received and acted upon at any time prior to final payment under this contract.*

*(3)* ***Termination of Stopped Work.*** *If a stop work order is not canceled and the work covered by such order is terminated for default or convenience, the reasonable costs resulting from the stop work order shall be allowed by adjustment or otherwise.*

*(4)* ***Adjustments of Price.*** *Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment clause of this contract.*

### 4-101.02 Variations in Estimated Quantities Clause (*form*) (Optional)

#### 4-101.02.1 Definite Quantity Contracts

The following clause is authorized for use in definite quantity service contracts:

***VARIATION IN QUANTITY***

*Upon the agreement of the parties, the quantity of services specified in this contract may be increased by a maximum of ten percent provided:*

*(1) the unit prices will remain the same (except for any price adjustments otherwise applicable); and,*

*(2) the Procurement Officer makes a written determination that such an increase will either be more economical than awarding another contract or that it would not be practical to award another contract.*

#### 4-101.02.2 Indefinite Quantity Contracts

Indefinite quantity contracts require flexibility as to the State's obligation to order and the contractor's obligation to deliver. The agreement should be designed to meet the agency's needs while making the contract as attractive as possible to potential contractors, thereby attempting to obtain maximum practicable competition in order to assure the best economy for the State of Mississippi. Because of the need for flexibility, no clause is provided herein; however, in each case, the contract should state:

(a) the minimum quantity, if any, the State is obligated to order and the contractor to provide;

(b) whether there is a quantity the State expects to order and how this quantity relates to any minimum and maximum quantities that may be ordered under this contract;

(c) any maximum quantity the State may order and the contractor must provide; and,

(d) whether the State is obligated to order its actual requirements under the contract, or in the case of a multiple award as defined in section 3-503 (Multiple Sourcing Contracting), that the State will order its actual requirements from the contractors under the multiple award subject to any minimum or maximum quantity stated.

**4-101.03 Price Adjustment Clause (Optional)**

***PRICE ADJUSTMENT***

*(1)* ***Price Adjustment Methods.*** *Any adjustment in contract price pursuant to a clause in this contract shall be made in one or more of the following ways:*

*(a) by agreement on a fixed price adjustment before commencement of the additional performance;*

*(b) by unit prices specified in the contract;*

*(c) by the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as specified in the contract; or,*

*(d) by a price escalation clause.*

*(2)* ***Submission of Cost or Pricing Data.*** *The contractor shall provide cost or pricing data for any price adjustments subject to the provisions of Section 3-403 (Cost or Pricing Data) of the Mississippi Personal Service Contract Review Board Rules and Regulations.*

**4-101.04 Claims Based on a Procurement Officer's Actions or Omissions Clause (Optional)**

***CLAIMS BASED ON PROCUREMENT OFFICER'S ACTIONS OR OMISSIONS***

*(1)* ***Notice of Claim.*** *If any action or omission on the part of a Procurement Officer or designee of such officer requiring performance changes within the scope of the contract constitutes the basis of a claim by the contractor for additional compensation, damages, or an extension of time for completion, the contractor shall continue with performance of the contract in compliance with the directions or orders of such officials, but by so doing, the contractor shall not be deemed to have prejudiced any claim for additional compensation, damages, or an extension of time for completion, provided:*

*(a) the contractor shall have given written notice to the Procurement Officer or designee of such officer:*

*(i.) prior to the commencement of the work involved, if at that time the contractor knows of the occurrence of such action or omission;*

*(ii.) within 30 days after the contractor knows of the occurrence of such action or omission, if the contractor did not have such knowledge prior to the commencement of the work; or,*

*(iii.) within such further time as may be allowed by the Procurement Officer in writing.*

*(This notice shall state that the contractor regards the act or omission as a reason which may entitle the contractor to additional compensation, damages, or an extension of time. The Procurement Officer or designee of such officer, upon receipt of such notice, may rescind such action, remedy such omission, or take such other steps as may be deemed advisable in the discretion of the Procurement Officer or designee of such officer.)*

*(b) the notice required by Subparagraph (a) of this Paragraph describes as clearly as practicable at the time the reasons why the contractor believes that additional compensation, damages, or an extension of time may be remedies to which the contractor is entitled; and,*

*(c) the contractor maintains and, upon request, makes available to the Procurement Officer within a reasonable time, detailed records to the extent practicable, of the claimed additional costs or basis for an extension of time in connection with such changes.*

*(2)* ***Limitation of Clause.*** *Nothing herein contained shall excuse the contractor from compliance with any rules or law precluding any state officers and any contractors from acting in collusion or bad faith in issuing or performing change orders which are clearly not within the scope of the contract.*

*(3)* ***Adjustment of Price.*** *Any adjustment in the contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment clause of this contract.*

**4-101.05 Termination for Default Clause (Optional)**

***TERMINATION FOR DEFAULT***

*(1)* ***Default.*** *If the contractor refuses or fails to perform any provisions of this contract with such diligence as will ensure its completion within the time specified in this contract, or any extension thereof, or otherwise fails to timely satisfy the contract provisions, or commits any other substantial breach of this contract, the Procurement Officer of the [State] may notify the contractor in writing of the delay or nonperformance and if not cured in ten (10) days or any longer time specified in writing by the Procurement Officer, such officer may terminate the contractor's right to proceed with the contract or such part of the contract as to which there has been delay or a failure to properly perform. In the event of termination in whole or in part, the Procurement Officer may procure similar services in a manner and upon terms deemed appropriate by the Procurement Officer. The contractor shall continue performance of the contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services.*

*(2)* ***Contractor's Duties.*** *Notwithstanding termination of the contract and subject to any directions from the Procurement Officer, the contractor shall take timely, reasonable, and necessary action to protect and preserve property in the possession of the contractor in which the State has an interest.*

(3) ***Compensation.*** *Payment for completed services delivered and accepted by the [State] shall be at the contract price. The [State] may withhold from amounts due the contractor such sums as the Procurement Officer deems to be necessary to protect the [State] against loss because of outstanding liens or claims of former lien holders and to reimburse the [State] for the excess costs incurred in procuring similar goods and services.*

(4) ***Excuse for Nonperformance or Delayed Performance.*** *Except with respect to defaults of subcontractors, the contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms (including any failure by the contractor to make progress in the prosecution of the work hereunder which endangers such performance) if the contractor has notified the Procurement Officer within 15 days after the cause of the delay and the failure arises out of causes such as: acts of God; acts of the public enemy; acts of the State and any other governmental entity in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather. If the failure to perform is caused by the failure of a subcontractor to perform or to make progress, and if such failure arises out of causes similar to those set forth above, the contractor shall not be deemed to be in default, unless the services to be furnished by the subcontractor were reasonably obtainable from other sources in sufficient time to permit the contractor to meet the contract requirements.*

*Upon request of the contractor, the Procurement Officer of the [State] shall ascertain the facts and extent of such failure, and, if such officer determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, the contractor's progress and performance would have met the terms of the contract, the delivery schedule shall be revised accordingly, subject to the rights of the [State] under the clause entitled (in fixed-price contracts, "Termination for Convenience," or in cost-reimbursement contracts, "Termination"). (As used in this Paragraph of this clause, the term "subcontractor" means subcontractor at any tier).*

(5) ***Erroneous Termination for Default.*** *If, after notice of termination of the contractor's right to proceed under the provisions of this clause, it is determined for any reason that the contract was not in default under the provisions of this clause, or that the delay was excusable under the provisions of Paragraph (4) of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the [State], be the same as if the notice of termination has been issued pursuant to such clause.*

(6) ***Additional Rights and Remedies****. The rights and remedies provided in this clause are in addition to any other rights and remedies provided by law or under this contract.*

## 4-101.06 Liquidated Damages Clause (Optional)

### 4-101.06.1 With Termination for Default Clause

The following clause is authorized for use in service contracts when it is difficult to determine with reasonable accuracy the amount of damage to the State due to delays caused by late contractor performance or nonperformance and the contract contains the Termination for Default Clause set forth in Section 4-101.05.

***LIQUIDATED DAMAGES***

*(1) When the contractor is given notice of delay or nonperformance as specified in Paragraph [(1) (Default)] of the Termination for Default clause of this contract and fails to cure in the time specified, the contractor shall be liable for damages for delay in the amount of $_____ per calendar day from date set for cure until either the [State] reasonably obtains similar services if the contractor is terminated for default, or until the contractor provides the services if the contractor is not terminated for default. To the extent that the contractor's delay or nonperformance is excused under Paragraph (4) (Excuse for Nonperformance or Delayed Performance) of the Termination for Default clause of this contract, liquidated damages shall not be due the State. The contractor remains liable for damages caused other than by delay.*

### 4-101.06.2 In Other Situations

If the contract will not have a Termination for Default clause or the liquidated damages are to be assessed for reasons other than delay, the Agency Head may approve the use of any appropriate liquidated damages clause.

## 4-101.07 Termination for Convenience Clause (Optional)

***TERMINATION FOR CONVENIENCE***

*(1)* ***Termination.*** *The Procurement Officer of the [State] may, when the interests of the [State] so require, terminate this contract in whole or in part, for the convenience of the [State]. The Procurement Officer shall give written notice of the termination to the contractor specifying the part of the contract terminated and when termination becomes effective.*

*(2)* ***Contractor's Obligations.*** *The contractor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination the contractor will stop work to the extent specified. The contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The Procurement Officer may direct the contractor to assign the contractor's right, title, and interest under the terminated orders or subcontracts to the State. The contractor must still complete the work not terminated by the notice of termination and may incur obligations as are necessary to do so.*

## 4-102 MONITORING CONTRACT PERFORMANCE

The Agency Head shall ensure that contracts are monitored at least monthly to confirm acceptable performance, timely fulfillment of deliverables and compliance with terms of the agreement.

### 4-102.01 Duties of the Procurement Officer shall include, but are not limited to the following:

(a) reviews and approves contract deliverables;

(b) ensures compliance with contractual terms;

(c) coordinates the flow of information between the parties;

(d) responds to requests of the contractor;

(e) monitors disbursements against the contract budget;

(f) monitors actual progress against work schedules;

(g) coordinates the furnishing of necessary materials;

(h) authorizes no cost modifications; and,

(i) makes recommendations on modifications involving increased cost.

## CHAPTER 5 - LEGAL AND CONTRACTUAL REMEDIES

### 5-101 AUTHORITY TO DEBAR OR SUSPEND

(a) **Authority.** With reasonable notice to the person involved and reasonable opportunity for that person to be heard, the PSCRB, after consultation with the using agency and the Special Assistant Attorney General assigned to the MSPB, shall have authority to debar a person for cause from consideration for award of contracts. The debarment shall be for a period of two (2) years. The PSCRB, after consultation with the using agency (the agency that has used the services supplied by the contractor) and the Special Assistant Attorney General, shall have authority to suspend a person from consideration for award of contracts if there is probable cause for debarment. The suspension shall not be for a period exceeding three (3) months.

(b) **Causes for Debarment or Suspension.** The causes for debarment or suspension include the following:

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

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

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

(4) violation of contract provisions, as set forth below, of a character which is regarded by the PSCRB to be so serious as to justify debarment action; including,

i. deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract or,

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

(5) any other cause the PSCRB determines to be so serious and compelling as to affect responsibility as a Mississippi contractor, including debarment by another governmental entity for any cause listed herein; and,

(6) for violation of the ethical standards set forth in Chapter VI (Ethics in Public Contracting).

(c) **Decision.** The PSCRB shall issue a written decision to debar or suspend. The decision shall:

(1) state the reason(s) for the action(s) taken; and,

(2) inform the debarred or suspended person involved of their right to administrative review as provided in this chapter.

(d) **Notice of Decision.** A copy of the decision under subsection (c) of this section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening.

(e) **Finality of Decision.** A decision shall be final and conclusive, unless fraudulent, or the debarred or suspended person commences an action in court.

**5-101.01 Application**

This regulatory provision applies to all debarments or suspensions of persons from consideration for award of contracts imposed by the PSCRB.

**5-101.02 Suspension**

**5-101.02.1 Initiation**

After consultation with the affected using agency, the Special Assistant Attorney General, and, where practicable, the contractor or prospective contractor who is to be suspended, the PSCRB shall made a written determination as to whether probable cause exists for debarment as set forth in Section 5-101 (Authority to Debar or Suspend). If probable cause is found, a contractor or prospective contractor shall be suspended. A notice of suspension, including a copy of such determination, shall be sent to the suspended contractor or prospective contractor. Such notice shall state that:

(a) the suspension is for the period it takes to complete an investigation into possible debarment including any appeals of a debarment decision, but not for a period in excess of three (3) months;

(b) bids or proposals will not be solicited from the suspended person, and if they are received they will not be considered during the period of suspension; and,

(c) if a hearing has not been held, the suspended person may request a hearing in accordance with Section 5-101.04 (Request for Hearing).

**5-101.02.2 Effect of Decision**

A contractor or prospective contractor is suspended upon issuance of the notice of suspension. The suspension shall remain in effect during any appeals. The suspension may be

ended by the PSCRB but otherwise shall only be ended when the suspension has been in effect for three (3) months or a debarment decision takes effect.

**5-101.03 Initiation of Debarment Action**

Written notice of the proposed debarment action shall be sent by certified mail, return receipt requested, to the contractor or prospective contractor. This notice shall:

(a) state that debarment is being considered;

(b) set forth the reasons for the action;

(c) state that if the contractor or prospective contractor so requests, a hearing will be held, provided such request is received by the PSCRB within ten (10) days after the contractor or prospective contractor receives notice of the proposed action; and,

(d) state that the contractor or prospective contractor may be represented by counsel. Such notice shall also be sent to the MSPB Special Assistant Attorney General and the affected using agency.

**5-101.04 Request for Hearing**

A contractor or prospective contractor that has been notified of a proposed debarment action may request in writing that a hearing be held. Such request must be received by the PSCRB within ten (10) days of receipt of notice of the proposed action under Section 5-101.03 (Initiation of Debarment Action). If no request is received within the ten-day period, a final determination may be made as set forth in Section 5-101.08 (Determination of Hearing Officer; Final Decision) after consulting with the MSPB Special Assistant Attorney General and the using agency.

**5-101.05 Notice of Hearing**

If a hearing is requested, the PSCRB may appoint a hearing officer to conduct the hearing and recommend a final decision. The hearing officer shall send a written notice of the time and place of the hearing. Such notice shall be sent by certified mail, return receipt requested, and shall state the nature and purpose of the proceedings. Copies shall be sent to the MSPB Special Assistant Attorney General, the using agency, and the contractor or prospective contractor.

**5-101.06 Authority of Hearing Officer**

The hearing officer, in the conduct of the hearing, may:

(a) hold informal conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding either by consent of the parties or upon such officer's own motion;

(b) require parties to state their positions with respect to the various issues in the proceeding;

(c) require parties to produce for examination those relevant witnesses and documents under their control;

(d) rule on motions, and other procedural items on matters pending before such officer;

(e) regulate the course of the hearing and conduct of participants therein;

(f) receive, rule on, exclude, or limit evidence, and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;

(g) fix time limits for submission of written documents in matters before such officer;

(h) impose appropriate sanctions against any party or person failing to obey an order under those procedures, which sanctions may include:

(1) refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(2) excluding all testimony of an unresponsive or evasive witness; and,

(3) expelling any party or person from further participation in the hearing;

(i) take official notice of any material fact not appearing in evidence in the record, if such fact is among the traditional matters of judicial notice; and,

(j) take such other action which is in the best interest of the State, consistent with due process and in the interest of justice.

**5-101.07 Hearing Procedures**

(a) Hearings shall be as informal as may be reasonable and appropriate under the circumstances and in accordance with applicable due process requirements. The weight to be attached to evidence presented in any particular form will be within the discretion of the hearing officer. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The hearing officer may require evidence in addition to that offered by the parties.

(b) A hearing may be recorded but need not be transcribed except at the request and expense of the contractor or prospective contractor. A record of those present, identification of any written evidence presented, and copies of all written statements and a summary of the hearing shall be sufficient record.

(c) Opening statements may be made unless a party waives this right.

(d) All witnesses may be cross-examined.

### 5-101.08 Determination of Hearing Officer – Final Decision

The hearing officer shall prepare a written determination recommending a course of action. Such determination shall be given to the PSCRB and the head of a purchasing agency. Copies shall also be sent to the contractor or prospective contractor, the MSPB Special Assistant Attorney General, and the affected using agency. The contractor or prospective contractor shall have ten (10) days to file comments upon the hearing officer's determination. The PSCRB may request oral argument. After consultation with the using agency and the MSPB Special Assistant Attorney General, the PSCRB shall issue a final decision. Both the hearing officer's determination and the final decision shall recite the evidence relied upon. When debarment is recommended or ordered, the length of the debarment, the reasons for such action, and to what extent affiliates are affected shall be set forth. In addition, the final determination shall inform the debarred person of his rights to judicial review under this chapter of these regulations.

### 5-101.09 Effect of Debarment Decision

A debarment decision will take effect upon issuance and receipt by the contractor or prospective contractor. After the debarment decision takes effect, the contractor shall remain debarred until the debarment period specified in the decision expires.

### 5-101.10 Maintenance of List of Debarred and Suspended Persons

The PSCRB shall maintain and update a list of debarred and suspended persons. All agencies of the State shall be supplied with this list. The PSCRB shall send updates of this list to all agencies of the State as necessary. Such list shall be available to the public upon request.

## 5-201 APPEAL AND REVIEW OF PERSONAL SERVICE CONTRACT REVIEW BOARD DECISIONS

(a) **Appeal.** Any person receiving an adverse decision, the State, or both may appeal from a decision by the PSCRB to the designated court or courts of the State.

(b) **Authorization of Appeal by the State.** No such appeal shall be made by the State unless recommended by the PSCRB or the head of the agency involved.

## 5-202 DISCONTINUANCE OF CONTRACTOR'S APPEAL

After notice of an appeal to the PSCRB has been filed with the PSCRB, a contractor may not discontinue such appeal without prejudice, except as authorized by the PSCRB.

## 5-203 APPLICABILITY OF THIS SECTION

The provisions of this section specifically apply where it is determined administratively, or upon administrative or judicial review, that a solicitation or award of a contract is in violation of law.

### 5-203.01 Determination that Solicitation or Award Violates Law

A solicitation or award may be in violation of the law due to actions of state employees, bidders, offerors, contractors, or other persons. After consultation with the MSPB Special Assistant Attorney General, the PSCRB or an Agency Head may determine that a solicitation or contract award is in violation of the provisions of the *Mississippi Personal Service Contract Review Board Rules and Regulations.* After consultation with the MSPB Special Assistant Attorney General, the Ethics Commission may determine that a solicitation or award violates the Ethics in Public Contracting provisions of the *Mississippi Personal Service Contract Review Board Rules and Regulations.* Any such determination shall be made in writing after an opportunity to be heard is given, and such determination is subject to appropriate appeal.

### 5-203.02 Finding of Bad Faith or Fraud

Bad faith or fraud shall not be assumed. Specific findings showing reckless disregard of clearly applicable laws or regulations must support a finding of bad faith. A finding of fraud must be supported by specific findings showing knowing, willful acts in disregard of such laws or regulations. Mississippi Code Annotated § 31-7-57 (1972, as amended) holds state employees personally liable if they authorize or make a solicitation or award of a contract in violation of the law.

## 5-204 REMEDIES PRIOR TO AN AWARD

If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:

(a) canceled; or,

(b) revised to comply with the law.

### 5-204.01 Canceling or Revising Solicitation or Proposed Award to Comply with Law

A finding by the PSCRB, after consultation with the MSPB Special Assistant Attorney General, that the solicitation or proposed award is in violation of law will constitute a compelling reason to cancel or revise a solicitation or proposed award. Such cancellation shall be made in accordance with Section 3-301 (Cancellation of Invitations for Bids or Requests for Proposals).

## 5-205 REMEDIES AFTER AN AWARD

If after an award, it is determined that the solicitation or award is in violation of the law then the contract will be canceled in accordance with Section 3-301 (Cancellation of Invitations for Bids or Requests for Proposals).

### 5-205.01 Termination

Contracts based on awards or solicitations that were in violation of law shall be terminated at no cost to the State, except as may be approved or ratified by the PSCRB in compliance with state law.

### 5-205.02 Effects of Declaring a Contract Null and Void

In all cases where a contract is voided, no further payments shall be made under the contract and the State is entitled to recover the greater of:

(a) the difference between payments made under the contract and the contractor's actual costs up until the contract was voided; or,

(b) the difference between payments under the contract and the value to the State of the services, if obtained under the contract.

The State may, in addition, claim damages under any applicable legal theory.

### 5-205.03 Effect of Ratification

The State shall be entitled to any damages it can prove under any theory including, but not limited to, contract and tort regardless of its ratification and affirmation of the contract.

## CHAPTER 6 - ETHICS IN CONTRACTING FOR PERSONAL AND PROFESSIONAL SERVICES

### INTRODUCTION:

This chapter is intended to be applied in conjunction with and shall not be considered as superseding any laws or regulations administered and enforced by the State Ethics Commission. Please refer to Mississippi Code Annotated §§ 25-4-101 through 25-4-119 (1972, as amended) for applicable statutes.

### 6-101 DEFINITIONS OF TERMS USED IN THIS CHAPTER

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

(b) **Conspicuously** means written in such special or distinctive format, print, or manner that a reasonable person against whom it is to operate ought to have noticed it.

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

(d) **Financial Interest** means:

(1) ownership of any interest or involvement in any relationship from which, or as a result of which, a person within the past year has received, or is presently or in the future entitled to receive, monetary compensation or material gratuity;

(2) ownership of such interest in any property or any business or income received from any property or business as may be specified by the Ethics Commission; or,

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

(e) **Gratuity** means a payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received.

(f) **Immediate family** means a spouse, children, parents, brothers and sisters, and such other relatives as may be designated by the Ethics Commission.

(g) **Official Responsibility** means direct administrative or operating authority, whether intermediate or final, either exercisable alone or with others, either personally or through subordinates, to approve, disapprove, or otherwise direct Mississippi action.

(h) **Purchase Request** means that document whereby a using agency requests that a contract be entered into for a specified need, and may include, but is not limited to, the description of the requested service, expected length of service, criteria for evaluation, and information supplied for the making of any written determination required by this Code.

(i) **Bona Fide Employee** means a person employed by a prospective contractor and subject to the prospective contractor's supervision and control as to the time, place, and manner of performance, which neither exerts nor proposes to exert improper influence to solicit or obtain Mississippi contracts. In determining whether a bona fide employment relationship exists, the following factors should be considered:

(1) whether the employment is continuous;

(2) whether the person is subject to the supervision and control of the prospective contractor;

(3) whether the size of any contingent fee is reasonable in relation to the service performed;

(4) whether the method of payment of the contingent fee is customary in the trade; and,

(5) whether the person is employed solely by the prospective contractor.

(j) **Bona Fide Established Commercial Selling Agency** means a business that neither exerts nor proposes to exert improper influence to solicit or obtain public contracts. In determining whether a business is a bona fide established commercial selling business, the following factors should be considered:

(1) whether the business is one which has either been active for a considerable period of time or is presently a going concern and is likely to continue as such;

(2) whether the business uses its own name and is characterized by the customary indicia of the conduct of a regular business;

(3) the degree to which the business' activities are directed toward the solicitation of contracts of the State;

(4) whether the size of any contingent fee is reasonable in relation to the services performed; and,

(5) whether the method of payment of the contingent fee is customary in the trade.

(k) **Business Employee** means a person, whether compensated or not, who performs personal services for a business.

(l) **Employee**, as defined in Section 1-201 (Definitions, Employee) is hereinafter referred to as "Mississippi Employee." As used throughout this section, the term "Mississippi Employee" shall include:

(1) a person elected to a Mississippi office;

(2) a non-elected person, whether appointed or selected through a personnel selection procedure, receiving a salary, wages, or other compensation from the State; and,

(3) a non-compensated or minimally compensated person who is performing personal services for the State.

The term "Mississippi Employee" does not include a person who, as an independent contractor, or contract worker as defined in Mississippi Code Annotated § 25-9-120(1) (1972, as amended) performs professional, scientific, technical, or advisory service for a state agency and who receives a fee, honorarium, or similar consideration for the services performed.

## 6-201 STATEMENT OF POLICY

Public employment is a public trust. It is the policy of the State of Mississippi to promote and balance the objective of protecting government integrity and the objective of facilitating the recruitment and retention of personnel needed by the State. Such policy is implemented by prescribing essential standards of ethical conduct without creating unnecessary obstacles to entering public service. Public employees must discharge their duties impartially so as to assure fair competitive access to governmental procurement by responsible contractors. Moreover, they should conduct themselves in such a manner as to foster public confidence in the integrity of the state procurement organization. Additionally, Mississippi Code Annotated § 25-4-101 (1972, as amended) states:

> The legislature declares that elective and public office and employment is a public trust and any effort to realize personal gain through official conduct, other than as provided by law, or as a natural consequence of the employment or position, is a violation of that trust. Therefore, public servants shall endeavor to pursue a course of conduct which will not raise suspicion among the public that they are likely to be engaged in acts that are in violation of this trust and which will not reflect unfavorably upon the state and local governments.

To achieve the purpose of this chapter, it is essential that those doing business with the State of Mississippi also observe the ethical standards prescribed herein.

## 6-202 GENERAL STANDARDS OF ETHICAL CONDUCT

(a) **General Ethical Standards for Employees**.

Any attempt to realize personal gain through public employment by conduct inconsistent with the proper discharge of the employee's duties is a breach of a public trust. In order to fulfill this general prescribed standard, employees must also meet the specific standards set forth in the remaining sections of this chapter.

(b) **General Ethical Standards for Non-Employees.**

Any effort to influence any public employee, or contractor with the State, to breach the standards of ethical conduct set forth in this section and the remaining sections of this chapter is also a breach of ethical standards.

**NOTE:** *The head of each governmental body or such official's designee is encouraged to explain and to discuss at least annually with such official's employees the provisions of these regulations.*

## 6-203 EMPLOYEE CONFLICT OF INTEREST

(a) **Conflict of Interest.**

It shall be a breach of ethical standards for any employee to participate directly or indirectly in a procurement when the employee knows that:

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

(2) a business or organization in which the employee, or any member of the employee's immediate family, has a financial interest pertaining to the procurement; or,

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

(b) **Discovery of Actual or Potential Conflict of Interest, Disqualification, and Waiver**.

Upon discovery of an actual or potential conflict of interest, an employee shall promptly file a written statement of disqualification and shall withdraw from further participation in the transaction involved. The employee shall, at the same time, apply to the Ethics Commission for an official advisory opinion as to what further participation, if any, the employee may have in the transaction.

(c) **Notice.**

Notice of this prohibition shall be provided in accordance with official opinions promulgated by the Ethics Commission.

*NOTE: Section 6-203 (Employee Conflict of Interest) covers instances in which a state employee involved in procurement is actively negotiating for employment with a contractor or prospective contractor. Such an employee must disqualify himself or herself from participation in a procurement involving such a contractor or prospective contractor and apply to the Ethics Commission for an official opinion of the statutory conflict of*

*interest prohibition relating to that procurement. Offers of employment under certain circumstances may also be gratuities which are prohibited by Section 6-204.*

## 6-204 GRATUITIES

It shall be a breach of this regulation for any person to offer, give, or agree to give any employee or former employee, or for any employee or former employee to solicit, demand, accept, or agree to accept from another person, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, or preparation of any part of a program requirement or a purchase request. It shall further be a breach for any person to influence the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter, pertaining to any program requirement or proposal therefor through the offering or giving of a gratuity. The prohibition against gratuities prescribed in this section shall be conspicuously set forth in every contract and solicitation therefor.

### 6-204.01 Gratuities Prohibition

#### 6-204.01.1 Relationship of Gratuity

In addition, the gratuity or offer of employment must be made in relation to any proceeding or application, request for a ruling, determination, claim or controversy, or other particular matter, and in connection with any decision, approval, disapproval, recommendation, preparation of any part of a program requirement or a purchase request, action to influence the content of any specification or procurement standard, rendering of advice, investigation, auditing, or other advisory capacity to constitute a breach.

#### 6-204.01.2 Family

This prohibition extends to the giving of gratuities to anyone on the state employee's or former state employee's behalf such as a member of that employee's immediate family.

### 6-204.02 When Prohibition Against Gratuities Not Applicable

Section 6-204 (Gratuities) does not prohibit:

(a) the solicitation or acceptance of anything of monetary value from a friend, parent, spouse, child, or other close relative when the circumstances make it clear that the motivation for the transaction is unrelated to any procurement or program requirement with the State and is based upon a personal or family relationship;

(b) the participation in the activities of, or the acceptance of an award for, a meritorious public contribution or achievement from a charitable, religious, professional, social or fraternal organization, or from a nonprofit educational, recreational, public service, or civic organization;

(c) acceptance only on current customary terms of finance of a loan from a bank or other financial institution for proper and usual activities of state employees, such as home mortgage loans; or,

(d) acceptance of unsolicited advertising products or promotional material, such a pens, pencils, note pads, calendars, and other such items.

### 6-204.03 Contract Clause

The following clause shall be conspicuously set forth in every contract and solicitation therefore requiring Personal Service Contract Review Board approval:

***REPRESENTATION REGARDING GRATUITIES* (Required)**

*The bidder, offeror, or contractor represents that it has not violated, is not violating, and promises that it will not violate the prohibition against gratuities set forth in Section 6-204 (Gratuities) of the Mississippi Personal Service Contract Review Board Rules and Regulations.*

## 6-205 PROHIBITION AGAINST CONTINGENT FEES

(a) **Contingent Fees.** It shall be a breach of ethical standards for a person to be retained, or to retain a person, to solicit or secure a state contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, unless such an arrangement is fully disclosed in writing.

(b) **Representation of Contractor.** Every person, before being awarded a state contract, shall represent, in writing, that such person has not retained anyone in violation of subsection (a) of this section. Failure to do so constitutes a breach of ethical standards.

(c) **Contract Clause.** The representation prescribed in subsection (b) of this section shall be conspicuously set forth in every contract and solicitation therefor.

### 6-205.01 Influence Peddling

The prohibition in Section 6-205 (Prohibition Against Contingent Fees) covers influence peddling and particularly that which might occur when a former state official is hired on a contingent basis by a business seeking state contracts.

### 6-205.02 Relationship of Commercial Selling Business to Prospective Contractor

The relationship between a bona fide established commercial selling business and the prospective contractor should be characterized by the following:

(a) the fees charged by the business are commensurate with the nature and extent of the business's services actually rendered to the prospective contractor;

(b) the business has adequate knowledge of the service of the prospective contractor which it represents to judge whether the item may be able to meet the State's requirements; and,

(c) the relationship between the business and the prospective contractor is or is contemplated to be continuing.

**6-205.03 Improper Influence**

A business employee or a commercial selling business should be conclusively presumed not to be bona fide if the Ethics Commission determines that improper influence has been or is being used to secure a state contract.

**6-205.04 Solicitation Clause**

Every solicitation for a service shall conspicuously set forth the following provision to be completed and submitted with every prospective contractor's bid or proposal for those contracts which require PSCRB approval:

***PROSPECTIVE CONTRACTOR'S REPRESENTATION REGARDING CONTINGENT FEES*** **(Required)**

*The prospective contractor represents as a part of such contractor's bid or proposal that such contract has/has not (use applicable word or words) retained any person or agency on a percentage, commission, or other contingent arrangement to secure this contract.*

**6-205.05 Information on Contingent Fees**

Any prospective contractor who has completed the clause set forth in Section 6-205.04 (Solicitation Clause) in the affirmative and is the apparently successful bidder or offeror shall submit the following information:

(a) the full name and business address of the business or person retained, and the type of business organization;

(b) the relationship of the business or person to the prospective contractor;

(c) the terms of the retention agreement or a copy of such agreement;

(d) if such person is a business employee:

(1) the duration of employment;

(2) whether that employee is on the contractor's payroll for purposes of social security and federal income tax withholding; and,

(3) whether that employee represents other businesses and, if so, the names and addresses of such businesses;

(e) whether the business or person represents the prospective contractor on:

(1) both government and commercial business;

(2) only government business; or,

(3) only the present contract;

(f) The extent of the duties of the business or person; and,

(g) The length of time the business or person has been engaged in a particular type of work and has performed this type of work for the contractor.

**6-205.06 Contract Clause**

The following clause shall be conspicuously set forth in every contract and solicitation therefor requiring PSCRB approval:

***REPRESENTATION REGARDING CONTINGENT FEES*** **(Required)**

*The contractor represents that it has not retained a person to solicit or secure a state contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except as disclosed in the contractor's bid or proposal.*

## 6-206 RESTRICTION ON EMPLOYMENT OF PRESENT EMPLOYEES

Except as may be permitted by regulations or rulings of the Ethics Commission, it shall be a breach of ethical standards for any employee who is participating directly or indirectly in the procurement process to become or be, while such an employee, the employee of any person contracting with the governmental body by whom the employee is employed. Additionally, Mississippi Code Annotated § 25-4-105(3)(a) (1972, as amended) states that "no public servant shall be a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent, other than in his contract of employment; or have a material financial interest in any business which is a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent except as may be permitted by Mississippi Code Annotated § 25-4-105(4)(d) (1972, as amended).

## 6-207 RESTRICTION ON FORMER EMPLOYEES IN MATTERS CONNECTED WITH THEIR FORMER DUTIES

(a) It shall be a breach of ethical standards for any former employee knowingly to act as a principal, or as an agent for anyone other than the State in connection with any:

(1) judicial or other proceeding, application, request for a ruling, or other determinations;

(2) contract;

(3) claim; or,

(4) charge or controversy;

in which the employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise while an employee, where the State is a party or has a direct and substantial interest.

(b) It shall be a breach of ethical standards for any former employee, within one year after cessation of the former employee's official responsibility, knowingly to act as a principal, or an agent for anyone other than the State, in connection with any:

(1) judicial or other proceeding, application, request for a ruling, or other determination;

(2) contract;

(3) claim; or,

(4) charge or controversy;

in matters which were within the former employee's official responsibility, where the State is a party or has a direct or substantial interest. Additionally, Mississippi Code Annotated § 25-4-105(3)(e) (1972, as amended) states that "no public servant shall perform any service for any compensation for any person or business after termination of his office or employment in relation to any case, decision, proceeding or application with respect to which he was directly concerned or in which he personally participated during the period of his service or employment."

## 6-208 DISQUALIFICATION OF BUSINESS WHEN AN EMPLOYEE HAS A FINANCIAL INTEREST

It shall be a breach of ethical standards for a business in which an employee has a financial interest knowingly to act as a principal, or as an agent for anyone other than the State, in connection with any:

(a) judicial or other proceeding, application, request for a ruling, or other determination;

(b) contract;

(c) claim; or,

(d) charge or controversy;

in which the employee either participates personally and substantially through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of the employee's official responsibility, where the State is a party or has a direct and substantial interest.

## 6-209 RESTRICTION ON EMPLOYEES PURCHASING UNDER TERMS OF A STATE CONTRACT

Mississippi Code Annotated § 25-4-105(1) (1972, as amended) states, "No public servant shall use his official position to obtain pecuniary benefit for himself other than that compensation provided for by law, or to obtain pecuniary benefit for any relative or any business with which he is associated."

In layman's terms, this means that anyone purchasing services is free to negotiate the best price possible with the seller but any attempt to tie the sale to a state contract based upon employment with a governmental entity could be considered to be a violation of the ethics law.

## 6-210 USE OF CONFIDENTIAL INFORMATION

It shall be a breach of ethical standards for any 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. Additionally, Mississippi Code Annotated § 25-4-102(5) (1972, as amended) states that "no person may intentionally use or disclose information gained in the course of or by reason of his official position or employment as a public servant in any way that could result in pecuniary benefit for himself, any relative, or any other person, if the information has not been communicated to the public or is not public information."

## CHAPTER 7 – POLICIES AND PROCEDURES

### 7-101 GENERAL PROVISIONS

This chapter provides the administrative procedures for submitting required documentation to implement state agency contract requests for personal services. For the purposes of these procedures, a service contract is defined as an agreement for the provision of services between an agency under the purview of the MSPB (unless exempt from the PSCRB) and a provider of the services.

### 7-102 PROCEDURES FOR PROCUREMENT

Pursuant to the provisions of the previous chapters of these regulations, the total amount of the contract shall be used to determine the appropriate procedures for procurement of services as follows:

(a) Service contracts for $50,000 or less may be procured from any source following agency rules and regulations;

(b) Service contracts greater than $50,000 and not exceeding $100,000 may be procured from the lowest acceptable bidder after obtaining three written quotes in conformity with the small purchases provisions of the PSCRB regulations;

(c) Service contracts over $100,000 may be procured from the lowest bidder or the best proposal after advertising and soliciting for bids or proposals in accordance with *PSCRB Rules and Regulations*, and subject to approval by the PSCRB;

(d) If the cumulative total of multiple service contracts between an agency and one vendor exceed $100,000 then SPAHRS will automatically route the contract to the PSCRB for approval;

(e) Procedures and regulations regarding sole-source procurement are addressed in 3-205; and

(f) Procedures and regulations regarding emergency procurement are addressed in 3-206.

### 7-103 PRE-REVIEW OF INVITATIONS FOR BIDS AND REQUESTS FOR PROPOSALS

An Invitation for Bid (hereinafter "IFB") or Request for Proposal (hereinafter "RFP") for a contract under the purview of the PSCRB may be electronically submitted to the PSCRB staff for consultant review prior to advertisement or issuance. The IFB or RFP should be submitted in final form (as if being produced to inquiring vendors) and include (1) the advertisement, (2) the IFB or RFP, and (3) the proposed contract. The PSCRB staff will review the IFB or RFP specifically to evaluate compliance with the PSCRB regulations. The PSCRB staff will notify the agency of necessary and/or suggested changes. Responsibility for all IFB and RFP content rests with the agency. Review of the IFB or RFP by PSCRB staff does not guarantee approval of the

procurement and/or the contract by the PSCRB. Agencies are encouraged to allow as much time in advance of advertisement as possible for this review. The PSCRB staff will require a minimum of five working days for review of an IFB or RFP packet which totals 50 pages or less (including attachments) and seven working days for review of a packet of more than 50 pages. During the months of May, June and July, the PSCRB staff will require a minimum of twenty working days for review of an IFB or RFP packet which totals 50 pages or less (including attachments) and twenty-five working days for review of a packet of more than 50 pages.

## 7-104 SUBMISSION DEADLINES

The PSCRB will hold one regularly scheduled meeting the Tuesday before the third Thursday every month, at 9:00 A.M. CST, on the Second Floor of the Regions Bank Building, 210 East Capitol Street, in Jackson, Mississippi 39201 unless a special meeting is called by the PSCRB Chairman. Notice of meetings may be found posted on the MSPB website (http://www.mspb.ms.gov), or by calling the PSCRB office (601-359-6517). All contract packets must be submitted for approval in SPAHRS and by electronic submission through the PSCRB's E-Application system, in their entirety. Submission to PSCRB must be at least 15 working days prior to the scheduled PSCRB meeting date in order to be considered for placement on the agenda for board action.

## 7-105 DEADLINE EXCEPTION REQUESTS

A request for exception to the 15 day submission deadline must be submitted in writing directly to the Chairman of the PSCRB (MSPB Executive Director) and must contain a detailed account of the circumstances justifying the exception. The written request must be signed by the Agency Head. All such exception requests must be approved by the Chairman, in his or her discretion, in order for the proposed contract to be placed on the agenda for the next PSCRB meeting. Submission of a request for deadline exception does not guarantee placement on the agenda.

## 7-106 REGULATORY BOARD APPROVAL

For contracts under the purview of the PSCRB, the contract and the supporting procurement information should first be submitted to and approved by the appropriate regulatory board (if required by the appropriate regulatory board's rules and regulations) prior to submission to the PSCRB. If the agency's regulatory board authorizes the agency to proceed with the procurement, then the agency should submit the contract and supporting procurement information to the PSCRB for approval.

## 7-107 NEW REQUEST

A new request shall be defined as the initial submission of a contract for the performance of specified contractual services.

## 7-108 RENEWALS

A request to renew an existing PSCRB-approved contract is to be electronically submitted to PSCRB no later than May 15th, along with all supporting documentation. If approval by an appropriate regulatory board is required, such approval must be obtained in sufficient time for the May 15th PSCRB deadline to be met. Any request for exception to this deadline must follow the same procedure as outlined in 7-105 (Deadline Exception Requests). Spending authority for the current term of the contract should be requested. Authority for any optional renewal years should be requested when the contract is renewed. Renewal terms included in a contract are optional and are exercised at the agency's discretion. When a contract is originally approved, the PSCRB is only approving the option to renew, not the actual renewal. The agency must submit the renewal document and supporting documentation for approval by the PSCRB prior to the contract expiring. The renewal document must also be executed and submitted to the PSCRB staff prior to the original contract term expiring. Retroactive approval of a renewal cannot be granted. Once a contract has expired or terminated, the contract cannot be retroactively approved or renewed. MS AG Op., Stringer (June 25, 1999).

## 7-109 MODIFICATIONS

A request to modify an existing PSCRB-approved contract is to be submitted to the PSCRB at least 15 working days prior to a PSCRB meeting date which precedes the modification effective date. Any request for exception to this deadline must follow the same procedure as outlined in 7-105 (Deadline Exception Requests). Modifications shall not grant extra compensation, fee, or allowance to any contractor after service is rendered or contract is made, unless contemplated within the contract itself or unless the scope of services is increased. The extension of a contract is considered a modification wherein the specified contractual services have not been completed by the end date stipulated in the original terms of the contract. Modifications cannot be made to expired contracts.

## 7-110 EMERGENCY CONTRACTS

Emergency contracts will be reviewed by PSCRB staff for technical compliance and the staff will notify the agency of any problems found; however; it is the responsibility of the agency to correct any errors. Emergency contracts will be presented to the PSCRB at its regular meeting and will be included in the minutes of said meeting, but no action is required by the PSCRB as to these contracts. This provision is not intended to prevent the PSCRB from making a report as provided in 3-602.01 (Statutory Authority to Audit) or to take other action as deemed appropriate.

## 7-111 PROTEST DOCUMENTS

Agencies shall submit, with their contract approval request, documentation signed by their executive director, agency head, or his or her designee certifying that adequate time to protest has been given to all prospective contractors and that no protest or potential protests are known to the agency or any agency employees. If a protest is known, the agency shall disclose the

subject matter of the protest, state whether the protest has been resolved, and explain the agency's determination concerning the protest.

## 7-112 POST-AWARD VENDOR DEBRIEFING

Agencies are encouraged to exchange information with vendors in an effort to build and strengthen business relationships and improve the procurement process between vendors and the State. To further this effort, agencies shall establish vendor debriefing procedure(s) and inform vendors at the time of procurement of the right to request a debriefing. At a minimum, debriefing should occur within five (5) business days after the vendor request and prior to submission of the contract packet to the PSCRB. Agencies shall submit with the contract approval request, documentation signed by their agency head or his or her designee, reporting the number of vendor debriefings requested and conducted. This information may be included as part of the protest correspondence required in Section 7-111 (Protest Documents).

### 7-112.01 Debriefing Request

A vendor, successful or unsuccessful, may request a post-award vendor debriefing, in writing, by U.S. mail or electronic submission, to be received by the agency within three (3) business days of notification of the contract award. A vendor debriefing is a meeting and not a hearing; therefore, legal representation is not required. If a vendor prefers to have legal representation present, the vendor must notify the agency and identify its attorney. The agency shall be allowed to schedule and/or suspend and reschedule the meeting at a time when a representative of the Office of the Mississippi Attorney General can be present.

### 7-112.02 When Debriefing Should Be Conducted

Unless good cause exists for delay, the debriefing should occur within five (5) business days after receipt of the vendor request and may be conducted during a face-to-face meeting, by telephonic or video conference, or by any other method acceptable to the agency. The Procurement Officer or designee should chair the meeting, and where practicable, include other staff with direct knowledge of the procurement.

### 7-112.03 Information To Be Provided

At a minimum, the debriefing information shall include the following:

(1) The agency's evaluation of significant weaknesses or deficiencies in the vendor's bid or proposal, if applicable;

(2) The overall evaluated cost or price, and technical rating, if applicable, of the successful vendor(s) and the debriefed vendor;

(3) The overall ranking of all vendors, when any ranking was developed by the agency during the selection process;

(4) A summary of the rationale for award; and,

(5) Reasonable responses to relevant questions about selection procedures contained in the solicitation, applicable regulations, and other applicable authorities that were followed.

### 7-112.04 Information Not To Be Provided

The debriefing shall not include point-by-point comparisons of the debriefed vendor's bid or proposal with those of other offering vendors. Moreover, the debriefing agency shall not reveal any information prohibited by law and/or the following:

(1) Trade secrets as identified by the offering vendor claiming the trade secrets;

(2) Privileged or confidential manufacturing processes and techniques as identified by the offering vendor claiming the privileged or confidential information;

(3) Commercial and financial information that is privileged or confidential, to include an offering vendor's cost, breakdowns, profit, indirect cost rates, and similar information as identified by the offering vendor claiming the privileged or confidential information; and/or,

(4) The names of individuals providing reference information about any vendor's past performance.

### 7-112.05 Statement In The Solicitation

The agency shall include in each solicitation a statement that vendor debriefing is available and the information described in Section 7-112.03 may be disclosed during post-award debriefing.

### 7-112.06 Summary

An official summary of the debriefing shall be included in the contract file.

### 7-112.07 Pre-Award Vendor Debriefing

Nothing in these regulations requires or prohibits pre-award vendor debriefing.

## 7-113 UTILIZATION OF STATE PROPERTY BY CONTRACTOR

If a contractor will be utilizing State property (office space, equipment, etc.) for the provision of services, the procuring agency shall submit a written notification to the Bond Commission explaining the property to be used. A copy of this letter must be submitted to the PSCRB as part of the procurement packet.

## 7-114 TRANSFER OF SPENDING AUTHORITY

SPAHRS no longer requires the transfer of spending authority from one fiscal year to the next for independent contractors.

## 7-115 EXECUTED CONTRACTS

After the approval of a contract by the PSCRB, the contract may be executed by the agency and the vendor and a copy of the executed contract must be electronically submitted to the PSCRB as soon as practicable. The executed contract must be identical to the proposed contract approved by the PSCRB. If a change is to be made to the contract after approval by the PSCRB but before execution, the change must be brought before the PSCRB for approval.

## 7-116 SPAHRS PROCEDURES FOR PSCRB CONTRACTS

### 7-116.01 Entering Contract Information in SPAHRS

An agency should enter complete contract information into the SPAHRS system and transmit it electronically to the PSCRB for review. The Request for Contract Personnel Services Approval form must be completed in full, following all applicable requirements by the Internal Revenue Code to determine contract type, all DFA requirements for vendor codes, social security numbers and commodity codes, and all PSCRB requirements detailed in the *Mississippi Personal Service Contract Rules and Regulations*. Only one contract service type may be entered for each request. Agencies must submit necessary vendor codes with vendor number/social security number in SPAHRS.

### 7-116.02 Requests to Modify

Requests to modify the terms of previously PSCRB-approved contracts are to be resubmitted to the appropriate regulatory board (if applicable) and approved by that board prior to submission to the PSCRB. Along with the amendment modifying the original contract terms, the approved SPAHRS entry must also be modified.

### 7-116.03 Terminations

Agencies must notify the PSCRB upon termination of previously approved contracts for personal services or the completion of the performance of services prior to the original terms of the contract (expiration date). The approved spending authority should be modified to reflect the total dollar amount expended. This modification must be transmitted to the PSRCB for approval. After approval of the modified amount, a termination date should be entered into SPAHRS. The original approved end date remains the end date approved by the PSCRB. A termination date is entered in the “Termination Date” field in SPAHRS.

### 7-116-04 Options to Renew

Options to renew which are not exercised by the agency will be treated as a termination by the PSCRB.

## CHAPTER 8 – ORAL PROCEEDINGS

### 8-101 RULEMAKING ORAL PROCEEDINGS

This section applies to all oral proceedings held for the purpose of providing the public with an opportunity to make oral presentations or written input on proposed new rules, amendments to rules, and proposed repeal of existing rules before the Personal Service Contract Review Board pursuant to the Administrative Procedures Act. Miss. Code Ann. § 25-43-3.104 (1972, as amended).

When a political subdivision, an agency, or ten (10) persons request an oral proceeding in regards to a proposed rule adoption, the requestor must submit a printed, typewritten, or legibly handwritten request.

A. Each request must be submitted on 8-1/2" x 11" white paper.

B. The request may be in the form of a letter addressed to the Chairman of the Personal Service Contract Review Board or in the form of a pleading as if filed with a court.

C. Each request must include the full name, telephone numbers, and mailing address of the requestor(s).

D. All requests shall be signed by the person filing the request, unless represented by an attorney, in which case the attorney may sign the request.

Notice of the date, time, and place of all oral proceedings shall be filed with the Secretary of State's Office for publication in the Administrative Bulletin. The agency providing the notice shall provide notice of oral proceedings to all persons requesting notification of proposed rule adoptions. The oral proceedings will be scheduled no earlier than twenty (20) days from the filing of the notice with the Secretary of State. The Chairman of the Personal Service Contract Review Board or designee who is familiar with the substance of the proposed rule shall preside at the oral proceeding on a proposed rule.

Public participation shall be permitted at oral proceedings, as follows:

A. At an oral proceeding on a proposed rule, persons may make statements and present documentary and physical submissions concerning the proposed rule.

B. Persons wishing to make oral presentations at such a proceeding shall notify the Chairman of the Personal Service Contract Review Board at least three business days prior to the proceeding and indicate the general subject of their presentations. The presiding officer in his or her discretion may allow individuals to participate that have not contacted the Personal Service Contract Review Board prior to the proceeding.

C. At the proceeding, those who participate shall indicate their names and addresses, identify any persons or organizations they may represent, and provide any other information relating to their participation deemed appropriate by the presiding officer.

D. The presiding officer may place time limitations on individual presentations when necessary to assure the orderly and expeditious conduct of the oral proceeding. To encourage joint presentations and to avoid repetition, additional time may be provided for persons whose presentations represent the views of other individuals as well as their own views.

E. Persons making presentations are encouraged to avoid restating matters that have already been submitted in writing. Written materials may be submitted at the oral proceeding.

F. Where time permits and to facilitate the exchange of information, the presiding officer may open the floor to questions or general discussion. The presiding officer may question participants and permit the questioning of participants by other participants about any matter relating to that rule-making proceeding, including any prior written submissions made by those participants in that proceeding. No participant shall be required to answer any question.

Physical and documentary submissions presented by participants in an oral proceeding shall be submitted to the presiding officer. Such submissions become the property of the Personal Service Contract Review Board, part of the rulemaking record, and are subject to the Personal Service Contract Review Board's public records request procedure. The Personal Service Contract Review Board may record oral proceedings by stenographic or electronic means.

**8-201 DECLARATORY OPINIONS**

This section sets forth the Personal Service Contract Review Board's rules governing the form, content, and filing of requests for declaratory opinions, the procedural rights of persons in relation to the written requests, and the Personal Service Contract Review Board's procedures regarding the disposition of requests as required by Mississippi Code Annotated § 25-43-2.103 (1972, as amended).

The Personal Service Contract Review Board will issue declaratory opinions regarding the applicability to specified facts of:

A. A statute administered or enforceable by the Personal Service Contract Review Board;

B. A rule or regulation promulgated by the Personal Service Contract Review Board; or,

C. An order issued by the Personal Service Contract Review Board.

A request must be limited to a single transaction or occurrence.

When a person with substantial interest, as required by Mississippi Code Annotated § 25-43-2.103 (1972, as amended), requests a declaratory opinion, the requestor must submit a printed, typewritten, or legibly handwritten request.

A. Each request must be submitted on 8-1/2" x 11" white paper.

B. The request may be in the form of a letter addressed to the Chairman of the Personal Service Contract Review Board or in the form of a pleading as if filed with a court.

C. Each request must include the full name, telephone numbers, and mailing address of the requestor(s).

D. All requests shall be signed by the person filing the request, unless represented by an attorney, in which case the attorney may sign the request.

E. Each request must clearly state that it is a request for a declaratory opinion.

Any party who signs the request shall attest that the request complies with the requirements set forth in these rules, including but not limited to a full, complete, and accurate statement of relevant facts and that there are no related proceedings pending before any agency, administrative, or judicial tribunal.

Each request must contain the following:

A. A clear identification of the statute, rule, regulation, or order at issue;

B. The question for the declaratory opinion;

C. A clear and concise statement of all facts relevant to the question presented;

D. The identity of all other known persons involved in or impacted by the facts giving rise to the request including their relationship to the facts, and their name, mailing address, and telephone number; and,

E. A statement sufficient to show that the requestor has a substantial interest in the subject matter of the request.

The Personal Service Contract Review Board may, for good cause, refuse to issue a declaratory opinion. The circumstances in which declaratory opinions will not be issued include, but are not necessarily limited to the following:

A. The matter is outside the primary jurisdiction of the Personal Service Contract Review Board;

B. There is a lack of clarity concerning the question presented;

C. There is pending or anticipated litigation, administrative action or anticipated administrative action, or other adjudication which may either answer the question presented by the request or otherwise make an answer unnecessary;

D. The statute, rule, or order on which a declaratory opinion is sought is clear and not in need of interpretation to answer the question presented by the request;

E. The facts presented in the request are not sufficient to answer the question presented;

F. The request fails to contain information required by these rules or the requestor failed to follow the procedure set forth in these rules;

G. The request seeks to resolve issues which have become moot or are abstract or hypothetical such that the requestor is not substantially affected by the rule, statute, or order on which a declaratory opinion is sought;

H. No controversy exists or is certain to arise which raises a question concerning the application of the statute, rule, or order;

I. The question presented by the request concerns the legal validity of a statute, rule, or order;

J. The request is not based upon facts calculated to aid in the planning of future conduct, but is, instead, based on past conduct in an effort to establish the effect of that conduct;

K. No clear answer is determinable;

L. The question presented by the request involves the application of a criminal statute or sets forth facts which may constitute a crime;

M. The answer to the question presented would require the disclosure of information which is privileged or otherwise protected by law from disclosure;

N. The question is currently the subject of an Attorney General's opinion request;

O. The question has been answered by an Attorney General's opinion;

P. One or more requestors have standing to seek an Attorney General's opinion on the proffered question;

Q. A similar request is pending before this agency, or any other agency, or a proceeding is pending on the same subject matter before any agency, administrative or judicial tribunal, or where such an opinion would constitute the unauthorized practice of law; or,

R. The question involves eligibility for a license, permit, certificate, or other approval by the Personal Service Contract Review Board or some other agency and there is a statutory or regulatory application process by which eligibility for said license, permit, or certificate or other approval may be determined.

Within forty-five (45) days after the receipt of a request for a declaratory opinion which complies with the requirements of these rules, the Personal Service Contract Review Board shall, in writing:

A. Issue an opinion declaring the applicability of the statute, rule, or order to the specified circumstances;

B. Agree to issue a declaratory opinion by a specified time but no later than ninety (90) days after receipt of the written request; or,

C. Decline to issue a declaratory opinion, stating the reasons for its action.

The forty-five (45) day period shall begin on the first business day after which the request is received by the Personal Service Contract Review Board.

Declaratory opinions and requests for declaratory opinions shall be available for public inspection and copying at the expense of the viewer during normal business hours. All declaratory opinion and requests shall be indexed by name, subject, and date of issue. Declaratory opinions and requests which contain information which is confidential or exempt from disclosure under the Mississippi Public Records Act or other laws shall be exempt from this requirement and shall remain confidential.

# APPENDICES

## APPENDIX A

## Agencies under PSCRB Purview

| Agency No. | Agency Name | Master No. |
|---|---|---|
| 071 | Office of the Attorney General | 071 |
| 111 | Office of the Secretary of State | 111 |
| 155 | Office of the State Auditor | 155 |
| 160 | MS State Personnel Board | 160 |
| 103 | Division of Budget & Policy Development | 161 |
| 131 | Office of Administrative Services | 161 |
| 161 | Department of Finance and Administration | 161 |
| 162 | Division of Support Services | 161 |
| 163 | Office of Tort Claims | 161 |
| 171 | Treasury - State | 171 |
| 172 | Treasury - MPACT | 171 |
| 173 | Health Care Expendable Fund Board | 171 |
| 174 | MS Affordable College Savings Plan | 171 |
| 181 | Department of Revenue | 181 |
| 183 | MS Gaming Commission | 183 |
| 201 | Department of Education | 201 |
| 203 | Ed. Dept. Minimum Program | 201 |
| 206 | Ed. Dept. Vocational & Technical | 201 |
| 231 | Blind School | 201 |
| 232 | Deaf School | 201 |
| 233 | Blind & Deaf School | 201 |
| 245 | Library Commission | 245 |
| 247 | Authority for Educational Television | 247 |
| 301 | Department of Health | 301 |
| 134 | Division of Spinal Cord and Health | 330 |
| 139 | Special Disability Program | 330 |
| 331 | Department of Rehabilitation Services | 330 |
| 333 | Office of Disability Determination Services | 330 |
| 334 | Office of SP Services for Ind. With Disability | 330 |
| 349 | DRS. Support Services | 330 |
| 653 | Div. of Voc. Rehab for the Blind | 330 |
| 371 | Department of Mental Health | 371 |
| 372 | East MS State Hospital Mental Health | 371 |
| 373 | Ellisville State School | 371 |
| 374 | Mississippi State Hospital | 371 |
| 377 | Ellisville School Farm | 371 |
| 379 | Drug & Alcohol Section | 371 |

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|---|---|---|
| 381 | Boswell Regional Center | 371 |
| 385 | North MS Regional Center | 371 |
| 389 | Central MS Residential Center | 371 |
| 391 | South MS State Hospital | 371 |
| 392 | Mississippi Adolescent Center | 371 |
| 393 | Mississippi Specialized Treatment Facility | 371 |
| 386 | Hudspeth Regional Center | 371 |
| 387 | South Mississippi Regional Center | 371 |
| 388 | North Mississippi State Hospital | 371 |
| 401 | Department of Agriculture & Commerce | 401 |
| 405 | Plant Industry Division - Agriculture & Commerce | 401 |
| 408 | Farmers Central Market - Agriculture & Commerce | 401 |
| 4012 | Agriculture & Commerce - Grain Division | 401 |
| 105 | Division of Community Development | 411 |
| 411 | Mississippi Development Authority | 411 |
| 414 | MDA - Division of Support Services | 411 |
| 427 | Board of Animal Health | 427 |
| 430 | Fair Commission | 430 |
| 450 | Department of Marine Resources | 450 |
| 451 | Forestry Commission | 451 |
| 454 | MS Institute for Forest Inventory | 451 |
| 460 | Wildlife and Fisheries | 468 |
| 462 | Wildlife Cons - Museum Natural Science | 468 |
| 468 | Department of Wildlife and Fisheries | 468 |
| 470 | Parks and Recreation | 468 |
| 471 | Department of Environmental Quality | 471 |
| 473 | Office of Geology and Energy | 471 |
| 474 | Office of Land and Water | 471 |
| 476 | Office of Pollution Control | 471 |
| 472 | Grand Gulf Military Monument Comm. | 472 |
| 475 | Department of Archives and History | 475 |
| 480 | Pat Harrison Waterway District | 480 |
| 482 | Pearl River Basin Development District | 482 |
| 487 | Pearl River Valley Water Supply District | 487 |
| 488 | Tombigbee River Valley Water Management | 488 |
| 491 | Oil & Gas Board | 491 |
| 497 | Soil & Water Conservation Commission | 497 |
| 500 | Insurance Department | 500 |
| 502 | State Fire Academy | 500 |
| 510 | Banking & Consumer Finance - CFF | 511 |
| 511 | Department of Banking & Consumer Finance | 511 |

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|---|---|---|
| 530 | Public Employees Retirement System | 530 |
| 551 | Department of Corrections | 551 |
| 557 | Correction - Medical Services | 551 |
| 558 | Corrections - Farming Operations | 551 |
| 559 | Parole Board | 551 |
| 601 | Department of Information Technology Services | 601 |
| 571 | Office of Youth Services | 650 |
| 647 | Jobs Program | 650 |
| 648 | Child Support | 650 |
| 649 | DHS - Division of Support Services | 650 |
| 651 | Department of Human Services | 650 |
| 652 | Division of Employment and Training | 650 |
| 660 | Division of Aging and Adult Services | 650 |
| 661 | Division of Community Services | 650 |
| 662 | Office of Social Services | 650 |
| 663 | Division of Social Services Block Grant | 650 |
| 664 | Division of Children and Youth | 650 |
| 667 | Welfare Restructuring Program | 650 |
| 665 | Division of Medicaid | 665 |
| 671 | Department of Employment Security | 671 |
| 672 | Workers Compensation Commission | 672 |
| 107 | Division of Public Safety Planning | 711 |
| 127 | Public Safety Council on Aging | 711 |
| 711 | Department of Public Safety | 711 |
| 712 | DPS - Division of Support Services | 711 |
| 713 | Division of Crime Laboratories | 711 |
| 714 | Division of Law Enforce Training Academy | 711 |
| 740 | Division of Medical Examiner | 711 |
| 742 | Office of Law Standards & Training | 711 |
| 743 | DPS Emergency Telecommunications | 711 |
| 744 | County Jail Standards & Training | 711 |
| 718 | Narcotics Bureau | 711 |
| 731 | Veterans Affairs Board | 731 |
| 734 | Veterans Home Purchase Board | 734 |
| 811 | Public Service Commission | 811 |
| 812 | Public Utilities Staff | 812 |
| 824 | Board of Dental Examiners | 824 |
| 825 | Agricultural Aviation Board | 825 |
| 828 | Board of Physical Therapy | 828 |
| 829 | Board of Medical Licensure | 829 |
| 830 | Board of Cosmetology | 830 |

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|---|---|---|
| 831 | MS Real Estate Appraiser License & Cert. Board | 831 |
| 832 | MS Real Estate Commission | 832 |
| 833 | Board of Funeral Services | 833 |
| 834 | Mississippi State Board of Contractors | 834 |
| 836 | Board of Nursing Home Administrators | 836 |
| 838 | Board of Nursing | 838 |
| 839 | Motor Vehicle Commission | 839 |
| 840 | Board of Barber Examiners | 840 |
| 841 | Board of Public Accountancy | 841 |
| 842 | Board of Professional Engineers & Land Surveyors | 842 |
| 843 | Athletic Commission | 843 |
| 845 | Board of Pharmacy | 845 |
| 846 | Board of Architecture and Landscape | 846 |
| 860 | Veterans Memorial Stadium | 161 |
| 865 | Arts Commission | 865 |
| 866 | Auctioneers Commission | 866 |
| 7210 | Mississippi Emergency Management Agency | 7210 |
| 867 | Board of Registered Professional Geologists | 867 |
| 868 | Board of Examiners for Social Workers & Marriage/Family Therapists | 868 |

# APPENDIX B

## Sample RFP

**Request for Proposal**
**To Provide A**
**Professional Consultant**

**Mississippi State Personnel Board**
**210 East Capitol Street, Suite 800**
**Jackson, MS 39201**

RFP NO. 98-02-MSPB

Contact Person: John Smith
601-999-9999
Fax Number: 601-999-9999

**MISSISSIPPI STATE PERSONNEL BOARD**
**210 East Capitol Street, Suite 800 Jackson, MS 39201**
**(601) 359-6517**

**INVITATION:** Written proposals subject to the conditions herein stated and attached hereto, will be received at this office until Thursday, May 6, 2010, at 2:00 p.m. local time for furnishing the services as described below for the Mississippi State Personnel Board (hereinafter "MSPB").

**DESCRIPTION:** The MSPB is hereby requesting written proposals to provide a professional consultant.

The MSPB will receive proposals from firms having specific experience and qualifications in the area identified in the solicitation. For consideration, proposals for the project must contain evidence of the firm's experience and abilities in the specified area and other disciplines directly related to the proposed service. Other information required by the MSPB may be included elsewhere in the solicitation. Unless otherwise stated, all offerors shall provide profiles and resumes of the staff to be assigned to the project, references, illustrative examples of similar work performed, and any other information that clearly demonstrates the offeror's expertise in the area of the solicitation.

A selection committee shall review and evaluate all replies. The selection committee will have only the response to the solicitation to review for selection of finalists. It is, therefore, important that respondents emphasize specific information pertinent to the work. Evaluation of the responses will be based on the following criteria:

A. The overall quality of the proposed plan for performing the required services (the plan should reflect an understanding of the project and its objectives). Consideration will be given to the completeness of the response to the specific requirements of the solicitation. ***(Critical)***

B. Proposer's ability to provide the required services as reflected/evidenced by qualifications (education, experience, etc.). This includes the ability of the proposer to provide a work product that is legally defensible. ***(Very Important)***

C. The personnel, equipment, facilities, and financial resources to perform the services currently available or demonstrated to be made available at the time of contracting. ***(Important)***

D. A record of past performance of similar work. ***(Critical)***

E. Price. ***(Important)***

Inquiries regarding this Request for Proposal must be directed to:

John Smith, (TITLE)
Mississippi State Personnel Board
210 East Capitol Street, Suite 800
Jackson, MS 39201
(601) 999-9999

Proposals and attachments must be submitted to:

Jim Smith, (TITLE)
Mississippi State Personnel Board
210 East Capitol Street, Suite 800
Jackson, MS 39201
(601) 999-9999

**MISSISSIPPI STATE PERSONNEL BOARD**
**210 EAST CAPITOL STREET, SUITE 800**
**JACKSON, MISSISSIPPI 39201**

## 1.0 SPECIFICATIONS, TERMS AND CONDITIONS FOR PROFESSIONAL CONSULTING SERVICES

### 1.1 General Statement:

The Mississippi State Personnel Board (hereinafter "MSPB"), in order to ensure that selection procedures for screening applicants for jobs with the state service in Mississippi are job related and legally defensible, is desirous of securing the services of a professional consultant. Additional information may be obtained by written request to *Jim Smith, Mississippi State Personnel Board, 210 East Capitol Street, Suite 800, Jackson, MS 39201*.

### 1.2 Detailed Minimum Specifications:

Devise a written proposal that will ensure that selection procedures for screening applicants for jobs with the state service of Mississippi are job related and legally defensible. All information, results, conclusions, studies and other data arising out of the consultant's performance may be utilized by the State in litigation. The written proposal should be such that it clearly and fully explains how the consultant will:

(1) provide expertise in conjunction with the development of valid job descriptions with essential functions in compliance with federal law, specifically, the Americans with Disabilities Act (ADA);

(2) provide job related minimum qualifications for job classes selected or identified by the MSPB and provide a recommendation on the continued utilization of tests, where applicable, in association with these job related minimum qualifications;

(3) provide professionally developed job descriptions with job related minimum qualifications and essential functions in compliance with federal law, with necessary documentation as professionally appropriate for establishing job relatedness; and,

(4) provide job class specifications in both hard copy (paper) and electronic formats (The State Personnel Board uses Microsoft Word and Adobe to maintain its current job class specifications documents. Special features of Word are used to format the documents. The consultant submitting the proposal will be required to provide electronic files in the format specified by the MSPB. Special formatting codes, file naming conventions, and other instructions will be provided to the consultant at the time of the award. As an option, the consultant's proposal should provide provision of **all** documentation in PDF format. Electronic files are to be provided in Microsoft Word and PDF format.).

The price submitted shall reflect a total cost for each successfully completed job description provided for each job class, specifying the total number of job descriptions that the consultant can successfully complete no later than May 31st of each fiscal year. The MSPB staff will provide the consultant with lists identifying the specific job classes for which these services are to be performed. Completed job descriptions must be delivered to MSPB for review as follows:

(1) The first batch must be delivered no later than three months after the commencement of the contract with a minimum of fifteen (15) job descriptions being submitted for review.

(2) All other batches must be delivered each month thereafter with a minimum of seventeen (17) job descriptions being submitted for review each month.

The period of performance of this service is for fiscal years 2013 through 2015 (July 1, 2012 - June 30, 2015). The contract is renewable for a period of two (2) years for fiscal year 2016 - 2017 conditioned upon the receipt of state funds and satisfactory performance during prior fiscal years as determined by the State Personnel Director.

**2.0 CONSULTANT'S WRITTEN PROPOSAL SHALL CONTAIN THE FOLLOWING MINIMUM INFORMATION:**

(1) name of consultant, location of consultant's principal place of business, and the place of performance of the proposed contract,

(2) age of consultant's business and the average number of employees over the past three (3) years;

(3) resume' listing abilities, qualifications and experience of all individuals who will be assigned to provide the required services;

(4) listing of three contracts under which services similar in scope, size, or discipline were performed or undertaken, including at least two (2) references for current contracts or those awarded during the past three (3) years (On a proposal form, list three (3) projects to include the names and addresses of the projects, the scope of the project, and the names and telephone numbers of the clients for reference purposes. All information on the proposal form must be completed. Incomplete or unsigned proposal forms will be rejected.);

(5) a plan giving as much detail as is practical explaining how the services will be performed; and,

(6) an estimate of price.

## 3.0 INSURANCE REQUIREMENTS

The successful offeror/proposer will be required to procure and maintain errors and omissions/professional liability coverage in the amount of:

$250,000 per occurrence for Fiscal Year 2013;

$250,000 per occurrence for Fiscal Year 2014;

$250,000 per occurrence for Fiscal Year 2015;

$500,000 per occurrence for Fiscal Year 2016; and,

$500,000 per occurrence for Fiscal Year 2015 (provided renewal option is exercised); and offer proof of such coverage. Prior to the execution of the contract, proof of such coverage shall be provided. Should the certificate expire during the term of the contract, it is the responsibility of the vendor to provide copies of the current insurance certificate.

## 3.1 INSURANCE

Contractor represents that it will maintain workers' compensation insurance which shall inure to the benefit of all Contractor's personnel provided hereunder and maintain errors and omissions/professional liability insurance with minimum limits as described in section 3.0 above. All errors and omissions/professional liability insurance will provide coverage to the MSPB as an additional insured. The MSPB reserves the right to request from carriers, certificates of insurance regarding the required coverage. Insurance carriers must be licensed or hold a Certificate of Authority from the Mississippi Department of Insurance.

## 4.0 RENEWAL OF CONTRACTS

The contract may be renewed at the discretion of the agency upon written notice to Contractor at least sixty (60) days prior to the contract anniversary date for a period of one (1) successive year under the same prices, terms, and conditions as in the original contract. The total number of renewal years permitted shall not exceed two (2).

## 5.0 COMPENSATION FOR SERVICES WILL BE IN THE FORM OF A FIRM FIXED PRICE AGREEMENT

## 6.0 REJECTION OF PROPOSALS

Proposals which do not conform to the requirements set forth in this RFP may be rejected by MSPB. Proposals may be rejected for reasons which include, but are not limited to, the following:

(1) the proposal contains unauthorized amendments to the requirements of the RFP;

(2) the proposal is conditional;

(3) the proposal is incomplete or contains irregularities which make the proposal indefinite or ambiguous;

(4) the proposal is received late;

(5) the proposal is not signed by an authorized representative of the party;

(6) the proposal contains false or misleading statements or references; and,

(7) the proposal does not offer to provide all services required by the RFP.

## 7.0 INFORMALITIES AND IRREGULAITIES

The MSPB has the right to waive minor defects or variations of a bid from the exact requirements of the specifications that do not affect the price, quality, quantity, delivery, or performance time of the services being procured. If insufficient information is submitted by a bidder with the bid for the MSPB to properly evaluate the bid, the MSPB has the right to require such additional information as it may deem necessary after the time set for receipt of bids, provided that the information requested does not change the price, quality, quantity, delivery, or performance time of the services being procured.

## 8.0 DISPOSITION OF PROPOSALS

All submitted proposals become the property of the State of Mississippi.

## 9.0 COMPETITIVE NEGOTIATION

The bidding method to be used is that of competitive negotiation from which MSPB is seeking the best combination of price, experience and quality of service. Discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award. Likewise, MSPB also reserves the right to accept any proposal as submitted for contract award, without substantive negotiation of offered terms, services or prices. For these reasons, all parties are advised to propose their most favorable terms initially.

## 10.0 RFP DOES NOT CONSTITUTE ACCEPTANCE OF OFFER

The release of the Request for Proposal does not constitute an acceptance of any offer, nor does such release in any way obligate MSPB to execute a contract with any other party. MSPB reserves the right to accept, reject, or negotiate any or all offers on the basis of the evaluation criteria contained within this document. The final decision to execute a contract with any party rests solely with MSPB.

## 11.0 EXCEPTIONS AND DEVIATIONS

Offerors taking exception to any part or section of the solicitation shall indicate such exceptions in the proposal and shall be fully described. Failure to indicate any exception will be interpreted as the offeror's intent to comply fully with the requirements as written. Conditional or qualified offers, unless specifically allowed, shall be subject to rejection in whole or in part.

## 12.0 NONCONFORMING TERMS AND CONDITIONS

A proposal that includes terms and conditions that do not conform to the terms and conditions in the Request for Proposal is subject to rejection as non-responsive. MSPB reserves the right to permit the offeror to withdraw nonconforming terms and conditions from its proposal prior to a determination by the MSPB of non-responsiveness based on the submission of nonconforming terms and conditions.

## 13.0 PROPOSAL ACCEPTANCE PERIOD

The original and five (5) copies of the proposal and all attachments (six (6) copies total) shall be signed and submitted in a sealed envelope or package to *Jim Smith, 210 East Capitol Street, Suite 800, Jackson, Mississippi 39201* no later than the time and date specified for receipt of proposals. Timely submission of the proposal is the responsibility of the offeror. Proposals received after the specified time, shall be rejected and returned to the offeror unopened. The envelope or package shall be marked with the proposal opening date and time and the number of the request for proposal. The time and date of receipt shall be indicated on the envelope or package by the MSPB Business Office. Each page of the proposal and all attachments shall be identified with the name of the offeror.

## 14.0 EXPENSES INCURRED IN PREPARING OFFERS

MSPB accepts no responsibility for any expense incurred by the offeror in the preparation and presentation of an offer. Such expenses shall be borne exclusively by the offeror.

## 15.0 PROPRIETARY INFORMATION

The offeror/proposer should mark any and all pages of the proposal considered to be proprietary information which may remain confidential in accordance with Mississippi Code Annotated §§ 25-61-9 and 79-23-1 (1972, as amended). Any pages not marked accordingly will be subject to review by the general public after award of the contract. Requests to review the proprietary information will be handled in accordance with applicable legal procedures.

## 16.0 ADDITIONAL INFORMATION

Questions about this Request for Proposal must be submitted in writing to *John Smith* at *210 East Capitol, Suite 800, Jackson, Mississippi 39201*; fax number 601-999-9999. Questions concerning the technical portions of the Request for Proposal should be directed to *Jane Doe* at *210 East Capitol, Suite 800, Jackson, Mississippi 39201*; fax number 601-999-9999. Offerors are cautioned that any statements made by the contract or technical contract person that materially change any portion of the Request for Proposal shall not be relied upon unless subsequently ratified by a formal written amendment to the Request for Proposal.

## 17.0 DEBARMENT

By submitting a proposal, the offeror certifies that it is not currently debarred from submitting proposals for contracts issued by any political subdivision or agency of the State of Mississippi and that it is not an agent of a person or entity that is currently debarred from submitting proposals for contracts issued by any political subdivision or agency of the State of Mississippi.

## 18.0 REQUIRED CLAUSES FOR PROCUREMENT

### 18.1 Acknowledgment of Amendments

Offerors shall acknowledge receipt of any amendment to the solicitation by signing and returning the amendment with the proposal, by identifying the amendment number and date in the space provided for this purpose on the proposal form, or by letter. The acknowledgment must be received by the MSPB by the time and at the place specified for receipt of proposals.

### 18.2 Certification of Independent Price Determination

The offeror certifies that the prices submitted in response to the solicitation have been arrived at independently and without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to those prices, the intention to submit a bid, or the methods or factors used to calculate the prices bid.

### 18.3 Prospective Contractor's Representation Regarding Contingent Fees *(To be placed in prospective Contractor's response bid or proposal.)*

The prospective Contractor represents as a part of such Contractor's bid or proposal that such Contractor has/has not *(use applicable word or words)* retained any person or agency on a percentage, commission, or other contingent arrangement to secure this contract.

## 18.4 E-Verification

If applicable, Contractor represents and warrants that it will ensure its compliance with the Mississippi Employment Protection Act of 2008, and will register and participate in the status verification system for all newly hired employees. Miss. Code Ann. §§ 71-11-1 *et seq.* (1972, as amended). The term "employee" as used herein means any person that is hired to perform work within the State of Mississippi. As used herein, "status verification system" means the Illegal Immigration Reform and Immigration Responsibility Act of 1996 that is operated by the United States Department of Homeland Security, also known as the E-Verify Program, or any other successor electronic verification system replacing the E-Verify Program. Contractor agrees to maintain records of such compliance. Upon request of the State, and after approval of the Social Security Administration or Department of Homeland Security when required, Contractor agrees to provide a copy of each such verification. Contractor further represents and warrants that any person assigned to perform services hereafter meets the employment eligibility requirements of all immigration laws. The breach of this agreement may subject Contractor to the following:

a) termination of this contract for services and ineligibility for any state or public contract in Mississippi for up to three (3) years with notice of such cancellation/termination being made public;

b) the loss of any license, permit, certification or other document granted to Contractor by an agency, department or governmental entity for the right to do business in Mississippi for up to one (1) year; or,

c) both. In the event of such cancellation/termination, Contractor would also be liable for any additional costs incurred by the State due to Contract cancellation or loss of license or permit to do business in the State.

## 18.5 E-Payment

Contractor agrees to accept all payments in United States currency via the State of Mississippi's electronic payment and remittance vehicle. The agency agrees to make payment in accordance with Mississippi law on "Timely Payments for Purchases by Public Bodies," which generally provides for payment of undisputed amounts by the agency within forty-five (45) days of receipt of invoice. Miss. Code Ann. § 31-7-305 (1972, as amended).

## 18.6 Representation Regarding Contingent Fees

Contractor represents that it has not retained a person to solicit or secure a state contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except as disclosed in Contractor's proposal.

## 18.7 Representation Regarding Gratuities

The offeror, or Contractor represents that it has not violated, is not violating, and promises that it will not violate the prohibition against gratuities set forth in Section 6-204 (Gratuities) of the *Mississippi Personal Service Contract Review Board Rules and Regulations*.

## 19.0 STANDARD TERMS AND CONDITIONS WHICH WILL BE INCLUDED IN ANY CONTRACT AWARDED FROM THIS RFP

## 19.1 Applicable Law

The contract shall be governed by and construed in accordance with the laws of the State of Mississippi, excluding its conflicts of laws, provisions, and any litigation with respect thereto shall be brought in the courts of the State. Contractor shall comply with applicable federal, state, and local laws and regulations.

## 19.2 Availability of Funds

It is expressly understood and agreed that the obligation of the State to proceed under this agreement is conditioned upon the appropriation of funds by the Mississippi State Legislature and the receipt of state and/or federal funds. If the funds anticipated for the continuing fulfillment of the agreement are, at any time, not forthcoming or insufficient, either through the failure of the federal government to provide funds or of the State of Mississippi to appropriate funds or the discontinuance or material alteration of the program under which funds were provided or if funds are not otherwise available to the State, the State shall have the right upon ten (10) working days written notice to Contractor, to terminate this agreement without damage, penalty, cost or expenses to the State of any kind whatsoever. The effective date of termination shall be as specified in the notice of termination.

## 19.3 Procurement Regulations

The contract shall be governed by the applicable provisions of the *Mississippi Personal Service Contract Review Board Rules and Regulation*s, a copy of which is available at 210 East Capitol Street, Suite 800, Jackson, Mississippi, 39201 for inspection, or downloadable at http://www.mspb.ms.gov.

## 19.4 Confidentiality

Notwithstanding any provision to the contrary contained herein, it is recognized that *[agency]* is a public agency of the State of Mississippi and is subject to the Mississippi Public Records Act, Mississippi Code Annotated §§ 25-61-1 *et seq*. (1972, as amended). If a public records request is made for any information provided to *[agency]* pursuant to the agreement, *[agency]* shall promptly notify the disclosing party of such request and will respond to the request only in accordance with the procedures and limitations set forth in applicable law. The disclosing party shall promptly institute appropriate legal

proceedings to protect its information. No party to the agreement shall be liable to the other party for disclosures of information required by court order or required by law.

## 19.5 Stop Work Order

(1) *Order to Stop Work*. The Procurement Officer of MSPB, may, by written order to Contractor at any time, and without notice to any surety, require Contractor to stop all or any part of the work called for by this contract. This order shall be for a specified period not exceeding 90 days after the order is delivered to Contractor, unless the parties agree to any further period. Any such order shall be identified specifically as a stop work order issued pursuant to this clause. Upon receipt of such an order, Contractor shall forthwith comply with its terms and take all reasonable steps to minimize the occurrence of costs allocable to the work covered by the order during the period of work stoppage. Before the stop work order expires, or within any further period to which the parties shall have agreed, the Procurement Officer shall either:

(a) cancel the stop work order; or,

(b) terminate the work covered by such order as provided in the 'Termination for Default Clause' or the 'Termination for Convenience Clause' of this contract.

(2) *Cancellation or Expiration of the Order*. If a stop work order issued under this clause is canceled at any time during the period specified in the order, or if the period of the order or any extension thereof expires, Contractor shall have the right to resume work. An appropriate adjustment shall be made in the delivery schedule or Contractor price, or both, and the contract shall be modified in writing accordingly, if:

(a) the stop work order results in an increase in the time required for, or in Contractor's cost properly allocable to, the performance of any part of this contract; and,

(b) Contractor asserts a claim for such an adjustment within 30 days after the end of the period of work stoppage; provided that, if the Procurement Officer decides that the facts justify such action, any such claim asserted may be received and acted upon at any time prior to final payment under this contract.

(3) *Termination of Stopped Work*. If a stop work order is not canceled and the work covered by such order is terminated for default or convenience, the reasonable costs resulting from the stop work order shall be allowed by adjustment or otherwise.

(4) *Adjustments of Price*. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment clause of this contract.

## 19.6 Compliance with Laws

Contractor understands that the MSPB is an equal opportunity employer and therefore, maintains a policy which prohibits unlawful discrimination based on race, color, creed, sex, age, national origin, physical handicap, disability, genetic information, or any other consideration made unlawful by federal, state, or local laws. All such discrimination is unlawful and Contractor agrees during the term of the agreement that Contractor will strictly adhere to this policy in its employment practices and provision of services. Contractor shall comply with, and all activities under this agreement shall be subject to, all applicable federal, State of Mississippi, and local laws and regulations, as now existing and as may be amended or modified.

## 19.7 Anti-Assignment/Subcontracting

Contractor acknowledges that it was selected by the MSPB to perform the services required hereunder based, in part, upon Contractor's special skills and expertise. Contractor shall not assign, subcontract or otherwise transfer this agreement in whole or in part without the prior written consent of the MSPB, which the MSPB may, in its sole discretion, approve or deny without reason. Any attempted assignment or transfer of its obligations without such consent shall be null and void. No such approval by the MSPB of any subcontract shall be deemed in any way to provide for the incurrence of any obligation of the State in addition to the total fixed price agreed upon in this agreement. Subcontracts shall be subject to the terms and conditions of this agreement and to any conditions of approval that the MSPB may deem necessary. Subject to the foregoing, this agreement shall be binding upon the respective successors and assigns of the parties.

## 19.8 Antitrust

By entering into a contract, Contractor conveys, sells, assigns, and transfers to the MSPB all rights, titles, and interest it may now have, or hereafter acquire, under the antitrust laws of the United States and the State of Mississippi that relate to the particular goods or services purchased or acquired by the MSPB under said contract.

## 19.9 Approval

It is understood that the Contract is void and no payment shall be made in the event that the Personal Service Contract Review Board does not approve this contract.

## 19.10 Attorney's Fees and Expenses

Subject to other terms and conditions of this agreement, in the event Contractor defaults in any obligations under this agreement, Contractor shall pay to the State all costs and expenses (including, without limitation, investigative fees, court costs, and attorney's fees) incurred by the State in enforcing this agreement or otherwise reasonably related thereto. Contractor agrees that under no circumstances shall the customer be obligated to pay any attorney's fees or costs of legal action to Contractor.

## 19.11 Authority to Contract

Contractor warrants (a) that it is a validly organized business with valid authority to enter into this agreement; (b) that it is qualified to do business and in good standing in the State of Mississippi; (c) that entry into and performance under this agreement is not restricted or prohibited by any loan, security, financing, contractual, or other agreement of any kind, and (d) notwithstanding any other provision of this agreement to the contrary, that there are no existing legal proceedings or prospective legal proceedings, either voluntary or otherwise, which may adversely affect its ability to perform its obligations under this agreement.

## 19.12 Change in Scope of Work

The MSPB may order changes in the work consisting of additions, deletions, or other revisions within the general scope of the contract. No claims may be made by Contractor that the scope of the project or of Contractor's services has been changed, requiring changes to the amount of compensation to Contractor or other adjustments to the contract, unless such changes or adjustments have been made by written amendment to the contract signed by the MSPB and Contractor.

If Contractor believes that any particular work is not within the scope of the project, is a material change, or will otherwise require more compensation to Contractor, Contractor must immediately notify the MSPB in writing of this belief. If the MSPB believes that the particular work is within the scope of the contract as written, Contractor will be ordered to and shall continue with the work as changed and at the cost stated for the work within the scope of service.

## 19.13 Contractor Personnel

The MSPB shall, throughout the life of the contract, have the right of reasonable rejection and approval of staff or subcontractors assigned to the work by Contractor. If the MSPB reasonably rejects staff or subcontractors, Contractor must provide replacement staff or subcontractors satisfactory to the MSPB in a timely manner and at no additional cost to the MSPB. The day-to-day supervision and control of Contractor's employees and subcontractors is the sole responsibility of Contractor.

## 19.14 Failure to Deliver

In the event of failure of Contractor to deliver services in accordance with the contract terms and conditions, the MSPB, after due oral or written notice, may procure the services from other sources and hold Contractor responsible for any resulting additional purchase and administrative costs. This remedy shall be in addition to any other remedies that the MSPB may have.

## 19.15 Failure to Enforce

Failure by the MSPB at any time to enforce the provisions of the contract shall not be construed as a waiver of any such provisions. Such failure to enforce shall not affect the validity of the contract or any part thereof or the right of the MSPB to enforce any provision at any time in accordance with its terms.

## 19.16 Force Majeure

Each party shall be excused from performance for any period and to the extent that it is prevented from performing any obligation or service, in whole or in part, as a result of causes beyond the reasonable control and without the fault or negligence of such party and/or its subcontractors. Such acts shall include without limitation acts of God, strikes, lockouts, riots, acts of war, epidemics, governmental regulations superimposed after the fact, fire, earthquakes, floods, or other natural disasters ("force majeure events"). When such a cause arises, Contractor shall notify the MSPB immediately in writing of the cause of its inability to perform, how it affects its performance, and the anticipated duration of the inability to perform. Delays in delivery or in meeting completion dates due to force majeure events shall automatically extend such dates for a period equal to the duration of the delay caused by such events, unless the MSPB determines it to be in its best interest to terminate the agreement.

## 19.17 Indemnification

To the fullest extent allowed by law, Contractor shall indemnify, defend, save and hold harmless, protect, and exonerate the MSPB, its commissioners, board members, officers, employees, agents, and representatives, and the State of Mississippi from and against all claims, demands, liabilities, suits, actions, damages, losses, and costs of every kind and nature whatsoever, including, without limitation, court costs, investigative fees and expenses, and attorney's fees, arising out of or caused by Contractor and/or its partners, principals, agents, employees and/or subcontractors in the performance of or failure to perform this agreement. In the State's sole discretion, Contractor may be allowed to control the defense of any such claim, suit, etc. In the event Contractor defends said claim, suit, etc., Contractor shall use legal counsel acceptable to the State. Contractor shall be solely responsible for all costs and/or expenses associated with such defense, and the State shall be entitled to participate in said defense. Contractor shall not settle any claim, suit, etc. without the State's concurrence, which the State shall not unreasonably withhold.

## 19.18 Independent Contractor Status

Contractor shall, at all times, be regarded as and shall be legally considered an independent contractor and shall at no time act as an agent for the MSPB. Nothing contained herein shall be deemed or construed by the MSPB, Contractor, or any third party as creating the relationship of principal and agent, master and servant, partners, joint venturers, employer and employee, or any similar such relationship between the MSPB and Contractor. Neither the method of computation of fees or other charges, nor

any other provision contained herein, nor any acts of the MSPB or Contractor hereunder creates, or shall be deemed to create a relationship other than the independent relationship of the MSPB and Contractor. Contractor's personnel shall not be deemed in any way, directly or indirectly, expressly or by implication, to be employees of the State. Neither Contractor nor its employees shall, under any circumstances, be considered servants, agents, or employees of the MSPB; and the MSPB shall be at no time legally responsible for any negligence or other wrongdoing by Contractor, its servants, agents, or employees. The MSPB shall not withhold from the contract payments to Contractor any federal or state unemployment taxes, federal or state income taxes, Social Security tax, or any other amounts for benefits to Contractor. Further, the MSPB shall not provide to Contractor any insurance coverage or other benefits, including Workers' Compensation, normally provided by the State for its employees.

**19.19 No Limitation of Liability**

Nothing in this agreement shall be interpreted as excluding or limiting any tort liability of Contractor for harm caused by the intentional or reckless conduct of Contractor or for damages incurred through the negligent performance of duties by Contractor or the delivery of products that are defective due to negligent construction.

**19.20 Notices**

All notices required or permitted to be given under this agreement must be in writing and personally delivered or sent by certified United States mail, postage prepaid, return receipt requested, to the party to whom the notice should be given at the address set forth below. Notice shall be deemed given when actually received or when refused. The parties agree to promptly notify each other in writing of any change of address.

For Contractor: *name, title, contractor, address*

For the Agency: *name, title, agency, address*

**19.21 Oral Statements**

No oral statement of any person shall modify or otherwise affect the terms, conditions, or specifications stated in this contract. All modifications to the contract must be made in writing by the MSPB and agreed to by Contractor.

**19.22 Ownership of Documents and Work Papers**

The MSPB shall own all documents, files, reports, work papers and working documentation, electronic or otherwise, created in connection with the project which is the subject of this agreement, except for Contractor's internal administrative and quality assurance files and internal project correspondence. Contractor shall deliver such documents and work papers to MSPB upon termination or completion of the agreement. The foregoing notwithstanding, Contractor shall be entitled to retain a set of such work

papers for its files. Contractor shall be entitled to use such work papers only after receiving written permission from MSPB and subject to any copyright protections.

### 19.23 Record Retention and Access to Records

Provided Contractor is given reasonable advance written notice and such inspection is made during normal business hours of Contractor, the MSPB or any duly authorized representatives shall have unimpeded, prompt access to any of Contractor's books, documents, papers, and/or records which are maintained or produced as a result of the project for the purpose of making audits, examinations, excerpts, and transcriptions. All records related to this agreement shall be retained by Contractor for three (3) years after final payment is made under this agreement and all pending matters are closed; however, if any audit, litigation or other action arising out of or related in any way to this project is commenced before the end of the three (3) year period, the records shall be retained for one (1) year after all issues arising out of the action are finally resolved or until the end of the three (3) year period, whichever is later.

### 19.24 Recovery of Money

Whenever, under the contract, any sum of money shall be recoverable from or payable by Contractor to MSPB, the same amount may be deducted from any sum due to Contractor under the contract or under any other contract between Contractor and MSPB. The rights of MSPB are in addition and without prejudice to any other right MSPB may have to claim the amount of any loss or damage suffered by MSPB on account of the acts or omissions of Contractor.

### 19.25 Right to Inspect Facility

The State, may at reasonable times, inspect the place of business of a Contractor or any subcontractors which is related to the performance of any contract awarded by the State.

### 19.26 State Property

Contractor will be responsible for the proper custody and care of any state-owned property furnished for Contractor's use in connection with the performance of this agreement. Contractor will reimburse the State for any loss or damage, normal wear and tear excepted.

### 19.27 Termination for Convenience

(1) *Termination*. The Procurement Officer of the MSPB may, when the interests of the State so require, terminate this contract in whole or in part, for the convenience of the State. The Procurement Officer shall give written notice of the termination to Contractor specifying the part of the contract terminated and when termination becomes effective.

(2) *Contractor's Obligations*. Contractor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination Contractor will stop work to the extent specified. Contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. Contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The Procurement Officer may direct Contractor to assign Contractor's right, title, and interest under terminated orders or subcontracts to the MSPB. Contractor must still complete the work not terminated by the notice of termination and may incur obligations as are necessary to do so.

## 19.28 Termination for Default

(1) *Default.* If Contractor refuses or fails to perform any of the provisions of this contract with such diligence as will ensure its completion within the time specified in this contract, or any extension thereof, or otherwise fails to timely satisfy the contract provisions, or commits any other substantial breach of this contract, the Procurement Officer of the MSPB may notify Contractor in writing of the delay or nonperformance and if not cured in ten (10) days or any longer time specified in writing by the Procurement Officer, such officer may terminate Contractor's right to proceed with the contract or such part of the contract as to which there has been delay or a failure to properly perform. In the event of termination in whole or in part, the Procurement Officer may procure similar supplies or services in a manner and upon terms deemed appropriate by the Procurement Officer. Contractor shall continue performance of the contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services.

(2) *Contractor's Duties*. Notwithstanding termination of the contract and subject to any directions from the Procurement Officer, Contractor shall take timely, reasonable, and necessary action to protect and preserve property in the possession of Contractor in which the State has an interest.

(3) *Compensation*. Payment for completed services delivered and accepted by the MSPB shall be at the contract price. The MSPB may withhold from amounts due Contractor such sums as the Procurement Officer deems to be necessary to protect the State against loss because of outstanding liens or claims of former lien holders and to reimburse the State for the excess costs incurred in procuring similar goods and services.

(4) *Excuse for Nonperformance or Delayed Performance*. Except with respect to defaults of subcontractors, Contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms (including any failure by Contractor to make progress in the prosecution of the work hereunder which endangers such performance) if Contractor has notified the Procurement Officer within 15 days after the cause of the delay and the failure arises out of causes such as: acts of God; acts of the public enemy; acts of the State and any other governmental entity in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe

weather. If the failure to perform is caused by the failure of a subcontractor to perform or to make progress, and if such failure arises out of causes similar to those set forth above, Contractor shall not be deemed to be in default, unless the services to be furnished by the subcontractor were reasonably obtainable from other sources in sufficient time to permit Contractor to meet the contract requirements. Upon request of Contractor, the Procurement Officer shall ascertain the facts and extent of such failure, and, if such officer determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, Contractor's progress and performance would have met the terms of the contract, the delivery schedule shall be revised accordingly, subject to the rights of the State under the clause entitled (in fixed-price contracts, "Termination for Convenience," in cost-reimbursement contracts, "Termination"). (As used in this Paragraph of this clause, the term "subcontractor" means subcontractor at any tier).

(5) *Erroneous Termination for Default*. If, after notice of termination of Contractor's right to proceed under the provisions of this clause, it is determined for any reason that the contract was not in default under the provisions of this clause, or that the delay was excusable under the provisions of Paragraph (4) (Excuse for Nonperformance or Delayed Performance) of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the State, be the same as if the notice of termination had been issued pursuant to such clause.

(6) *Additional Rights and Remedies*. The rights and remedies provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

**19.29 Third Party Action Notification**

Contractor shall give MSPB prompt notice in writing of any action or suit filed, and prompt notice of any claim made against Contractor by any entity that may result in litigation related in any way to this agreement.

**19.30 Unsatisfactory Work**

If at any time during the contract term, the service performed or work done by Contractor is considered by MSPB to create a condition that threatens the health, safety, or welfare of the citizens and/or employees of the State of Mississippi, Contractor shall, on being notified by MSPB, immediately correct such deficient service or work. In the event Contractor fails, after notice, to correct the deficient service or work immediately, MSPB shall have the right to order the correction of the deficiency by separate contract or with its own resources at the expense of Contractor.

**19.31 Waiver**

No delay or omission by either party to this agreement in exercising any right, power, or remedy hereunder or otherwise afforded by contract, at law, or in equity shall constitute an acquiescence therein, impair any other right, power or remedy hereunder or otherwise

afforded by any means, or operate as a waiver of such right, power, or remedy. No waiver by either party to this agreement shall be valid unless set forth in writing by the party making said waiver. No waiver of or modification to any term or condition of this agreement will void, waive, or change any other term or condition. No waiver by one party to this agreement of a default by the other party will imply, be construed as or require waiver of future or other defaults.

## 20.0 EVALUATION PROCEDURE AND FACTORS TO BE CONSIDERED IN THE EVALUATION PROCESS:

### 20.1 Qualifications of Offeror

The offeror may be required before the award of any contract to show to the complete satisfaction of the MSPB that it has the necessary facilities, ability, and financial resources to provide the service specified therein in a satisfactory manner. The offeror may also be required to give a past history and references in order to satisfy the MSPB in regard to the offeror's qualifications. The MSPB may make reasonable investigations deemed necessary and proper to determine the ability of the offeror to perform the work, and the offeror shall furnish to the MSPB all information for this purpose that may be requested. The MSPB reserves the right to reject any offer if the evidence submitted by, or investigation of, the offeror fails to satisfy the MSPB that the offeror is properly qualified to carry out the obligations of the contract and to complete the work described therein. Evaluation of the offeror's qualifications shall include:

(1) the ability, capacity, skill, and financial resources to perform the work or provide the service required;

(2) the ability of the offeror to perform the work or provide the service promptly or within the time specified, without delay or interference;

(3) the character, integrity, reputation, judgment, experience, and efficiency of the offeror; and,

(4) the quality of performance of previous contracts or services.

**20.2 Step One:** Proposals will be reviewed to assure compliance with the minimum specifications. Proposals that do not comply with the minimum specifications will be rejected immediately, receiving no further consideration.

**20.3 Step Two:** Proposals that satisfactorily complete Step One will be reviewed/analyzed to determine if the proposal adequately meets the needs of MSPB. Factors to be considered are as follows:

(1) The overall quality of the proposed plan for performing the required services (the plan should reflect an understanding of the project and its objectives). Consideration will be given to the completeness of the response to the specific requirements of the solicitation. ***(Critical)***

(2) Proposer's ability to provide the required services as reflected/evidenced by qualifications (education, experience, etc.). This includes the ability of the proposer to provide a work product that is legally defensible. ***(Very Important)***

(3) The personnel, equipment, facilities, and financial resources to perform the services currently available or demonstrated to be made available at the time of contracting. ***(Important)***

(4) A record of past performance of similar work. ***(Critical)***

(5) Price. ***(Important)***

**20.4** **Step Three:** The MSPB Executive Director or her designee will contact the offeror/proposer with the proposal which best meets MSPB's needs (based on factors evaluated in Step Two) and attempt to negotiate an agreement that is deemed acceptable to both parties.

**21.0 ALL PROPOSALS SUBMITTED IN RESPONSE TO THIS REQUEST SHALL BE IN WRITING.**

**22.0 COST DATA SUBMITTED AT THIS STAGE IS SUBJECT TO NEGOTIATION BUT SHOULD INCLUDE AN ESTIMATE OF THE ANNUAL COST OF THE SERVICE.**

**23.0 THE FOLLOWING RESPONSE FORMAT SHALL BE USED FOR ALL SUBMITTED PROPOSALS:**

I. **Management Summary:** Provide a cover letter indicating the underlying philosophy of the firm in providing the service.

II. **Proposal:** Describe in detail how the service will be provided. Include a description of major tasks and subtasks.

III. **Corporate experience and capacity:** Describe the experience of the firm in providing the service, give number of years that the service has been delivered, and provide a statement on the extent of any corporate expansion required to handle the service.

IV. **Personnel:** Attach resumes' of all those who will be involved in the delivery of service (from principals to field technicians) that include their experience in this area of service delivery. Indicate the level of involvement by principals of the firm in the day-to-day operation of the contract.

V. **References:** Give at least three (3) references for contracts of similar size and scope, including at least two (2) references for current contracts or those awarded during the past three years. Include the name of the organization, the length of the contract, a brief summary of the work, and the name and telephone number of a responsible contact person.

VI. **Acceptance of conditions:** Indicate any exceptions to the general terms and conditions of the bid document and to insurance, bonding, and any other requirements listed.

VII. **Additional data:** Provide any additional information that will aid in evaluation of the response.

VIII. **Cost data:** Estimate the annual cost of the service. Cost data submitted at this stage is not binding and is subject to negotiation if your firm is chosen as a finalist. Include the number of personnel proposed to be assigned to the contract and the total estimated cost of the labor portion of the contract (include a sample staffing chart). Identify all non-labor costs and their estimated totals.

## APPENDIX C
## Independent Contractor/Contract Worker Determination

### Administrative Procedures

IRS Code stipulates that compensation paid to contractual workers is subject to the same federal employment tax requirements as that of salaried workers. The IRS categorizes contractual personnel as either independent contractors or employees for the purpose of withholding and paying employment taxes. Generally, while independent contractors are responsible for the proper payment of employment taxes for themselves and their employees, the contracting agency is responsible for withholding and paying employment taxes for those contract personnel determined not to be (nor working for) an independent contractor. The State of Mississippi has a more narrow definition of "employee" than that used in the IRS regulation. Mississippi statute states that an "employee" is any person legally occupying a position in state service. Miss. Code Ann. § 25-11-103(l) (1972, as amended). In order to prevent potential confusion caused by IRS terminology and Mississippi statutory terminology, contractual personnel determined not to be (nor working for) independent contractors will be referred to as "contract workers." Therefore, contractual personnel who do not meet the definition of independent contractors should be classified as contractual workers and subject to the proper withholding of employment taxes. *See* Miss. Code Ann. § 25-9-120 (1972, as amended).

Agency and institutional heads are responsible for determining what work is being performed by contractual workers and ensuring that proper procedures are followed to comply with the IRS Code. Prior to entry and submission of the "Request for Contract Personnel Services Approval" form, each contractor should be classified using the criteria referenced below. If the contractor fails to qualify for classification as an independent contractor, then the contractor must be treated as a contractual worker. The department or agency should give consideration to the contract type. If the contractor is classified as a contractual worker, the agency is liable for the employer's share of employment taxes. In budgeting for the contract, the department should allow for this additional cost.

Please refer to the Department of Finance and Administration for instructions concerning the accounting codes and proper withholding of federal and state income taxes, Social Security/Medicare matching funds and unemployment insurance taxes. Refer also to IRS Publication 15-A, (available for downloading from http://www.irs.gov/pub/irs-pdf/p15a.pdf). The IRS has eleven main tests, organized into three main groups, to determine whether an employer-employee relationship exists, or whether the contractor is an independent contractor. These tests replace the IRS's previous "Twenty Factors" test.

### I. BEHAVIORAL CONTROL

Facts that show whether the business has a right to direct and control how the worker does the task for which the worker is hired include the type and degree of:

**Instructions the business gives the worker—**

An employee is generally subject to the business' instructions about when, where, and how to work. All of the following are examples of types of instructions about how to do work:

- When and where to do the work
- What tools or equipment to use
- What workers to hire or to assist with the work
- Where to purchase supplies and services
- What work must be performed by a specified individual
- What order or sequence to follow

The amount of instruction needed varies among different jobs. Even if no instructions are given, sufficient behavioral control may exist if the employer has the right to control how the work results are achieved. A business may lack the knowledge to instruct some highly specialized professionals; in other cases, the task may require little or no instruction. The key consideration is whether the business has retained the right to control the details of a worker's performance or instead has given up that right.

**Training the business gives to the worker—**

An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods.

## II. FINANCIAL CONTROL

Facts that show whether the business has a right to control the business aspects of the worker's job include:

**The extent to which the worker has unreimbursed business expenses—**

Independent contractors are more likely to have unreimbursed expenses than are employees. Fixed ongoing costs that are incurred regardless of whether work is currently being performed are especially important; however, employees may also incur unreimbursed expenses in connection with the services they perform for their business.

**The extent of the worker's investment—**

An independent contractor often has a significant investment in the facilities or tools he or she uses in performing services for someone else. However, a significant investment is not necessary for independent contractor status.

**The extent to which the worker makes services available to the relevant market—**

An independent contractor is generally free to seek out business opportunities. Independent contractors often advertise, maintain a visible business location, and are available to work in the relevant market.

**How the business pays the worker—**

An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time. This usually indicates that a worker is an employee, even when the wage or salary is supplemented by a commission. An independent contractor is usually paid by a flat fee for the job; however, it is common in some professions, such as law, to pay independent contractors hourly.

**The extent to which the worker can realize a profit or loss—**

Since an employer usually provides employees a workplace, tools, materials, equipment, and supplies needed for the work, and generally pays the costs of doing business, employees do not have an opportunity to make a profit or loss. An independent contractor can make a profit or loss.

## III. TYPE OF RELATIONSHIP

Facts that show the parties' type of relationship include:

**Written contract describing the relationship the parties intended to create—**

This is probably the least important of the criteria, since what really matters is the nature of the underlying work relationship, not what the parties choose to call it; however, in close cases, the written contract can make a difference.

**Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay—**

The power to grant benefits carries with it the power to take them away, which is a power generally exercised by employers over employees. A true independent contractor will finance his or her own benefits out of the overall profits of the enterprise.

**The permanency of the relationship—**

If the company engages a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence that the intent was to create an employer-employee relationship.

**The extent to which services performed by the worker are a key aspect of the regular business of the company—**

If a worker provides services that are a key aspect of the company's regular business activity, it is more likely that the company will have the right to direct and control his or her activities. For example, if a law firms hires an attorney, it is likely that it will present the attorney's work as its own and would have the right to control or direct that work. This would indicate an employer-employee relationship.

*Note: For questionable situations, the federal government will assist agencies in making the independent contractor vs. contract worker determination with the submission of FSS-8, Determination of Worker Status for Purposes of Federal Employee Taxes and Income Tax Withholding.*

## APPENDIX D
## Required Clauses in Contract for Services

*Note: Words appearing in brackets "[ ]" may be substituted for the appropriate state agency reference.*

### APPLICABLE LAW

The contract shall be governed by and construed in accordance with the laws of the State of Mississippi, excluding its conflicts of laws, provisions, and any litigation with respect thereto shall be brought in the courts of the State. Contractor shall comply with applicable federal, state, and local laws and regulations.

*(The following clause, or one substantially similar, shall be required in multi-term contractual agreements only.)*

### AVAILABILITY OF FUNDS

It is expressly understood and agreed that the obligation of the *[State]* to proceed under this agreement is conditioned upon the appropriation of funds by the Mississippi State Legislature and the receipt of state and/or federal funds. If the funds anticipated for the continuing fulfillment of the agreement are, at any time, not forthcoming or insufficient, either through the failure of the federal government to provide funds or of the State of Mississippi to appropriate funds or the discontinuance or material alteration of the program under which funds were provided or if funds are not otherwise available to the *[State]*, the *[State]* shall have the right upon ten (10) working days written notice to Contractor, to terminate this agreement without damage, penalty, cost or expenses to the *[State]* of any kind whatsoever. The effective date of termination shall be as specified in the notice of termination.

### REPRESENTATION REGARDING CONTINGENT FEES

Contractor represents that it has not retained a person to solicit or secure a state contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except as disclosed in Contractor's bid or proposal.

### REPRESENTATION REGARDING GRATUITIES

The bidder, offeror, or Contractor represents that it has not violated, is not violating, and promises that it will not violate the prohibition against gratuities set forth in Section 6-204 (Gratuities) of the *Mississippi Personal Service Contract Review Board Rules and Regulations*.

### PROCUREMENT REGULATIONS

The contract shall be governed by the applicable provisions of the *Mississippi Personal Service Contract Review Board Rules and Regulations*, a copy of which is available at 210 East Capitol,

Suite 800, Jackson, Mississippi 39201 for inspection, or downloadable at http://www.mspb.ms.gov.

**COMPLIANCE WITH LAWS**

Contractor understands that the [State] is an equal opportunity employer and therefore, maintains a policy which prohibits unlawful discrimination based on race, color, creed, sex, age, national origin, physical handicap, disability, genetic information, or any other consideration made unlawful by federal, state, or local laws. All such discrimination is unlawful and Contractor agrees during the term of the agreement that Contractor will strictly adhere to this policy in its employment practices and provision of services. Contractor shall comply with, and all activities under this agreement shall be subject to, all applicable federal, State of Mississippi, and local laws and regulations, as now existing and as may be amended or modified.

(*Language substantially similar to the following clause shall be inserted in all Mississippi contracts requiring PSCRB approval.*)

**STOP WORK ORDER**

(1) *Order to Stop Work:* The procurement officer, may, by written order to Contractor at any time, and without notice to any surety, require Contractor to stop all or any part of the work called for by this contract. This order shall be for a specified period not exceeding 90 days after the order is delivered to Contractor, unless the parties agree to any further period. Any such order shall be identified specifically as a stop work order issued pursuant to this clause. Upon receipt of such an order, Contractor shall forthwith comply with its terms and take all reasonable steps to minimize the occurrence of costs allocable to the work covered by the order during the period of work stoppage. Before the stop work order expires, or within any further period to which the parties shall have agreed, the procurement officer shall either:

(a) cancel the stop work order; or,

(b) terminate the work covered by such order as provided in the Termination for Default clause or the Termination for Convenience clause of this contract.

(2) *Cancellation or Expiration of the Order:* If a stop work order issued under this clause is canceled at any time during the period specified in the order, or if the period of the order or any extension thereof expires, Contractor shall have the right to resume work. An appropriate adjustment shall be made in the delivery schedule or Contractor price, or both, and the contract shall be modified in writing accordingly, if:

(a) the stop work order results in an increase in the time required for, or in Contractor's cost properly allocable to, the performance of any part of this contract; and,

(b) Contractor asserts a claim for such an adjustment within 30 days after the end of the period of work stoppage; provided that, if the procurement officer decides that the facts

justify such action, any such claim asserted may be received and acted upon at any time prior to final payment under this contract.

(3) *Termination of Stopped Work:* If a stop work order is not canceled and the work covered by such order is terminated for default or convenience, the reasonable costs resulting from the stop work order shall be allowed by adjustment or otherwise.

(4) *Adjustments of Price:* Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment clause of this contract.

**E-PAYMENT**

Contractor agrees to accept all payments in United States currency via the State of Mississippi's electronic payment and remittance vehicle. The agency agrees to make payment in accordance with Mississippi law on "Timely Payments for Purchases by Public Bodies," which generally provides for payment of undisputed amounts by the agency within forty-five (45) days of receipt of invoice. Miss. Code Ann. § 31-7-305 (1972, as amended).

**E-VERIFICATION**

If applicable, Contractor represents and warrants that it will ensure its compliance with the Mississippi Employment Protection Act of 2008, and will register and participate in the status verification system for all newly hired employees. Miss. Code Ann. §§ 71-11-1 *et seq.* (1972, as amended). The term "employee" as used herein means any person that is hired to perform work within the State of Mississippi. As used herein, "status verification system" means the Illegal Immigration Reform and Immigration Responsibility Act of 1996 that is operated by the United States Department of Homeland Security, also known as the E-Verify Program, or any other successor electronic verification system replacing the E-Verify Program. Contractor agrees to maintain records of such compliance. Upon request of the State and after approval of the Social Security Administration or Department of Homeland Security when required, Contractor agrees to provide a copy of each such verification. Contractor further represents and warrants that any person assigned to perform services hereafter meets the employment eligibility requirements of all immigration laws. The breach of this agreement may subject Contractor to the following:

(1) termination of this contract for services and ineligibility for any state or public contract in Mississippi for up to three (3) years with notice of such cancellation/termination being made public;

(2) the loss of any license, permit, certification or other document granted to Contractor by an agency, department or governmental entity for the right to do business in Mississippi for up to one (1) year; or,

(3) both. In the event of such cancellation/termination, Contractor would also be liable for any additional costs incurred by the State due to Contract cancellation or loss of license or permit to do business in the State.

**TRANSPARENCY**

This contract, including any accompanying exhibits, attachments, and appendices, is subject to the "Mississippi Public Records Act of 1983," and its exceptions. See Miss. Code Ann. §§ 25-61-1 *et seq.* (1972, as amended) and Miss. Code Ann. § 79-23-1 (1972, as amended). In addition, this contract is subject to the provisions of the Mississippi Accountability and Transparency Act of 2008. Miss. Code Ann. §§ 27-104-151 *et seq.* (1972, as amended). Unless exempted from disclosure due to a court-issued protective order, a copy of this executed contract is required to be posted to the Department of Finance and Administration's independent agency contract website for public access at http://www.transparency.mississippi.gov. Information identified by Contractor as trade secrets, or other proprietary information, including confidential vendor information or any other information which is required confidential by state or federal law or outside the applicable freedom of information statutes, will be redacted.

*Contracts, except those for contract workers paid in SPAHRS or for Contractors exempted from this rule, must include the following language:*

**PAYMODE**

Payments by state agencies using the Statewide Automated Accounting System (SAAS) shall be made and remittance information provided electronically as directed by the State. These payments shall be deposited into the bank account of Contractor's choice. The State may, at its sole discretion, require Contractor to electronically submit invoices and supporting documentation at any time during the term of this Agreement. Contractor understands and agrees that the State is exempt from the payment of taxes. All payments shall be in United States currency.

## APPENDIX E
## Required Clauses in RFP's and IFB's

The following clauses are required when soliciting bids or proposals for personal or professional services. These requirements are found throughout the Regulations but are collected here for ease of reference.

*Note: Words appearing in brackets "[ ]" may be substituted for the appropriate state agency reference.*

### APPLICABLE LAW

The contract shall be governed by and construed in accordance with the laws of the State of Mississippi, excluding its conflicts of laws, provisions, and any litigation with respect thereto shall be brought in the courts of the State. Contractor shall comply with applicable federal, state, and local laws and regulations.

*(The following clause, or one substantially similar, shall be required in RFP's or IFB's which seek multi-term contractual agreements.)*

### AVAILIBILITY OF FUNDS

It is expressly understood and agreed that the obligation of the [State] to proceed under this agreement is conditioned upon the appropriation of funds by the Mississippi State Legislature and the receipt of state and/or federal funds. If the funds anticipated for the continuing fulfillment of the agreement are, at any time, not forthcoming or insufficient, either through the failure of the federal government to provide funds or of the State of Mississippi to appropriate funds or the discontinuance or material alteration of the program under which funds were provided or if funds are not otherwise available to the [State], the [State] shall have the right upon ten (10) working days written notice to Contractor, to terminate this agreement without damage, penalty, cost or expenses to the [State] of any kind whatsoever. The effective date of termination shall be as specified in the notice of termination.

### PROCUREMENT REGULATIONS

The contract shall be governed by the applicable provisions of the *Mississippi Personal Service Contract Review Board Rules and Regulations*, a copy of which is available at 210 East Capitol, Suite 800, Jackson, Mississippi 39201 for inspection, or downloadable at http://www.mspb.ms.gov.

### COMPLIANCE WITH LAWS

Contractor understands that the [State] is an equal opportunity employer and therefore, maintains a policy which prohibits unlawful discrimination based on race, color, creed, sex, age, national origin, physical handicap, disability, genetic information, or any other consideration made unlawful by federal, state, or local laws. All such discrimination is unlawful and Contractor

agrees during the term of the agreement that Contractor will strictly adhere to this policy in its employment practices and provision of services. Contractor shall comply with, and all activities under this agreement shall be subject to, all applicable federal, State of Mississippi, and local laws and regulations, as now existing and as may be amended or modified.

(*Language substantially similar to the following clause shall be inserted in all RFP's and IFB's seeking contracts which require PSCRB approval.*)

**STOP WORK ORDER**

(1) **Order to Stop Work**: The procurement officer, may, by written order to Contractor at any time, and without notice to any surety, require Contractor to stop all or any part of the work called for by this contract. This order shall be for a specified period not exceeding 90 days after the order is delivered to Contractor, unless the parties agree to any further period. Any such order shall be identified specifically as a stop work order issued pursuant to this clause. Upon receipt of such an order, Contractor shall forthwith comply with its terms and take all reasonable steps to minimize the occurrence of costs allocable to the work covered by the order during the period of work stoppage. Before the stop work order expires, or within any further period to which the parties shall have agreed, the procurement officer shall either:

(a) cancel the stop work order; or,

(b) terminate the work covered by such order as provided in the Termination for Default clause-or the Termination for Convenience clause of this contract.

(2) **Cancellation or Expiration of the Order**: If a stop work order issued under this clause is canceled at any time during the period specified in the order, or if the period of the order or any extension thereof expires, Contractor shall have the right to resume work. An appropriate adjustment shall be made in the delivery schedule or Contractor price, or both, and the contract shall be modified in writing accordingly, if:

(a) the stop work order results in an increase in the time required for, or in Contractor's properly allocable to, the performance of any part of this contract; and,

(b) Contractor asserts a claim for such an adjustment within 30 days after the end of the period of work stoppage; provided that, if the procurement officer decides that the facts justify such action, any such claim asserted may be received and acted upon at any time prior to final payment under this contract.

(3) **Termination of Stopped Work**: If a stop work order is not canceled and the work covered by such order is terminated for default or convenience, the reasonable costs resulting from the stop work order shall be allowed by adjustment or otherwise.

(4) **Adjustments of Price:** Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment clause of this contract.

## REPRESENTATION REGARDING CONTINGENT FEES

Contractor represents that it has not retained a person to solicit or secure a state contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except as disclosed in Contractor's bid or proposal.

## REPRESENTATION REGARDING GRATUITIES

The bidder, offeror, or Contractor represents that it has not violated, is not violating, and promises that it will not violate the prohibition against gratuities set forth in Section 6-204 (Gratuities) of the *Mississippi Personal Service Contract Review Board Rules and Regulations*.

## ACKNOWLEDGMENT OF AMENDMENTS

Bidders shall acknowledge receipt of any amendment to the solicitation by signing and returning the amendment with the bid, by identifying the amendment number and date in the space provided for this purpose on the bid form, or by letter. The acknowledgment must be received by the *[agency]* by the time and at the place specified for receipt of bids.

## CERTIFICATION OF INDEPENDENT PRICE DETERMINATION

The bidder certifies that the prices submitted in response to the solicitation have been arrived at independently and without, for the purpose of restricting competition, any consultation, communication, or agreement with any other bidder or competitor relating to those prices, the intention to submit a bid, or the methods or factors used to calculate the prices bid.

*Note: The following clause shall be completed and conspicuously placed within the response bid or proposal.*

## PROSPECTIVE CONTRACTOR'S REPRESENTATION REGARDING CONTINGENT FEES

The prospective Contractor represents as a part of such Contractor's bid or proposal that such Contractor has/has not *(use applicable word or words)* retained any person or agency on a percentage, commission, or other contingent arrangement to secure this contract.

## E-PAYMENT

Contractor agrees to accept all payments in United States currency via the State of Mississippi's electronic payment and remittance vehicle. The agency agrees to make payment in accordance with Mississippi law on "Timely Payments for Purchases by Public Bodies," which generally provides for payment of undisputed amounts by the agency within forty-five (45) days of receipt of invoice. Miss. Code Ann. § 31-7-305 (1972, as amended).

## E-VERIFICATION

If applicable, Contractor represents and warrants that it will ensure its compliance with the Mississippi Employment Protection Act of 2008, and will register and participate in the status verification system for all newly hired employees. Miss. Code Ann. §§ 71-11-1 *et seq.* (1972, as amended). The term "employee" as used herein means any person that is hired to perform work within the State of Mississippi. As used herein, "status verification system" means the Illegal Immigration Reform and Immigration Responsibility Act of 1996 that is operated by the United States Department of Homeland Security, also known as the E-Verify Program, or any other successor electronic verification system replacing the E-Verify Program. Contractor agrees to maintain records of such compliance. Upon request of the State and after approval of the Social Security Administration or Department of Homeland Security when required, Contractor agrees to provide a copy of each such verification. Contractor further represents and warrants that any person assigned to perform services hereafter meets the employment eligibility requirements of all immigration laws. The breach of this agreement may subject Contractor to the following:

(1) termination of this contract for services and ineligibility for any state or public contract in Mississippi for up to three (3) years with notice of such cancellation/termination being made public;

(2) the loss of any license, permit, certification or other document granted to Contractor by an agency, department or governmental entity for the right to do business in Mississippi for up to one (1) year; or,

(3) both. In the event of such cancellations/termination, Contractor would also be liable for any additional costs incurred by the State due to Contract cancellation or loss of license or permit to do business in the State.

## TRANSPARENCY

This contract, including any accompanying exhibits, attachments, and appendices, is subject to the "Mississippi Public Records Act of 1983," and its exceptions. See Miss. Code Ann. §§ 25-61-1 *et seq.*, (1972, as amended) and Miss. Code Ann. § 79-23-1 (1972, as amended). In addition, this contract is subject to the provisions of the Mississippi Accountability and Transparency Act of 2008. Miss. Code Ann. §§ 27-104-151 *et seq.* (1972, as amended). Unless exempted from disclosure due to a court-issued protective order, a copy of this executed contract is required to be posted to the Department of Finance and Administration's independent agency contract website for public access at http://www.transparency.mississippi.gov. Information identified by Contractor as trade secrets, or other proprietary information, including confidential vendor information, or any other information which is required confidential by state or federal law or outside the applicable freedom of information statutes, will be redacted.

*Contracts, except those for contract workers paid in SPAHRS or for Contractors exempted from this rule, must include the following language:*

**PAYMODE**

Payments by state agencies using the Statewide Automated Accounting System (SAAS) shall be made and remittance information provided electronically as directed by the State. These payments shall be deposited into the bank account of Contractor's choice. The State may, at its sole discretion, require Contractor to electronically submit invoices and supporting documentation at any time during the term of this Agreement. Contractor understands and agrees that the State is exempt from the payment of taxes. All payments shall be in United States currency.

## APPENDIX F
## Clauses Available for Use in Service Contracts

Appendix F includes (alphabetically by title) various service contracting clauses which are available for use. Many clauses require the inclusion of additional information. A word or phrase in square brackets indicates that the information identified is to be inserted (e.g., *[time], [date]).* Clarifications of clauses are in parentheses within or at the end of the clause. These are discretionary and the agency is neither required to use them nor prohibited from using others which are not included in this appendix.

### ALTERNATIVE BIDS

Bidders offering service delivery methods other than those permitted by the scope of work may submit a separate envelope clearly marked "Alternative Bid". Alternative bids will be deemed non-responsive and will not be considered for award. All such responses will; however, be examined prior to award. Such examination may result in cancellation of all bids received to permit rewriting the scope of work to include the alternative method, or the alternative method may be considered for future requirements of the *[agency]*.

### ANTI-ASSIGNMENT/SUBCONTRACTING

Contractor acknowledges that it was selected by the State to perform the services required hereunder based, in part, upon Contractor's special skills and expertise. Contractor shall not assign, subcontract, or otherwise transfer this agreement, in whole or in part, without the prior written consent of the State, which the State may, in its sole discretion, approve or deny without reason. Any attempted assignment or transfer of its obligations without such consent shall be null and void. No such approval by the State of any subcontract shall be deemed in any way to provide for the incurrence of any obligation of the State in addition to the total fixed price agreed upon in this agreement. Subcontracts shall be subject to the terms and conditions of this agreement and to any conditions of approval that the State may deem necessary. Subject to the foregoing, this agreement shall be binding upon the respective successors and assigns of the parties.

### ANTITRUST

By entering into a contract, Contractor conveys, sells, assigns, and transfers to the *[agency]* all rights, titles, and interest it may now have, or hereafter acquire, under the antitrust laws of the United States and the State that relate to the particular goods or services purchased or acquired by the *[agency]* under said contract.

### APPROVAL

It is understood that this contract requires approval by the Personal Service Contract Review Board. If this contract is not approved, it is void and no payment shall be made hereunder.

## ATTORNEY'S FEES AND EXPENSES

Subject to other terms and conditions of this agreement, in the event Contractor defaults in any obligations under this agreement, Contractor shall pay to the State all costs and expenses (including, without limitation, investigative fees, court costs, and attorney's fees) incurred by the State in enforcing this agreement or otherwise reasonably related thereto. Contractor agrees that under no circumstances shall the customer be obligated to pay any attorney's fees or costs of legal action to Contractor.

## AUTHORITY TO CONTRACT

Contractor warrants: (a) that it is a validly organized business with valid authority to enter into this agreement; (b) that it is qualified to do business and in good standing in the State of Mississippi; (c) that entry into and performance under this agreement is not restricted or prohibited by any loan, security, financing, contractual, or other agreement of any kind; and, (d) notwithstanding any other provision of this agreement to the contrary, that there are no existing legal proceedings or prospective legal proceedings, either voluntary or otherwise, which may adversely affect its ability to perform its obligations under this agreement.

## CHANGE IN SCOPE OF WORK

The *[agency]* may order changes in the work consisting of additions, deletions, or other revisions within the general scope of the contract. No claims may be made by Contractor that the scope of the project or of Contractor's services has been changed, requiring changes to the amount of compensation to Contractor or other adjustments to the contract, unless such changes or adjustments have been made by written amendment to the contract signed by the *[agency]* and Contractor.

If Contractor believes that any particular work is not within the scope of the project, is a material change, or will otherwise require more compensation to Contractor, Contractor must immediately notify the *[agency]* in writing of this belief. If the *[agency]* believes that the particular work is within the scope of the contract as written, Contractor will be ordered to and shall continue with the work as changed and at the cost stated for the work within the contract.

## CLAIMS BASED ON A PROCUREMENT OFFICER'S ACTIONS OR OMISSIONS

(1) **Notice of Claim**. If any action or omission on the part of a procurement officer or designee of such officer requiring performance changes within the scope of the contract constitutes the basis for a claim by Contractor for additional compensation, damages, or an extension of time for completion, Contractor shall continue with performance of the contract in compliance with the directions or orders of such officials, but by so doing, Contractor shall not be deemed to have prejudiced any claim for additional compensation, damages, or an extension of time for completion; provided:

(a) Contractor shall have given written notice to the procurement officer or designee of such officer:

i. prior to the commencement of the work involved, if at that time Contractor knows of the occurrence of such action or omission;

ii. within 30 days after Contractor knows of the occurrence of such action or omission, if Contractor did not have such knowledge prior to the commencement of the work; or,

iii. within such further time as may be allowed by the procurement officer in writing.

This notice shall state that Contractor regards the act or omission as a reason which may entitle Contractor to additional compensation, damages, or an extension of time. The procurement officer or designee of such officer, upon receipt of such notice, may rescind such action, remedy such omission, or take such other steps as may be deemed advisable in the discretion of the procurement officer or designee of such officer;

(b) the notice required by subparagraph (a) of this paragraph describes, as clearly as practicable at the time, the reasons why Contractor believes that additional compensation, damages, or an extension of time may be remedies to which Contractor is entitled; and,

(c) Contractor maintains and, upon request, makes available to the procurement officer within a reasonable time, detailed records to the extent practicable, of the claimed additional costs or basis for an extension of time in connection with such changes.

(2) **Limitation of Clause**. Nothing contained herein shall excuse Contractor from compliance with any rules of law precluding state officers and Contractors from acting in collusion or bad faith in issuing or performing change orders which are clearly not within the scope of the contract.

(3) **Adjustment of Price**. Any adjustment in the contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment clause of this contract.

**CONFIDENTIAL INFORMATION**

"Confidential Information" shall mean: (a) those materials, documents, data, and other information which Contractor has designated in writing as proprietary and confidential; and, (b) all data and information which Contractor acquires as a result of its contact with and efforts on behalf of the customer and any other information designated in writing as confidential by the State. Each party to this agreement agrees to the following:

(1) to protect all confidential information provided by one party to the other;

(2) to treat all such confidential information as confidential to the extent that confidential treatment is allowed under state and/or federal law; and,

(3) except as otherwise required by law, not to publish or disclose such information to any third party without the other party's written permission; and,

(4) to do so by using those methods and procedures normally used to protect the party's own confidential information.

Any liability resulting from the wrongful disclosure of confidential information on the part of Contractor or its subcontractor shall rest with Contractor. Disclosure of any confidential information by Contractor or its subcontractor without the express written approval of the customer shall result in the immediate termination of this agreement.

**CONFIDENTIALITY**

Notwithstanding any provision to the contrary contained herein, it is recognized that *[agency]* is a public agency of the State of Mississippi and is subject to the Mississippi Public Records Act. Miss. Code Ann. §§ 25-61-1 *et seq*. (1972, as amended). If a public records request is made for any information provided to *[agency]* pursuant to the agreement, *[agency]* shall promptly notify the disclosing party of such request and will respond to the request only in accordance with the procedures and limitations set forth in applicable law. The disclosing party shall promptly institute appropriate legal proceedings to protect its information. No party to the agreement shall be liable to the other party for disclosures of information required by court order or required by law.

**CONTRACTOR PERSONNEL**

The *[agency]* shall, throughout the life of the contract, have the right of reasonable rejection and approval of staff or subcontractors assigned to the work by Contractor. If the *[agency]* reasonably rejects staff or subcontractors, Contractor must provide replacement staff or subcontractors satisfactory to the *[agency]* in a timely manner and at no additional cost to the *[agency]*. The day-to-day supervision and control of Contractor's employees and subcontractors is the sole responsibility of Contractor.

**COPYRIGHTS**

Contractor agrees that *[agency]* shall determine the disposition of the title to and the rights under any copyright by Contractor or employees on copyrightable material first produced or composed under this agreement. Further, Contractor hereby grants to *[agency]* a royalty-free, nonexclusive, irrevocable license to reproduce, translate, publish, use and dispose of, and to authorize others to do so, all copyrighted (or copyrightable) work not first produced or composed by Contractor in the performance of this agreement, but which is incorporated in the material furnished under the agreement. This grant is provided that such license shall be only to the extent Contractor now has, or prior to the completion of full final settlements of agreement may acquire, the right to grant such license without becoming liable to pay compensation to others solely because of such grant.

**DEBARMENT AND SUSPENSION**

Contractor certifies to the best of its knowledge and belief, that it:

(1) is not presently debarred, suspended, proposed for debarment, declared ineligible, or

voluntarily excluded from covered transaction by any federal department or agency or any political subdivision or agency of the State of Mississippi;

(2) has not, within a three year period preceding this proposal, been convicted of or had a civil judgment rendered against it for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state, or local) transaction or contract under a public transaction;

(3) has not, within a three year period preceding this proposal, been convicted of or had a civil judgment rendered against it for a violation of federal or state antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(4) is not presently indicted for or otherwise criminally or civilly charged by a governmental entity (federal, state or local) with commission of any of these offenses enumerated in paragraphs two (2) and (3) of this certification; and,

(5) has not, within a three year period preceding this proposal, had one or more public transactions (federal, state, or local) terminated for cause or default.

**DISCLOSURE OF CONFIDENTIAL INFORMATION**

In the event that either party to this agreement receives notice that a third party requests divulgence of confidential or otherwise protected information and/or has served upon it a subpoena or other validly issued administrative or judicial process ordering divulgence of confidential or otherwise protected information that party shall promptly inform the other party and thereafter respond in conformity with such subpoena to the extent mandated by law. This section shall survive the termination or completion of this agreement. The parties agree that this section is subject to and superseded by Mississippi Code Annotated §§ 25-61-1 *et seq*. (1972, as amended).

**EXCEPTIONS TO CONFIDENTIAL INFORMATION**

Contractor and the State shall not be obligated to treat as confidential and proprietary any information disclosed by the other party ("disclosing party") which:

(1) is rightfully known to the recipient prior to negotiations leading to this agreement, other than information obtained in confidence under prior engagements;

(2) is generally known or easily ascertainable by nonparties of ordinary skill in the business of the customer;

(3) is released by the disclosing party to any other person, firm, or entity (including governmental agencies or bureaus) without restriction;

(4) is independently developed by the recipient without any reliance on confidential information;

(5) is or later becomes part of the public domain or may be lawfully obtained by the State or Contractor from any nonparty; or,

(6) is disclosed with the disclosing party's prior written consent.

**ERRORS IN EXTENSION**

If the unit price and the extension price are at variance, the unit price shall prevail.

**FAILURE TO DELIVER**

In the event of failure of Contractor to deliver services in accordance with the contract terms and conditions, the *[agency]*, after due oral or written notice, may procure the services from other sources and hold Contractor responsible for any resulting additional purchase and administrative costs. This remedy shall be in addition to any other remedies that the *[agency]* may have.

**FAILURE TO ENFORCE**

Failure by the *[agency]* at any time to enforce the provisions of the contract shall not be construed as a waiver of any such provisions. Such failure to enforce shall not affect the validity of the contract or any part thereof or the right of the *[agency]* to enforce any provision at any time in accordance with its terms.

**FINAL PAYMENT**

Upon satisfactory completion of the work performed under this contract, as a condition before final payment under this contract, or as a termination settlement under this contract, Contractor shall execute and deliver to the *[agency]* a release of all claims against the State arising under, or by virtue of, the contract, except claims which are specifically exempted by Contractor to be set forth therein. Unless otherwise provided in this contract, by state law, or otherwise expressly agreed to by the parties in this contract, final payment under the contract or settlement upon termination of this contract shall not constitute waiver of the State's claims against Contractor under this contract.

**FORCE MAJEURE**

Each party shall be excused from performance for any period and to the extent that it is prevented from performing any obligation or service, in whole or in part, as a result of causes beyond the reasonable control and without the fault or negligence of such party and/or its subcontractors. Such acts shall include without limitation acts of God, strikes, lockouts, riots, acts of war, epidemics, governmental regulations superimposed after the fact, fire, earthquakes, floods, or other natural disasters ("force majeure events"). When such a cause arises, Contractor shall notify the State immediately in writing of the cause of its inability to perform, how it affects its performance, and the anticipated duration of the inability to perform. Delays in delivery or in meeting completion dates due to force majeure events shall automatically extend such dates for a period equal to the duration of the delay caused by such events, unless the State determines it to be in its best interest to terminate the agreement.

## HIPAA COMPLIANCE

Contractor agrees to comply with the "Administrative Simplification" provisions of the Health Insurance Portability and Accountability Act of 1996, including electronic data interchange, code sets, identifiers, security, and privacy provisions, as may be applicable to the services under this contract.

## INDEMNIFICATION

To the fullest extent allowed by law, Contractor shall indemnify, defend, save and hold harmless, protect, and exonerate the agency, its commissioners, board members, officers, employees, agents, and representatives, and the State of Mississippi from and against all claims, demands, liabilities, suits, actions, damages, losses, and costs of every kind and nature whatsoever including, without limitation, court costs, investigative fees and expenses, and attorney's fees, arising out of or caused by Contractor and/or its partners, principals, agents, employees and/or subcontractors in the performance of or failure to perform this agreement. In the State's sole discretion, Contractor may be allowed to control the defense of any such claim, suit, etc. In the event Contractor defends said claim, suit, etc., Contractor shall use legal counsel acceptable to the State. Contractor shall be solely responsible for all costs and/or expenses associated with such defense, and the State shall be entitled to participate in said defense. Contractor shall not settle any claim, suit, etc. without the State's concurrence, which the State shall not unreasonably withhold.

## INDEMNIFICATION (for contracts between two state agencies or entities)

Contractor's tort liability, as an entity of the State of Mississippi, is determined and controlled in accordance with Mississippi Code Annotated §§ 11-46-1 *et seq*. (1972, as amended), including all defenses and exceptions contained therein. Nothing in this agreement shall have the effect of changing or altering this liability or of eliminating any defense available to the State under statute.

## INDEPENDENT CONTRACTOR STATUS

Contractor shall, at all times, be regarded as and shall be legally considered an independent contractor and shall at no time act as an agent for the State. Nothing contained herein shall be deemed or construed by the State, Contractor, or any third party as creating the relationship of principal and agent, master and servant, partners, joint ventures, employer and employee, or any similar such relationship between the State and Contractor. Neither the method of computation of fees or other charges, nor any other provision contained herein, nor any acts of the State or Contractor hereunder creates, or shall be deemed to create a relationship other than the independent relationship of the State and Contractor. Contractor's personnel shall not be deemed in any way, directly or indirectly, expressly or by implication, to be employees of the State. Neither Contractor nor its employees shall, under any circumstances, be considered servants, agents, or employees of the *[agency]*, and the *[agency]* shall be at no time legally responsible for any negligence or other wrongdoing by Contractor, its servants, agents, or employees. The *[agency]* shall not withhold from the contract payments to Contractor any federal or state unemployment taxes, federal or state income taxes, Social Security tax, or any other amounts for

benefits to Contractor. Further, the *[agency]* shall not provide to Contractor any insurance coverage or other benefits, including Worker's Compensation, normally provided by the State for its employees.

**INFRINGEMENT INDEMNIFICATION**

Contractor warrants that the materials and deliverables provided to the customer under this agreement, and their use by the customer, will not infringe or constitute an infringement of any copyright, patent, trademark, or other proprietary right. Should any such items become the subject of an infringement claim or suit, Contractor shall defend the infringement action and/or obtain for the customer the right to continue using such items. Should Contractor fail to obtain for the customer the right to use such items, Contractor shall suitably modify them to make them non-infringing or substitute equivalent software or other items at Contractor's expense. In the event the above remedial measures cannot possibly be accomplished, and only in that event, Contractor may require the customer to discontinue using such items, in which case Contractor will refund to the customer the fees previously paid by the customer for the items the customer may no longer use, and shall compensate the customer for the lost value of the infringing part to the phase in which it was used, up to and including the contract price for said phase. Said refund shall be paid within ten (10) working days of notice to the customer to discontinue said use.

Scope of Indemnification: Provided that the State promptly notifies Contractor in writing of any alleged infringement claim of which it has knowledge, Contractor shall defend, at its own expense, the State against, and pay all costs, damages and attorney fees that a court finally awards for infringement based on the programs and deliverables provided under this agreement.

**INSURANCE**

Contractor represents that it will maintain workers' compensation insurance which shall inure to the benefit of all Contractor's personnel provided hereunder, comprehensive general liability or professional liability insurance, with minimum limits of $_____ per occurrence and fidelity bond insurance with minimum limits of $_____. All general liability, professional liability and fidelity bond insurance will provide coverage to the *[agency]* as an additional insured. The *[agency]* reserves the right to request from carriers, certificates of insurance regarding the required coverage. Insurance carriers must be licensed or hold a Certificate of Authority from the Mississippi Department of Insurance.

**INTEGRATED AGREEMENT/MERGER**

This agreement, including all contract documents, represents the entire and integrated agreement between the parties hereto and supersedes all prior negotiations, representations or agreements, irrespective of whether written or oral. This agreement may be altered, amended, or modified only by a written document executed by the State and Contractor. Contractor acknowledges that it has thoroughly read all contract documents and has had the opportunity to receive competent advice and counsel necessary for it to form a full and complete understanding of all rights and obligations herein. Accordingly, this agreement shall not be construed or interpreted in favor of or against the State or Contractor on the basis of draftsmanship or preparation hereof.

## LIQUIDATED DAMAGES

*With Termination for Default Clause*: The following clause is authorized for use in service contracts when it is difficult to determine with reasonable accuracy the amount of damage to the State due to delays caused by late Contractor performance or nonperformance and the contract contains the Termination for Default clause set forth in Section 4-101.05.

**Liquidated Damages**

> When Contractor is given notice of delay or nonperformance as specified in Paragraph (1) (Default) of the Termination for Default clause of this contract and fails to cure in the time specified, Contractor shall be liable for damages for delay in the amount of $_____ per calendar day from date set for cure until either the State reasonably obtains similar services if Contractor is terminated for default, or until Contractor provides the services if Contractor is not terminated for default. To the extent that Contractor's delay or nonperformance is excused under Paragraph (4) (Excuse for Nonperformance or Delayed Performance) of the Termination for Default clause of this contract, liquidated damages shall not be due the State. Contractor remains liable for damages caused other than by delay.

*In Other Situations:* If the contract will not have a Termination for Default clause or the liquidated damages are to be assessed for reasons other than delay, the head of a purchasing agency may approve the use of any appropriate liquidated damages clause.

## MODIFICATION OR RENEGOTIATION

This agreement may be modified only by written agreement signed by the parties hereto. The parties agree to renegotiate the agreement if federal and/or state revisions of any applicable laws or regulations make changes in this agreement necessary.

## NO LIMITATION OF LIABILITY

Nothing in this agreement shall be interpreted as excluding or limiting any tort liability of Contractor for harm caused by the intentional or reckless conduct of Contractor or for damages incurred through the negligent performance of duties by Contractor or the delivery of products that are defective due to negligent construction.

## NOTICES

All notices required or permitted to be given under this agreement must be in writing and personally delivered or sent by certified United States mail, postage prepaid, return receipt requested, to the party to whom the notice should be given at the address set forth below. Notice shall be deemed given when actually received or when refused. The parties agree to promptly notify each other in writing of any change of address.

For Contractor: *name, title, Contractor, address*

For the agency: *name, title, agency, address*

**NON-SOLICITATION OF EMPLOYEES**

Each party to this agreement agrees not to employ or to solicit for employment, directly or indirectly, any persons in the full-time or part-time employment of the other party until at least six (6) months after this agreement terminates unless mutually agreed to in writing by the State and Contractor.

**ORAL STATEMENTS**

No oral statement of any person shall modify or otherwise affect the terms, conditions, or specifications stated in this contract. All modifications to the contract must be made in writing by the *[agency]* and agreed to by Contractor.

**OWNERSHIP OF DOCUMENTS AND WORK PAPERS**

*[Agency]* shall own all documents, files, reports, work papers and working documentation, electronic or otherwise, created in connection with the project which is the subject of this agreement, except for Contractor's internal administrative and quality assurance files and internal project correspondence. Contractor shall deliver such documents and work papers to *[agency]* upon termination or completion of the agreement. The foregoing notwithstanding, Contractor shall be entitled to retain a set of such work papers for its files. Contractor shall be entitled to use such work papers only after receiving written permission from *[agency]* and subject to any copyright protections.

**PATENTS AND ROYALTIES**

Contractor covenants to save, defend, keep harmless, and indemnify the *[agency]* and all of its officers, departments, agencies, agents, and employees from and against all claims, loss, damage, injury, fines, penalties, and cost--including court costs and attorney's fees, charges, liability, and exposure, however caused--for or on account of any copyright or patented or unpatented invention, process, or article manufactured or used in the performance of the contract, including its use by the *[agency]*. If Contractor uses any design, device, or material covered by patent or copyright, it is mutually agreed and understood without exception that the contract price includes all royalties or costs arising from the use of such design, device, or materials in any way in the work.

**PRICE ADJUSTMENT**

(1) *Price Adjustment Methods*. Any adjustments in contract price, pursuant to a clause in this contract, shall be made in one or more of the following ways:

(a) by agreement on a fixed price adjustment before commencement of the additional performance;

(b) by unit prices specified in the contract;

(c) by the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as specified in the contract; or,

(d) by the price escalation clause.

(2) *Submission of Cost or Pricing Data*. Contractor shall provide cost or pricing data for any price adjustments subject to the provisions of Section 3-403 (Cost or Pricing Data) of the *Mississippi Personal Service Contract Review Board Rules and Regulations*.

**PRIORITY**

The contract consists of this agreement, the request for proposal *[number]* (hereinafter "RFP" and attached as Schedule [ _____ ]), and the response proposal by *[Contractor]* dated *[date]* (hereinafter "Proposal" and attached as Schedule [ _____ ]). Any ambiguities, conflicts or questions of interpretation of this contract shall be resolved by first, reference to this agreement and, if still unresolved, by reference to the RFP and, if still unresolved, by reference to the proposal. Omission of any term or obligation from this agreement or attached Schedules [ ____ ] or [ ____ ] shall not be deemed an omission from this contract if such term or obligation is provided for elsewhere in this contract.

**QUALITY CONTROL**

Contractor shall institute and maintain throughout the contract period a properly documented quality control program designed to ensure that the services are provided at all times and in all respects in accordance with the contract. The program shall include providing daily supervision and conducting frequent inspections of Contractor's staff and ensuring that accurate records are maintained describing the disposition of all complaints. The records so created shall be open to inspection by the *[agency]*.

**RECORD RETENTION AND ACCESS TO RECORDS**

Provided Contractor is given reasonable advance written notice and such inspection is made during normal business hours of Contractor, the State or any duly authorized representatives shall have unimpeded, prompt access to any of Contractor's books, documents, papers, and/or records which are maintained or produced as a result of the project for the purpose of making audits, examinations, excerpts, and transcriptions. All records related to this agreement shall be retained by Contractor for three (3) years after final payment is made under this agreement and all pending matters are closed; however, if any audit, litigation or other action arising out of or related in any way to this project is commenced before the end of the three (3) year period, the records shall be retained for one (1) year after all issues arising out of the action are finally resolved or until the end of the three (3) year period, whichever is later.

## RECOVERY OF MONEY

Whenever, under the contract, any sum of money shall be recoverable from or payable by Contractor to the *[agency]*, the same amount may be deducted from any sum due to Contractor under the contract or under any other contract between Contractor and the *[agency]*. The rights of the *[agency]* are in addition and without prejudice to any other right the *[agency]* may have to claim the amount of any loss or damage suffered by the *[agency]* on account of the acts or omissions of Contractor.

## RENEWAL OF CONTRACT

*(Use this clause when the Contractor **cannot** decline a renewal.)*

The contract may be renewed at the discretion of the agency upon written notice to Contractor at least [number] days prior to each contract anniversary date for a period of [number] successive one-year periods under the same prices, terms, and conditions as in the original contract. The total number of renewal years permitted shall not exceed [number].

*(Use this clause when the Contractor **has** the right to decline the renewal.)*

Upon written agreement of both parties at least [number] days prior to each contract anniversary date, the contract may be renewed by the *[agency]* for a period of [number] successive one-year period(s) under the same prices, terms, and conditions as in the original contract. The total number of renewal years permitted shall not exceed [number].

## REQUIREMENTS CONTRACT

During the period of the contract, Contractor shall provide all the service described in the contract. Contractor understands and agrees that this is a requirements contract and that the *[agency]* shall have no obligation to Contractor if no services are required. Any quantities that are included in the scope of work reflect the current expectations of the *[agency]* for the period of the contract. The amount is only an estimate and Contractor understands and agrees that the *[agency]* is under no obligation to Contractor to buy any amount of the services as a result of having provided this estimate or of having any typical or measurable requirement in the past. Contractor further understands and agrees that the *[agency]* may require services in an amount less than or in excess of the estimated annual contract amount and that the quantity actually used, whether in excess of the estimate or less than the estimate, shall not give rise to any claim for compensation other than the total of the unit prices in the contract for the quantity actually used.

## RIGHT TO AUDIT

Contractor shall maintain such financial records and other records as may be prescribed by the *[agency]* or by applicable federal and state laws, rules, and regulations. Contractor shall retain these records for a period of three years after final payment, or until they are audited by the *[agency]*, whichever event occurs first. These records shall be made available during the term of the contract and the subsequent three-year period for examination, transcription, and audit by the Mississippi State Auditor's Office, its designees, or other authorized bodies.

## RIGHT TO INSPECT FACILITY

The State may, at reasonable times, inspect the place of business of a Contractor or any subcontractor which is related to the performance of any contract awarded by the State.

## SEVERABILITY

If any part of this agreement is declared to be invalid or unenforceable, such invalidity or unenforceability shall not affect any other provision of the agreement that can be given effect without the invalid or unenforceable provision, and to this end the provisions hereof are severable. In such event, the parties shall amend the agreement as necessary to reflect the original intent of the parties and to bring any invalid or unenforceable provisions in compliance with applicable law.

## STATE PROPERTY

Contractor will be responsible for the proper custody and care of any state-owned property furnished for Contractor's use in connection with the performance of this agreement. Contractor will reimburse the State for any loss or damage, normal wear and tear excepted.

## TERMINATION FOR CONVENIENCE

(1) *Termination*. The procurement officer may, when the interests of the State so require, terminate this contract in whole or in part, for the convenience of the State. The procurement officer shall give written notice of the termination to Contractor specifying the part of the contract terminated and when termination becomes effective.

(2) *Contractor's Obligations*. Contractor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination Contractor will stop work to the extent specified. Contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. Contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The procurement officer may direct Contractor to assign Contractor's right, title, and interest under terminated orders or subcontracts to the State. Contractor must still complete the work not terminated by the notice of termination and may incur obligations as are necessary to do so.

## TERMINATION FOR DEFAULT

(1) *Default*. If Contractor refuses or fails to perform any of the provisions of this contract with such diligence as will ensure its completion within the time specified in this contract or any extension thereof, or otherwise fails to timely satisfy the contract provisions, or commits any other substantial breach of this contract, the procurement officer may notify Contractor in writing of the delay or nonperformance and if not cured in ten (10) days or any longer time specified in writing by the procurement officer, such officer may terminate Contractor's right to proceed with the contract or such part of the contract as to which there has been delay or a failure to properly perform. In the event of termination in whole or in part, the procurement

officer may procure similar supplies or services in a manner and upon terms deemed appropriate by the procurement officer. Contractor shall continue performance of the contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services.

(2) *Contractor's Duties*. Notwithstanding termination of the contract and subject to any directions from the procurement officer, Contractor shall take timely, reasonable, and necessary action to protect and preserve property in the possession of Contractor in which the State has an interest.

(3) *Compensation*. Payment for completed services delivered and accepted by the State shall be at the contract price. The State may withhold from amounts due Contractor such sums as the procurement officer deems to be necessary to protect the State against loss because of outstanding liens or claims of former lien holders and to reimburse the State for the excess costs incurred in procuring similar goods and services.

(4) *Excuse for Nonperformance or Delayed Performance*. Except with respect to defaults of subcontractors, Contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms (including any failure by Contractor to make progress in the prosecution of the work hereunder which endangers such performance) if Contractor has notified the procurement officer within 15 days after the cause of the delay and the failure arises out of causes such as: acts of God; acts of the public enemy; acts of the State and any other governmental entity in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather. If the failure to perform is caused by the failure of a subcontractor to perform or to make progress, and if such failure arises out of causes similar to those set forth above, Contractor shall not be deemed to be in default, unless the services to be furnished by the subcontractor were reasonably obtainable from other sources in sufficient time to permit Contractor to meet the contract requirements. Upon request of Contractor, the procurement officer shall ascertain the facts and extent of such failure, and, if such officer determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, Contractor's progress and performance would have met the terms of the contract, the delivery schedule shall be revised accordingly, subject to the rights of the State under the clause entitled (in fixed-price contracts, "Termination for Convenience," in cost-reimbursement contracts, "Termination"). (As used in this Paragraph of this clause, the term "subcontractor" means subcontractor at any tier).

(5) *Erroneous Termination for Default*. If, after notice of termination of Contractor's right to proceed under the provisions of this clause, it is determined for any reason that the contract was not in default under the provisions of this clause, or that the delay was excusable under the provisions of Paragraph (4) (Excuse for Nonperformance or Delayed Performance) of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the State, be the same as if the notice of termination had been issued pursuant to such clause.

(6) *Additional Rights and Remedies*. The rights and remedies provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

## TERMINATION UPON BANKRUPTCY

This contract may be terminated in whole or in part by *[agency]* upon written notice to Contractor, if Contractor should become the subject of bankruptcy or receivership proceedings, whether voluntary or involuntary, or upon the execution by Contractor of an assignment for the benefit of its creditors. In the event of such termination, Contractor shall be entitled to recover just and equitable compensation for satisfactory work performed under this contract, but in no case shall said compensation exceed the total contract price.

## THIRD PARTY ACTION NOTIFICATION

Contractor shall give the customer prompt notice in writing of any action or suit filed, and prompt notice of any claim made against Contractor by any entity that may result in litigation related in any way to this agreement.

## UNSATISFACTORY WORK

If, at any time during the contract term, the service performed or work done by Contractor is considered by the *[agency]* to create a condition that threatens the health, safety, or welfare of the citizens and/or employees of the State of Mississippi, Contractor shall, on being notified by the *[agency]*, immediately correct such deficient service or work. In the event Contractor fails, after notice, to correct the deficient service or work immediately, the *[agency]* shall have the right to order the correction of the deficiency by separate contract or with its own resources at the expense of Contractor.

## VARIATIONS IN ESTIMATED QUANTITIES

*Definite Quantity Contracts:* The following clause is authorized for use in definite quantity service contracts:

### VARIATION IN QUANTITY

Upon the agreement of the parties, the quantity of services specified in this contract may be increased by a maximum of ten percent provided:

(1) the unit prices will remain the same (except for any price adjustments otherwise applicable); and,

(2) the procurement officer makes a written determination that such an increase will either be more economical than awarding another contract, or that it would not be practical to award another contract.

*Indefinite Quantity Contracts*: No clause is provided here because, in indefinite quantity contracts, the flexibility as to the State's obligation to order and Contractor's obligation to deliver should be designed to meet using agency needs while making the contract as attractive as possible to potential Contractors, thereby attempting to obtain maximum practicable competition

in order to assure the best economy for the State of Mississippi; however, in each case, the contract should State:

(1) the minimum quantity, if any, the State is obligated to order and Contractor to provide;

(2) whether there is a quantity the State expects to order and how this quantity relates to any minimum and maximum quantities that may be ordered under the contract;

(3) any maximum quantity the State may order and Contractor must provide; and,

(4) whether the State is obligated to order its actual requirements under the contract, or in the case of a multiple award as defined in Section 3-504 (Multiple Source Contracting), that the State will order its actual requirements from Contractors under the multiple award subject to any minimum or maximum quantity stated.

**WAIVER**

No delay or omission by either party to this agreement in exercising any right, power, or remedy hereunder or otherwise afforded by contract, at law, or in equity shall constitute an acquiescence therein, impair any other right, power or remedy hereunder or otherwise afforded by any means, or operate as a waiver of such right, power, or remedy. No waiver by either party to this agreement shall be valid unless set forth in writing by the party making said waiver. No waiver of or modification to any term or condition of this agreement will void, waive, or change any other term or condition. No waiver by one party to this agreement of a default by the other party will imply, be construed as or require waiver of future or other defaults.

## APPENDIX G
## Clauses Available for Use in Solicitations for Bids or Proposals

Unless otherwise noted, the clauses are designed to be used under competitive sealed bidding (IFB) procedures. To alter a clause so that it can be used under competitive negotiation (RFP) procedures, change the terms "bid" and "bidder" to "offer" and "offeror," "bid form" to "proposal form," "invitation for bid" to "request for proposal," and so forth. These clauses are discretionary and the agency is neither required to use them nor prohibited from using others which are not included in this appendix.

### ADDITIONAL INFORMATION

Questions about the contract portions of the bid document must be submitted in writing *to [name of contact person]* at *[address/fax machine number/email address]*. Questions concerning the technical portions of the bid document should be directed to *[name of contact person]* at *[address/fax machine number/email address]*. Bidders are cautioned that any statements made by the contract or the technical contact person that materially change any portion of the bid document shall not be relied upon unless subsequently ratified by a formal written amendment to the bid document.

### BID ACCEPTANCE PERIOD

The original and *[number]* copies of the bid form, *[number]* copies total, shall be signed and submitted in a sealed envelope or package to *[place for receipt of bids]* no later than the time and date specified for receipt of bids. Timely submission of the bid form is the responsibility of the bidder. Bids received after the specified time shall be rejected and returned to the bidder unopened. The envelope or package shall be marked with the bid opening date and time, and the number of the invitation for bid. The time and date of receipt shall be indicated on the envelope or package by *[department receiving bids]*. Each page of the bid form and all attachments shall be identified with the name of the bidder.

Failure to submit a bid on the bid form provided shall be considered just cause for rejection of the bid. Modifications or additions to any portion of the bid document may be cause for rejection of the bid. The *[agency]* reserves the right to decide, on a case-by-case basis, whether to reject a bid with modifications or additions as non-responsive. As a precondition to bid acceptance, the *[agency]* may request the bidder to withdraw or modify those portions of the bid deemed non-responsive that do not affect quality, quantity, price, or delivery of the service.

*(Non-responsive portions of the bid that do not affect service quality, quantity, price or delivery may be, for example, clauses that specify the State in which litigation is to be brought or that provide for high interest charges for late payment.)*

## BID WITHDRAWAL

If the price bid is substantially lower than those of other bidders, a mistake may have been made. A bidder may withdraw its bid from consideration if certain conditions are met:

(1) The bid is submitted in good faith

(2) The price bid is substantially lower than those of other bidders because of a mistake.

(3) The mistake is a clerical error, not an error of judgment.

(4) Objective evidence drawn from original work papers, documents, and other materials used in the preparation of the bid demonstrates clearly that the mistake was an unintentional error in arithmetic or an unintentional omission of a quantity of labor or material.

To withdraw a bid that includes a clerical error after bid opening, the bidder must give notice in writing to the *[agency]* of claim of right to withdraw a bid. Within two business days after the bid opening, the bidder requesting withdrawal must provide to the *[agency]* all original work papers, documents, and other materials used in the preparation of the bid.

A bidder may also withdraw a bid, prior to the time set for the opening of bids, by simply making a request in writing to the *[agency]*. No explanation is required.

A bidder may also withdraw a bid if the *[agency]* fails to award or issue a notice of intent to award the bid within *[time period]* after the date fixed for the opening of bids.

No bidder who is permitted to withdraw a bid shall, for compensation, supply any material or labor to or perform any subcontract or other work for the person to whom the contract is awarded, or otherwise benefit from the contract.

No partial withdrawals of a bid are permitted after the time and date set for the bid opening; only complete withdrawals are permitted.

## BIDDER CERTIFICATION

The bidder agrees that submission of a signed bid form is certification that the bidder will accept an award made to it as a result of the submission.

## BIDDER INVESTIGATIONS

Before submitting a bid, each bidder shall make all investigations and examinations necessary to ascertain all site conditions and requirements affecting the full performance of the contract and to verify any representations made by the *[agency]* upon which the bidder will rely. If the bidder receives an award as a result of its bid submission, failure to have made such investigations and examinations will in no way relieve the bidder from its obligation to comply in every detail with all provisions and requirements of the contract documents, nor will a plea of ignorance of such

conditions and requirements be accepted as a basis for any claim whatsoever for additional compensation.

## CERTIFICATES AND LICENSES

Contractor shall provide notarized copies of all valid licenses and certificates required for performance of the work. The notarized copies shall be delivered to the *[agency]* no later than ten days after Contractor receives the notice of award from the *[agency]*. Current notarized copies of licenses and certificates shall be provided to the *[agency]* within twenty-four hours of demand at any time during the contract term. Licenses and certificates required for this contract include, by way of illustration and not limitation, the following:

(1) A business license valid in *[agency]*.

(2) A professional license or certificate in the field of *[specialty area]*.

(3) *[Any additional licenses that may be required to be held by architects, health professionals, pesticide or herbicide application technicians, asbestos removal Contractors, etc.]*.

## DEBARMENT

By submitting a bid, the bidder certifies that it is not currently debarred from submitting bids for contracts issued by any political subdivision or agency of the State, and that it is not an agent of a person or entity that is currently debarred from submitting bids for contract issued by any political subdivision or agency of the State.

## EXCEPTIONS

Bidders taking exception to any part or section of the solicitation shall indicate such exceptions on the bid form. Failure to indicate any exception will be interpreted as the bidder's intent to comply fully with the requirements as written. Conditional or qualified bids, unless specifically allowed, shall be subject to rejection in whole or in part.

## EXPENSES INCURRED IN PREPARING BID

The *[agency]* accepts no responsibility for any expense incurred by the bidder in the preparation and presentation of a bid. Such expenses shall be borne exclusively by the bidder.

## INFORMALITIES AND IRREGULARITIES

The *[agency]* has the right to waive minor defects or variations of a bid from the exact requirements of the specifications that do not affect the price, quality, quantity, delivery, or performance time of the services being procured. If insufficient information is submitted by a bidder with the bid for the *[agency]* to properly evaluate the bid, the *[agency]* has the right to require such additional information as it may deem necessary after the time set for receipt of

bids, provided that the information requested does not change the price, quality, quantity, delivery, or performance time of the services being procured.

*(Information requested may include, for example, a copy of business or professional licenses, or a work schedule.)*

**LATE SUBMISSIONS**

A bid received at the place designated in the solicitation for receipt of bids after the exact time specified for receipt will not be considered unless it is the only bid received, or it is received before award is made and was sent by registered or certified mail not later than the fifth calendar day before the date specified for receipt of bids. It must be determined by the *[agency]* that the late receipt was due solely to mishandling by the *[agency]* after receipt at the specified address.

The only acceptable evidence to establish the date of mailing of a late bid is the U.S. Postal Service postmark on the wrapper or on the original receipt from the U.S. Postal Service. If the postmark does not show a legible date, the contents of the envelope or package shall be processed as if mailed late. "Postmark" means a printed, stamped, or otherwise placed impression, exclusive of a postage meter impression, that is readily identifiable without further action as having been supplied and affixed by the U.S. Postal Service on the date of mailing. Bidders should request postal clerks to place a hand cancellation postmark (often called a bull's eye) on both the receipt and the envelope or wrapper.

The only acceptable evidence to establish the time of receipt at the office identified for bid opening is the time and date stamp of that office on the bid wrapper or other documentary evidence of receipt used by that office.

**NONCONFORMING TERMS AND CONDITIONS**

A bid response that includes terms and conditions that do not conform to the terms and conditions in the bid document is subject to rejection as non-responsive. The *[agency]* reserves the right to permit the bidder to withdraw nonconforming terms and conditions from its bid response prior to a determination by the *[agency]* of non-responsiveness based on the submission of nonconforming terms and conditions.

**PRE-BID CONFERENCE (MANDATORY)**

A *mandatory* pre-bid conference will be held at *[time]* on *[date]* at *[location]*. All interested parties are required to attend. The purpose of the pre-bid conference is to allow potential bidders an opportunity to present questions to staff and obtain clarification of the requirements of the bid documents. Because the [agency] considers the conference to be critical to understanding the bid requirements, attendance is mandatory in order to qualify as a bidder. Minutes of the conference *[will/will not]* be published.

## PRE-BID CONFERENCE (OPTIONAL)

An *optiona*l pre-bid conference will be held at *[time]* on *[date]* at *[location]*. All interested parties are urged to attend. The purpose of the pre-bid conference is to allow potential bidders an opportunity to present questions to staff and obtain clarification of the requirements of the bid documents. Minutes of the conference *[will/will not]* be published.

## QUALIFICATIONS OF BIDDERS

The bidder may be required before the award of any contract to show to the complete satisfaction of the *[agency]* that it has the necessary facilities, ability, and financial resources to provide the service specified therein in a satisfactory manner. The bidder may also be required to give a past history and references in order to satisfy the *[agency]* in regard to the bidder's qualifications. The *[agency]* may make reasonable investigations deemed necessary and proper to determine the ability of the bidder to perform the work, and the bidder shall furnish to the *[agency]* all information for this purpose that may be requested. The *[agency]* reserves the right to reject any bid if the evidence submitted by, or investigation of, the bidder fails to satisfy the *[agency]* that the bidder is properly qualified to carry out the obligations of the contract and to complete the work described therein. Evaluation of the bidder's qualifications shall include:

(1) the ability, capacity, skill, and financial resources to perform the work or provide the service required;

(2) the ability of the bidder to perform the work or provide the service promptly or within the time specified, without delay or interference;

(3) the character, integrity, reputation, judgment, experience, and efficiency of the bidder; and,

(4) the quality of performance of previous contracts or services.

## SURETY REQUIRED

(1) Bid surety: A bid bond, cashier's check, or certified check in the amount of *[percentage]* of the amount of the bid made payable to the *[agency]* shall accompany each bid. The bid surety of all bidders shall be retained until after the award of the contract is made. The bid surety of the successful bidder shall be retained until the posting of a performance bond. The failure of the bidder to accept an award and file acceptable performance and payment bonds within fifteen days after award shall be just cause for cancellation of the award and the forfeiture of the bid surety to the *[agency]* as liquidated damages. Award may then be made to the next lowest responsive and responsible bidder.

(2) Performance surety: A performance bond in the amount of 100 percent of the bid shall be required of the successful bidder to ensure satisfactory completion of the work. The bond shall be a corporate surety bond issued by a surety company authorized to do business in the State of Mississippi.

(3) Payment surety: A payment bond in the amount of 100 percent of the bid shall be required of the successful bidder to guarantee payment of all persons who have and fulfill contracts with Contractor for performing labor or providing equipment or material in the performance of the work provided for in the contract. The bond shall be a corporate surety bond issued by a surety company authorized to do business in the State of Mississippi.

(4) Alternative surety: A certified check for cash escrow deposit in the face amount of the contract such as a personal bond, property bond, or a bank or savings and loan association letter of credit may be tendered in lieu of a bid, payment, or performance bond subject to approval by the *[agency]* attorney.

(5) In no event shall the requirement for a bond be waived.