

Appendices

Appendix A - Standard Special Provision Required Contract Provisions Federal-Aid Construction Contracts

Appendix B - U.S. Department of Transportation Hotline

Appendix C - North Carolina Turnpike Authority Policies and Procedures for the Procurement of Commodities and Services (February 2009)

Appendix A -
Standard Special Provision
Required Contract Provisions Federal-Aid
Construction Contracts

STANDARD SPECIAL PROVISION

REQUIRED CONTRACT PROVISIONS FEDERAL - AID CONSTRUCTION CONTRACTS

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- I. General
- II. Nondiscrimination
- III. Nonsegregated Facilities
- IV. Davis-Bacon and Related Act Provisions
- V. Contract Work Hours and Safety Standards Act Provisions
- VI. Subletting or Assigning the Contract
- VII. Safety: Accident Prevention
- VIII. False Statements Concerning Highway Projects
- IX. Implementation of Clean Air Act and Federal Water Pollution Control Act
- X. Compliance with Governmentwide Suspension and Debarment Requirements
- XI. Certification Regarding Use of Contract Funds for Lobbying

ATTACHMENTS

- A. Employment and Materials Preference for Appalachian Development Highway System or Appalachian Local Access Road Contracts (included in Appalachian contracts only)

I. GENERAL

1. Form FHWA-1273 must be physically incorporated in each construction contract funded under Title 23 (excluding emergency contracts solely intended for debris removal). The contractor (or subcontractor) must insert this form in each subcontract and further require its inclusion in all lower tier subcontracts (excluding purchase orders, rental agreements and other agreements for supplies or services).
The applicable requirements of Form FHWA-1273 are incorporated by reference for work done under any purchase order, rental agreement or agreement for other services. The prime contractor shall be responsible for compliance by any subcontractor, lower-tier subcontractor or service provider.
Form FHWA-1273 must be included in all Federal-aid design-build contracts, in all subcontracts and in lower tier subcontracts (excluding subcontracts for design services, purchase orders, rental agreements and other agreements for supplies or services). The design-builder shall be responsible for compliance by any subcontractor, lower-tier subcontractor or service provider.
Contracting agencies may reference Form FHWA-1273 in bid proposal or request for proposal documents, however, the Form FHWA-1273 must be physically incorporated (not referenced) in all contracts, subcontracts and lower-tier subcontracts (excluding purchase orders, rental agreements and other agreements for supplies or services related to a construction contract).
2. Subject to the applicability criteria noted in the following sections, these contract provisions shall apply to all work performed on the contract by the contractor's own organization and with the assistance of workers under the contractor's immediate superintendence and to all work performed on the contract by piecework, station work, or by subcontract.
3. A breach of any of the stipulations contained in these Required Contract Provisions may be sufficient grounds for withholding of progress payments, withholding of final payment, termination of the contract, suspension / debarment or any other action determined to be appropriate by the contracting agency and FHWA.
4. Selection of Labor: During the performance of this contract, the contractor shall not use convict labor for any purpose within the limits of a construction project on a Federal-aid highway unless it is labor performed by convicts who are on parole, supervised release, or probation. The term Federal-aid highway does not include roadways functionally classified as local roads or rural minor collectors.

II. NONDISCRIMINATION

The provisions of this section related to 23 CFR Part 230 are applicable to all Federal-aid construction contracts and to all related construction subcontracts of \$10,000 or more. The provisions of 23 CFR Part 230 are not applicable to material supply, engineering, or architectural service contracts.

In addition, the contractor and all subcontractors must comply with the following policies: Executive Order 11246, 41 CFR 60, 29 CFR 1625-1627, Title 23 USC Section 140, the Rehabilitation Act of 1973, as amended (29 USC 794), Title VI of the Civil Rights Act of 1964, as amended, and related regulations including 49 CFR Parts 21, 26 and 27; and 23 CFR Parts 200, 230, and 633.

The contractor and all subcontractors must comply with: the requirements of the Equal Opportunity Clause in 41 CFR 60-1.4(b) and, for all construction contracts exceeding \$10,000, the Standard Federal Equal Employment Opportunity Construction Contract Specifications in 41 CFR 60-4.3.

Note: The U.S. Department of Labor has exclusive authority to determine compliance with Executive Order 11246 and the policies of the Secretary of Labor including 41 CFR 60, and 29 CFR 1625-1627. The contracting agency and the FHWA have the authority and the responsibility to ensure compliance with Title 23 USC Section 140, the Rehabilitation Act of 1973, as amended (29 USC 794), and Title VI of the Civil Rights Act of 1964, as amended, and related regulations including 49 CFR Parts 21, 26 and 27; and 23 CFR Parts 200, 230, and 633.

The following provision is adopted from 23 CFR 230, Appendix A, with appropriate revisions to conform to the U.S. Department of Labor (US DOL) and FHWA requirements.

1. **Equal Employment Opportunity:** Equal employment opportunity (EEO) requirements not to discriminate and to take affirmative action to assure equal opportunity as set forth under laws, executive orders, rules, regulations (28 CFR 35, 29 CFR 1630, 29 CFR 1625-1627, 41 CFR 60 and 49 CFR 27) and orders of the Secretary of Labor as modified by the provisions prescribed herein, and imposed pursuant to 23 U.S.C. 140 shall constitute the EEO and specific affirmative action standards for the contractor's project activities under this contract. The provisions of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) set forth under 28 CFR 35 and 29 CFR 1630 are

incorporated by reference in this contract. In the execution of this contract, the contractor agrees to comply with the following minimum specific requirement activities of EEO:

- a. The contractor will work with the contracting agency and the Federal Government to ensure that it has made every good faith effort to provide equal opportunity with respect to all of its terms and conditions of employment and in their review of activities under the contract.
 - b. The contractor will accept as its operating policy the following statement:
"It is the policy of this Company to assure that applicants are employed, and that employees are treated during employment, without regard to their race, religion, sex, color, national origin, age or disability. Such action shall include: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship, pre-apprenticeship, and/or on-the-job training."
2. **EEO Officer:** The contractor will designate and make known to the contracting officers an EEO Officer who will have the responsibility for and must be capable of effectively administering and promoting an active EEO program and who must be assigned adequate authority and responsibility to do so.
3. **Dissemination of Policy:** All members of the contractor's staff who are authorized to hire, supervise, promote, and discharge employees, or who recommend such action, or who are substantially involved in such action, will be made fully cognizant of, and will implement, the contractor's EEO policy and contractual responsibilities to provide EEO in each grade and classification of employment. To ensure that the above agreement will be met, the following actions will be taken as a minimum:
- a. Periodic meetings of supervisory and personnel office employees will be conducted before the start of work and then not less often than once every six months, at which time the contractor's EEO policy and its implementation will be reviewed and explained. The meetings will be conducted by the EEO Officer.
 - b. All new supervisory or personnel office employees will be given a thorough indoctrination by the EEO Officer, covering all major aspects of the contractor's EEO obligations within thirty days following their reporting for duty with the contractor.
 - c. All personnel who are engaged in direct recruitment for the project will be instructed by the EEO Officer in the contractor's procedures for locating and hiring minorities and women.
 - d. Notices and posters setting forth the contractor's EEO policy will be placed in areas readily accessible to employees, applicants for employment and potential employees.
 - e. The contractor's EEO policy and the procedures to implement such policy will be brought to the attention of employees by means of meetings, employee handbooks, or other appropriate means.
4. **Recruitment:** When advertising for employees, the contractor will include in all advertisements for employees the notation: "An Equal Opportunity Employer." All such advertisements will be placed in publications having a large circulation among minorities and women in the area from which the project work force would normally be derived.
- a. The contractor will, unless precluded by a valid bargaining agreement, conduct systematic and direct recruitment through public and private employee referral sources likely to yield qualified minorities and women. To meet this requirement, the contractor will identify sources of potential minority group employees, and establish with such identified sources procedures whereby minority and women applicants may be referred to the contractor for employment consideration.
 - b. In the event the contractor has a valid bargaining agreement providing for exclusive hiring hall referrals, the contractor is expected to observe the provisions of that agreement to the extent that the system meets the contractor's compliance with EEO contract provisions. Where implementation of such an agreement has the effect of discriminating against minorities or women, or obligates the contractor to do the same, such implementation violates Federal nondiscrimination provisions.
 - c. The contractor will encourage its present employees to refer minorities and women as applicants for employment. Information and procedures with regard to referring such applicants will be discussed with employees.
5. **Personnel Actions:** Wages, working conditions, and employee benefits shall be established and administered, and personnel actions of every type, including hiring, upgrading, promotion, transfer, demotion, layoff, and termination, shall be taken without regard to race, color, religion, sex, national origin, age or disability. The following procedures shall be followed:
- a. The contractor will conduct periodic inspections of project sites to insure that working conditions and employee facilities do not indicate discriminatory treatment of project site personnel.
 - b. The contractor will periodically evaluate the spread of wages paid within each classification to determine any evidence of discriminatory wage practices.
 - c. The contractor will periodically review selected personnel actions in depth to determine whether there is evidence of discrimination. Where evidence is found, the contractor will promptly take corrective action. If the review indicates that the discrimination may extend beyond the actions reviewed, such corrective action shall include all affected persons.
 - d. The contractor will promptly investigate all complaints of alleged discrimination made to the contractor in connection with its obligations under this contract, will attempt to resolve such complaints, and will take appropriate corrective action within a reasonable time. If the investigation indicates that the discrimination may affect persons other than the complainant, such corrective action shall include such other persons. Upon completion of each investigation, the contractor will inform every complainant of all of their avenues of appeal.
6. **Training and Promotion:**
- a. The contractor will assist in locating, qualifying, and increasing the skills of minorities and women who are applicants for employment or current employees. Such efforts should be aimed at developing full journey level status employees in the type of trade or job classification involved.
 - b. Consistent with the contractor's work force requirements and as permissible under Federal and State regulations, the contractor shall make full use of training programs, i.e., apprenticeship, and on-the-job training programs for the geographical area of contract performance. In the event a special provision for training is provided under this contract, this subparagraph will be superseded as indicated in the special provision. The contracting agency may reserve training positions for persons who receive welfare assistance in accordance with 23 U.S.C. 140(a).
 - c. The contractor will advise employees and applicants for employment of available training programs and entrance requirements for each.
 - d. The contractor will periodically review the training and promotion potential of employees who are minorities and women and will encourage eligible employees to apply for such training and promotion.

7. **Unions:** If the contractor relies in whole or in part upon unions as a source of employees, the contractor will use good faith efforts to obtain the cooperation of such unions to increase opportunities for minorities and women. Actions by the contractor, either directly or through a contractor's association acting as agent, will include the procedures set forth below:
 - a. The contractor will use good faith efforts to develop, in cooperation with the unions, joint training programs aimed toward qualifying more minorities and women for membership in the unions and increasing the skills of minorities and women so that they may qualify for higher paying employment.
 - b. The contractor will use good faith efforts to incorporate an EEO clause into each union agreement to the end that such union will be contractually bound to refer applicants without regard to their race, color, religion, sex, national origin, age or disability.
 - c. The contractor is to obtain information as to the referral practices and policies of the labor union except that to the extent such information is within the exclusive possession of the labor union and such labor union refuses to furnish such information to the contractor, the contractor shall so certify to the contracting agency and shall set forth what efforts have been made to obtain such information.
 - d. In the event the union is unable to provide the contractor with a reasonable flow of referrals within the time limit set forth in the collective bargaining agreement, the contractor will, through independent recruitment efforts, fill the employment vacancies without regard to race, color, religion, sex, national origin, age or disability; making full efforts to obtain qualified and/or qualifiable minorities and women. The failure of a union to provide sufficient referrals (even though it is obligated to provide exclusive referrals under the terms of a collective bargaining agreement) does not relieve the contractor from the requirements of this paragraph. In the event the union referral practice prevents the contractor from meeting the obligations pursuant to Executive Order 11246, as amended, and these special provisions, such contractor shall immediately notify the contracting agency.
8. **Reasonable Accommodation for Applicants / Employees with Disabilities:** The contractor must be familiar with the requirements for and comply with the Americans with Disabilities Act and all rules and regulations established there under. Employers must provide reasonable accommodation in all employment activities unless to do so would cause an undue hardship.
9. **Selection of Subcontractors, Procurement of Materials and Leasing of Equipment:** The contractor shall not discriminate on the grounds of race, color, religion, sex, national origin, age or disability in the selection and retention of subcontractors, including procurement of materials and leases of equipment. The contractor shall take all necessary and reasonable steps to ensure nondiscrimination in the administration of this contract.
 - a. The contractor shall notify all potential subcontractors and suppliers and lessors of their EEO obligations under this contract.
 - b. The contractor will use good faith efforts to ensure subcontractor compliance with their EEO obligations.
10. **Assurance Required by 49 CFR 26.13(b):**
 - a. The requirements of 49 CFR Part 26 and the State DOT's U.S. DOT-approved DBE program are incorporated by reference.
 - b. The contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the contracting agency deems appropriate.
11. **Records and Reports:** The contractor shall keep such records as necessary to document compliance with the EEO requirements. Such records shall be retained for a period of three years following the date of the final payment to the contractor for all contract work and shall be available at reasonable times and places for inspection by authorized representatives of the contracting agency and the FHWA.
 - a. The records kept by the contractor shall document the following:
 - (1) The number and work hours of minority and non-minority group members and women employed in each work classification on the project;
 - (2) The progress and efforts being made in cooperation with unions, when applicable, to increase employment opportunities for minorities and women; and
 - (3) The progress and efforts being made in locating, hiring, training, qualifying, and upgrading minorities and women;
 - b. The contractors and subcontractors will submit an annual report to the contracting agency each July for the duration of the project, indicating the number of minority, women, and non-minority group employees currently engaged in each work classification required by the contract work. This information is to be reported on Form FHWA-1391. The staffing data should represent the project work force on board in all or any part of the last payroll period preceding the end of July. If on-the-job training is being required by special provision, the contractor will be required to collect and report training data. The employment data should reflect the work force on board during all or any part of the last payroll period preceding the end of July.

III. NONSEGREGATED FACILITIES

This provision is applicable to all Federal-aid construction contracts and to all related construction subcontracts of \$10,000 or more.

The contractor must ensure that facilities provided for employees are provided in such a manner that segregation on the basis of race, color, religion, sex, or national origin cannot result. The contractor may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. The contractor's obligation extends further to ensure that its employees are not assigned to perform their services at any location, under the contractor's control, where the facilities are segregated. The term "facilities" includes waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, washrooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing provided for employees. The contractor shall provide separate or single-user restrooms and necessary dressing or sleeping areas to assure privacy between sexes.

IV. DAVIS-BACON AND RELATED ACT PROVISIONS

This section is applicable to all Federal-aid construction projects exceeding \$2,000 and to all related subcontracts and lower-tier subcontracts (regardless of subcontract size). The requirements apply to all projects located within the right-of-way of a roadway that is functionally classified as Federal-aid highway. This excludes roadways functionally classified as local roads or rural minor collectors, which are exempt. Contracting agencies may elect to apply these requirements to other projects.

The following provisions are from the U.S. Department of Labor regulations in 29 CFR 5.5 "Contract provisions and related matters" with minor revisions to conform to the FHWA-1273 format and FHWA program requirements.

1. Minimum wages

- a. All laborers and mechanics employed or working upon the site of the work, will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the

Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics.

Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph 1.d. of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in 29 CFR 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under paragraph 1.b. of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

- b. (1) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:
 - (i) The work to be performed by the classification requested is not performed by a classification in the wage determination; and
 - (ii) The classification is utilized in the area by the construction industry; and
 - (iii) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.
 - (2) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.
 - (3) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Wage and Hour Administrator for determination. The Wage and Hour Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.
 - (4) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs 1.b.(2) or 1.b.(3) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.
 - c. Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.
 - d. If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, Provided, That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.
2. **Withholding.** The contracting agency shall upon its own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor under this contract, or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work, all or part of the wages required by the contract, the contracting agency may, after written notice to the contractor, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.
 3. **Payrolls and basic records**
 - a. Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work. Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.
 - b. (1) The contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the contracting agency. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under 29 CFR 5.5(a)(3)(i), except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the

- payrolls shall only need to include an individually identifying number for each employee (e.g. , the last four digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional Form WH-347 is available for this purpose from the Wage and Hour Division Web site at <http://www.dol.gov/esa/whd/forms/wh347instr.htm> or its successor site. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors. Contractors and subcontractors shall maintain the full social security number and current address of each covered worker, and shall provide them upon request to the contracting agency for transmission to the State DOT, the FHWA or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a violation of this section for a prime contractor to require a subcontractor to provide addresses and social security numbers to the prime contractor for its own records, without weekly submission to the contracting agency.
- (2) Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:
- (i) That the payroll for the payroll period contains the information required to be provided under §5.5 (a)(3)(ii) of Regulations, 29 CFR part 5, the appropriate information is being maintained under §5.5 (a)(3)(i) of Regulations, 29 CFR part 5, and that such information is correct and complete;
 - (ii) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR part 3;
 - (iii) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.
- (3) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph 3.b.(2) of this section.
- (4) The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.
- c. The contractor or subcontractor shall make the records required under paragraph 3.a. of this section available for inspection, copying, or transcription by authorized representatives of the contracting agency, the State DOT, the FHWA, or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the FHWA may, after written notice to the contractor, the contracting agency or the State DOT, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.
- 4. Apprentices and trainees**
- a. Apprentices (programs of the USDOL). Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer and Labor Services, or with a State Apprenticeship Agency recognized by the Office, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Office of Apprenticeship Training, Employer and Labor Services or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice.
- The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed.
- Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination.
- In the event the Office of Apprenticeship Training, Employer and Labor Services, or a State Apprenticeship Agency recognized by the Office, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.
- b. Trainees (programs of the USDOL). Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration.
- The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration.
- Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed.

- In the event the Employment and Training Administration withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.
- c. Equal employment opportunity. The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.
 - d. Apprentices and Trainees (programs of the U.S. DOT). Apprentices and trainees working under apprenticeship and skill training programs which have been certified by the Secretary of Transportation as promoting EEO in connection with Federal-aid highway construction programs are not subject to the requirements of paragraph 4 of this Section IV. The straight time hourly wage rates for apprentices and trainees under such programs will be established by the particular programs. The ratio of apprentices and trainees to journeymen shall not be greater than permitted by the terms of the particular program.
5. **Compliance with Copeland Act requirements.** The contractor shall comply with the requirements of 29 CFR part 3, which are incorporated by reference in this contract.
 6. **Subcontracts.** The contractor or subcontractor shall insert Form FHWA-1273 in any subcontracts and also require the subcontractors to include Form FHWA-1273 in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.
 7. **Contract termination:** debarment. A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.
 8. **Compliance with Davis-Bacon and Related Act requirements.** All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this contract.
 9. **Disputes concerning labor standards.** Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.
 10. **Certification of eligibility.**
 - a. By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).
 - b. No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).
 - c. The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

V. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT

The following clauses apply to any Federal-aid construction contract in an amount in excess of \$100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by 29 CFR 5.5(a) or 29 CFR 4.6. As used in this paragraph, the terms laborers and mechanics include watchmen and guards.

1. **Overtime requirements.** No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.
2. **Violation; liability for unpaid wages; liquidated damages.** In the event of any violation of the clause set forth in paragraph (1.) of this section, the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (1.) of this section, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (1.) of this section.
3. **Withholding for unpaid wages and liquidated damages.** The FHWA or the contracting agency shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (2.) of this section.
4. **Subcontracts.** The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (1.) through (4.) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (1.) through (4.) of this section.

VI. SUBLETTING OR ASSIGNING THE CONTRACT

This provision is applicable to all Federal-aid construction contracts on the National Highway System.

1. The contractor shall perform with its own organization contract work amounting to not less than 30 percent (or a greater percentage if specified elsewhere in the contract) of the total original contract price, excluding any specialty items designated by the contracting agency. Specialty items may be performed by subcontract and the amount of any such specialty items performed may be deducted from the total original contract price before computing the amount of work required to be performed by the contractor's own organization (23 CFR 635.116).
 - a. The term "perform work with its own organization" refers to workers employed or leased by the prime contractor, and equipment owned or rented by the prime contractor, with or without operators. Such term does not include employees or equipment of a subcontractor or lower tier subcontractor, agents of the prime contractor, or any other assignees. The term may include payments for the costs of hiring leased employees

from an employee leasing firm meeting all relevant Federal and State regulatory requirements. Leased employees may only be included in this term if the prime contractor meets all of the following conditions:

- (1) the prime contractor maintains control over the supervision of the day-to-day activities of the leased employees;
 - (2) the prime contractor remains responsible for the quality of the work of the leased employees;
 - (3) the prime contractor retains all power to accept or exclude individual employees from work on the project; and
 - (4) the prime contractor remains ultimately responsible for the payment of predetermined minimum wages, the submission of payrolls, statements of compliance and all other Federal regulatory requirements.
- b. "Specialty Items" shall be construed to be limited to work that requires highly specialized knowledge, abilities, or equipment not ordinarily available in the type of contracting organizations qualified and expected to bid or propose on the contract as a whole and in general are to be limited to minor components of the overall contract.
2. The contract amount upon which the requirements set forth in paragraph (1) of Section VI is computed includes the cost of material and manufactured products which are to be purchased or produced by the contractor under the contract provisions.
 3. The contractor shall furnish (a) a competent superintendent or supervisor who is employed by the firm, has full authority to direct performance of the work in accordance with the contract requirements, and is in charge of all construction operations (regardless of who performs the work) and (b) such other of its own organizational resources (supervision, management, and engineering services) as the contracting officer determines is necessary to assure the performance of the contract.
 4. No portion of the contract shall be sublet, assigned or otherwise disposed of except with the written consent of the contracting officer, or authorized representative, and such consent when given shall not be construed to relieve the contractor of any responsibility for the fulfillment of the contract. Written consent will be given only after the contracting agency has assured that each subcontract is evidenced in writing and that it contains all pertinent provisions and requirements of the prime contract.
 5. The 30% self-performance requirement of paragraph (1) is not applicable to design-build contracts; however, contracting agencies may establish their own self-performance requirements.

VII. SAFETY: ACCIDENT PREVENTION

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts.

1. In the performance of this contract the contractor shall comply with all applicable Federal, State, and local laws governing safety, health, and sanitation (23 CFR 635). The contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions as it determines, or as the contracting officer may determine, to be reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract.
2. It is a condition of this contract, and shall be made a condition of each subcontract, which the contractor enters into pursuant to this contract, that the contractor and any subcontractor shall not permit any employee, in performance of the contract, to work in surroundings or under conditions which are unsanitary, hazardous or dangerous to his/her health or safety, as determined under construction safety and health standards (29 CFR 1926) promulgated by the Secretary of Labor, in accordance with Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3704).
3. Pursuant to 29 CFR 1926.3, it is a condition of this contract that the Secretary of Labor or authorized representative thereof, shall have right of entry to any site of contract performance to inspect or investigate the matter of compliance with the construction safety and health standards and to carry out the duties of the Secretary under Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C.3704).

VIII. FALSE STATEMENTS CONCERNING HIGHWAY PROJECTS

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts.

In order to assure high quality and durable construction in conformity with approved plans and specifications and a high degree of reliability on statements and representations made by engineers, contractors, suppliers, and workers on Federal-aid highway projects, it is essential that all persons concerned with the project perform their functions as carefully, thoroughly, and honestly as possible. Willful falsification, distortion, or misrepresentation with respect to any facts related to the project is a violation of Federal law. To prevent any misunderstanding regarding the seriousness of these and similar acts, Form FHWA-1022 shall be posted on each Federal-aid highway project (23 CFR 635) in one or more places where it is readily available to all persons concerned with the project:

18 U.S.C. 1020 reads as follows:

"Whoever, being an officer, agent, or employee of the United States, or of any State or Territory, or whoever, whether a person, association, firm, or corporation, knowingly makes any false statement, false representation, or false report as to the character, quality, quantity, or cost of the material used or to be used, or the quantity or quality of the work performed or to be performed, or the cost thereof in connection with the submission of plans, maps, specifications, contracts, or costs of construction on any highway or related project submitted for approval to the Secretary of Transportation; or

Whoever knowingly makes any false statement, false representation, false report or false claim with respect to the character, quality, quantity, or cost of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation; or

Whoever knowingly makes any false statement or false representation as to material fact in any statement, certificate, or report submitted pursuant to provisions of the Federal-aid Roads Act approved July 1, 1916, (39 Stat. 355), as amended and supplemented;

Shall be fined under this title or imprisoned not more than 5 years or both."

IX. IMPLEMENTATION OF CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts.

By submission of this bid/proposal or the execution of this contract, or subcontract, as appropriate, the bidder, proposer, Federal-aid construction contractor, or subcontractor, as appropriate, will be deemed to have stipulated as follows:

1. That any person who is or will be utilized in the performance of this contract is not prohibited from receiving an award due to a violation of Section 508 of the Clean Water Act or Section 306 of the Clean Air Act.
2. That the contractor agrees to include or cause to be included the requirements of paragraph (1) of this Section X in every subcontract, and further agrees to take such action as the contracting agency may direct as a means of enforcing such requirements.

X. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION

This provision is applicable to all Federal-aid construction contracts, design-build contracts, subcontracts, lower-tier subcontracts, purchase orders, lease agreements, consultant contracts or any other covered transaction requiring FHWA approval or that is estimated to cost \$25,000 or more – as defined in 2 CFR Parts 180 and 1200.

1. Instructions for Certification – First Tier Participants:

- a. By signing and submitting this proposal, the prospective first tier participant is providing the certification set out below.
- b. The inability of a person to provide the certification set out below will not necessarily result in denial of participation in this covered transaction. The prospective first tier participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective first tier participant to furnish a certification or an explanation shall disqualify such a person from participation in this transaction.
- c. The certification in this clause is a material representation of fact upon which reliance was placed when the contracting agency determined to enter into this transaction. If it is later determined that the prospective participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the contracting agency may terminate this transaction for cause of default.
- d. The prospective first tier participant shall provide immediate written notice to the contracting agency to whom this proposal is submitted if any time the prospective first tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
- e. The terms "covered transaction," "debarred," "suspended," "ineligible," "participant," "person," "principal," and "voluntarily excluded," as used in this clause, are defined in 2 CFR Parts 180 and 1200. "First Tier Covered Transactions" refers to any covered transaction between a grantee or subgrantee of Federal funds and a participant (such as the prime or general contract). "Lower Tier Covered Transactions" refers to any covered transaction under a First Tier Covered Transaction (such as subcontracts). "First Tier Participant" refers to the participant who has entered into a covered transaction with a grantee or subgrantee of Federal funds (such as the prime or general contractor). "Lower Tier Participant" refers any participant who has entered into a covered transaction with a First Tier Participant or other Lower Tier Participants (such as subcontractors and suppliers).
- f. The prospective first tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.
- g. The prospective first tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions," provided by the department or contracting agency, entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions exceeding the \$25,000 threshold.
- h. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant is responsible for ensuring that its principals are not suspended, debarred, or otherwise ineligible to participate in covered transactions. To verify the eligibility of its principals, as well as the eligibility of any lower tier prospective participants, each participant may, but is not required to, check the Excluded Parties List System website (<https://www.epls.gov/>), which is compiled by the General Services Administration.
- i. Nothing contained in the foregoing shall be construed to require the establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of the prospective participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.
- j. Except for transactions authorized under paragraph (f) of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

* * * * *

2. Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion – First Tier Participants:

- a. The prospective first tier participant certifies to the best of its knowledge and belief, that it and its principals:
 - (1) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal department or agency;
 - (2) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them 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; 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;
 - (3) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (a)(2) of this certification; and
 - (4) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.
- b. Where the prospective participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

2. Instructions for Certification - Lower Tier Participants:

(Applicable to all subcontracts, purchase orders and other lower tier transactions requiring prior FHWA approval or estimated to cost \$25,000 or more - 2 CFR Parts 180 and 1200)

- a. By signing and submitting this proposal, the prospective lower tier is providing the certification set out below.
- b. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department, or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

- c. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous by reason of changed circumstances.
- d. The terms "covered transaction," "debarred," "suspended," "ineligible," "participant," "person," "principal," and "voluntarily excluded," as used in this clause, are defined in 2 CFR Parts 180 and 1200. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations. "First Tier Covered Transactions" refers to any covered transaction between a grantee or subgrantee of Federal funds and a participant (such as the prime or general contract). "Lower Tier Covered Transactions" refers to any covered transaction under a First Tier Covered Transaction (such as subcontracts). "First Tier Participant" refers to the participant who has entered into a covered transaction with a grantee or subgrantee of Federal funds (such as the prime or general contractor). "Lower Tier Participant" refers any participant who has entered into a covered transaction with a First Tier Participant or other Lower Tier Participants (such as subcontractors and suppliers).
- e. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.
- f. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions exceeding the \$25,000 threshold.
- g. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant is responsible for ensuring that its principals are not suspended, debarred, or otherwise ineligible to participate in covered transactions. To verify the eligibility of its principals, as well as the eligibility of any lower tier prospective participants, each participant may, but is not required to, check the Excluded Parties List System website (<https://www.epls.gov/>), which is compiled by the General Services Administration.
- h. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.
- i. Except for transactions authorized under paragraph e of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

* * * * *

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--Lower Tier Participants:

- 1. The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal department or agency.
- 2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

* * * * *

XI. CERTIFICATION REGARDING USE OF CONTRACT FUNDS FOR LOBBYING

This provision is applicable to all Federal-aid construction contracts and to all related subcontracts which exceed \$100,000 (49 CFR 20).

- 1. The prospective participant certifies, by signing and submitting this bid or proposal, to the best of his or her knowledge and belief, that:
 - a. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
 - b. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
- 2. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.
- 3. The prospective participant also agrees by submitting its bid or proposal that the participant shall require that the language of this certification be included in all lower tier subcontracts, which exceed \$100,000 and that all such recipients shall certify and disclose accordingly.

Appendix B - U.S. Department of Transportation Hotline

U.S. DEPARTMENT OF TRANSPORTATION HOTLINE:

(11-22-94)

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SP1 G100

To report bid rigging activities call: **1-800-424-9071**

The U.S. Department of Transportation (DOT) operates the above toll-free hotline Monday through Friday, 8:00 a.m. to 5:00 p.m. eastern time. Anyone with knowledge of possible bid rigging, bidder collusion, or other fraudulent activities should use the hotline to report such activities.

The hotline is part of the DOT's continuing effort to identify and investigate highway construction contract fraud and abuse is operated under the direction of the DOT Inspector General. All information will be treated confidentially and caller anonymity will be respected.

Appendix C -
North Carolina Turnpike Authority Policies and
Procedures for the Procurement of
Commodities and Services
(February 2009)

**NORTH CAROLINA TURNPIKE AUTHORITY
POLICIES AND PROCEDURES
FOR
THE PROCUREMENT
OF
COMMODITIES AND SERVICES**

**NORTH CAROLINA TURNPIKE AUTHORITY
POLICIES AND PROCEDURES FOR THE PROCUREMENT
OF
COMMODITIES AND SERVICES**

RESPONSIBILITY

The North Carolina Turnpike Authority (hereinafter referred to as the “NCTA” or “Authority”) is responsible for administering the agency program for procuring commodities, goods, information technology and services. These policies and procedures shall apply to the acquisition of all equipment, materials, supplies, printing, and services, through outright purchase, rental, lease, lease-purchase, or installment purchase

The Executive Director is hereby authorized to develop administrative controls and operation manuals to implement the authority and responsibilities for implementing the policies and procedures promulgated herein.

POLICY STATEMENT AND SCOPE

It is the Authority’s policy to administer its procurement program in a manner that ensures and encourages free and open competition and based upon sound procurement procedures and management. Unless an exception is approved by NCTA Board of Directors to meet special needs or emergency circumstances, NCTA procurements shall comply with the policies and procedures as prescribed herein.

It is the Authority’s policy to encourage and promote the use of historically underutilized businesses, including but not limited to small contractors, minority contractors, physically handicapped contractors and women contractors in the procurement of general commodities and services, information technology and consultant services. In promoting the use of historically underutilized businesses, the Authority will be guided by statutory provisions set forth in Article 3 of Chapter 143 of the North Carolina General Statutes and guidance set forth by the Department of Transportation and DOA. When federal aid funds are utilized on turnpike projects, the Authority will adhere to the Disadvantaged Business Enterprise (“DBE”) requirements as those may be applicable to the Authority’s procurement program.

PROCUREMENT PROCEDURES

I. PROCUREMENT PROCEDURES FOR GENERAL COMMODITIES AND SERVICES

a) Small Purchases:

A small purchase is defined as the purchase of commodities (equipment, materials and supplies), services or printing, not covered by a State or Authority term contract, involving an expenditure of funds of five thousand dollars (\$5,000) or less. The Executive Director, or his designee, shall set forth, in writing, purchasing procedures for making small purchases. The Executive Director shall keep an account of all such expenditures and make such reports to the Board as may be requested.

b) Purchases Between Five Thousand Dollars and Ten Thousand Dollars:

For purchases involving an expenditure of funds over five thousand dollars (\$5,000) but less than ten thousand dollars (\$10,000), such expenditures shall be approved in the Annual Plan of Work, in the Authority budget or by the Board. The NCTA shall solicit three written quotes. If the NCTA is unable to obtain three written quotes, written justification will be provided to the Executive Director or his or her designee for approval prior to purchase. The Executive Director shall keep an account of all such expenditures and make such reports to the Board of as may be requested.

c) Purchases Over Ten Thousand Dollars:

For purchases involving an expenditure of funds over ten thousand dollars (\$10,000), such expenditures shall be authorized in the Annual Plan of Work, in the Authority budget or by the Board. The NCTA shall adhere to the following procedures:

- i) Competition shall be solicited;
- ii) Solicitation documents requesting or inviting offers shall be issued; and
- iii) Mailing lists may be used also for the purpose of soliciting competition.

Competitive Bidding Procedure for Purchases Over Ten Thousand Dollars:

(1) Where the total requirements for commodities, services or printing jobs involve an expenditure of funds in excess of \$10,000, a competitive bidding procedure shall be utilized as follows:

- (a) Sealed offers for commodities and printing shall be solicited via advertisement, and
- (b) After opening and evaluating the offers received, the Authority shall award contracts.

(2) For service contracts, the NCTA shall prepare a task description of the services requested and the desired results. Task descriptions shall contain all of the following:

- (a) The date(s) of service (The contract shall not be for more than three years including extensions and renewals, without the prior approval of the Authority Board);
 - (b) Detailed specifications or type and level of work required;
 - (c) What the NCTA shall furnish;
 - (d) What the Contractor shall furnish;
 - (e) The method, schedule, and procedures for billing and payments;
and
 - (f) Other subject matters bearing on the conduct of the work.
- (3) Evaluation:
- (a) In determining the award of contracts, bona fide offers shall be considered and evaluated as provided by this Policy. The evaluation criteria to be used in determining the award of contract shall be identified in the procurement document.
 - (b) An unexecuted offer or an offer without a delivery time shall be rejected.
 - (c) During the period of evaluation and prior to award, only the information provided in the tabulation is public record. Possession of offers, including any accompanying information submitted with the offers, shall be limited to persons in the NCTA who are responsible for handling the offers and accompanying information, and to others determined necessary by the NCTA, for the purpose of evaluation and award of contract. Offeror participation in the evaluation process shall not be permitted. Any communication with an offeror that may be necessary for purpose of clarification of its offer shall be conducted by persons in the NCTA who are responsible for handling the offers and accompanying information. After award of the contract or when the need for the item or service is canceled, the complete file shall be available to any interested party with the exception of trade secrets.

II. PROCUREMENT PROCEDURES FOR INFORMATION TECHNOLOGY AND IT SERVICES

Information technology (IT) purchases shall be in accordance generally with "Best Value" information technology procurements (G.S. 143-135.9) as follows:

"Best Value procurement means the selection of a contractor based on a determination of which proposal offers the best trade-off between price and performance where quality is considered an integral performance factor. The award decision will be based on multiple factors, including: total costs of ownership; cost of acquiring, operating, maintaining and supporting a product or service over its projected lifetime; the evaluated technical merit of the vendor's proposal; the vendor's past performance; and the evaluated probability of performing the requirements stated in the

solicitation on time, with high quality, and in a manner that accomplishes the stated business objectives and maintains industry standards compliance.”

Unless an exception is approved by NCTA Board of Directors for special needs or emergency circumstances, information technology procurements by the NCTA shall comply with the following delegations and procedures:

- a) Purchases of Less than \$5,000.00:
A small purchase is defined as the purchase of IT goods and services, where the expenditure of funds is five thousand dollars (\$5,000) or less. The Executive Director, or his designee, shall set forth in writing purchasing procedures for making small purchases consistent with the documentation required pursuant to the Authority's administrative policies. The Executive Director shall keep an account of all such expenditures and make such reports to the Board as may be requested.
- b) Purchases of More than \$5,000.00:
For purchases involving an expenditure of funds over five thousand dollars (\$5,000), such expenditures shall be approved in the Annual Plan of Work, in the Authority budget or by the Board. The Executive Director shall keep an account of all such expenditures and make such reports to the Board as may be requested. The Executive Director will utilize the following methodologies to encourage competition:
 - i) The Executive Director or his or her designee will issue a solicitation document requesting or inviting offers;
 - ii) The solicitation document will include terms and conditions for the procurement of the goods and services; and
 - iii) The NCTA may request a distribution list, if available from State Information Technology Services (ITS), and use the ITS list in addition to any distribution list developed and maintained by the NCTA for the purpose of soliciting competition.
- c) Types of solicitations:
The following types of solicitation methods may be used:
 - (1) One-step Request for Proposals (RFP) – The Technical and Price Proposal is submitted in a single document.
 - (1) If the lowest priced technically acceptable method of source selection is used, only clarifications are allowed.
 - (2) If the trade off or ranking method of source selection is used, communications may be established to clarify competitive ranges or to negotiate final price.
 - (2) Two-step RFP – The Technical Proposal (step one) and the Price Proposal (step two) are submitted in separate documents.
 - (1) If the lowest priced technically acceptable method is used, technical responses (step one) are evaluated for acceptability

only. Only clarifications with offerors are allowed. Price offers are opened (step two) for only those offerors who submitted technically acceptable responses. Selection is made by low price analysis.

- (2) If the ranking method of source selection is used, Technical Proposals (step one) are submitted, after which clarifications, communications to establish a competitive range, and negotiations with offerors may be allowed as specified in the solicitation document. Price Proposals (step two) will be requested only from offerors placed in the competitive range after the technical evaluation and discussion phase is concluded. Subsequent negotiations may be conducted with offerors after receipt of Price Proposals. Final price adjustments or best and final offers may be allowed.

d) Authorized Procurement Methods for Competitive Source Selection for IT and IT Services:

i) "Best Value" Source Selection method:

- (1) The appropriate best value bidding method will be determined by the Executive Director, or his or her designee.
- (2) A conference or site visit may be scheduled, as deemed necessary and specified in the solicitation document.
- (3) A public bid opening will be conducted for the receipt of offers. For solicitations that allow for negotiation after receipt of offers, only the names of responding bidders will be revealed. Price information will be made public at the opening except for a two-step process..
- (4) The NCTA will establish a technical evaluation committee to evaluate the offers in accordance with the evaluation factors specified in the solicitation document. For solicitations that include a best value ranking process, scoring and ranking may be determined by using any consistent rating methodology, including adjectival, numerical, or ordinal rankings. Relative strengths, deficiencies, weaknesses, and risks supporting the evaluation will be documented in the contract file. Evaluation factors may include but are not limited
 - (a) to quality factors;
 - (b) delivery and implementation schedule;
 - (c) maximum facilitation of data exchange and systems integration;
 - (d) warranties, guarantees, and return policies;
 - (e) vendor financial stability;
 - (f) consistency of the proposed solution with the states strategic program direction;
 - (g) effectiveness of business solution and approach;
 - (h) industry and program experience; prior record of vendor performance;

- (i) vendor expertise with similar projects;
 - (j) proven development methodologies and tools; and
 - (k) innovative use of technologies.
- (5) Clarifications, communications to establish a competitive range, or negotiations may be conducted with offerors after receipt of offers in accordance with instructions and procedures set forth in the solicitation document and as appropriate to the method of source selection chosen. In those cases where negotiation is permitted by procedures set forth in the solicitation document, offerors may be allowed to submit best and final offers subsequent to negotiated changes in the initial offer or previous offer.
- (6) The technical evaluation committee will determine a final ranking of all offers under consideration using only the criteria set forth in the solicitation document. The offerors will be ranked from most advantageous to least advantageous to the NCTA.
- (7) Award will be made to the responsive and responsible offeror whose offer is determined in writing to be the most advantageous to the NCTA, using the evaluation factors set forth in the solicitation. If the lowest price technically acceptable method is used, award will be made to the responding and responsible offeror with the lowest price.
- ii) A "Trade-off method" of source selection may be utilized when it is in the best interest of the NCTA to consider award to other than the lowest priced offer or other than the highest technically qualified offer. For a solicitation using a trade off source selection method, the following will apply:
- (1) All evaluation factors that will affect the contract award decision and their relative importance will be clearly stated in the solicitation.
 - (2) Price will be considered as an evaluation factor in the selection process. The solicitation will state the importance or numerical weight of all evaluation factors including price.
 - (3) Offers will be ranked using the evaluation factors and their relative importance or weight as defined in the solicitation document. The relative overall ranking of any offer may be adjusted up or down when considered with, or traded-off against, other non-price factors. For example, an offer with the lowest price when compared to other offers would normally receive the best ranking in the price evaluation category. However, if other non-price evaluation factors received low rankings, the overall ranking of the offer would be reduced.
 - (4) Clarifications are permitted. If specified in the solicitation, communications and negotiations may be permitted after receipt of offer.

- iii) The “Lowest Price Technically Acceptable” source selection method may be used when best value is expected to result from selection of the technically acceptable offer with the lowest evaluated price. When using the lowest price technically acceptable method, the following will apply:
- (1) The evaluation factors that establish the requirements of acceptability will be set forth in the solicitation. Solicitations will specify that award will be made on the basis of the lowest evaluated price of those proposals that meet or exceed the acceptability requirements for non-price factors.
 - (2) Trade offs between price and non-price factors will not be permitted.
 - (3) Proposals will be evaluated for acceptability but will not be ranked using the non-price factors.
 - (4) Only clarifications will be permitted.
- iv) Other competitive best value source selection methodologies may be used if they are determined to be advantageous to the NCTA and are approved for use by the Executive Director or his or her designee.

III. PROCUREMENT PROCEDURES FOR CONSULTANT SERVICES

Consultant services shall mean work or task(s) performed by State employees or independent contractors possessing specialized knowledge, experience, expertise and professional qualifications to investigate assigned problems or projects and to provide counsel, review, analysis or advice in formulating or implementing improvements in programs or services.

- a) Contracting Procedures for Consultants:
The NCTA shall acquire consultant services only when the contract is in the best interests of the Authority and the State. In acquiring such services, competition shall be sought whenever practicable.
- b) Consultant Contract with other Agencies:
Consultant services shall be obtained from other agencies when such services substantially would meet the reasonable specifications of the project.
- c) Request for Authority to Contract with Consultants:
Before receiving authorization to seek consultant services, an agency shall submit to the written justification for its request for consultant services to the Office of the Governor of North Carolina in compliance with Article 3C of GS 143. This written justification shall at a minimum explain what services the agency desires to secure, why the work to be performed by the consultant cannot be reasonably accomplished by employees of the requesting agency, how the work to be performed relates to the proper functions of the agency, what benefits the agency expects to receive from

the consultant's services, what the agency estimates to be the cost of the services sought, and what potential sources of consultant services if any the agency has identified. If the NCTA is requesting authority to contract for consulting services outside of State government, it shall also detail what potential sources of those services exist within State government and explain why the desired services were not available from those sources. The written justification shall be accompanied by a letter of endorsement for the proposed contract(s) from the Executive Director or his designee.

The NCTA may be required by the Governor or designee, to:

- i) canvass additional sources within state government;
- ii) solicit proposals from private contractors;
- iii) execute a negotiated contract(s) without competitive proposals if the Governor determines that performance or price competition is not available or that the requirement is for an authorized cooperative project with another governmental unit(s) or a public or private nonprofit organization(s) or that the contract price is too small to justify soliciting competitive proposals; or
- iv) abandon the project for being outside the scope of the agency's responsibilities or for having insufficient benefit to the NCTA or State relative to the potential expenditure of funds.

d) Competitive Proposals:

If the NCTA receives approval from the Office of the Governor to solicit proposals for consultant services, the NCTA shall:

- i) Prepare a request for proposals in accordance with these policies and disseminate among prospective service providers;
- ii) Circulate the request for proposals to such sources of consultant services;
- iii) Publicly open all proposals received at a date and time set in the request for proposals; however, in a two-step evaluation process, only the technical proposal shall be opened on the opening date. The cost proposal is opened only if the technical proposal is determined by the State to be acceptable;
- iv) Review all proposals received on the basis of evaluation criteria significantly related to the function to be performed and equally applied to all proposals received;
- v) Prepare a file memorandum citing criteria for selection and contract award.

e) Negotiated Consultant Contracts:

If the NCTA enters into a negotiated contract(s) for consultant services without soliciting competitive proposals, the NCTA shall submit the proposed contract(s) to the Office of the Governor for review and approval prior to execution. Upon completion of this review the requesting agency shall be notified in writing by the Governor or his designee that an approved contract(s) may be executed.

- f) Consultant Contract Modification:
Any modification to an approved contract(s) shall be subject to the same approval requirements as the original contract(s). The Governor or his designee may at his option, during the process of reviewing requests for contract modifications, waive any of the provisions of this Policy.
- g) Format:
All contracts for consultant services shall be in writing and shall be executed by the Executive Director.
- h) Relationship of Consultant to State:
No contract for consultant services shall create an employer-employee relationship between the State of North Carolina and the consultant.

ELECTRONIC, TELEGRAPH, FACSIMILE, AND TELEPHONE OFFERS

Electronic, telegraph, facsimile, and telephone offers shall not be accepted in response to solicitations that are required to be sealed.

RECALL OF OFFERS

Offers may be recalled prior to opening upon signed request from an authorized agent of the company.

PUBLIC OPENING

Advertised procurements shall be publicly opened at the time, date, and place identified in the procurement document. At the time of opening, the names of the companies, the manufacturer(s) and catalog number(s) of the item(s) they have offered and the prices, deliveries and payment terms they have submitted shall be tabulated and this tabulation shall become public record, except as provided in this Policy.

Under a two step process, the cost/price offer(s) shall not become public record until the technical offer(s) are evaluated (first step) and then only those offerors determined to have acceptable technical offers shall have their cost/price offers opened (second step). The cost/price offers from offerors whose technical offers were deemed unacceptable shall remain unopened. The remaining cost/price offers shall be publicly opened, and the offeror(s) with the acceptable technical offer(s) notified of the time and place for the opening. At least two agency working days notice shall be given prior to the opening. In addition, there shall be at least two agency employees present at the opening.

LATE OFFERS, MODIFICATIONS, OR WITHDRAWALS

No late offer, late modification, or late withdrawal shall be considered unless received before contract award, and the offer, modification, or withdrawal would have been timely but for the action or inaction of NCTA personnel directly

serving the procurement process. The offeror shall have his offer delivered on time, regardless of the mode of delivery used, including the U.S. Postal Service or any other delivery services available.

ERROR/CLARIFICATION

When an offer appears to contain an obvious error or otherwise where an error is suspected, the circumstances may be investigated and then may be considered and acted upon. Any action taken shall not prejudice the rights of the public or other offering companies. Where offers are submitted substantially in accordance with the procurement document but are not entirely clear as to intent or to some particular fact or where there are other ambiguities, clarification may be sought and accepted provided that, in doing so, no change is permitted in prices.

EXTENSION OF ACCEPTANCE TIME

When in the public interest, companies may be requested to extend the time offered for the acceptance of offers.

NOTIFICATION OF AWARD

The Authority shall post a notice of the resulting contract award via the NCTA website or through the State Division of Purchasing and Contract when utilizing said services.

LACK OF COMPETITION

The purpose of soliciting offers is both to seek and to obtain competition; the responsibility is dual. Where only a single offer or a single acceptable offer is received or, otherwise, where reasonable and available competition is not obtained, the reason shall be ascertained and made a matter of record.

TABULATIONS AND ABSTRACTS

Telephone, electronic, and written requests for detailed or written tabulations and abstracts of offers shall not be honored.

SOLICITATION DOCUMENTS

A solicitation document is defined as a written Request for Quotes, Request for Proposals (RFP) or an Invitation for Bids (IFB). The NCTA shall use the IFB or RFP document, whichever is applicable, when soliciting competition on contracts valued over ten thousand dollars (\$10,000). The IFB and RFP solicitation documents shall require bidders or offerors to certify that each bid or offer is submitted competitively and without collusion.

DIVISION OF REQUIREMENTS

The NCTA shall not divide requirements in order to keep the expenditure under its \$5,000 small purchase limit and thereby avoid following the appropriate contracting requirement. In the case of similar and related items and groups of items, the dollar limits apply to the total cost rather than the cost of any single

item.

ADVERTISEMENT REQUIREMENTS

Solicitation documents shall be advertised at least once and at least 10 days prior to the date designated for opening. This Policy does not prevent solicitation of offers by additional direct mailings or additional advertisement.

The solicitation documents shall include such relevant information as specifications and requirements; terms and conditions; a short description of the commodity, service or printing requirement; and the opening date, time and place. If the solicitation requires potential offerors to attend a mandatory conference or mandatory site visit, this information shall also be furnished with the advertisement, to include date, time, location, contact person and the contact person's phone number.

Within three agency working days from the award of a contract, the NCTA shall post an award notice directly to the NCTA website on the internet. The award notice shall be posted for at least 30 consecutive calendar days. This award notice shall identify the contract and award information.

MANDATORY CONFERENCES/SITE VISITS

- (1) When a solicitation requires potential offerors to attend a mandatory conference or mandatory site visit, the date, time, location, and other pertinent details of the conference or site visit shall be given in the solicitation document, and in the advertisement.
- (2) If only one potential offeror attends the mandatory conference or mandatory site visit, the conference or site visit may continue to be conducted, but the solicitation shall be canceled immediately following the conference or site visit. If this occurs, the NCTA shall investigate why only one potential offeror was in attendance and ascertain if there is any competition available. If it is determined that competition is available, the NCTA shall again attempt to obtain competition by following this Policy. If it is determined that there is no competition available, then the procurement may be handled as a waiver as permitted by this Policy.
- (3) Any and all questions by a potential offeror regarding a solicitation document shall be addressed to the persons in the NCTA who are responsible for handling the offers and accompanying information. Any and all revisions to the solicitation document shall be made only by written addendum. Verbal communications from whatever source are of no effect.

REJECTION OF OFFERS

In soliciting offers, any and all offers received may be rejected in whole or in part. Basis for rejection shall include, but not be limited to, the offer being deemed unsatisfactory as to quantity, quality, delivery, price or service offered; the offer not complying with conditions of the procurement document or with the intent of the proposed contract; lack of competitiveness by reason of collusion or otherwise or knowledge that reasonably available competition was not received;

error(s) in specifications or indication that revision(s) would be to the state's advantage; cancellation of or changes in the intended project or other determination that the proposed requirement is no longer needed; limitation or lack of available funds; circumstances which prevent determination of the lowest responsible or most advantageous offer; any determination that rejection would be to the best interest of the NCTA or the State. Action in rejecting offers in whole or in part shall be made a matter of record.

NEGOTIATION

If the NCTA does not receive a satisfactory offer in response to a solicitation and all offers are rejected, negotiations may be conducted with all known sources of supply that may be capable of satisfying the requirement; if it is determined that soliciting offers again would serve no purpose. Negotiations shall be conducted in writing. If the negotiations are conducted with only one source or if only one source responds to the negotiations, the reason for lack of competition shall be documented in writing for public record. Negotiations may also be conducted under conditions that merit a waiver of competition, or in other situations that are advantageous as determined by the Authority Board.

PURCHASE OF USED ITEMS

The Policy stated herein regarding seeking competition shall be followed wherever feasible, when it appears that the acquisition of used commodities is in the public interest.

Solicitation documents on used items may or may not include a request for prices on like new products, but in either case acquisition may be made on the basis of that which is considered most advantageous for the intended purpose.

REMOVAL OF CERTAIN ITEMS FROM GENERAL CONSTRUCTION

The NCTA shall review the items being included in a construction/renovation project and remove any items that it considers are non-related to the actual construction/renovation of the building. Items that are considered commodities or just furnishings, and that would complete the project for use by the Authority, shall be handled in accordance with this Policy. Items that are usually removed for construction/renovation projects include carpet, office panel systems, food service equipment, and furniture. If the NCTA determines that one of these items, or any item that is normally handled as a commodity purchase, is best suited for inclusion in the construction/renovation project, the Authority's justification shall be documented in writing for public record.

INSPECTION AND TESTING

In general, it is the responsibility of the NCTA to inspect all materials, supplies, and equipment upon delivery to insure compliance with the contract requirements and specifications. The NCTA is responsible to insure that items and services purchased comply with applicable codes, statutes, local ordinances, policies or safety requirements.

SAMPLES

When samples are required in response to a solicitation document issued, the NCTA shall test, or have tested, those samples.

SPECIFICATIONS

When it is determined to be advantageous, the NCTA may authorize revisions to a contract specification, including any cost adjustment associated with any such revision, as part of contract administration, regardless of initial contract award.

REPORT OF DISCREPANCY

Where the goods, supplies, materials equipment, services or printing delivered fails to meet the specifications or contract requirements, the discrepancy shall be resolved by the Executive Director or his or her designee.

ENFORCEMENT OF GUARANTEES AND WARRANTIES

The NCTA shall enforce the contractual guarantee or warranty applying to the goods, supplies, materials, and equipment purchased. If the NCTA has difficulty in obtaining satisfactory performance including service as provided for in a guarantee or warranty, the vendor will be notified promptly. The NCTA shall notify the vendor promptly when latent or other defects are discovered.

TERM CONTRACTS

- (1) Term contracts, known also as indefinite quantity or requirements contracts, are used generally to establish suppliers and prices of a given commodity, group of commodities, printing, or services for a period of time without guaranteed quantities being specified.
- (2) A term contract is a binding agreement between purchaser and seller to buy and sell certain commodities, printing, or services at certain prices and under stipulated terms and conditions. It is neither an "approved list" nor a list of approved or ceiling prices.
- (3) A term contract shall be based upon competition.
- (4) The NCTA may issue solicitation documents for an agency specific term contracts for use by the Authority if the commodity, printing, or service **is not covered by a statewide term contract.**

DETERMINING FACTORS FOR ISSUING TERM CONTRACTS

In determining whether a product should be on an agency specific term contract, the NCTA shall consider such factors as volume, nature of the product, repetitiveness of use, relative stability of prices, and transportation costs.

SPECIAL ITEMS

In situations where a general type of item is covered by a statewide term contract but a special type item is needed for a particular application, the NCTA may proceed with the purchase of the special type item under this Policy. The need for the special type item in lieu of the general type item shall be justified by the NCTA in writing and documented in the agency file for public record.

EXTENSION OF CONTRACT TERMINATION DATES

When in the public interest, contractors may be requested to extend the scheduled termination dates of contracts.

PARTIAL AND MULTIPLE AWARDS

Partial, progressive or multiple awards may be made by reason of insufficient funds, legislative mandates, where it is advantageous to award separately by items or where more than one supplier is needed to provide the contemplated requirements as to quantity, quality, delivery, service(s) or geographical areas.

Notwithstanding the necessity for awards to more than one supplier in the case of some indefinite quantity contracts, such awards shall be limited to the number of suppliers deemed necessary to reasonably satisfy the intended requirements. Extreme care shall be exercised to protect the character and principles of competition. Quantities shall not be divided among companies on definite quantity requirements unless and except as provided in the procurement document.

WAIVER OF COMPETITION

Under conditions listed in this Policy, and otherwise if deemed to be in the public interest by the Authority Board, upon recommendation of the Executive Director, competition may be waived. Conditions permitting waiver include cases where:

- performance or price competition is not available;
- a needed product or service is available from only one source of supply;
- emergency action is indicated;
- competition has been solicited but no satisfactory offers received;
- standardization or compatibility is the overriding consideration;
- a donation predicates the source of supply;
- personal or particular professional services are required;
- a product or service is needed for the blind or severely disabled and there are overriding considerations for its use;
- additional products or services are needed to complete an ongoing job or task;
- products are bought for "over the counter" resale;
- a particular product or service is desired for educational, training, experimental, developmental or research work;
- equipment is already installed, connected and in service, and it is determined advantageous to purchase it;
- items are subject to rapid price fluctuation or immediate acceptance;
- there is evidence of resale price maintenance or other control of prices, lawful or unlawful, or collusion on the part of companies which thwarts normal competitive procedures;
- the amount of the purchase is too small to justify soliciting competition or where a purchase is being made and a satisfactory price is available from a previous contract;
- the requirement is for an authorized cooperative project with another governmental unit(s) or a charitable non-profit organization(s); and

- a used item(s) is available on short notice and subject to prior sale.

Although competition may be waived, competition is required wherever practicable. Where waiver is contemplated, the NCTA may negotiate with a potential vendor(s) in an effort to acquire the quality of commodity, service or printing needed at the best possible price, delivery, terms and conditions. Under an emergency or pressing need situation, a solicitation document requesting or inviting an offer(s) shall be issued, unless circumstances prohibit their use.

CONFIDENTIALITY

All information and documentation relative to the development of a contractual document (Request for Quotes, Request for Proposals, Waiver of Competition, Negotiation, etc.) for a proposed procurement or contract shall be deemed confidential in nature, except as deemed necessary by the purchaser to develop a complete contractual document. Such material shall remain confidential until the award of contract.

This includes all information and documentation relative to the development of a specification until the adoption of that specification or an award of contract if developed for a specific procurement or contract, whichever is later.

During the period of evaluating offers and prior to award, only the information provided in the tabulation is public record. Possession of offers, including any accompanying information submitted with the offers, shall be limited to persons in the NCTA who are responsible for handling the offers and accompanying information, and to others determined necessary by the Executive Director, for the purpose of evaluation and award of contract. Offeror participation in the evaluation process shall not be permitted. Any communication with an offeror that may be necessary for purpose of clarification of its offer shall be conducted by the Executive Director or his or her designee. After award of the contract, or when the need for the item or service is canceled, the complete file shall be available to any interested party with the exception of trade secrets, subject to the following:

To promote maximum competition and to protect the public competitive procedure from being used to obtain information which would normally not be available otherwise, the NCTA may maintain the confidentiality of certain types of information. Such information includes trade secrets, as determined by North Carolina law, and like information as the Executive Director or his or her designee may determine to insure the integrity of the public purchasing process. Trade secrets which the offeror does not wish disclosed shall be identified as follows: Each page shall be identified in boldface at the top and bottom as "CONFIDENTIAL". Cost information shall not be deemed confidential.

PAYMENT PLANS

Purchase contracts may provide for payment over a period of time. Such instances, however, shall be fully justified, kept to a minimum and carry written prior approval of the Executive Director. The intended plan of payment shall be net 30 days unless otherwise identified in the procurement document.

FUNDS FROM DIFFERENT SOURCES

All public funds irrespective of source, whether special, federal, local, gifts, bequests, receipts, fees, or State appropriated, used for the purchase, rental, lease, installment purchase and lease/purchase of commodities, printing and services shall be handled in accordance with applicable General Statute.

CONDITIONAL GRANTS ETC IN PUBLIC PURCHASING

Where a grant, donation or special discount is predicated upon making a purchase from the grantor, the proposed transaction shall be explained in writing and shall have prior approval of the Executive Director or designee. Prior to approval, the Executive Director shall consider the conditions placed on the grant, donation, or special discount, and how they will affect the Authority and the State, the cost of agreeing to such conditions, and the market place conditions. When a donation from private sources is predicated upon making the purchase or lease from a specific source, the purchase or lease may be made without prior approval of the Executive Director.

CHANGE IN CORPORATE STRUCTURE

In cases where contractors are involved in corporate consolidations, acquisitions or mergers, the NCTA may negotiate agreements for the transfer of contractual obligations and the continuance of contracts within the framework of the new corporate structures but with the understanding that the contracts are not instruments for sale and shall not be assigned.

PURCHASES FOR ACROSS THE COUNTER RESALE

Purchases of items for "across the counter" resale shall be in accordance with policies adopted by the Authority Board.

PURCHASING FROM OR THROUGH AGENCY EMPLOYEES

Every reasonable effort shall be made to avoid making purchases from or through employees of any agency. Prior written approval from the Executive Director is required in any instance which may develop of doing business with such personnel. In deciding whether to grant approval, the Executive Director shall consider the type item or service needed, the prevailing market conditions, whether competition is available, the cost involved, and the effects of doing business with the employee.

USE OF PURCHASING POWER FOR PRIVATE GAIN

The purchasing power of the state or the NCTA shall not be used for private advantage or gain. Purchases under contracts made by the State or the NCTA

shall not be allowed for personal use out of private funds nor shall NCTA place orders for articles for ownership by employees or other individuals.

ANTITRUST VIOLATIONS

In instances of identical offers or where there are otherwise indications of collusion, awards may be made in a manner intended to discourage or prevent its continuance as deemed to represent the NCTA's best interest. Instances of suspected antitrust violation shall be reported to appropriate law enforcement authorities.

COOPERATIVE PURCHASING

The NCTA is authorized to utilize cooperative purchasing with another governmental agency or charitable non-profit organization. Where the NCTA is a participant in an authorized cooperative project with another governmental agency or with a charitable non-profit organization, goods and services necessary to the project shall be acquired according to this Policy; provided, however, that the interest of the NCTA and the State would not be better served by one of the following acquisition methods:

- (1) by making acquisition on behalf of such governmental activity or charitable non-profit organization; or
- (2) by authorizing acquisition on the State's behalf under the provisions of another State or another governmental entity, provided due consideration is given to the differences in purchasing rules, regulations and procedures of the contracting entity.

PROTEST PROCEDURES

To insure fairness to all offerors and to promote open competition, the NCTA shall actively follow-up and be consistent in responding to an offeror's protest over contract awards.

When an offeror desires to protest a contract awarded by the NCTA, the NCTA and the offeror shall comply with the following:

- (1) The offeror shall submit a written request for a protest meeting to the Executive Director which shall be received within 30 consecutive calendar days from the date of the contract award. The offeror's letter shall contain specific reasons and any supporting documentation for why it has a concern with the award. If the letter does not contain this information or if the Executive Director determines that a meeting would serve no purpose, the Executive Director may, within 10 consecutive calendar days from the date of receipt of the letter, respond in writing to the offeror and refuse the protest meeting request.
- (2) If the protest meeting is granted, the Executive Director shall attempt to schedule the meeting within 30 consecutive calendar days after receipt of the letter, or as soon as possible thereafter. Within 10 consecutive calendar days from the date of the protest meeting, the Executive Director shall respond to the offeror in writing with the Executive Director's decision.

- (3) The Executive Director may appoint a designee to act on the Executive Director's behalf under this Policy.

DEFAULT PROCEEDINGS; DEBARMENT

The NCTA may find a contractor in default of a contract for failing to perform in accordance with the contract requirements, terms and conditions. If a contractor is found in default of contract, the NCTA may take action, immediately if necessary, to purchase the needed commodities, printing or services on the open market and charge any additional cost for the commodities, printing or services and expense for doing so to the defaulting contractor.

FAITHFUL PERFORMANCE

A bond, or other suitable means of insuring faithful performance, may be required of the contractor at the contractor's expense. Liquidated damages, in the form of a monetary penalty for late delivery, may be provided for in the contract, as a means of ensuring faithful performance from the contractor.

RECIPROCAL PREFERENCE

Each solicitation document used to obtain contracts for equipment, materials, supplies, and services that exceed twenty-five thousand dollars (\$25,000) in value shall include space for a bidder to give their principal place of business address if it is different than the address given in the execution section of the solicitation document. This shall not prevent the NCTA from investigating this information and concluding that the principal place of business is different.

PROCUREMENT CARDS

The NCTA may utilize procurement cards (organizational charge cards). Procurement cards are for official use only and shall be used in accordance with the policies and procedures of the Office of State Treasurer and other applicable, established state policies and procedures. As the State's electronic procurement system is implemented, it shall be used to the fullest extent possible, including issuance of purchase orders. Procurement cards may be used as a payment mechanism within e-procurement if permitted by fiscal policies of the NCTA.

PRESSING NEEDS AND EMERGENCIES

The NCTA may make purchases of commodities or services in the open market in cases of emergency or pressing need. For this purpose, a pressing need is one arising from unforeseen causes including, but not limited to, delay by contractors, delay in transportation, breakdown in machinery, or unanticipated volume of work. An emergency is defined as a situation which endangers lives, property or the continuation of a vital program and which can be rectified only by immediate, on-the-spot purchases or rental of commodities or services.

The NCTA may negotiate with a potential vendor(s) in an effort to acquire the quality of commodity, service or printing needed at the best possible price, delivery, terms and conditions. A solicitation document requesting or inviting an offer(s) shall be issued, unless circumstances prohibit their use.

A pressing need or emergency purchase in excess of \$10,000 shall be approved by the Executive Director, the Chief Financial Officer and the Chair of the Board. Pressing need or emergency purchase in excess of \$25,000 shall be reported to the Authority Board.

INVENTORIES AND STORES

The North Carolina Department of Administration, Division of Purchase & Contract has responsibility for general supervision of storerooms and stores operated by state government, for supervision of inventories of tangible personal property belonging to state government and for reports by them of stocks on hand.

In the event the NCTA is required to maintain centralized warehouse facilities, the Authority Board shall have inventory control procedures in place which insure at a minimum, written inventory count of contents, written records of receipts and issues, economical ordering and efficient level of inventories, safe storage of hazardous materials, and security.

RECORD MAINTENANCE

Except where State law provides to the contrary, after the award of a contract, the purchasing records of the NCTA are public documents, and these documents shall be maintained for a period of five years after the expiration date of the contract.

Each contract file shall be identified individually so it can be readily located and referenced. All purchase transactions shall be documented. As applicable, each file shall include:

- (1) Original offers if in writing, or written documentation of verbal offers received;
- (2) Reasons for award or cancellation;
- (3) Worksheets/evaluations;
- (4) Mailing list, if used;
- (5) Written justification for waiver or emergency purchase;
- (6) Tabulation of offers received;
- (7) Copy of purchase order(s);
- (8) Related correspondence;
- (9) Reason(s) for receiving only one offer in response to a solicitation;
- (10) Negotiated contracts; and
- (11) Reasons for not accepting technical proposals.

After award of contract all material in the file, except confidential information, shall be open to interested persons during normal office hours, and may be hand copied or copies shall be furnished in accordance with the Public Records Act.

HISTORICALLY UNDERUTILIZED BUSINESS, MINORITY BUSINESS, SMALL BUSINESS AND DISADVANTAGED BUSINESS


As applicable to expenditures made pursuant to these policies and procedures, the NCTA will comply fully with the North Carolina Department of Transportation's ("NCDOT") Disadvantaged Business Enterprise ("DBE") Program, unless the NCTA establishes a separate program as approved by the United States Department of Transportation. The NCTA will comply with the DBE goals and good faith effort requirements established in conjunction with NCDOT. The NCTA will keep account of its utilization of historically underutilized businesses, small businesses and disadvantaged businesses and incorporate such utilization in reports to NCDOT or such other State or federal agencies as required.

RECYCLED PAPER


The NCTA will comply with the State's goals to purchase recycled content paper and paper products as established in G.S. 143-58.3.

ADOPTION

The Policies and Procedures for the Procurement of Commodities and Services is adopted on this 18th day of February 2009.

Signed: 

Eugene A. Conti, Jr., Chairman
North Carolina Turnpike Authority Board

Attest:


Perry R. Safran, Secretary-Treasurer
North Carolina Turnpike Authority Board