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NoraV Borja

IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

IN RE THE NMI JUDICIARY PROCUREMENT RULES

SUPREME COURT NO. 2020-ADM-0016-RUL

ORDER ADOPTING JUDICIARY PROCUREMENT RULES

¶ 1 On June 11, 2020, the Judiciary submitted the NMI Judiciary Procurement Rules, attached as Exhibit A, to the Twenty-First Northern Marianas Commonwealth Legislature for approval. Article IV, Section 9(a) of the NMI Constitution provides that proposed rules become effective sixty days after submission unless disapproved by a majority of the members of the House of Representatives or the Senate. On July 16, 2020, the House of Representatives unanimously approved the Procurement Rules, and the Senate has not disapproved the Procurement Rules during the sixty-day period.¹

¶ 2 As background, in 1991, the National Center for State Courts (“NCSC”) proposed a number of recommendations to reinforce the NMI Judiciary’s independence as a co-equal and separate branch of government. The Judiciary’s administrative control over its procurement is among the recommendations. Consequently, these Procurement Rules were developed to secure the institutional and administrative independence of the Judiciary in exercising a number of functions.

¹ On March 23, 2020, the Judiciary submitted an initial proposal of the Procurement Rules for approval. During the sixty-day time frame, the House of Representatives voted to disapprove it.

The initial disapproval by the House of Representatives exhibits the legislature’s plenary veto power over proposed rules. *See Reyes v. Reyes*, 2004 MP 1 ¶ 97 (noting that the legislature “has what is, in effect, plenary power over the rules proposed by the Chief Justice of the CNMI Judiciary.”). Such plenary power reaffirms the principles of separation of powers and checks and balances.

However, Article IV, Section 9(a) of the NMI Constitution grants the chief justice the power to propose rules governing “matters of judicial administration.” Section 9(a) enables the Judiciary to independently administer court matters to the extent constitutionally permissible, thereby assuring its independence from the executive and legislative branches. *See* HLI 10-3 (recognizing the need to create constitutional courts to “assure [the judicial branch’s] independence from the executive and legislative branches.”). The NMI Constitution contemplates the judiciary’s independent oversight of its own administrative functions; therefore, these Procurement Rules shall control to the extent they conflict with other rules and regulations. *See Reyes*, 2004 MP 1 ¶ 99 (“As a pure judicial function, the procedural rules of a court take precedence over statutes, to the extent that there is any inconsistency.”).

¶ 3 The Procurement Rules further the Judiciary’s independence as the third branch of government and carefully account for efficiency, costs, and changes in technology. As described in Rule 1(c): “[t]he purpose of these Rules is to provide for the fair and equitable treatment of all persons involved in public procurement by the Judiciary, to maximize the purchasing value of public funds in procuring goods and services, and to provide safeguards for maintaining a procurement system of quality and integrity.” NMI JUD. R. PROC. 1(c).

¶ 4 IT IS HEREBY ORDERED that the Procurement Rules are adopted pursuant to Article IV, Section 9 of the NMI Constitution and are effective as of August 11, 2020.

ENTERED this 11th day of August, 2020.

/s/

ALEXANDRO C. CASTRO
Chief Justice

/s/

JOHN A. MANGLONA
Associate Justice

/s/

PERRY B. INOS
Associate Justice



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NORTHERN MARIANA ISLANDS JUDICIARY RULES OF PROCUREMENT

Exhibit A

Effective August 11, 2020

Effective August 11, 2020

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ARTICLE I - GENERAL PROVISIONS

PART A - PURPOSES, CONSTRUCTION, AND APPLICATION

Rule 1. Authority, Purpose, and Rules of Construction.

- (a) The Rules are promulgated under the authority of Article IV, Section 9 of the Constitution of the Northern Mariana Islands, which gives the chief justice of the Commonwealth the authority to propose rules governing judicial administration.
- (b) **Interpretation.** These Rules shall be construed and applied to promote their underlying purposes and policies.
- (c) **Purposes and Policies.** The purpose of these Rules is to provide for the fair and equitable treatment of all persons involved in public procurement by the Judiciary, to maximize the purchasing value of public funds in procuring goods and services, and to provide safeguards for maintaining a procurement system of quality and integrity.
- (d) **Singular, Plural, and Gender Rules.**
Unless the context requires otherwise:
 - (1) words in the singular number include the plural, and those in the plural include the singular; and
 - (2) words of a particular gender include any gender and the neuter, and when the sense so indicates, words of the neuter gender may refer to any gender.

Rule 2. Supplementary General Principles of Law Applicable.

Unless displaced by the particular provisions of these Rules, the principles of law and equity, including the Uniform Commercial Code of the Northern Mariana Islands, the common law of law merchant, and law relative to capacity to contract, agency, fraud, misrepresentation, duress, coercion, mistake, or bankruptcy shall supplement these Rules.

Rule 3. Requirement of Good Faith.

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

Rule 4. Application.

- (a) **Prospective Application.** These Rules apply to all procurement activities conducted by the Judiciary solicited or entered into after their effective date, unless the parties agree to their application to a contract solicited or entered into prior to their effective date. They shall apply irrespective of the source of funds, and shall also apply to the disposal of Judiciary properties. Nothing in these Rules shall prevent the Judiciary

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from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement.

- (b) **Inapplicability.** These Rules do not apply to court-appointed counsel, court interpreters, employment contracts or contracts for personal services under an excepted service; or to the procurement of professional services from persons such as interns, law clerks, mediators, therapists, psychiatrists, or psychologists; or to expenditures incurred pursuant to court order in matters before the various courts of the Judiciary.

Rule 5. Effective Date.

These Rules shall become effective on the date adopted by the Supreme Court.

PART B - DETERMINATIONS

Rule 6. Determinations.

The Procurement Officer shall retain all written determinations required under these Rules in the appropriate official contract file. Written determinations include those made in electronic transmissions.

PART C - DEFINITIONS OF TERMS USED IN THESE RULES

Rule 7. Definitions of Terms.

As used in these Rules, unless the context otherwise requires, the following meanings apply:

- (a) **“Architectural and Engineering Services”** means:
- (1) professional services of an architectural or engineering nature, as defined by Commonwealth law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in these Rules;
 - (2) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and
 - (3) such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including: studies, investigations, surveying, mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase

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services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

- (b) **“Blind Trust”** means an independently managed trust in which the employee-beneficiary has no management rights and in which the employee-beneficiary is not given notice of alterations in, or other dispositions of, the property subject to the trust.
- (c) **“Business”** means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity.
- (d) **“Change Order”** means a written order signed by the chief justice, directing the contractor to make changes which the Changes clause of the contract authorizes the Procurement Officer to order without the consent of the contractor.
- (e) **“Chief Justice”** means the chief justice of the Northern Mariana Islands Judiciary.
- (f) **“Commonwealth”** means the Government of the Commonwealth of the Northern Mariana Islands which includes the executive, legislative, and judicial branches. It also includes government agencies, political subdivisions, public corporations and agencies of local government, all collectively referred to herein as “public agencies.”
- (g) **“Confidential Information”** means any information which is available to an employee only because of the employee’s status as an employee of the Judiciary and is not a matter of public knowledge or available to the public on request.
- (h) **“Conspicuously”** means written in such special or distinctive format, print, or manner that a reasonable person against whom it is to operate ought to have noticed it.
- (i) **“Construction”** means the process of building, altering, repairing, improving, or demolishing any public infrastructure facility, including any structure, building, or other improvements of any kind to real property. It does not include the routine operation, routine repair, or routine maintenance of any existing public infrastructure facility, including structures, buildings, or real property.
- (j) **“Contract”** means all types of Judiciary agreements, regardless of what they may be called, for the procurement or disposal of supplies, services, or construction.
- (k) **“Contract File”** means the official contract file containing the following: A signed copy of the complete contract; all signed amendments including rationale for the contract change and

justification for the resulting cost/price or delivery date change; all correspondence with the contractor; approvals or disapprovals of contract deliveries; requests for waivers or deviations and the associated responses; documentation regarding settlement of claims and disputes; documentation regarding stop work or suspension of work orders; contract closeout documentation; written record of procurement history; and other documents related to the subject procurement contract.

- (l) **“Contract Modification”** means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract.
- (m) **“Contractor”** means any person having a contract with a governmental body.
- (n) **“Cooperative Purchasing”** means procurement conducted by, or on behalf of, one or more public procurement units, as defined in these Rules.
- (o) **“Cost-Reimbursement Contract”** means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of these Rules, and a fee, if any.
- (p) **“Data”** means recorded information, regardless of form or characteristic.
- (q) **“Day(s)”**, unless otherwise stated, means calendar days.
- (r) **“Definite-Quantity Contract”** means a contract which provides for delivery of a definite quantity of specific supplies or services for a specified period. This type of contract may be used when it can be determined in advance that a definite quantity of supplies or services will be required during the specified period.
- (s) **“Design-Bid-Build”** (and, where authorized by these Rules, “Construction Management At-Risk”) means a project delivery method in which the Judiciary sequentially awards separate contracts, the first for architectural and engineering services to design the project and the second for construction of the project according to the design.
- (t) **“Design-Build”** means a project delivery method in which the Judiciary enters into a single contract for design and construction of an infrastructure facility.
- (u) **“Design-Build-Finance-Operate-Maintain”** means a project delivery method in which the Judiciary enters into a single

contract for design, construction, finance, maintenance, and operation of an infrastructure facility over a contractually defined period. No Judiciary funds are appropriated to pay for any part of the services provided by the contractor during the contract period.

- (v) **“Design-Build-Operate-Maintain”** means a project delivery method in which the Judiciary enters into a single contract for design, construction, maintenance, and operation of an infrastructure facility over a contractually defined period. All or a portion of the funds required to pay for the services provided by the contractor during the contract period are either appropriated to the Judiciary prior to award of the contract or secured by the Judiciary through fare, toll, or user charges.
- (w) **“Design Requirements”** means the written description – but need not include drawings – and other documents illustrating the scale and relationship of the features, functions, and characteristics of a project related to the infrastructure facility or service to be procured under Article 3, including:
 - (1) required features, functions, characteristics, qualities, and properties that are required by the Judiciary;
 - (2) the anticipated schedule, including start, duration, and completion; and
 - (3) estimated budgets (as applicable to the specific procurement) for design, construction, operation and maintenance.
- (x) **“Designee”** means a duly authorized representative of a person holding a superior position.
- (y) **“Direct or Indirect Participation”** means involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity.
- (z) **“Director of Courts”** means the Director of Courts of the Northern Mariana Islands Judiciary.
- (aa) **“Dispute”** means a disagreement concerning the legal rights and obligations of contracting parties.
- (bb) **“Electronic”** means electrical, digital, magnetic, optical, electromagnetic, email, or any similar technology.
- (cc) **“Employee”** means an individual drawing a salary from the Judiciary. Consultants, independent contractors, and part-time

workers shall be considered employees only with respect to the ethics in public contracting provisions in Article 11.

(dd) “Established Catalog Price” means the price included in a catalog, price list, schedule, or other form that:

- (1) is regularly maintained by a manufacturer or contractor;
- (2) is either published or otherwise available for inspection by customers, and
- (3) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved,

(ee) “External Procurement Activity” means any buying organization not located in the Commonwealth which, if located in the Commonwealth, would qualify as a public procurement unit. Agencies of the United States and of any other State in the United States of America or its territories are external procurement activities.

(ff) “Financial Interest” means:

- (1) Ownership of any interest or involvement in any relationship from which or as a result of which, a person within the past year has received or is presently or in the future entitled to receive compensation; or
- (2) Holding a position in a business such as an officer, director, trustee, partner, employee or the like or holding any position of management.

(gg) “Firm-Fixed-Price Contract” means a contract which provides for a price that is not subject to any subsequent adjustment as a result of the contractor’s cost experience in performing the contract. This type of contract places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss.

(hh) “General Counsel” means the attorney for the Judiciary.

(ii) “Goods” means all property, including but not limited to equipment, materials, supplies, and other tangible personal property of any kind or nature, printing, insurance, and leases of real and personal property.

(jj) “Grant” means the furnishing of assistance, whether financial or otherwise, to any person to support a program authorized by law. It does not include an award whose primary purpose is to procure an end product, whether in the form of supplies, services, or construction; a contract resulting from such an award is not a grant but a procurement contract.

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- (kk) **“Gratuity”** means a payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received.
- (ll) **“Immediate Family”** means spouse, children, parents, brothers, or sisters.
- (mm) **“Independent Peer Reviewer”** means an independent professional who provides peer review of key elements of the design of major public facilities whose function is not to conduct a second design alongside the designers of record, but to provide the Judiciary with independent professional advice and assurance that key design elements of the project are consistent with the functional description in the request for proposals and with the common law standard of professional care.
- (nn) **“Independent Peer Reviewer Services”** are additional architectural and engineering services provided to the Judiciary in design-build-operate-maintain or design-build-finance-operate-maintain procurement. The function of the independent peer reviewer is to confirm that the key elements of the professional engineering and architectural design provided by the contractor are in conformance with the applicable standard of care.
- (oo) **“Invitation for Bids”** means all documents, whether attached or incorporated by reference, utilized for soliciting bids.
- (pp) **“Infrastructure Facility”** means a building; structure; or networks of buildings, structures, pipes, controls, and equipment that provide transportation, utilities, or public safety services in the Judiciary. Included are courthouses; jails; prisons; water treatment plants, distribution systems, and pumping stations; wastewater treatment plants, collection systems, and pumping stations; solid waste disposal systems, parking areas, and related facilities.
- (qq) **“Judicial Council”** mean the Northern Mariana Islands Judicial Council.
- (rr) **“Judiciary”** means the judicial branch of the Commonwealth of the Northern Mariana Islands.
- (ss) **“Local Public Procurement Unit”** means any county, city, town, and any other subdivision of the Commonwealth or public agency of any such subdivision, public authority, educational, health, or other institution, and to the extent provided by law, any other entity which expends public funds for the procurement of supplies, services, and construction, and any nonprofit corporation operating a charitable hospital.

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- (tt) **“May”** denotes the permissive.
- (uu) **“Official Responsibility”** means direct administrative or operating authority, whether intermediate or final, either exercisable alone or with others, either personally or through subordinates, to approve, disapprove, or otherwise direct the Judiciary action.
- (vv) **“Official with Expenditure Authority”** means that public official who may expend, obligate, encumber, or otherwise commit public funds under the CNMI planning and budgeting act or under any appropriation act.
- (ww) **“Office of Procurement”** means the office created in the Judiciary, headed by the Procurement Officer.
- (xx) **“Operations and Maintenance”** means a project delivery method whereby the Judiciary enters into a single contract for the routine operation, routine repair, and routine maintenance of an infrastructure facility.
- (yy) **“Person”** means an individual, sole proprietorship, partnership, joint venture, corporation, other unincorporated association or a private legal entity.
- (zz) **“Procurement”** means buying, purchasing, renting, leasing, or otherwise acquiring any supplies, services, goods, or construction. It also includes all functions that pertain to the obtaining of any supply, service, good, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.
- (aaa) **“Procurement Officer”** means the head of the Office of Procurement of the Judiciary and the person duly authorized to enter into and administer contracts and make written determinations with respect thereto.
- (bbb) **“Proposal development documents”** means drawings and other design related documents that are sufficient to fix and describe the size and character of an infrastructure facility as to architectural, structural, mechanical and electrical systems, materials, and such other elements as may be appropriate to the applicable project delivery method.
- (ccc) **“Public Notice”** means the distribution or dissemination of information to interested parties using methods that are reasonably available. Such methods will often include publication in newspapers of general circulation, electronic or paper mailing lists, and any Judiciary web site designated and maintained for that purpose.

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- (ddd) **“Public Procurement Unit”** means a local public procurement Unit, an external procurement activity, a state public procurement unit, and any not-for-profit entity comprised of more than one unit or activity of the foregoing listed units.
- (eee) **“Purchase Description”** means the words used in a solicitation to describe the supplies, services, or construction to be purchased, and includes specifications attached to, or made a part of the solicitation.
- (fff) **“Purchase Request”** means that document whereby the Judiciary requests that a contract be entered into for a specified need, and may include, but is not limited to, the technical description of the requested item, delivery schedule, transportation, criteria for evaluation, suggested sources of supply, and information supplied for the making of any written determination required by these Rules.
- (ggg) **“Register of Proposals”** means a document containing a list of persons or entities that submitted solicited proposals on a particular Judiciary procurement.
- (hhh) **“Request for Proposals”** means all documents, whether attached or incorporated by reference, used for soliciting proposals.
- (iii) **“Requirements contract”** means a contract which provides for filling all actual purchase for supplies or services during a specified contract period, with deliveries or performance to be scheduled with the contractor.
- (jjj) **“Responsible Bidder or Offeror”** means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.
- (kkk) **“Responsive Bidder”** means a person who has submitted a bid which conforms in all material respects to the invitation for bids.
- (lll) **“Services”** means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. This term shall not include employment agreements or collective bargaining agreements.
- (mmm) **“Shall”** denotes the imperative.
- (nnn) **“Signature”** means a manual or electronic identifier, or the electronic result of an authentication technique attached to or logically associated with a record that is intended by the person using it to have the same force and effect as a manual signature.

- (ooo) **“Specification”** means any description of the physical or functional characteristics, or of the nature of a supply, service, or construction item for an infrastructure facility. It may include a description of any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery.
- (ppp) **“State Public Procurement Unit”** means the Office of the Procurement Officer of the Judiciary, the Commonwealth, or any other state or territory.
- (qqq) **“Supplies”** means all property, including but not limited to equipment, materials, printing, insurance, and leases of real property, excluding land or a permanent interest in land.
- (rrr) **“Using Agency”** means any governmental body of the Commonwealth which utilizes any supplies, services, or construction procured under these Rules.
- (sss) **“Written” or “In Writing”** means the product of any method of forming characters on paper, other materials, or viewable screens, which can be read, retrieved, and reproduced, including information that is electronically transmitted and stored.

PART D - PUBLIC ACCESS

Rule 8. Public Access to Procurement Information.

- (a) **Policy.** Procurement information shall be a public record as provided by Commonwealth law and the Policy on Public Access to Judicial Branch and Administrative Records.
- (b) **Confidentiality.** Procurement information may be kept confidential when necessary to ensure proper bidding procedures or to protect private, confidential, financial or technical data, trade secrets or other proprietary information submitted by a proposer or bidder or any other applicable exemption under Commonwealth law or Judiciary regulation/policy. This decision shall be made by the Procurement Officer. Any contractor, vendor, or proposer submitting information, whether technical or proprietary as to price, shall so indicate to the Procurement Officer in any submission and explain the nature of the information and why it must be designated as private or confidential/exempt under the Policy on Government Access.
- (c) **Notice.** Any request for public records of exempt or private materials shall also require reasonable notice to any contractor, vendor, or proposer to be allowed to respond or undertake measures to protect such information.

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Rule 9. Authorization for the Use of Electronic Transmissions.

The use of electronic media, including acceptance of electronic signatures, is authorized consistent with Commonwealth statute; Judiciary policy; or guidance for use of such media, so long as such guidance provides for appropriate security to prevent unauthorized access to the bidding, approval, and award processes; and accurate retrieval or conversion of electronic forms of such information into a medium which permits inspection and copying.

ARTICLE 2 – OFFICE OF PROCUREMENT

Rule 10. Contract Review, Processing, and Oversight

- (a) **Initiation and Procurement Officer Certification.** All contracts will be prepared by the Procurement Officer who shall certify that these Procurement Rules have been complied with, that the proposed contract is for a public purpose, and that it does not constitute a waste or abuse of public funds. When complete, the contract must include all attachments and exhibits that are incorporated into the contract by reference.
- (b) **Budget and Finance Director Certification.** The contract shall next be approved by the Budget and Finance Director who shall certify the availability of funds.
- (c) **Legal Counsel Certification.** The contract shall next be reviewed and approved by the General Counsel who shall certify the contract as to form and legal capacity.
- (d) **Chief Justice Approval.** The contract shall then be approved by the Chief Justice or designee.
- (e) **Contractor Approval.** After approval of the Chief Justice or designee, the contract will be forwarded to the contractor for approval and signature.
- (f) **Certification of Completeness and Notice to Proceed.** After the contractor's signature, the Procurement Officer shall review the contract documents for completeness. If satisfied, the Procurement Officer shall:
 - (1) Sign in the appropriate space; and
 - (2) send a notice to proceed to the contractor notifying that the contract is finalized, with a copy to the Chief Justice, and authorizing the contractor to commence work pursuant to the contract terms.
- (g) **Notice to Proceed Required.** The contractor shall not incur any expenses under the contract until it has received a notice to proceed.

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- (h) **When Effective.** No contract is effective until all of the parties whose signatures are required on the contract form have signed the contract. All contracts shall contain a clause ensuring the right of the Commonwealth to audit the contractor's records pertaining to the contract as provided by law.

ARTICLE 3 – SOURCE SELECTION AND CONTRACT FORMATION

PART A - METHODS OF SOURCE SELECTION

Rule 11. Methods of Source Selection.

Unless otherwise authorized by law or regulation, all Judiciary contracts shall be awarded by one of the following methods:

- (a) **Rule 12 (Competitive Sealed Bidding);**
- (b) **Rule 13 (Competitive Sealed Proposals);**
- (c) **Rule 14 (Small Purchases);**
- (d) **Rule 15 (Sole Source Procurement);**
- (e) **Rule 16 (Emergency Procurement);**
- (f) **Rule 17 (Expedited Purchasing in Special Circumstances);**
- (g) **Rule 18 (Vehicle Procurement);**
- (h) **Rule 19 (Computer Software and Hardware Procurement);**
- (i) **Rule 20 (GSA Procurement); or**
- (j) **Rule 42 (Architectural, Engineering, and Other Professional Services).**

Rule 12. Competitive Sealed Bidding.

- (a) **Conditions for Use.** All Judiciary Contracts shall be awarded by competitive sealed bidding under Rule 12, except as provided in:
 - (1) Rule 13 (Competitive Sealed Proposals);
 - (2) Rule 14 (Small Purchases);
 - (3) Rule 15 (Sole Source Procurement);
 - (4) Rule 16 (Emergency Procurement);
 - (5) Rule 17 (Expedited Purchasing in Special Circumstances);
 - (6) Rule 18 (Vehicle Procurement);
 - (7) Rule 19 (Computer Software and Hardware Procurement);

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- (8) Rule 20 (GSA Procurement);
 - (9) Rule 41 (Source Selection Methods Assigned to Project Delivery Methods); or
 - (10) Rule 42 (Architectural, Engineering, and Other Professional Services).
- (b) **Invitation for Bids.** An invitation for bids shall be issued and shall include at the minimum:
- (1) an invitation for bids number;
 - (2) date of issuance;
 - (3) judiciary's name, address, and location;
 - (4) specific location where bids must be submitted;
 - (5) due date by which bids must be received;
 - (6) date, hour, and place of bid opening;
 - (7) a purchase description in sufficient detail to permit full and open competition and allow bidders to properly respond;
 - (8) quantity(ies) to be furnished;
 - (9) time, place, and method of delivery or performance requirements;
 - (10) essential contractual terms and conditions; and
 - (11) any bonding requirements.
- (c) **Public Notice.** The Procurement Officer shall issue public notice of all invitations for bids. Such notice shall include:
- (1) advertising invitations for bids:
 - (A) in a newspaper of general circulation in the Commonwealth at least once in each week from the time the solicitation is issued, including the week when the bidding period expires; or
 - (B) if there is no adequate local competition, in an online national or regional newspaper at least once.
 - (2) posting invitations for bids on the Judiciary's public website for at least fourteen (14) days;
 - (3) or both.
 - (4) The Judiciary may also provide notice to responsible vendors known to the Judiciary. If adequate local competition for the solicited goods or services exists, the public notice may be made only within the Commonwealth. If adequate local competition is not believed to exist, invitations for bids shall be advertised in at least one online

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regional or national publication, or on the Judiciary's public website. In such cases, the Procurement Officer may consider extending the bidding period.

- (d) **Pre-bid conference.** A pre-bid conference may be conducted at the discretion of the Procurement Officer to explain procurement requirements. Notice of a pre-bid conference may be included in invitations for bids, sent to all prospective bidders known to have obtained invitations for bids; or posted on the Judiciary's public website.
- (e) **Bid submission.** All bids shall be submitted to the Procurement Office. Bids received prior to the time set for opening shall be maintained sealed in a secure location.
 - (1) Bids submitted from vendors outside the Commonwealth must be postmarked by the date set in invitations for bids and must be received within seven working days of that date. Bidders outside the Commonwealth must notify the Procurement Officer in writing of their intent to bid in order to be extended these additional seven (7) days for the receipt of the actual bid documents. The Procurement Office has discretion to grant the extension. This notice of intent to bid may be made by any mode of written communication including facsimile, email, or other electronic transmission; or
 - (2) Bids may be submitted electronically, but need to meet the deadline indicated above.
 - (3) If a bid package is unsealed by mistake, it shall be resealed and the person who opened the bid shall write his signature and print his title on the envelope and deliver it to the Procurement Officer. No information contained in the bid shall be disclosed prior to the bid opening. The resealed bid shall be placed into a secure location.
- (f) **Bid Opening.** The Procurement Officer or designee shall conduct the bid opening, publicly in the presence of one or more witnesses at the time and place as designated in invitations for bids. The amount of each bid, and such other relevant information as may be specified by these Rules, together with the name of each bidder shall be recorded; the record and each bid shall be open to public inspection.
- (g) **Bid Acceptance and Bid Evaluation.** Bids shall be unconditionally accepted without alteration or correction, except as authorized in these Rules. Bids shall be evaluated based on the requirements set forth in invitations for bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and

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suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. Invitations for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in invitations for bids.

(h) Bid Rejection. A bid may be rejected for any of the following reasons:

- (1) failure to conform to essential requirements of the invitation for bids such as specifications or time of delivery;
- (2) imposition of conditions or restrictions in the bid which modify requirements of the invitation or limit the bidder's liability to the Judiciary. For example, bids shall be rejected in which the bidder:
 - (A) protects against future changes in conditions, such as increased costs;
 - (B) fails to state a price and indicates that price shall be the price in effect at the time of delivery;
 - (C) states a price but qualifies it as subject to price in effect at time of delivery; or
 - (D) limits the rights of the Judiciary.
- (3) unreasonableness as to price; or
- (4) a bid from a non-responsible bidder as defined in Rule 22 (Responsibility of Bidders and Offerers).

(i) Correction or Withdrawal of Bids.

- (1) Correction or withdrawal of inadvertently erroneous bids, before or after award, or cancellation of awards based on bid mistakes must be approved in writing by the Procurement Officer.
- (2) After the bid opening, no changes in bid price or other provisions of bids prejudicial to the interest of the Judiciary or fair competition shall be allowed.
- (3) Whenever a bid mistake is suspected, the Judiciary shall request confirmation of the bid prior to award. In such an instance, if the bidder alleges an error, the Judiciary shall only permit correction or withdrawal of the bid for the following reasons:
 - (A) correction of bids shall only be permitted when:
 - (i) an obvious clerical mistake is clearly evident from examining the bid document. Examples of such

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mistakes are errors in addition or the obvious misplacement of a decimal point; or

- (ii) the otherwise low bidder alleges a mistake and the intended bid is evident from the bid document or is otherwise supported by clear and convincing evidence as to the bid intended and the corrected bid remains the low bid. A low bidder shall not be permitted to correct a bid mistake resulting from an error in judgment.

- (B) Withdrawal of a bid shall only be permitted where the otherwise low bidder alleges a mistake and there is clear and convincing evidence as to the existence of a mistake.

(j) Award.

- (1) The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in invitations for bids. Unsuccessful bidders shall also be promptly notified. Written notice shall be by mail, email, or otherwise furnished immediately to bidders.
 - (2) Notice of an award to the successful bidder shall only be made by the presentation of a contract including all of the required signatures. No acceptance of an offer shall occur nor shall any contract be formed until a contract is written and approved by all the officials required by law and regulation.
 - (3) Judiciary contracts shall contain a clause which states that the signature of the contractor shall be the last in time to be affixed to a contract and that no contract can be formed prior to the approval of all required officials.
 - (4) In the event all bids exceed available funds and the bid of the lowest responsive and responsible bidder exceeds available funds by five percent or less, and time or economic considerations preclude re-solicitation of work of a reduced scope, the Procurement Officer may negotiate an adjustment of the bid price including changes in bid requirements, with the lowest responsive and responsible bidder in order to bring the bid price within the amount of available funds. The negotiation shall be documented in writing and attached to the bidding documents.
- (k) Cancellation of awards.** Cancellation of awards or contracts shall only be permitted when:
- (1) evidence as to the existence of the mistake is not discovered until after the award;

- (2) there exists no clear and convincing evidence to support the bid intended; and
 - (3) performance of the contract at the award price would be unconscionable.
- (l) **Multi-Step Sealed Bidding.** When it is considered impractical to initially prepare a purchase description to support an award based on price, an invitation for bids may be issued requesting the submission of unpriced offers to be followed by an invitation for bids limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.

Rule 13. Competitive Sealed Proposals.

(a) Conditions for Use.

- (1) When the Judiciary determines that the use of a competitive sealed bidding process is either not practical or not advantageous to the Judiciary, a contract may be entered into through the solicitation and evaluation of competitive sealed proposals.
 - (2) Contracts for the design-build, design-build-operate-maintain, or design-build-finance-operate-maintain project delivery methods specified in Article 5 shall be entered into by competitive sealed proposals, except as otherwise provided in Rule 14 (Small Purchases), Rule 15 (Sole Source Procurement), Rule 16 (Emergency Procurement), and Rule 17 (Expedited Purchasing in Special Circumstances) of Rule 11 (Methods of Source Selection).
- (b) Request for Proposals (“RFP”).** Proposals shall be solicited through a request for proposals. Each request for proposals for design-build (Rule 40(d)), design-build-operate-maintain (Rule 40 (e)), and design-build-finance-operate-maintain (Rule 40(f)):

- (1) shall include design requirements;
- (2) shall solicit proposal development documents; and
- (3) may, when the Judiciary determines that the cost of preparing proposals is high in view of the size, estimated price, and complexity of the procurement:
 - (A) prequalify offerors by issuing a Request for Qualifications in advance of the request for proposals; and
 - (B) select a short list of responsible offerors prior to discussions and evaluations under Rule 13(f), provided that the number of proposals that will be short-listed is stated in the request for proposals and prompt public

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notice is given to all offerors as to which proposals have been short-listed.

- (c) **Public Notice.** Adequate public notice of the request for proposals shall be given in the same manner as provided in Rule 12(c) (Competitive Sealed Bidding, Public Notice).
- (d) **Presubmission Conference.** The request for proposal may include a provision for a conference with any prospective offerors to be held prior to the proposal submission date to answer offeror questions, clarify requirements and evaluation factors, or other topics at the discretion of the Judiciary.
- (e) **Receipt of Proposals.** Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals shall be prepared and shall be open for public inspection after contract award.
- (f) **Evaluation Factors.**
 - (1) *General.* The request for proposals shall state the relative importance of price and other factors and subfactors, if any. Price or cost to the Judiciary shall be included as an evaluation factor in every request for proposals. The following must be complied with in evaluating proposals:
 - (A) *Evaluation Factors.* All evaluation factors stated in the RFP shall be considered in determining proposals in the competitive range (i.e., those allowed to participate further in the selection process), and any subsequent evaluations (including evaluation of best and final offers from the competitive range offerors).
 - (B) The Procurement Officer shall determine which proposals are in the competitive range, based on the recommendations of the evaluator or evaluation team, for the purpose of conducting written or oral discussions, and shall include all proposals that have a reasonable chance of being selected for award. When there is doubt as to whether a proposal is in the competitive range, the proposal shall be included. Proposals determined to have no reasonable chance of being selected for contract award shall no longer be considered for selection. A proposal is not reasonably susceptible of being selected for award and can be excluded from the competitive range if it is clear that:
 - (i) its contents are so unacceptable that a revision of the proposal in the negotiation stage would be equivalent to accepting a new proposal; or

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- (ii) in comparison with other proposals, such proposal clearly has no chance of being selected for award.
- (C) Beyond ensuring that the proposal meets the minimum requirements in the solicitation, if evaluation of technical criteria is necessary, the Procurement Officer will assign qualified personnel to conduct a technical evaluation of the proposals. The evaluators, including any other personnel responsible for the selection of competitive range offerors or final selection of an offeror, shall be designated to exercise such responsibility by the Procurement Officer.
- (D) *Evaluation Plan.* Before conducting any evaluation, the Procurement Officer shall approve an evaluation plan which at a minimum shall include:
 - (i) a description of the evaluation process, methodology, and techniques to be used;
 - (ii) a statement of the evaluation factors and any significant sub-factors, and their relative importance; and
 - (iii) all documentation requirements.
- (E) *Documentation Requirements.* Documentation requirements for the technical evaluation shall include:
 - (i) the basis for the evaluation;
 - (ii) an assessment of each offeror's ability to accomplish the technical requirements;
 - (iii) a summary, matrix, or quantitative ranking of each technical proposal in relation to the best rating possible; and
 - (iv) a summary of findings. The supporting documentation prepared for the selection decision shall show the proposals' comparative strengths, weaknesses, and risks in terms of the evaluation factors.
- (F) The Procurement Officer shall promptly notify offerors when they are excluded from the competitive range or otherwise excluded from further consideration and stating the basis for the exclusion.
- (G) If provided for in the request for proposals, discussions may be conducted with responsible offerors who submit proposals in the competitive range for the purpose of clarification and ensuring a full understanding of, and responsiveness to, all solicitation requirements. Offerors

shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals and such revisions may be permitted after submission and prior to award for the purpose of obtaining the best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

- (2) *Additional Requirements.* Each request for proposals for design-build (Rule 40(d)), design-build-operate-maintain (Rule 40(e)), and design-build-finance-operate-maintain (Rule 40(f)):
 - (A) shall state the relative importance of (1) demonstrated compliance with the design requirements, (2) offeror qualifications, (3) financial capacity, (4) project schedule, (5) price (or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements), and (6) other factors, if any; and
 - (B) shall require each offeror, when the contract price is estimated to exceed \$10,000,000, when the contract period of operations and maintenance is ten (10) years or longer, or in circumstances established by the Judiciary, to identify an independent peer reviewer whose competence and qualifications to provide such services shall be an additional evaluation factor in the award of the contract.
- (g) **Award.** Award shall be made to the responsible offeror whose proposal is determined to be most advantageous to the Judiciary taking into consideration price and the evaluation factors set forth in the request for proposal. No other factors or criteria shall be used in the evaluation and the contract file shall contain the basis on which the award is made. Within three (3) working days after the date of contract award, the Procurement Officer shall provide written notification to each unsuccessful offeror (unless pre-award notice was given under Rule 13(f)(1)(F)). The notice shall include, as applicable:
 - (1) the number of offerors solicited;
 - (2) the number of proposals received;
 - (3) the name and address of each offeror receiving an award;
 - (4) the items, quantities, and unit prices of each award (if the number of items or other factors makes listing unit prices impracticable, only the total contract price need be furnished); and

- (5) in general terms, the reason the offeror's proposal was not accepted, unless the price information in item readily reveals the reason. In no event shall an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed publicly or to any other offeror.
- (h) **Debriefings.** The Procurement Officer is authorized to provide debriefings that furnish the basis for the source selection decision and contract award.

Rule 14. Small Purchases.

- (a) **Application.** Any procurement not exceeding the amounts established under Rule 14 may be made in accordance with small purchase procedures. However, procurement requirements shall not be artificially divided so as to constitute a small purchase.
- (b) **No Bidding Requirement.** Bidding is not required for procurement not exceeding \$5,000.00.
- (c) **Price Quotation Requirement.** Bidding is not required, but is encouraged, for procurement valued over \$5,000.00 to \$20,000.00 inclusive. The Procurement Officer must obtain price quotations from at least three (3) vendors and base the selection on competitive price and quality for procurement valued over \$5,000.00 to \$20,000.00 inclusive. Any price quotations obtained must be written, documented, and submitted to the Procurement Officer for approval.
- (d) **Purchase Order Requirement.** Purchase orders may be utilized for small purchases under Rule 14 (b) and (c).
- (e) **Not Applicable to Vehicle Purchase or Lease.** Any lease or purchase of vehicles shall be procured pursuant to Rule 18.
- (f) **Machinery and Equipment.** Any lease or purchase of machinery and equipment in excess of \$25,000.00 shall be procured pursuant to Rule 12 or other applicable provisions of these Rules.

Rule 15. Sole Source Procurement.

- (a) **Application.** A contract may be awarded for a supply, service, or construction item without competition when:
 - (1) the Procurement Officer determines in writing that there is only one source for the required supply, service, or construction;
 - (2) to obtain professional services for the purpose of facilitating the process of obtaining needed critical

infrastructure funding in order to harden and enhance the capability of protecting critical infrastructure of the Judiciary;

- (3) to obtain expert witnesses for litigation;
 - (4) to obtain legal services; or
 - (5) to obtain policy consultants of the Judiciary.
- (b) **Written Justification.** A written justification for sole source procurement shall be prepared by the requestor and approved by the Procurement Officer and shall contain:
- (1) the specific unique capabilities required;
 - (2) the specific unique capabilities of the contractor;
 - (3) the efforts made to obtain competition; and
 - (4) the specific considerations given to alternative sources and specific reasons why alternative sources were not selected.
- (c) **Other Requirements.** Where applicable, the Procurement Officer shall provide a written copy of the federal grant, act, or court order under which the services sought are authorized or required.

Rule 16. Emergency Procurement.

- (a) **Application.** Notwithstanding any other provision within these Rules, the Judiciary may make emergency procurements when a threat to public health, safety, or welfare exists under emergency conditions, including natural disasters, water, power, and communication outages, and other calamities.
- (b) **Competition Encouraged.** Procurements made under emergency conditions shall be as competitive as practicable under the circumstances. If time allows, documented quotes should be obtained.
- (c) **Written Justification.** A written justification for the basis of the emergency and for the selection of the particular contractor must be prepared by the Director of Courts and approved by the Procurement Officer and shall be maintained in the contract file.

Rule 17. Expedited Purchasing in Special Circumstances.

- (a) **Application.** When an unusual or unique situation exists that require the expedited procurement of goods or services, including professional services, for the purpose of facilitating the process of obtaining needed critical infrastructure funding in order to harden and enhance the capability of protecting critical infrastructures of the Judiciary, the Procurement Officer may request that the Chief Justice approve expedited

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procurement above the small purchase amount under Rule 14 without the solicitation of competitive sealed bidding or request for proposals.

- (b) **Factors to Consider.** The factors to be considered in approving or disapproving this request shall be:

 - (1) the urgency of the Judiciary's need for the goods or services;
 - (2) the comparative costs of procuring the goods or service from a sole source or through the competitive process;
 - (3) the availability of the goods or service in the Commonwealth and the timeliness in acquiring it; and
 - (4) any other factors establishing the expedited procurement is in the best interest of the Judiciary.
- (c) **Written Determination Required.** Upon the Chief Justice's written determination that the factors in Rule 17(b) justify an expedited purchase, the Procurement Officer shall process the necessary document(s) to procure the required goods or services in the most efficient manner.
- (d) **Notice.** If the Chief Justice determines that the request for the expedited procurement did not meet the criteria in Rule 17(b), he should promptly notify the Procurement Officer of the disapproval in writing.
- (e) **Competition Encouraged.** The expedited procurement shall be as competitive as possible under the circumstances.
- (f) **Maximum Allowable Procurement.** The total amount of goods or service that may be approved under Rule 17 shall not exceed \$50,000.00 except when such goods or services are procured for the purpose of facilitating the process of obtaining needed critical infrastructure funding in order to harden and enhance the capability of protecting critical infrastructures of the Judiciary.

Rule 18. Vehicle Procurement.

- (a) **Lease or Purchase.** The lease or purchase of vehicles shall be procured using an invitation for bids, unless it qualifies for other procurement methods. The Procurement Officer shall establish standard vehicle specifications which shall be updated on a regular basis (not less frequently than every 2 years). All vehicles leased or purchased shall be procured in the name of the Judiciary, and shall conform to Commonwealth and federal laws, including the Commonwealth Government Vehicle Act (1 CMC § 7406), and associated rules and regulations.

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- (b) **Whether to Lease or Purchase.** The Judiciary shall consider whether to lease or purchase vehicles based on a case-by-case evaluation of comparative costs and other factors. The following factors are the minimum that shall be considered, and a record reflecting the application of these factors shall be provided in a form prescribed by the Procurement Officer and shall be included in the contract file:
- (1) estimated length of the period in which the vehicle is to be used and the extent of use within that period;
 - (2) financial and operating advantages of alternative types and makes of vehicles;
 - (3) cumulative rental payments for the estimated period of use;
 - (4) net purchase price;
 - (5) maintenance and other service costs; and
 - (6) the following additional factors shall be considered, as appropriate:
 - (A) availability of purchase options;
 - (B) potential for use of the vehicle by other agencies after its use by the Judiciary has ended;
 - (C) trade-in or salvage value;
 - (D) imputed interest; and
 - (E) availability of maintenance service (e.g., whether the vehicles be serviced by the Judiciary, dealership, or other service centers if it is purchased).
- (c) **Purchase Method.** The purchase method is appropriate if the vehicles will be used beyond the point in time when cumulative leasing costs exceeds the purchase costs.
- (d) **Lease Method.** The lease method is appropriate if it is to the Judiciary's advantage under the circumstances. The lease method may also serve as an interim option when the circumstances require immediate use of vehicles to meet program or system goals; but do not currently support acquisition by purchase.
- (e) **Lease with Option to Purchase.** If a lease is justified, a lease with option to purchase is preferable. Generally, a long term lease shall be avoided, but may be appropriate if an option to purchase or other favorable terms are included. If a lease with option to purchase is used, the contract shall state the purchase price or provide a formula which shows how the purchase price will be established at the time of purchase. The option to purchase may only be exercised by the Judiciary. The Chief

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Justice shall notify the Procurement Officer thirty (30) days in advance if the Judiciary does not intend to exercise the purchase option.

Rule 19. Computer Software and Hardware Procurement.

- (a) **Application.** Notwithstanding any other provision of these Rules, commercial computer software, including documentation, and hardware may be procured pursuant to Rule 19.
- (b) **License Acquisition.** Commercial computer software, including commercial computer software documentation, may be acquired under a license customarily provided to the public to the extent such license is lawful and satisfies the Judiciary's needs.
- (c) **Commercial Software.** In acquiring commercial software, the Judiciary shall not generally require offerors and contractors to:
 - (1) furnish technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public; or
 - (2) transfer intellectual property rights or otherwise relinquish to, or otherwise provide, the Judiciary the rights to use, modify, reproduce, release, perform, display, or disclose commercial computer software or commercial computer software documentation, except as mutually agreed to by the parties. With regard to commercial computer software and commercial software documentation, the Judiciary shall have only those rights specified in the license therefor.
- (d) **Competitive Procurement Exception.** Competitive bidding, or competitive procurement, shall not be required for commercial software upon a showing that:
 - (1) the software is advertised for sale to the public at prices which are readily determinable from public sources, including but not limited to, sources on the internet;
 - (2) proof of contemporaneous pricing which is actually available to Commonwealth purchasers is supplied in the contract package; and
 - (3) the other prices shown are within ten percent (10%) of the pricing selected or the selected vendor will provide support for the software of a value which compensates for the difference in price.

- (e) **Software Updates/Extensions.** Competitive bidding, or competitive procurement, shall not be required with respect to software for the following:
 - (1) an updated version of software previously purchased;
 - (2) an extension of the license for previously-purchased software; or
 - (3) an extension of maintenance services for previously-purchased software.
- (f) **GSA Purchase.** The purchase of computer hardware, software, or related services pursuant to a US General Services Administration (“GSA”) blanket contract are presumed competitive under these Rules.

Rule 20. General Services Administration Procurement (“GSA Procurement”).

- (a) **Competitive Presumption.** Notwithstanding any other provision of these Rules, the purchase of any goods pursuant to a GSA contract is presumed competitive. This presumption shall apply to commercially available products and products which are designed, manufactured, or assembled according to GSA specifications.
- (b) **Requirement.** The Procurement Officer must submit a purchase order with a price quotation from the vendor that clearly identifies that the goods purchased are covered under a GSA contract. No other procedures need be used to comply with the provisions of Rule 20.

PART B - CANCELLATION OF INVITATIONS FOR BIDS OR REQUESTS FOR PROPOSALS

Rule 21. Cancellation of Invitations for Bids or Requests for Proposals.

- (a) **Cancellation.** An invitation for bids, a request for proposals, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, when it is in the best interests of the Judiciary based on:
 - (1) inadequate or ambiguous specifications contained in the solicitation;
 - (2) specifications which have been revised;
 - (3) goods or services being procured which are no longer required;

- (4) inadequate consideration given to all factors of cost to the Judiciary in the solicitation;
 - (5) bids or proposals received indicated that the needs of the Judiciary can be certified by a less expensive good or service;
 - (6) all offers with acceptable bids or proposals received are at unreasonable prices;
 - (7) bids were collusive; or
 - (8) any other reasons which justify the cancellation based on the best interest of the Judiciary.
- (b) **Contract File.** The reason(s) for a cancellation under Rule 21(a) shall be made part of the contract file.

PART C - QUALIFICATIONS AND DUTIES

Rule 22. Responsibility of Bidders and Offerors.

- (a) **Determination of Nonresponsibility.** Awards shall only be made to responsible bidders or offerors. To be determined responsible, a prospective contractor must:
- (1) have adequate financial resources to perform the contract, or the ability to obtain such resources;
 - (2) be able to comply with the required delivery or performance schedule;
 - (3) have a satisfactory performance record;
 - (4) have a satisfactory record of integrity and business ethics;
 - (5) have the necessary organization, experience, and skills required to successfully perform the contract, or the ability to obtain them;
 - (6) have the necessary production, construction, and technical equipment facilities, or the ability to obtain them; and
 - (7) be otherwise qualified and eligible to receive an award under applicable laws and rules.
- (b) **Obtaining Information.** Prior to award, the Procurement Officer shall obtain information from the bidder or offeror necessary to make a determination of responsibility using the factors in Rule 22(a)(1)–(7). The unreasonable failure of a bidder or offeror to promptly supply information in connection with a responsibility inquiry may be grounds for determination of non-responsibility. When a bid or proposal on which a contract award could otherwise be made is rejected because the

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prospective contractor is found to be non-responsible, a written explanation, prepared and signed by the Procurement Officer stating the basis for the finding, shall be placed in the contract file.

- (c) **Right of Nondisclosure.** Confidential information furnished by a bidder or offeror pursuant to Rule 22 shall not be disclosed outside the Office of Procurement, or any other Judiciary official involved, without prior consent by the bidder or offeror.
- (d) **Nonresponsibility Determination.** When a bid or proposal is rejected because the prospective contractor is found to be non-responsible, the Procurement Officer shall state the basis of the determination in writing and it shall be placed in the contract file.

Rule 23. Prequalification of Suppliers.

Prospective suppliers may be prequalified for particular types of supplies, services, and construction. The method of submitting prequalification information and the information required in order to be prequalified shall be determined by the Procurement Officer.

Rule 24. Substantiation of Offered Prices.

The Procurement Officer may request factual information reasonably available to the bidder or offeror to substantiate that the price or cost offered, or some portion of it, is reasonable, if:

- (a) the price is not:
 - (1) based on adequate price competition;
 - (2) based on established catalogue or market prices; or
 - (3) set by law or regulation; and
- (b) the price or cost exceeds an amount established in these Rules.

PART D - TYPES OF CONTRACTS

Rule 25. Types of Contracts.

- (a) **Policy to Use Best Suited Contract.** The Judiciary may use the type of contract that is best suited to a particular award for the purchase of goods or services, construction, or other procurement that it determines to be in the best interests of the Judiciary. This can include firm fixed price contracts, cost-reimbursement contracts, definite quantity contracts, and requirements contracts.
- (b) **Cost-Reimbursement Contract.**
 - (1) *Application.* Cost-reimbursement contracts must contain a ceiling which the contractor shall not exceed without the

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recommendation of the official with expenditure authority and approval by the Procurement Officer. A cost-reimbursement contract may be used when the Procurement Officer determines in writing that:

- (A) Uncertainties in the work to be performed make the cost of performance too difficult to estimate with the degree of accuracy required for a firm fixed price contract;
 - (B) Use of a cost-reimbursement contract is likely to be less costly to the Judiciary than any other type due to the nature of the work to be performed under the contract; and
 - (C) The contractor's accounting system is adequate for determining costs applicable to the contract, and Judiciary oversight in the form of a construction management contract will be obtained to ensure the use of efficient methods and effective cost controls in the performance of the contract.
- (2) *Limitations.* The use of cost-reimbursement contracts is prohibited for the acquisition of commercially available items.

(c) Cost-plus-fixed-fee contracts.

- (1) *Description.* A cost-plus-fixed-fee contract is a cost-reimbursement contract that provides for payment to the contractor of a negotiated fee that is fixed at the inception of the contract. The fixed fee does not vary with actual cost, but may be adjusted as a result of changes in the work to be performed under the contract, authorized pursuant to Rule 50.
- (2) *Application.*
- (A) A cost-plus-fixed-fee contract is suitable for use when the conditions of Rule 25(b)(1) are present and the contract is for the performance of research or preliminary exploration or study, and the level of effort required is unknown.
 - (B) A cost-plus-fixed-fee contract normally must not be used in development of major systems once preliminary exploration, studies, and risk reduction have indicated a high degree of probability that the development is achievable and the Judiciary has established reasonably firm performance objectives and schedules.
- (3) *Limitations.* No cost-plus-fixed-fee contract shall be awarded unless the official with expenditure authority complies with all limitations in Rule 25(b)(1)(C) and (b)(2).

(d) Requirements Contract.

- (1) *Application.* The use of a requirements contract may be appropriate for acquiring supplies or services when the Judiciary anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that will be required during a definite period.
- (2) *Requirements.*
 - (A) The solicitation and resulting contract shall state a realistic estimated total quantity required. This estimate is not a representation to an offeror or contractor that the estimated quantity will be required or ordered, or that conditions affecting requirements will be stable or normal. The Judiciary may obtain the estimate from records of previous requirements and consumption, or by other means, and shall base the estimate on the most current information available.
 - (B) The contract shall state, if feasible, the maximum limit of the contractor's obligation to deliver and the Judiciary's obligation to order.
 - (C) The contract may also specify maximum or minimum quantities that the Judiciary may order under each individual order and the maximum that it may order during a specified period of time.
 - (D) The contract shall specify that failure of the Judiciary to order such estimated minimum or maximum quantities will not entitle the contractor to any equitable adjustment in unit price.

Rule 26. Multi-Year Contracts.

- (a) **Application.** A multi-year contract is authorized where:
 - (1) estimated requirements cover the period of the contract and are reasonably firm and continuing; and
 - (2) such a contract will serve the best interests of the Judiciary by encouraging effective competition or otherwise promoting economy in Judiciary procurement.
- (b) **Specified Period.** Unless otherwise provided by law, a contract for supplies or services may be entered into for any period of time deemed to be in the best interests of the Judiciary, provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for

succeeding fiscal periods shall be subject to the availability and appropriation of funds.

- (c) **Cancellation Due to Unavailability of Funds in Succeeding Fiscal Periods.** When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled and the contractor shall be reimbursed for the reasonable value of any non-recurring costs incurred but not amortized in the price of the supplies or services delivered under the contract. The cost of cancellation may be paid from any appropriations available for such purposes.

PART E - INSPECTION OF PLANT AND AUDIT OF RECORDS

Rule 27. Right to Inspect Plant.

The Judiciary may, at reasonable times, inspect the part of the plant or place of business of a contractor or any subcontractor which is related to the performance of any contract awarded or to be awarded. A clause to this effect shall be included in all applicable Judiciary contracts and obligations.

Rule 28. Right to Audit Records.

As required in 1 CMC § 7845, which governs Access to Contracts and Grants Information, the contractor and subcontractor or grantee and subgrantee at all levels shall provide the Public Auditor of the Commonwealth with access to and the right to examine and copy any records, data or papers relevant to a Judiciary contract or grant for a period of three years after the final payment under the contract or grant. A clause to this effect shall appear in all Judiciary contracts and obligations.

PART F - DETERMINATIONS AND REPORTS

Rule 29. Finality of Determinations.

The determinations required by Rule 12(i) (Competitive Sealed Bidding, Correction or Withdrawal of Bids; Cancellation of Awards), Rule 13(a) (Competitive Sealed Proposals, Conditions for Use), Rule 13(g) (Competitive Sealed Proposals, Award), Rule 15 (Sole Source Procurement), Rule 16 (Emergency Procurement), Rule 17 (Expedited Purchasing in Special Circumstances), Rule 18 (Vehicle Procurement), Rule 19 (Computer Software and Hardware Procurement), Rule 22(a) (Responsibility of Bidders and Offerors, Determination of Non-responsibility), Rule 24 (Substantiation of Offered Prices), Rule 25 (Types of Contracts), Rule 28(a) (Multi-Year Contracts, Application), and Rule 41 (Choice of Project Delivery Methods) are final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.

Rule 30. Reporting of Anticompetitive Practices.

When for any reason collusion or other anticompetitive practices are suspected among any bidders or offerors, a notice of the relevant facts shall be transmitted to the General Counsel. Suspected bidders or offerors shall be provided notice and an opportunity to be heard prior to issuing a written decision to debar.

- (a) **Written Decision to Debar.** The Procurement Officer's decision to debar or suspend shall be in writing. The decision shall state the reasons for the action taken. A copy of the decision shall be mailed, emailed, or otherwise furnished immediately to the debarred or suspended person. A copy of the decision shall also be provided to other Commonwealth procurement offices.

Rule 31. Retention of Procurement Records.

All procurement records shall be retained and disposed of in accordance with the Judiciary Document Retention Policy.

Rule 32. Records of Procurement Actions Taken Under Rule 15 (Sole Source Procurement), Rule 16 (Emergency Procurement), and Rule 17 (Expedited Purchasing in Special Circumstances).

- (a) **Duty to Maintain Record.** The Procurement Officer shall maintain a record listing all contracts made under Rule 15 (Sole Source Procurement), Rule 16 (Emergency Procurement), or Rule 17 (Expedited Purchasing in Special Circumstances) pursuant to the Judiciary Document Retention Policy.
- (b) **Contents of Record.** The record shall contain:
 - (1) the contractor's name;
 - (2) the amount and type of each contract; and
 - (3) a listing of the supplies, services, or construction procured under each contract.

ARTICLE 4 – SPECIFICATIONS**Rule 33. Maximum Practical Competition.**

All specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the Judiciary's needs, and shall not be unduly restrictive.

Rule 34. Duties of the Procurement Officer.

The Procurement Officer shall monitor the use of specifications for supplies, services, and construction required by the Judiciary.

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- (a) **Obtaining Expert Advice and Assistance.** The Procurement Officer may obtain expert advice and assistance from Judiciary division personnel in the development of specifications and may request a division to prepare its own specifications.

Rule 35. Specifications Prepared by Other than Judiciary Personnel.

The requirements of Article 4 (Specifications) regarding the purposes and non-restrictiveness of specifications shall apply to all specifications prepared other than by Judiciary personnel, including, but not limited to, those prepared by architects, engineers, and, when the design-build, design-build-operate-maintain, or design-build-finance-operate-maintain project delivery method are used, those persons preparing specifications for the project.

Rule 36. [RESERVED]

Rule 37. Brand Name or Equal Specification.

- (a) **Use.** Brand name or equal specifications may be used when the Procurement Officer determines in writing that:
 - (1) no other design or performance specification or qualified products list is available;
 - (2) time does not permit the preparation of another form of purchase description, not including a brand name specification;
 - (3) the nature of the product or the nature of the Judiciary's requirements makes use of a brand name or equal specification suitable for the procurement; or
 - (4) use of a brand name or equal specification is in the Judiciary's best interests.
- (b) **Designation of Several Brand Names.** Brand name or equal specifications shall seek to designate three (3), or as many different brands as are practicable, as "or equal" references and shall further state that substantially equivalent products to those designated will be considered for award.
- (c) **Required Characteristics.** Unless the Procurement Officer determines in writing that the essential characteristics of the brand names included in the specifications are commonly known in the industry or trade, brand name or equal specifications shall include a description of the particular design, functional, or performance characteristics which are required.
- (d) **Nonrestrictive Use of Brand Name or Equal Specifications.** Where a brand name or equal specification is used in a solicitation, the solicitation shall contain explanatory language

that the use of a brand name is for the purpose of describing the standard of quality, performance, and characteristics desired and is not intended to limit or restrict competition.

Rule 38. Brand Name Specification.

- (a) **Use.** Since use of a brand name specification is restrictive of product competition, it may be used only when the Procurement Officer makes a written determination that only the identified brand name item or items will satisfy the Judiciary's needs.
- (b) **Competition.** The Procurement Officer shall seek to identify sources from which the designated brand name item or items can be obtained and shall solicit such sources to achieve whatever degree of price competition is practicable. If only one source can supply the requirement, the procurement shall be made under Rule 15 (Sole Source Procurement).

**ARTICLE 5 – PROCUREMENT OF INFRASTRUCTURE
FACILITIES AND SERVICES**

**PART A - CONTRACTING FOR INFRASTRUCTURE
FACILITIES AND SERVICES**

Rule 39. Project Delivery Methods Authorized.

- (a) **Authorized Delivery Methods.** The following project delivery methods are authorized for procurements relating to the design, construction, routine operation, routine repair, and routine maintenance of infrastructure facilities and services for the Judiciary:
 - (1) design-bid-build (including construction management at-risk);
 - (2) operations and maintenance;
 - (3) design-build;
 - (4) design-build-operate-maintain; or
 - (5) design-build-finance-operate-maintain.
- (b) **Participation in Report or Study.** Participation in a report or study that is subsequently used in the preparation of design requirements for a project shall not disqualify a firm from participating as a member of a proposing team in a design-build, design-build-operate-maintain, or design-build-finance-operate-maintain procurement, unless such participation would provide the firm with a substantial competitive advantage.

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Rule 40. Source Selection Methods Assigned to Project Delivery Methods.

- (a) **Scope.** Rule 40 specifies the source selection methods applicable to procurements for the project delivery methods identified in Rule 39 (Project Delivery Methods Authorized), except as provided in Rule 14 (Small Purchases), Rule 15 (Sole Source Procurement), Rule 16 (Emergency Procurement), and Rule 17 (Expedited Purchasing in Special Circumstances).
- (b) **Design-bid-build (and Construction Management At-Risk).**
 - (1) *Design: Architectural, Engineering, and Other Professional Services.* The qualifications based selection process set forth in Rule 42 (Architectural, Engineering and Other Professional Services) shall be used to procure architectural, engineering, and other professional services in design-bid-build procurements.
 - (2) *Construction.* Competitive sealed bidding, as set forth in Rule 12(a) (Competitive Sealed Bidding), shall be used to procure construction in design-bid-build procurements, except the use of competitive sealed proposals, as set forth in Rule 13 (Competitive Sealed Proposals), is authorized to procure construction management at-risk services.
- (c) **Operations and Maintenance.** Contracts for operations and maintenance shall be procured as set forth in Rule 11 (Methods of Source Selection).
- (d) **Design-build.** Contracts for design-build shall be procured by competitive sealed proposals, as set forth in Rule 13 (Competitive Sealed Proposals), except that these Rules authorize the Procurement Officer to establish procedures that may describe the circumstances under which particular design-build procurements will not require the submission of proposal development documents as required in Rule 13(f)(2).
- (e) **Design-build-operate-maintain.** Contracts for design-build-operate-maintain shall be procured by competitive sealed proposals, as set forth in Rule 13 (Competitive Sealed Proposals).
- (f) **Design-build-finance-operate-maintain.** Contracts for design-build-finance-operate-maintain shall be procured by competitive sealed proposals, as set forth in Rule 13 (Competitive Sealed Proposals).

Rule 41. Choice of Project Delivery Methods.

The Procurement Officer shall establish procedures describing the project delivery methods listed in Rule 39 (Project Delivery Methods Authorized). The procedures shall:

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- (a) set forth criteria to be used in determining which project delivery method is to be used for a particular project;
- (b) grant to the Procurement Officer, responsible for carrying out the project, the discretion to select an appropriate project delivery method for a particular project;
- (c) describe the bond, insurance, and other security provisions contained in Article 5, Part B that apply to each project;
- (d) describe the appropriate contract clauses and fiscal responsibility requirements contained in Article 5, Part C that apply to each project; and
- (e) require the Procurement Officer to execute and include in the contract file a written statement setting forth the facts which led to the selection of a particular project delivery method for each project.

Rule 42. Architectural, Engineering, and Other Professional Services.

- (a) **Policy.** The Judiciary shall publicly announce all requirements for architectural, engineering, and other professional services and negotiate their contracts on the basis of demonstrated competence and qualification for the type of services required, and at fair and reasonable prices.
- (b) **Application.** Architectural, engineering, and other professional services shall be procured pursuant to Rule 42, except when authorized as a small purchase, expedited, or emergency procurement (or sole source procurement in the case of professions other than architect or engineer).
- (c) **Selection.** The Procurement Officer shall maintain files of current statements of qualifications of architectural, engineering, and other professional firms. After public announcement of requirement for architect, engineer, or other professional service, current statements shall be reviewed together with those that may be submitted by other firms in response to the announcement. As to architectural, engineering, and other professional services, discussions shall be conducted with no fewer than three firms regarding the contract requirements and technical approach, and then shall select therefrom, in order of preference, no fewer than three firms determined to be the most highly qualified to perform the services required. Fee proposals may be solicited upon public announcement; however, this information shall not be considered in the selection of the most highly qualified firms. Such fee proposals may be used by the Procurement Officer in determining a fair and reasonable contract price. If there are less than three submissions, the Procurement Officer shall have

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the sole discretion to either move forward with the selection phase or cancel and re-announce the request for qualifications under these Rules.

(d) Negotiation and Award.

- (1) The Procurement Officer shall negotiate a contract with the highest qualified firm for compensation determined to be fair and reasonable to the Judiciary. In making this decision, the Procurement Officer shall take into account the estimated value, the scope, the complexity, the professional nature of the services to be rendered, and the prices proposed by other firms responding to the solicitation.
- (2) If a fair and reasonable price cannot be negotiated with the highest ranking qualified firm, then negotiations with that firm shall be formally terminated.
- (3) The Procurement Officer shall then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the Procurement Officer shall formally terminate negotiations. The Procurement Officer shall then undertake negotiations with the third most qualified firm. Should the Procurement Officer be unable to negotiate a contract at a fair and reasonable price with any of the selected firms, the Procurement Officer shall select additional firms in order of their competence and qualifications, and the Procurement Officer shall continue negotiations in accordance with Rule 42 until an agreement is reached.

PART B - BONDS, INSURANCE, GUARANTEES

Rule 43. Bid Security.

- (a) **Requirement for Bid Security.** Bid security shall be required for all competitive sealed bidding for construction contracts when the price is estimated by the Procurement Officer to exceed \$25,000.00 or when the Procurement Officer determines it is in the best interest of the Judiciary. Bid security shall be a bond provided by a surety company holding a certificate of authority from the U.S. Secretary of the Treasury as an acceptable surety or other surety acceptable to the General Counsel, and authorized to do business in the Commonwealth, or the equivalent in cash, certified check, cashier's check, or otherwise supplied in a form satisfactory to the Judiciary.

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- (b) **Amount of Security.** Bid security shall be an amount equal to at least fifteen percent (15%) of the amount of the bid or other amount as specified in the invitation for bids.
- (c) **Rejection of Bids for Noncompliance with Bid Security Requirements.** Failure to furnish bid security, when required in the invitation, shall result in rejection of the bid as non-responsive, unless it is determined that the bid fails to comply in a non-substantial manner with the security requirements.
- (d) **Withdrawal of Bids.** After bids are opened, they shall be irrevocable for the period specified in the invitation for bids (except as provided for bids in Rule 12(i)). If a bidder is permitted to withdraw its bid (or proposal) before award, or is excluded from the competition before award, no action shall be had against the bidder or the bid security.

Rule 44. Contract Performance and Payment Bonds.

- (a) **When Required -- Amounts.** When a construction, design-build, design-build-operate-maintain, or design-build-finance-operate-maintain contract is awarded in excess of \$25,000, the following bonds or security shall be delivered to the Judiciary and shall become binding on the parties upon the execution of the contract:
 - (1) a performance bond satisfactory to the Judiciary, executed by a surety company authorized to do business in the Commonwealth or otherwise secured in a manner satisfactory to the Judiciary, in an amount equal to one hundred percent (100%) of the specified contract price; and
 - (2) a payment bond satisfactory to the Judiciary, executed by a surety company authorized to do business in the Commonwealth or otherwise secured in a manner satisfactory to the Judiciary, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the construction work provided for in the contract. The bond shall be in an amount equal to one hundred percent (100%) of the specified contract price.
- (3) *Acceptability of Payment and Performance Bonds.* The Procurement Officer shall ensure that the bonding company's pledged assets are sufficient to cover the bond obligation. Prior to the execution of the contract, the Procurement Officer shall require the selected contractor to submit:
 - (A) a current license from the bonding company showing that it has authority to issue bonds; and

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- (B) a certification from the bonding company that the unencumbered value of its assets (exclusive of all outstanding commitments on other bond obligations) exceed the payment amount of each bond.
- (4) A contractor submitting an unacceptable payment or performance bond may be permitted a reasonable time, as determined by the Procurement Officer, to substitute an acceptable bond prior to executing a contract. When evaluating payment and performance bonds, the Procurement Officer shall confirm the acceptability of the bonding company from other government agencies, such as the Department of Commerce.
- (b) **Reduction of Bond Amounts.** The Chief Justice may authorize the Procurement Officer to reduce the amount of performance and payment bonds to an amount down to fifty percent (50%) of the amounts established in Rule 44(a).
- (c) **Authority to Require Additional Bonds.** Nothing in Rule 44 shall be construed to limit the authority of the Judiciary to require a performance bond or other security in addition to such bonds, or in circumstances other than specified in Rule 44(a).
- (d) **Suits on Payment Bonds -- Right to Institute.** The right to sue on the payment bond for the amount, or the balance thereof, unpaid at the time of the suit and to prosecute an action for the sum or sums due to such person shall belong to every person who has:
 - (1) furnished labor or material to the contractor or its subcontractors for the work provided in the contract, for which a payment bond is furnished under Rule 44; and
 - (2) not been paid in full before the expiration of a period of ninety (90) days after the day on which
 - (A) the last of the labor was done or performed; or
 - (B) material was furnished or supplied by such person for which a claim is made;
 - (3) any person with a direct contractual relationship with a subcontractor of the contractor, but no express or implied contractual relationship with the contractor furnishing the payment bond, shall have a right of action upon the payment bond by giving to the contractor within ninety (90) days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material upon which such claim is made, written notice that
 - (A) states with substantial accuracy the

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- (i) amount claimed;
- (ii) name of the party to whom the material was furnished or supplied or for whom the labor was performed; and

(B) is served

- (i) personally; or
- (ii) by other form of receipted transmittal that confirms actual delivery to the contractor at any place the contractor maintains an office or conducts its business.

(e) Suits on Payment Bonds -- Where and When Brought.

Every suit instituted upon a payment bond shall be brought in the Commonwealth. The obligee named in the bond need not be joined as a party in any such suit.

Rule 45. Bond Forms and Copies.

- (a) Bond Forms.** The Procurement Officer shall establish the form of the bonds required by Article 5, Part B.
- (b) Certified Copies of Bonds.** Any person may request and obtain from the Judiciary a certified copy of a bond upon payment of the fee pursuant to the NMI Judiciary Fee Schedule. A certified copy of a bond shall be prima facie evidence of the contents, execution, and delivery of the original.

Rule 46. Errors and Omissions Insurance.

The Procurement Officer shall establish procedures that specify when to require offerors to provide appropriate errors and omissions insurance to cover architectural and engineering services under the project delivery methods set forth in Rule 39(a)(1), (3), (4), and (5).

Rule 47. Other Forms of Security.

The Procurement Officer shall establish procedures requiring request for proposals to include one or more of the following forms of security to assure the timely, faithful, and uninterrupted provision of operations and maintenance services procured separately, or as one element of design-build-operate-maintain or design-build-finance-operate-maintain services:

- (a)** operations period surety bonds that secure the performance of the contractor's operations and maintenance obligations under the project delivery methods set forth in Rule 39(a)(2), (4), and (5);
- (b)** letters of credit in an amount appropriate to cover the cost to the Judiciary of preventing infrastructure service interruptions for a period up to twelve (12) months under the project delivery methods set forth in Rule 39(a)(2), (4), and (5); and

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- (c) appropriate written guarantees from the contractor (or depending upon the circumstances, from parent corporations) to secure the recovery of reprocurement costs to the Judiciary in the event of a default in performance by the contractor.

PART C - CONTRACT CLAUSES AND FISCAL RESPONSIBILITY

Rule 48. Contract Clauses and Their Administration.

- (a) **Price.** Judiciary contracts shall state the maximum amount that can be charged under the contract and disallow open-ended contracts (i.e., contracts which do not specify the maximum contract price). Whatever contract type is selected, the Judiciary shall limit contracts to a fixed price or a ceiling price, and the contractor shall not exceed the price set unless a change order is approved. Provided, however, in the case of contracts for legal or lobbying services obtained pursuant to a contingency fee agreement, the contract shall put a fixed price on any costs to be borne by the Judiciary out of its budget, including but not limited to any price to be charged by the contractor in lieu of a percentage of an award obtained as a result of the contractor's services.
- (b) **Payment Terms.** Payments shall be made only upon submission of evidence of work performed and adherence to contract terms and specifications. Generally, a one-time payment shall be made after the Procurement Officer has certified completion of work or delivery of goods or services. Other types of payments are as follows:
 - (1) *Advance Payments.* Advance payments shall be authorized only in certain circumstances as provided in Rules 48(b)(1)(A), (b)(1)(B), or (b)(1)(C).
 - (A) The contractor fails to qualify as a responsible contractor due solely to the absence of financial capability, and it is justified under Rule 15 (Sole Source Procurement) that the contractor is the only available source, subject to the following conditions:
 - (i) under general requirements, the contractor pledges adequate security, and the official with expenditure authority determines, based on written findings, that the advance payment is in the public interest.
 - (ii) the standards for advance payment determination are:
 - (1) the advance payments will not exceed the contractor's interim cash needs based on an

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- analysis of the cash flow required for contract performance, consideration of the reimbursement or other payment cycle, and employment of the contractor's own working capital;
 - (2) the advance payments are necessary to supplement other funds or credit available for the contract;
 - (3) the recipient is otherwise qualified as a responsible contractor in all areas other than financial capability; and
 - (4) paying the contractor in advance will result in specific advantages to the Judiciary.
- (iii) advance payments shall be limited to not more than twenty-five percent (25%) of the contract price or an amount equivalent to a sixty (60) day working capital requirement, whichever is lower.
- (B) The Procurement Officer demonstrates in writing that the common business practice of a particular industry requires buyers to pay on an advance payment basis. Such advance payment shall be limited to not more than fifty percent (50%) of the contract price. Pertinent documents supporting such business practice shall be attached to the written justification.
- (C) The Procurement Officer demonstrates in writing that the advance payment is made pursuant to procurement of goods and services as provided in Rule 15(a)(2) or Rule 17(b)(1).
- (2) *Progress Payments.* Contracts may provide for progress payments to contractors for work performed or costs incurred in the performance of the contract. Not less than 10 percent (10%) of the contract amount shall be withheld pending final completion of the contract and an evaluation of the contractor's performance. However, if the contract consists of the performance of separate and distinct tasks, then any funds so withheld with regard to a particular task may be paid upon completion of that task and an evaluation of the contractor's performance. No progress payment is authorized on a contract unless it has first been established that the covered work or service has been delivered in accordance with the contract. Payments shall be allowed on stored materials only upon arrival of materials in the CNMI, not prior to shipment, and only after inspection by the Procurement Officer.

- (c) **Specificity.** The contract shall accurately reflect the actual Judiciary requirement, stating adequately what is to be done or to be delivered to the Judiciary. For instance, definite quantities shall be stated in the statement of deliverables, unless use of a requirements contract was justified under Rule 25(d) (Types of Contracts, Requirements Contract). Contracts with general requirements shall be disallowed.

(d) **Price Adjustments.**

- (1) Adjustments in price shall be computed in one or more of the following ways:
 - (A) by agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
 - (B) by unit prices specified in the contract or subsequently agreed upon;
 - (C) by the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;
 - (D) in such other manner as the contracting parties may mutually agree; or
 - (E) in the absence of agreement by the parties, by a unilateral determination by the Procurement Officer of the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as computed by the Procurement Officer.
- (2) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of Rule 24 (Substantiation of Offered Prices).

(e) **Additional Contract Clauses.** Judiciary contracts shall include clauses covering the following subjects:

- (1) the prohibition against gratuities and kickbacks prescribed in Rule 69;
- (2) liquidated damages as appropriate;
- (3) specified excuses for delay or nonperformance;
- (4) termination of the contract for default;
- (5) termination of the contract in whole or in part for the convenience of the Judiciary;
- (6) time of performance; and
- (7) other contract provisions, as appropriate, and covering the following subjects:

- (A) the unilateral right of the Judiciary to order, in writing:
 - (i) changes in the work within the scope of the contract; and
 - (ii) changes in the time of performance of the contract that do not alter the scope of the contract work;
- (B) variations occurring between estimated quantities of work in a contract and actual quantities;
- (C) suspension of work ordered by the Judiciary; and
- (D) site conditions differing from those indicated in the contract, or ordinarily encountered, except that differing site conditions clauses need not be included in a contract:
 - (i) when the contract is negotiated;
 - (ii) when the contractor provides the site or the design; or
 - (iii) when the parties have otherwise agreed with respect to the risk of differing site conditions.
- (f) **Modification of Required Clauses.** The Procurement Officer may vary the clauses under Rule 48(e)(2)-(11) for inclusion in any Judiciary contract, provided that any variations are supported by a written determination that states the circumstances justifying such variations, and provided that notice of any such material variation be stated in the invitation for bids or request for proposals.

Rule 49. Change Order

- (a) **When allowed.** Execution of a change order shall only be allowed if an increase, decrease, or change in the scope of work is required which was not reasonably foreseeable at the time of the formation of the contract. However, no change order resulting in an increase in contract cost or time shall be allowed when it is a direct result of the contractor's inexperience, inefficiency, or incompetence.
- (b) **Assessment Required.** Before adding significant new work to existing contracts, the Judiciary shall thoroughly assess whether or not it would be more prudent to seek competition. Change orders on construction and architect, engineer, and other professional contracts which exceed twenty-five percent (25%) of the cumulative contract price shall automatically be procured through competitive procedures pursuant to Rule 11, except when the procurement of the additional work is authorized without using full and open competition under Rule 14 (Small Purchases), Rule 15 (Sole Source Procurement),

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Rule 16 (Emergency Procurement), or Rule 17 (Expedited Purchasing in Special Circumstances).

- (c) **Rule 10 Compliance and Work Stop.** Contractors shall not be allowed to continue working beyond the expiration term of an original contract in the absence of an approved new contract or change order. Change orders shall be processed using the procedures for processing new contracts in Rule 10.
- (d) **Extension of Services.** Award of contracts for recurring and continuing service requirements are often delayed due to circumstances beyond the control of contracting offices. In order to avoid negotiation of short extensions to existing contracts, the Procurement Officer may include an option clause in solicitations and contracts which will enable the government to require continued performance of any services within the limits and at the rates specified in the contract. The option provision may be exercised more than once, but the total extension of performance thereunder shall not exceed six (6) months.

Rule 50. Fiscal Responsibility.

- (a) **Certification Requirement.** The Director of Budget and Finance shall certify in writing every Judiciary contract modification, change order, or contract price adjustment and report upon the status of the costs of the total project budget or contract budget, as to the effect of the contract modification, change order, or adjustment in contract price on the total project budget or the total contract budget.
- (b) **Funding Sufficiency Requirement.** In the event that the certification discloses a resulting increase in the total project budget and/or the total contract budget, the Procurement Officer shall not execute or make such contract modification, change order, or adjustment in contract price unless:
 - (1) sufficient funds are available therefor; or
 - (2) the scope of the project or contract is adjusted so as to permit the degree of completion that is feasible within the total project budget and/or total contract budget as it existed prior to the contract modification, change order, or adjustment in contract price under consideration; provided, however, that with respect to the validity, as to the contractor, of any executed contract modification, change order, or adjustment in contract price which the contractor has reasonably relied upon, it shall be presumed that there has been compliance with the provisions of Rule 50.

ARTICLE 6 – [RESERVED]**ARTICLE 7 – [RESERVED]****ARTICLE 8 – [RESERVED]****ARTICLE 9 – APPEALS AND REMEDIES****Rule 51. Authority to Resolve Protested Solicitations and Awards.**

- (a) **Right to Protest.** Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract pursuant to these Rules may protest to the Procurement Officer, before or after the award of a contract. The protest shall be submitted in writing within ten (10) days after such aggrieved person knows or should have known of the facts giving rise thereto. The Procurement Officer shall promptly notify all interested parties of the protest, the time when to submit their views, and relevant information concerning the protest. All interested parties shall submit their response within fourteen (14) days from the date of notice.
- (b) **Authority to Resolve Protests.** The Procurement Officer shall have the authority, prior to the commencement of an action in court concerning the controversy, to settle and resolve a protest of an aggrieved bidder, offeror, or contractor, actual or prospective, concerning the solicitation or award of a contract.
- (c) **Decision.** If the protest is not resolved by mutual agreement, the Procurement Officer shall promptly issue a written decision within twenty (20) days after all interested parties have submitted their views in accordance with Rule 51(a). The Procurement Officer may extend time to issue a decision up to twenty (20) additional days based on the complexity of the matter, and shall notify all interested parties of the extension. The decision shall:
 - (1) state the reasons for the action taken; and
 - (2) inform the protestor of its right to judicial review as provided in Article 9.
- (d) **Notice of Decision.** A copy of the decision under Rule 51(c) shall be mailed, emailed, or otherwise furnished immediately to the protestor and any other party intervening.
- (e) **Finality of Decision.** A decision under Rule 51(c) shall be final and conclusive for purposes of judicial review, unless fraudulent, or any person adversely affected by the decision

commences an action in court in accordance with Rule 57 (Access to Courts).

(f) Stay of Procurements During Protests.

- (1) *Protest Before Award.* In the event of a timely protest under Rule 51(a), or under Rule 57 (Access to Courts), the Judiciary shall not proceed further with the solicitation or with the award of the contract unless the Procurement Officer, after consultation with the General Counsel, makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the Judiciary.
- (2) *Protest After Award.* Although persons involved in or affected by the filing of a protest after award may be limited, in addition to the Procurement Officer, at least the contractor shall be furnished the notice of protest and its basis in accordance with Rule 51(a) above. When it appears likely that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Commonwealth's interest, the Procurement Officer should consider seeking a mutual agreement with the contractor to suspend performance on a no-cost basis.
- (g) **Entitlement to Costs.** In addition to any other relief, when a protest is sustained and the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror shall be entitled to the reasonable costs incurred in connection with the solicitation, including bid preparation costs other than attorney's fees.

Rule 52. Authority to Debar or Suspend.

- (a) **Authority to Debar.** After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Procurement Officer, after consultation with the General Counsel, shall have authority to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than three (3) years.
- (b) **Authority to Suspend.** The Procurement Officer, after consultation with the General Counsel, shall have authority to suspend a person from consideration for award of contracts if there is probable cause for debarment. The suspension shall not be for a period of more than three (3) months.
- (c) **Causes for Debarment or Suspension.** The causes for debarment or suspension include the following:
 - (1) conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or

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private contract or subcontract, or in the performance of such contract or subcontract;

- (2) conviction under Commonwealth, state, or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, violation of the Consumer Protection Act (4 CMC §§ 5101, et seq.), violation of any unfair business practices as prescribed by 4 CMC § 5202, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a Judiciary contractor;
 - (3) conviction under Commonwealth, state or federal antitrust statutes arising out of the submission of bids or proposals such as in Chapter 2 of Division 5 of Title 4 of the Commonwealth Code;
 - (4) violation of contract provisions, as set forth below, of a character which is regarded by the Procurement Officer to be so serious as to justify debarment action:
 - (A) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or
 - (B) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;
 - (5) any other cause that the Procurement Officer determines to be so serious and compelling as to affect responsibility as a Judiciary contractor, including debarment by another governmental entity for any cause listed in these Rules; and
 - (6) for violation of the ethical standards set forth in Article 11 (Ethics in Public Contracting).
- (d) **Decision.** The Procurement Officer shall issue a written decision to debar or suspend. The decision shall:
- (1) state the reasons for the action taken; and
 - (2) inform the debarred or suspended person involved of its right to judicial review as provided in Article 9.
- (e) **Notice of Decision.** A copy of the decision under Rule 52(d) shall be mailed, emailed, or otherwise furnished immediately to the debarred or suspended person and any other party intervening.

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- (f) **Finality of Decision.** A decision under Rule 52(d) shall be final and conclusive for purposes of judicial review, unless fraudulent, or the debarred or suspended person commences an action in court in accordance with Rule 57 (Access to Courts).

Rule 53. Authority to Resolve Contract and Breach of Contract Disputes.

- (a) **Applicability.** Rule 53 applies to disputes between the Judiciary and a contractor and which arise under, or by virtue of, a contract between them. This includes without limitation disputes based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.
- (b) **Authority.** The Procurement Officer is authorized, prior to commencement of an action in a court concerning the dispute, to settle and resolve a dispute described in Rule 53(a).
- (c) **Decision.** If such a dispute is not resolved by mutual agreement, the Procurement Officer shall promptly issue a decision in writing. The decision shall:
 - (1) state the reasons for the action taken; and
 - (2) inform the contractor of its right to judicial review as provided in Article 9.
- (d) **Notice of Decision.** A copy of the decision under Rule 53(c) shall be mailed, emailed, or otherwise furnished immediately to the contractor.
- (e) **Finality of Decision.** The decision under Rule 53(c) shall be final and conclusive for purposes of judicial review, unless fraudulent, or the contractor commences an action in court in accordance with Rule 57 (Access to Courts).
- (f) **Failure to Render Timely Decision.** If the Procurement Officer does not issue the written decision required under Rule 53(c) within thirty (30) days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

Rule 54. Remedies Prior to an Award for Solicitations or Awards in Violation of Law.

If prior to award it is determined, administratively or upon administrative or judicial review, that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be (1) cancelled or (2) revised to comply with the law.

Rule 55. Remedies After an Award for Solicitations or Awards in Violation of Law.

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If after an award it is determined, administratively or upon administrative or judicial review, that a solicitation or award of a contract is in violation of law, then:

- (a) if the person awarded the contract has not acted fraudulently or in bad faith:
 - (1) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the Judiciary; or
 - (2) the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.
- (b) if the person awarded the contract has acted fraudulently or in bad faith:
 - (1) the contract may be declared null and void; or
 - (2) the contract may be ratified and affirmed if such action is in the best interests of the Judiciary, without prejudice to the Judiciary's rights to such damages as may be appropriate.

Rule 56. Interest.

Interest on amounts ultimately determined to be due to a contractor or the Judiciary shall be payable at the statutory rate applicable to judgments from the date the claim arose through the date of decision or judgment, whichever is later.

Rule 57. Access to Courts.

- (a) **Solicitation and Award of Contracts.** The Commonwealth courts shall have jurisdiction over a final action between the Judiciary and a bidder, offeror, or contractor, prospective or actual, to determine whether a solicitation or award of a contract is in accordance with the Constitution, statutes, regulations, these Procurement Rules, and the terms and conditions of the solicitation. The Commonwealth courts shall have such jurisdiction, whether the actions are at law or in equity, and whether the actions are for monetary damages or for declaratory, injunctive, or other equitable relief.
- (b) **Debarment or Suspension.** The Commonwealth courts shall have jurisdiction over an action between the Judiciary and a person who is subject to a suspension or debarment proceeding, to determine whether the debarment or suspension is in accordance with the Constitution, statutes, and regulations. The Commonwealth courts shall have such jurisdiction, whether the

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actions are at law or in equity, and whether the actions are for declaratory, injunctive, or other equitable relief.

- (c) **Actions Under Contracts or for Breach of Contract.** The Commonwealth courts shall have jurisdiction over a final action between the Judiciary and a contractor, for any cause of action which arises under, or by virtue of, the contract, whether the action is at law or in equity, whether the action is on the contract or for a breach of the contract, and whether the action is for monetary damages or declaratory, injunctive, or other equitable relief.
- (d) **Limited Finality for Administrative Determinations.** In any judicial action under Rule 57, factual or legal determinations by employees, agents, or other persons appointed by the Judiciary shall have no finality and shall not be conclusive, notwithstanding any contract provision, regulation, or rule of law to the contrary, except to the extent provided in Rule 29 (Finality of Determinations).

Rule 58. Time Limitations on Actions.

- (a) **Protested Solicitations and Awards.** Any action under 57(a) (Access to Courts, Solicitation and Award of Contracts) shall be initiated as follows:
 - (1) within thirty (30) days after the aggrieved person knows or should have known of the facts giving rise to the action; or
 - (2) within fourteen (14) days after receipt of a final administrative decision pursuant to Rule 51(c) (Authority to Resolve Protested Solicitations and Awards, Decision).
- (b) **Debarments and Suspensions for Cause.** Any action under Rule 57(b) (Access to Courts, Debarment or Suspension) shall be commenced within six (6) months after receipt of the decision of the Procurement Officer under Rule 52(d) (Authority to Debar or Suspend, Decision), or the decision of under Rule 75(b)(3) (Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards, Supplemental Remedies), whichever is applicable.
- (c) **Actions Under Contracts or for Breach of Contract.** The statutory limitations on an action between private persons on a contract or for breach of contract shall apply to any action commenced pursuant to Rule 57(c) (Access to Courts, Actions Under Contracts or for Breach of Contract).

ARTICLE 10 – COOPERATIVE PURCHASING

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Rule 59. Cooperative Purchasing Authorized for Infrastructure Facilities.

- (a) **Authority.** The Judiciary may participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of infrastructure facilities with one or more public procurement units in accordance with an agreement entered into between the participants. Such cooperative purchasing may include, but is not limited to, joint or multi-party contracts between public procurement units and open-ended public procurement unit contracts that are made available to other public procurement units.
- (b) **Full and Open Competition.** All cooperative purchasing conducted under Article 10 shall be through contracts awarded through full and open competition, including use of source selection methods substantially equivalent to those specified in Article 3 (Source Selection and Contract Formation).

Rule 60. Supply of Personnel, Information, and Technical Services.

- (a) **Supply of Personnel.** The Judiciary, upon written request from another public procurement unit, may provide personnel to the requesting public procurement unit. The public procurement unit making the request shall pay or reimburse the Judiciary the direct and indirect cost of furnishing the personnel, in accordance with an agreement between the parties.
- (b) **Supply of Services.** The informational, technical, and other services of the Judiciary may be made available to any other public procurement unit. The requesting public procurement unit shall pay for the expenses of the services so provided, in accordance with an agreement between the parties.

Rule 61. Use of Payments Received by a Supplying Public Procurement Unit.

All payments from any public procurement unit or external procurement activity received by the Judiciary for supplying personnel or services shall be accounted for as provided by law.

Rule 62. Public Procurement Units in Compliance with Rules.

Where the public procurement unit administering a cooperative purchase complies with the requirements of these Rules, any participating public procurement unit shall be deemed to have complied with these Rules. A cooperative purchasing agreement may not be entered into to circumvent these Rules.

Rule 63. Contract Disputes.

- (a) **Public Procurement Unit Subject to Article 9 (Appeals and Remedies).** Under a cooperative purchasing agreement,

disputes arising between an administering public procurement unit and its bidders, offerors, or contractors shall be resolved between the ordering public procurement unit and the supplying bidders, offerors, or contractors in accordance with the ordering public procurement unit's existing appeals and remedies procedures.

- (b) **Public Procurement Unit Not Subject to Article 9 (Appeals and Remedies).** Any public procurement unit which is not subject to Article 9 (Appeals and Remedies), is authorized to enter into an agreement with another public procurement unit to establish procedures or use such unit's or activity's existing procedures to resolve disputes with contractors, whether or not such disputes arose under a cooperative purchasing agreement.

ARTICLE 11 – ETHICS IN PUBLIC CONTRACTING

PART A - STANDARDS OF CONDUCT

Rule 64. Statement of Policy.

Employment in the Judiciary is a public trust. Judiciary employees shall discharge their duties impartially so as to ensure fair competitive access to procurement by prospective bidders and offerors and conduct themselves in a manner that fosters public confidence in the integrity of the Judiciary's procurement process.

Rule 65. General Standards of Ethical Conduct.

- (a) **General Ethical Standards for Employees.** Any attempt to realize personal gain through public employment by conduct inconsistent with the proper discharge of the employee's duties is a breach of a public trust. In order to fulfill this general prescribed standard, employees must also meet the specific standards set forth in: Rule 68 (Employee Conflict of Interest); Rule 66 (Employee Disclosure Requirements); Rule 69 (Gratuities and Kickbacks); Rule 70 (Prohibition Against Contingent Fees); Rule 71 (Restrictions on Employment of Present and Former Employees); and Rule 72 (Use of Confidential Information).
- (b) **General Ethical Standards for Non-Employees.** Any effort to influence any public employee to breach the standards of ethical conduct set forth under these Rules is also a breach of ethical standards.

Rule 66. Employee Disclosure Requirements

- (a) **Disclosure of benefit received from contract.** Any employee who has, or obtains any benefit from, any government contract

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with a business in which the employee has a financial interest shall report such benefit to the Procurement Officer.

- (b) **Failure to disclose benefit received.** Any employee who knows or should have known of such benefit and fails to report such benefit is in breach of these ethical standards.

Rule 67. Criminal Sanctions.

To the extent that violations of the ethical standards of conduct set forth in Part A constitute violations of Commonwealth law, they shall be punishable as provided therein. Such sanctions shall be in addition to the civil remedies set forth in Article 11.

Rule 68. Employee Conflict of Interest.

- (a) **Conflict of Interest.** It shall be a breach of ethical standards for any employee to participate directly or indirectly in a procurement when the employee knows that:
 - (1) the employee or any member of the employee's immediate family has a financial interest pertaining to the procurement;
 - (2) a business or organization in which the employee, or any member of the employee's immediate family, has a financial interest pertaining to the procurement; or
 - (3) any other person, business, or organization with whom the employee or any member of the employee's immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement.
- (b) **Financial Interest in a Blind Trust.** Where an employee or any member of the employee's immediate family holds a financial interest in a blind trust, the employee shall not be deemed to have a conflict of interest with regard to matters pertaining to that financial interest, provided that disclosure of the existence of the blind trust has been made to the Procurement Officer.
- (c) **Discovery of Actual or Potential Conflict of Interest, Disqualification, and Waiver.** Upon discovery of an actual or potential conflict of interest, an employee shall promptly file with the Procurement Officer a written statement of disqualification and shall withdraw from further participation in the transaction involved. The employee may, at the same time, apply to the General Counsel for an advisory opinion as to what further participation, if any, the employee may have in the transaction.
- (d) **Waiver.** On written request of an employee, the General Counsel may grant an employee a written waiver from the

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application of Rule 68 (Employee Conflict of Interest) and grant permission to proceed with the transaction to such extent and upon such terms and conditions as may be specified. Such waiver and permission may be granted when the interests of the Judiciary so require or when the ethical conflict is insubstantial or remote

- (e) **Notice.** Notice of this prohibition shall be provided to Judiciary employees.

Rule 69. Gratuities and Kickbacks.

- (a) **Gratuities.** It shall be a breach of ethical standards for any person to offer, give, or agree to give any employee or former employee, or for any employee or former employee to solicit, demand, accept, or agree to accept from another person, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, preparation of any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or dispute or other particular matter, pertaining to any program requirement, or a contractor or subcontract, or to any solicitation or proposal therefor.
- (b) **Kickbacks.** It shall be a breach of ethical standards for any payment, gratuity, or offer of employment to be made by or on behalf of a subcontractor under a contract to the prime contractor or higher tier subcontractor or any person associated therewith as an inducement for the award of a subcontract or order.
- (c) **Contract Clause.** The prohibition against gratuities and kickbacks prescribed in Rule 69 shall be included in every Judiciary contract and solicitation.

Rule 70. Prohibition Against Contingent Fees.

- (a) **Contingent Fees.** It shall be a breach of ethical standards for a person to be retained, or to retain a person, to solicit or secure a Judiciary contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies for the purpose of securing business.
- (b) **Representation of Contractor.** Every person, before being awarded a Judiciary contract, shall represent, in writing, that such person has not retained anyone in violation of Rule 70(a). Failure to do so constitutes a breach of ethical standards.

- (c) **Contract Clause.** The representation prescribed in Rule 70(b) shall be included in every contract and solicitation.

Rule 71. Restrictions on Employment of Present and Former Employees.

- (a) **Contemporaneous Employment Prohibited.** Except as may be permitted by these Rules, it shall be a breach of ethical standards for any employee who is participating directly or indirectly in the procurement process to become or be, while such an employee, the employee of any person contracting with the Judiciary.
- (b) **Restrictions on Former Employees in Matters Connected with Their Former Duties.**
 - (1) **Permanent Disqualification of Former Employee Personally Involved in a Particular Matter.** It shall be a breach of ethical standards for any former employee knowingly to act as a principal, or as an agent for anyone other than the Judiciary, in connection with any:
 - (A) judicial or other proceeding, application, request other determination;
 - (B) contract;
 - (C) claim; or
 - (D) charge or dispute, in which the employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise while an employee, where the Judiciary is a party or has a direct and substantial interest.
 - (2) **One Year Representation Restriction Regarding Matters for Which a Former Employee Was Officially Responsible.** It shall be a breach of ethical standards for any former employee, within one year after cessation of the former employee's official responsibility, knowingly to act as a principal, or as an agent for anyone other than the Judiciary, in connection with any:
 - (A) judicial or other proceeding, application, request for a ruling, or other determination;
 - (B) contract;
 - (C) claim; or
 - (D) charge or dispute, in matters which were within the former employee's official responsibility, where the Judiciary is a party or has a direct or substantial interest.

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- (c) **Disqualification of Business When an Employee Has a Financial Interest.** It shall be a breach of ethical standards for a business in which an employee has a financial interest knowingly to act as a principal, or as an agent for anyone other than the Judiciary, in connection with any:
- (1) judicial or other proceeding, application, request for a ruling, or other determination;
 - (2) contract;
 - (3) claim; or
 - (4) charge or dispute, in which the employee either participates personally and substantially through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of the employee's official responsibility, where the Judiciary is a party or has a direct and substantial interest.

Rule 72. Use of Confidential Information.

It shall be a breach of ethical standards for any employee or former employee knowingly to use confidential information for actual or anticipated personal gain, or for the actual or anticipated personal gain of any other person.

Rule 73. Collusion by Bidders

Collusion or secret agreements between bidders for the purpose of securing an advantage to the bidders against the authorizing agent in the awarding of contracts is prohibited. The official with the expenditure authority may declare the contract void if he finds sufficient evidence that the contract was obtained by collusion or secret agreement among the bidders to the disadvantage of the Judiciary.

PART B – REMEDIES

Rule 74. Civil and Administrative Remedies Against Employees Who Breach Ethical Standards.

- (a) **Existing Remedies Not Impaired.** Civil and administrative remedies against employees which are in existence on the effective date of these Rules shall not be impaired.
- (b) **Supplemental Remedies.** In addition to existing remedies for breach of the ethical standards of this Article, the Judiciary may impose any one or more of the following:
 - (1) oral or written warnings or reprimands;

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- (2) suspension with or without pay for specified periods of time; and
- (3) termination of employment.
- (c) **Right to Recovery from Employee Value Received in Breach of Ethical Standards.** The value of anything received by an employee in breach of the ethical standards of Article 11 shall be recoverable by the Judiciary as provided in Rule 76 (Recovery of Value Transferred or Received in Breach of Ethical Standards).
- (d) **Due Process.** All procedures under Rule 74 shall be in accordance with due process requirements and existing law. In addition, notice and an opportunity for a hearing shall be provided prior to imposition of any suspension or termination of employment.

Rule 75. Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards.

- (a) **Existing Remedies Not Impaired.** Civil and administrative remedies against non-employees which are in existence on the effective date of these Rules shall not be impaired.
- (b) **Supplemental Remedies.** In addition to existing remedies for breach of the ethical standards of Article 11, any one or more of the following may be imposed:
 - (1) written warnings or reprimands;
 - (2) termination of transactions; and
 - (3) debarment or suspension from being a contractor or subcontractor under Judiciary contracts.
- (c) **Right to Recovery from Non-Employee Value Transferred in Breach of Ethical Standards.** The value of anything transferred in breach of the ethical standards of Article 11 by a non-employee shall be recoverable by the Judiciary as provided in Rule 76 (Recovery of Value Transferred or Received in Breach of Ethical Standards).
- (d) **Right of the Judiciary to Debar or Suspend.** Debarment or suspension may be imposed in accordance with Rule 52 (Authority to Debar or Suspend) for breach of the ethical standards of Article 11, provided that such action may not be taken without the concurrence of the General Counsel.
- (e) **Due Process.** All procedures under Rule 75 shall be in accordance with due process requirements, including, but not limited to, a right to notice and an opportunity for a hearing prior to imposition of any termination, debarment, or

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suspension from being a contractor or subcontractor under a Judiciary contract.

Rule 76. Recovery of Value Transferred or Received in Breach of Ethical Standards.

- (a) **General Provisions.** The value of anything transferred or received in breach of the ethical standards of Article 11 by an employee or a non-employee may be recovered from both the employee and non-employee.
- (b) **Recovery of Kickbacks by the Judiciary.** Upon a showing that a subcontractor made a kickback to a prime contractor or a higher tier subcontractor in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the amount thereof was included in the price of the subcontract or order and ultimately borne by the Judiciary and will be recoverable hereunder from the recipient. In addition, said value may also be recovered from the subcontractor making such kickbacks. Recovery from one offending party shall not preclude recovery from other offending parties.

ARTICLE 12 – MISCELLANEOUS

Rule 77. [RESERVED]

Rule 78. Disposal of Judiciary Properties.

- (a) At the end of the useful life of any Judiciary vehicle, equipment, furniture, computer, supplies, and other properties, the Procurement Officer shall dispose of them when it is determined that such properties are of no further use to the Judiciary. The disposition shall be by public auction to the highest bidder. The sale proceeds shall be collected and deposited as provided by law.
- (b) The Procurement Officer may trade Judiciary property for property from another Commonwealth branch, agency, or unit.

Rule 79. Appendix and Revision.

- (a) The appendix may include standard forms, charts, tables, references, additional definitions, or other materials deemed appropriate under these Rules.
- (b) The Judiciary may add, amend or update the appendix under these Rules.
- (c) The Judiciary may correct manifest clerical and typographical errors in these Rules without submission to the legislature.

APPENDIX A

DEFINITIONS

[Reserved]

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APPENDIX B**TABLE OF SOURCE SELECTION METHOD**

VALUE OF CONTRACT	REQUIRED PROCUREMENT METHOD	COMMENTS
Up to \$5000.00	Competitive Method not required	May use invitations for bids or purchase orders
Over \$5,000.00 and up to \$25,000.00	Requires at least 3 documented price quotes	Encourages competitive bidding; May award based on price and quality. May use purchase orders
Over \$25,000.00	Requires invitations for bids or request for proposals, unless it is an emergency or sole source procurement.	Written justification must accompany an emergency or sole source procurement.
Emergency Procurement	As competitive as practicable under the circumstances	If time allows, should obtain documented quotes
\$50,000.00 under Expedited Procurement	As competitive as practicable under the circumstances	Must meet four factor test

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APPENDIX C

VEHICLE SPECIFICATIONS

[Reserved]

APPENDIX D

STANDARD FORMS

[Reserved]