

**RESOLUTION NO. 858**

**A RESOLUTION OF THE TOWN COMMISSION OF THE TOWN OF SEWALL'S POINT, FLORIDA, APPROVING A PROCUREMENT POLICY THAT SETS FORTH A CONFLICTS OF INTEREST POLICY AND FEDERAL PROCUREMENT REQUIREMENTS; PROVIDING FOR AN EFFECTIVE DATE AND OTHER PURPOSES.**

**WHEREAS**, the Town of Sewall's Point, Florida (hereinafter, "Town"), is a duly constituted municipality having such power and authority conferred upon it by the Florida Constitution and Chapter 166, Florida Statutes; and

**WHEREAS**, Section 2-265 of the Town's Code of Ordinances authorizes the Town Commission to adopt procurement policies by resolution; and

**WHEREAS**, the Town Commission wishes to adopt a procurement policy in the form attached hereto as Exhibit "A" and incorporated herein by this reference (the "Policy"); and

**WHEREAS**, the Policy is separated into two parts: (1) Part A includes a conflicts of interest policy and is, otherwise, set aside for future policies that may supplement the Town's Purchasing Code and further address contracts to be awarded in the course of ordinary business that do not involve federal funds, and (2) Part B applies to contracts that may be funded in whole or in part with federal financial assistance and includes federal procurement requirements; and

**WHEREAS**, the Town Commission finds that Policy is in the best interests of the Town and serves a public purpose.

**NOW THEREFORE, BE IT RESOLVED BY THE TOWN COMMISSION OF THE TOWN OF SEWALL'S POINT, FLORIDA:**

**Section 1.** The whereas clauses are incorporated herein as true and correct and as the legislative findings of the Town Commission.

**Section 2.** The Town Commission hereby adopts the Procurement Policy attached hereto as Exhibit "A."

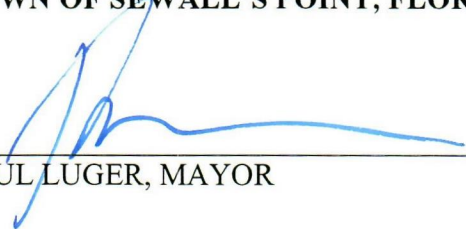
**Section 3.** This resolution will take effect immediately upon its adoption.

*Commissioner Morris* offered the Resolution and moved its adoption. The motion was seconded by *Commissioner Baile*, and upon being put to a vote, the vote was:

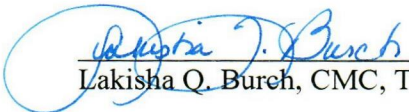
	<u>AYE</u>	<u>NAY</u>
PAUL LUGER, MAYOR	<u>✓</u>	<u>   </u>
FRANK FENDER, VICE MAYOR	<u>✓</u>	<u>   </u>
VINCENT N. BARILE, COMMISSIONER	<u>✓</u>	<u>   </u>
JAMES W. CAMPO, COMMISSIONER	<u>✓</u>	<u>   </u>
DAN MORRIS, COMMISSIONER	<u>✓</u>	<u>   </u>

The Town Manager thereupon declared this Resolution No. 858 approved and adopted by the Town Commission of the Town of Sewall's Point on this 24<sup>th</sup> day of July, 2018.

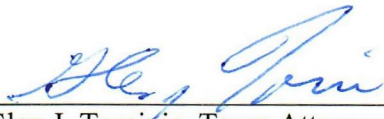
**TOWN OF SEWALL'S POINT, FLORIDA**

  
 \_\_\_\_\_  
 PAUL LUGER, MAYOR

ATTEST:

  
 \_\_\_\_\_  
 Lakisha Q. Burch, CMC, Town Clerk

(TOWN SEAL)

  
 \_\_\_\_\_  
 Glen J. Torcivia, Town Attorney  
 Florida Bar No. 343374  
 Approved as to form and legal sufficiency

## **Town of Sewall's Point, Florida**

### **Procurement Policy**

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#### **PURPOSE AND APPLICABILITY**

The purpose of this policy (the "Policy") is to address the manner in which the Town of Sewall's Point, Florida (the "Town") must conduct the selection, award, and administration of contracts. This Policy is authorized under the Town's Code of Ordinances, section 2-265, and it applies to all procurements of goods and services, recognizing that contracts that are, or may be, funded in whole or in part using federal financial assistance (e.g., grants or cooperative agreements) (referred to herein as "Federal contracts") must also be compliant with the procurement standards of the government-wide *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*, at 2 C.F.R. §§ 200.317 through 200.326. Pursuant to 2 C.F.R. § 200.324(c)(2), the Town hereby self-certifies that this Policy is compliant with these requirements.

This Policy is separated into two parts. "Part A – Standard Policy" and the Town's Purchasing Code apply to contracts awarded in the course of ordinary business and other contracts the Town does not anticipate will be funded in whole or in part with federal financial assistance. "Part B – Policy for Federal Contracting" applies to contracts that may be funded in whole or in part with federal financial assistance, such as those awarded in response to a disaster which has been or which the Town anticipates will be declared as such by the President of the United States.

Contracts procured under "blue skies" (i.e., not in direct response to a Federally-declared disaster), nonetheless have the potential to be utilized or activated in a disaster situation. Accordingly, personnel implementing this Policy should carefully consider whether it is foreseeable that a purchase order or work order could be issued under a pre-existing, "blue sky" contract to address disaster-related needs. If so, these "blue sky" contracts should be treated as Federal contracts and procured in compliance with the requirements provided in Part B. Use of a pre-existing contract that was not procured according to the procedures in Part B in response to a Federally-declared disaster may result in disallowance or deobligation of costs otherwise eligible for Federal financial assistance.

The requirements under Part B of this Policy are intended to be at least as strict as those under Part A and the Town's Purchasing Code. In the event that Part A or the Town's Purchasing Code and Part B conflict, the stricter requirement will apply to Federal contracts.

**PART A - STANDARD POLICY**

The *Standards of Conduct Covering Conflicts of Interest* are attached hereto and incorporated herein as Appendix B.

## **PART B – POLICY FOR FEDERAL CONTRACTING**

### **I. ASSIGNMENT OF CONTRACT MANAGER**

For every procurement and/or contract governed by this Part, the Town will assign a Contract Manager who will be the point-of-contact for all matters related to that procurement or contract. The Contract Manager may be a current employee of the Town or an additional hire or contractor specifically tasked with these duties.

### **II. ESTABLISHMENT OF PROCUREMENT FILE**

For every procurement and/or contract governed by this Part, the Contract Manager will establish a Procurement File. The Procurement File will include all items required pursuant to this Policy and any other items deemed relevant to the procurement or the resulting contract. The Procurement File will include records sufficient to detail the history of the procurement and the resulting contract and must include the following at a minimum:

- A. Rationale for determining the need for the services/work covered.
- B. Rationale for the method of procurement selected, i.e. micro purchases, small purchase procedures, sealed bids, competitive proposals, or noncompetitive proposals.
- C. Rationale for selection of contract type, i.e. lump sum, unit price, cost reimbursement, time and materials/equipment. If a time and materials/equipment contract is used, a completed *Determination of Suitability* must also be included (see Appendix A).
- D. List of sources solicited.
- E. Copies of published notices of proposed contract action.
- F. Copy of the solicitation, all addenda, and all amendments.
- G. List of all responsible bidders including proposed pricing. Include a copy of each bidder's complete response for RFP/RFQ solicitations and bid submission or documentation of price quotations for other types of solicitations.
- H. Documentation evidencing appointment of selection committee or description of how contractor(s) was selected.
- I. Rationale for the selection or rejection of contractor to include determination of contractors' responsiveness, grading sheets, evaluations, and reasons for rejection of any bid.
- J. Determination regarding responsibility of the selected contractor.
- K. Documentation confirming good standing of contractor including copy of search via [www.sam.gov](http://www.sam.gov) and the Florida Department of Management Services' Convicted / Suspended / Discriminatory / Complaints Vendor Lists available at [https://www.dms.myflorida.com/business\\_operations/state\\_purchasing/vendor informa](https://www.dms.myflorida.com/business_operations/state_purchasing/vendor_informa)

[tion/convicted suspended discriminatory complaints vendor lists.](#)

- L. Notice of award.
- M. Notice to unsuccessful bidders or offerors and any record of debriefing.
- N. Record of protests, disputes, and claims.
- O. Bid, performance, payment, and other bond documents.
- P. Copy of contract.
- Q. Basis for the contract price, including cost or price analysis, including pre-award estimate, bid sheets, and any independent research on cost or price.
- R. In the case of an RFQ, copy of the independent cost analysis conducted prior to entering into negotiations.
- S. Documentation regarding any conflict of interest issues that arise and description of how they were handled.
- T. Notice to proceed.

The documentation included in the Procurement File should be commensurate with the size and complexity of the procurement.

### **III. CONTRACTING CAPACITY AND OVERSIGHT**

The Town Manager or his or her designee will develop a system of contract administration that ensures the Town and all applicable contractors and subcontractors, if any, act in accordance with all applicable terms and conditions of the specific contract, purchase order, or work order.

### **IV. ACQUISITION OF UNNECESSARY OR DUPLICATIVE ITEMS**

It is the policy of the Town to avoid the acquisition of unnecessary or duplicative items:

- A. The Town will contract only for current and reasonably expected needs and avoid acquisition of unnecessary or duplicative items.
- B. Written justification for the purchase of goods or services must be documented in the Procurement File prior to the initiation of any procurement process.
- C. Consideration must be given to consolidating or breaking out procurements to obtain a more economical purchase. However, “project splitting”—breaking out a larger procurement merely to bring it under the micro-purchase or simplified acquisition threshold—is not permitted.
- D. Where appropriate, an analysis shall be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach. As to temporary facilities, the Town must determine whether leasing, purchasing, or constructing is the most cost-effective option. As to equipment to perform emergency work, the Town must consider the estimated length of the period the equipment is to be

used and the extent of use within that period; cumulative rental payments for the estimated period of use; net purchase price; transportation and installation costs; maintenance and other service costs; availability of purchase options; and trade-in or salvage value. Any such analysis should be documented and maintained in the Procurement File.

- E. The Town may award contracts for the potential performance of work under an emergency or major disaster before an incident occurs. These pre-positioned or pre-awarded contracts must be awarded in accordance with this Policy and must adequately encompass in their scope of work the type and extent of work anticipated for their use in response to and recovery from the disaster. Similarly, a "blue sky" contract that is not necessarily related to emergency or disaster work, but which the Town may use in response to an emergency or major disaster, should be procured under this Part and must contemplate the Town's needs resulting from a reasonably expected disaster. Inclusion of such requirements must be clear from the solicitation and documented in the Procurement File.

## V. CONTRACTOR QUALIFICATIONS

- A. **Responsibility.** The Town may award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. For each contract subject to this Part, the Town will make a documented determination that the prospective contractor qualifies as responsible and will set forth the basis for that determination in the Procurement File. The review will include, at a minimum, the following:
  - i. Contractor Integrity. The Town will consider the contractor's integrity which may include consideration of whether the contractor has:
    - a. Committed fraud or a criminal offense in connection with obtaining or attempting to obtain a contract;
    - b. Violated federal or state antitrust statutes;
    - c. Committed embezzlement, theft, forgery, bribery, falsification or destruction of records, or tax evasion;
    - d. Made false statements;
    - e. Violated federal criminal tax laws or has delinquent federal or state taxes;
    - f. Received stolen property;
    - g. Committed any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of the contractor;
    - h. Been indicted for any of the offenses described in (a) through (g), above; or
    - i. Has delinquent federal or state taxes.

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- ii. Public Policy. A contractor must comply with the public policies of the Federal Government and the State of Florida. This may include, among other things, past and current compliance with:
  - a. Equal opportunity and nondiscrimination laws prohibiting discrimination on the basis of race, color, creed, national origin, sex, disability, handicap, age, or limited English proficiency;
  - b. The affirmative steps required for Federal contracts for ensuring that small and minority businesses, women's business enterprises, and labor surplus area firms described are considered for all subcontracting; and
  - c. Applicable prevailing wage laws, regulations, and executive orders.
- iii. Record of Past Performance. A contractor must be able to provide a satisfactory past performance record, which can include consideration of whether the contractor has:
  - a. Sufficient Resources - key personnel with adequate experience and subcontractors with adequate experience that will be performing work under the prospective contract.
  - b. Adequate Past Experience - successful past experience in carrying out similar work, including a record of:
    - 1. having the necessary organization, accounting, and operational controls;
    - 2. conforming to requirements and standards of good workmanship;
    - 3. forecasting and controlling costs and showing appropriate budgetary controls;
    - 4. adherence to schedules, including the administrative aspects of performance;
    - 5. reasonable and cooperative behavior and commitment to customer satisfaction;
    - 6. business-like concern for the interest of the customer; and
    - 7. meeting quality requirements.
- iv. Financial Resources. The contractor must have adequate financial resources to perform the contract or the ability to obtain such resources. The Town may analyze the existing cash flow of the contractor, account receivables, and other financial data as well as existing business prospects in making this evaluation.
- v. Technical Resources. The contractor must have or be able to acquire the required construction, production, and/or technical facilities, equipment, employees, and other resources to perform the work under the contract.



**B. Other Qualifications.**

- i. Conflicts of Interest. The Town must exclude contractors that developed or drafted specifications, requirements, statements of work, or invitations for bids or requests for proposals from competing for such procurements in order to ensure objective contractor performance and eliminate unfair competitive advantage. See the Town's *Standards of Conduct Covering Conflicts of Interest* for more information about the Town's policies regarding conflicts of interest. The *Standards of Conduct Covering Conflicts of Interest* are attached hereto and incorporated herein as Appendix B.
- ii. Lobbying Certification. For Federal contracts, if a contract will exceed \$100,000, the Town must obtain a lobbying certification (available at Appendix A, 44 C.F.R. Part 18) and, if applicable, a lobbying disclosure from a prospective contractor before awarding the contract.
- iii. Debarment and Suspension. Prior to any contract award, the contractor must be screened to ensure it is in good standing to perform the contract. The contractor must be in good standing with the Florida Secretary of State and vetted through centralized government debarment and suspension lists to ensure the contractor is not debarred or suspended from local, State, or federal programs. Prospective contractors will be verified through [www.sam.gov](http://www.sam.gov) and [https://www.dms.myflorida.com/business\\_operations/state\\_purchasing/vendor\\_information/convicted\\_suspended\\_discriminatory\\_complaints\\_vendor\\_lists](https://www.dms.myflorida.com/business_operations/state_purchasing/vendor_information/convicted_suspended_discriminatory_complaints_vendor_lists). A debarred or suspended contractor is not a responsible contractor.

**VI. SOLICITATION & COMPETITION**

- A. **Prohibited Restrictions on Competition.** All procurement transactions will be conducted in a manner providing full and open competition. This includes ensuring that no restrictions are placed on a good or service that may limit competition. Some of the situations considered to be restrictive of competition include but are not limited to:
- i. Organizational conflicts of interest, including allowing contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals to compete for such procurements. These contractors must be excluded from bidding. For more on organizational conflicts of interest see the Town's *Standards of Conduct Covering Conflicts of Interest*.
  - ii. Imposing prohibited geographical preferences (see § VII, below).
  - iii. Placing unreasonable requirements on firms in order for them to qualify to do business.
  - iv. Requiring unnecessary experience.
  - v. Requiring excessive bonding.
  - vi. Non-competitive pricing practices between firms or between affiliated companies.
  - vii. Non-competitive solicitations or contracts to persons or firms on retainer contracts (or

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currently under another contract) where the award is not for property or services specified for delivery under the scope of the retainer contract.

- viii. Specifying only a “brand name” product instead of allowing for “an equal” product to be proposed and describing the performance of relevant requirements of the procurement.
- ix. Specifying a preferred item is a form of a brand name only specification. It is not permissible unless there is an appropriate non-competitive justification.
- x. Any arbitrary action in the procurement process, e.g., unfairly restrictive time limits for a potential vendor to respond to a request.

**B. Solicitation Requirements.** All solicitations must meet the following requirements:

- i. All solicitations will incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. This description must not contain features which unduly restrict competition.
- ii. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible.
  - a. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equivalent” description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated.
  - b. Performance or functional specifications are preferred to detailed technical specifications. A performance specification describes an end result, an objective, or standard to be achieved, and leaves the determination of how to reach the result to the contractor. When using performance specifications, the solicitation should describe what the product should be able to do or the services to accomplish without imposing unnecessarily detailed requirements on how to accomplish the tasks.
- iii. All solicitations must identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals. If using the procurement through competition proposals method (see § VIII.D, below), the solicitation should state if the Town is reserving its right to award the contract to other than the lowest priced offeror.
- iv. For procurements of Federal contracts that will be funded in whole or in part with FEMA grants, the solicitation must acknowledge the Town’s use of FEMA funding for the contract, in compliance with the terms of its financial assistance award from FEMA. Specifically, the document should indicate that FEMA is providing the funds, the Catalog of Federal Domestic Assistance Number, as applicable, and the amount provided.

- v. Solicitations should state the type of contract that will be awarded:
  - a. *Fixed Price* – provides a firm price that remains irrespective of the contractor’s actual cost of performing the work, putting the risk on the contractor. May include an economic price adjustment, incentives, or both.
  - b. *Cost Reimbursement* – provides for payment of certain incurred costs and for the reimbursement of the contractor’s reasonable, allocable, actual, and allowable costs, with an agreed-upon fee. Must include a limit to the costs that a contractor may incur which the contractor may not exceed without the Town’s approval, except at his own risk. Examples include cost-plus-fixed-fee, cost-plus-incentive-fee, and cost-plus-award-fee contracts.
  - c. *Time and Materials or Time and Equipment* – cost to the Town is the sum of the actual costs of materials and direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit. Certain conditions precedent must be met by the Town before this contract may be used. See § XI, below.
  - d. *Cost Plus a Percentage of Cost* – the use of cost plus a percentage of cost and cost plus a percentage of construction costs methods of contracting are prohibited.
    - i. *Differentiating Time and Materials and Cost Plus Percentage of Cost Contracts.* As described above, a time and materials contract provides for the payment of labor costs on the basis of fixed hourly billing rates which are specified in the contract. These hourly billing rates would include wages, indirect costs, general and administrative expense, and profit. No fee or profit is allowed except as part of the fixed billing rate for direct labor hours, such that materials are billed at cost. To include for the payment of labor costs on the basis of fixed hourly billing rates and allow the contractor to bill for actual costs other than labor (such as materials or travel) plus a percentage rate of those actual costs would constitute a prohibited cost-plus-percentage-of-cost contract.
    - ii. *Special Consideration for Overhead on Direct Costs.* A contractor, however, is allowed to recover overhead costs on its direct costs, such as materials or travel, if the contractor’s accounting system clearly separates the overhead costs associated with those direct costs and those overhead costs are not included in the overhead pool that is applied to direct labor costs. In other words, there must be no duplicate billing for material handling overhead costs in the rates applied to labor hours.
- vi. Solicitations must also set forth the requirements related to contracting with small and minority businesses, women’s business enterprises, and labor surplus area firms set forth in § XV, below.

## **VII. GEOGRAPHICAL PREFERENCES IN FEDERAL CONTRACTS**

The Town shall conduct procurements of Federal contracts in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable federal statutes expressly mandate or encourage geographic preference. Nothing in this section however preempts state licensing laws of the State of Florida. When contracting for architectural and engineering (A/E) services under this Part, the Town may use geographic location as a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract. Examples of prohibited geographical preferences include:

- Excluding contractors from outside a geographic area.
- Providing a local vendor that has submitted a bid within a certain percentage of the lowest bid to match the lowest bid.
- Reducing, by a percentage, a bid submitted by a local vendor during the evaluation of bids submitted during sealed bidding.
- Adding weight on evaluation factors to an in-state or local business as part of a procurement by competitive proposals.

## **VIII. PROPER METHODS OF PROCUREMENT**

- A. **Procurement by Micro-Purchase Procedure.** For the acquisition of supplies or services when the aggregate dollar amount does not exceed the micro-purchase threshold defined at 2 C.F.R. § 200.67 (currently \$3,500.00), the Town, to the extent practicable, will distribute such purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the Town considers the price to be reasonable. The Contract Manager or person designated to handle the purchase will also document the Town's determination regarding price but need not document the reason for the procurement method, contractor selection, or selection of contract type. The Town must, however, document its determination that the contractor is responsible (see § V, above) and reason for selection if more than one bidder was considered. If applicable, the Town must also document its determination that the otherwise lowest bidder is not responsible.
- B. **Procurement by Small Purchase Procedure.** When securing services, supplies, or other property which do not cost more than the simplified acquisition threshold which, pursuant to 41 U.S.C. § 403(1), is currently listed as \$150,000, the Town shall obtain written price or rate quotations from at least three qualified sources. The contracts should be fixed price or not to exceed cost-reimbursement contracts with assurances that the scope of work can be completed for less than the simplified acquisition threshold. The Procurement File must include an independent estimate that the procurement is within the threshold to qualify for this type procurement. Any future changes, particularly any that cause the procurement to rise above the small purchase threshold, should also be documented in the Procurement File. The Town must also document its determination that the contractor

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is responsible (see § V, above) and its reason for selection if more than one bidder was considered. If applicable, the Town must also document its determination that the otherwise lowest bidder is not responsible.

- C. **Procurement by Sealed Bids.** Sealed Bids will be used when feasible and as long as the following conditions apply:
- i. A complete adequate and realistic specification or purchase description is available;
  - ii. Two or more responsible bidders are willing and able to compete effectively for the business; and
  - iii. The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.
- If the Town determines sealed bidding is the appropriate method of procurement, it shall:
- i. Publicly solicit the bid;
  - ii. Ensure bids are solicited from an adequate number of known suppliers (minimum of 3, although more may be appropriate depending on the facts and circumstances of the procurement), providing them sufficient response time prior to the date set for opening the bids;
  - iii. Include any specifications and pertinent attachments in the invitation for bids, which shall define the items or services in order for the bidder to properly respond;
  - iv. Open the bids at the time and place prescribed in the invitation for bids;
  - v. Award a firm fixed price contract (lump sum or unit price) in writing to the lowest responsive and responsible bidder;
  - vi. Consider factors such as discounts, transportation costs, and life cycle cost in determining which bid is lowest when these factors are specified in the bid documents;
  - vii. Only use payment discounts to determine the low bid when prior experience indicates that such discounts are usually taken advantage of;
  - viii. Only use a fixed price incentive contract or include an economic price adjustment provision in a fixed price contract when there is a rational basis for doing so, which must be documented in the Procurement File; and
  - ix. Reserve the right to reject any or all bids, provided there is a sound documented reason.
- D. **Procurement by Competitive Proposals.** If the Town determines that the sealed bid method is not appropriate for obtaining certain goods and services (i.e., the contract award cannot be based exclusively on price or price-related factors due to the nature of

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the goods or services required), the Town will issue a Request for Proposals hereinafter referred to as an ("RFP").

- i. Requirements for RFPs.
  - a. RFPs must be publicized.
  - b. RFPs must identify all evaluation factors and their relative importance, but need not disclose numerical percentage ratings or weights. Evaluation factors must reflect the subject matter and elements most important to the Town. Examples include technical design; technical approach; length of delivery schedules; past performance; and quality of proposed personnel.
  - c. The Town must solicit responses from an adequate number of qualified sources (minimum of three, although more may be appropriate depending on the facts and circumstances of the procurement) providing them with sufficient response time before the date set for receipt of proposals.
  - d. The Town must award the contract to the responsible firm whose proposal is the most advantageous to the program, with price and other factors considered. The Town may award a contract to the offeror whose proposal offers the "best value" to the Town, provided that the solicitation informs potential offerors that the award will be made on a "best value" basis and includes a statement that the Town reserves the right to award the contract to an offeror other than the lowest priced offeror.
  - e. Any response to publicized RFPs must be considered to the maximum extent practical.
- ii. Evaluation of Proposals. Prior to issuing the RFP, the Contract Manager must ensure that the written method for conducting technical evaluation of the proposals received and for selecting offeror(s) is included in the Procurement File. The Town must consider all evaluation factors specified in the solicitation documents and evaluate offers only on those factors. Evaluation factors may not be modified after proposals have been submitted without re-opening the solicitation. If a contract will include options, the Town must evaluate proposals for any option quantities or periods contained in the solicitation if it intends to exercise those options after the contract is awarded.

- iii. Special Considerations for Architectural/Engineering Professional Services. The Town may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

If failing to agree on a fair and reasonable price, the Town may conduct negotiations with the next most qualified offeror. If necessary, the Town will conduct negotiations with successive offerors in descending order until a contract award can be made to the offeror whose price is fair and reasonable.

## **IX. PROCUREMENT BY NON-COMPETITIVE PROPOSALS**

Procurement by non-competitive proposals is procurement through solicitation of a proposal from only one source or a limited number of sources and shall be used only after the Town determines and documents in the Procurement File that one or more of the following circumstances apply:

- A. **The item is available from a single source.** The Town will place written documentation supporting the sole source purchase in the Procurement File and will consider the following before any purchase of goods and/or services from a single source:
  - i. Whether the offeror demonstrates a unique or innovative concept or capability not available from other sources.
  - ii. Whether any other product provides equivalent or similar benefits.
  - iii. Considering benefits received, whether the cost of the item is reasonable compared to others.
  - iv. There is no possibility of competition from other dealers or distributors (e.g., there are patent or data rights restrictions that would preclude competition).
  - v. In the case of a sole source award to an existing contractor already performing work before a major disaster, there would be a substantial duplication of costs that would not be expected to be recovered through competition. This situation would arise, for example, if a contractor was in the middle of constructing a facility when the facility was damaged by a major disaster, and the scope of work under the proposed project was to repair the construction work completed as of the date of the incident.
- B. **The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation.** The Town may forego public procurement requirements to address exigent circumstances—meaning that there is no time to conduct a procurement before the goods and services must be obtained. The Town must, however, contemporaneously document its rationale in the Procurement File. In making such a determination, the Town will consider the totality of circumstances, including the following

to determine whether a procurement meets the definition of “emergency” or “exigency” circumstance:

- i. An “exigency” is something that is necessary in a particular situation that requires or demands immediate aid or action. In the case of an exigency, the Town would be seriously injured unless it performed the procurement in a noncompetitive manner.
- ii. An “emergency” is an unexpected and unusually dangerous situation that calls for immediate action or an urgent need for assistance or relief. An emergency will typically involve a threat to life, public health or safety, improved property, and/or some form of dangerous situation.

Use of the public exigency or emergency exception is only permissible during the actual exigent or emergency circumstances. Once the exigent or emergency circumstances cease to exist, the Town is expected to transition to a more appropriate method of contracting using full and open competition. Failure to properly transition to a more appropriate method of contracting at the cessation of the exigent or emergency circumstance jeopardizes federal funding.

- C. **The federal awarding agency or pass-through entity authorizes this type of procurement in response to a written request from the Town.** Note that this approval is exceptionally rare.
- D. **After solicitation of a number of sources, competition is determined inadequate.** If, after following proper procurement guidelines, competition is determined to be inadequate, the Town may select a vendor provided a price or cost analysis is performed to demonstrate the cost of the goods or services is reasonable. This situation could arise when, among other things, the Town has advertised the invitation for bids or RFP and solicited a number of sources, but has received only a single bid or proposal or received no responsive bids or proposals. Such circumstances must be well-documented in the Procurement File.

Before utilizing this exception, the Town should review its solicitation and the publicizing of its solicitation to ensure that the solicitation was not inadvertently drafted in a manner to reduce or eliminate competition, which resulted in the receipt of one or no proposals. If this is found to be the case, the Town should revise the solicitation and re-publicize it in order to resolve the competitive concerns.

In undertaking this review, it may be necessary to speak to those firms solicited to find out why they did not submit offers or bids. If the reason is an overly restrictive specification or delivery requirement, then the Town should evaluate whether to cancel the solicitation, change that specification to allow for more bids or offers, and re-solicit bids or offers. If the Town chooses to move forward with the award in light of the restrictive specification, then the Town must document in the Procurement File why the restrictive specification or delivery requirement was necessary and could not be modified so as to enable additional competition.

A “cardinal change” is a significant change in contract work that causes a major deviation from the original purpose of the work or the intended method of achievement, or causes a revision of



contract work so extensive, significant, or cumulative that, in effect, the contractor is required to perform very different work from that described in the original contract. A cardinal change is a noncompetitive award that should only be made if the necessary conditions described above are met.

Where there is no price competition, the Town must negotiate profit as a separate element of price.

**X. DOCUMENTATION ASSOCIATED WITH PROCUREMENT BY NON-COMPETITIVE PROPOSALS**

- A. Where the Town contemplates using non-competitive proposals to award a contract, the Contract Manager shall document the reason for a non-competitive procurement, in a manner such that any reasonable person(s) unfamiliar with the circumstances will be able to identify and understand the underlying reasons for the non-competitive procurement. The justification will cite at least one of the exceptions to competition listed above, and indicate in detail, the reasons that support the exception.
- B. If the justification relates to a situation where there would be substantial duplication of costs that would not be expected to be recovered through competition, then the Contract Manager shall describe the nature of the costs or effort avoided, including any and all organizational effort on the part of the Town.
- C. If the justification relates to an exigency or emergency, the Town shall document the nature of the exigency or emergency. Non-competitive procurements should be limited in duration to the period necessary to conduct a competitive procurement.
  - i. Where the “exigency or emergency” exception is used to justify the noncompetitive procurement, the following contracting requirements still apply:
    - o The Town must document the exigent or emergency circumstances that justify the use of a non-competitive method of procurement.
    - o The resulting contract must include the required contract clauses at 2 C.F.R. § 200.326 and Appendix II to the Uniform Rules.
    - o The resulting contract must include the Federal bonding requirements at 2 C.F.R. § 200.325 if the contract is for construction or facility improvement.
    - o The Town must award only to a responsible contractor.
    - o The Town must complete a cost or price analysis to determine if the cost or price is fair and reasonable.
    - o The Town may not use cost-plus-percentage-of-cost contracting.
    - o If the Town uses a time and materials or time and equipment contract, it must document its determination that no other contract type was suitable; include a

ceiling price in the contract that the contractor exceeds at its own risk; and assert a high degree of oversight to ensure that the contractor is using efficient methods and effective cost controls.

- D. If the justification relates to lack of competition, the Contract Manager shall document the justification for and why the Town moved forward with a noncompetitive award without cancelling the solicitation and resoliciting offers or bids. Evaluation of the sufficiency of publication of the solicitation to an adequate number of firms should be documented. Communications with firms solicited to find out why they did not submit offers or bids should be documented. Evaluation of whether to cancel the solicitation, change that specification to allow for more bids or offers, and re-solicit bids or offers should be documented. Any decision to move forward with an award in light of a restrictive specification should be documented, including why the restrictive specification or delivery requirement was necessary and could not be modified so as to allow additional competition.
- E. For any proposed contract with an estimated value of more than the simplified acquisition threshold which, pursuant to 41 U.S.C. § 403(1), is currently listed as \$150,000, procurement using the non-competitive proposals method requires approval by the Town Commission that the non-competitive proposals method is appropriate under the exception(s) as identified above.

## **XI. TIME AND MATERIALS CONTRACTS**

A time and materials ("T&M") contract is a contract under which the cost to the Town is the sum of the actual costs of materials (or equipment) and direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

In Federal contracting, these types of contracts are generally discouraged, but may be unavoidable in certain circumstances. Thus, the Town will award and utilize time and materials type Federal contracts **only** after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. The Town will assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls. For any T&M contracts, the Procurement File must include a completed *Determination of Suitability of Time & Materials Contract* (see Appendix A) including the following:

- A. Written determination that no other contract type is suitable with supporting documentation regarding the emergency or exigent circumstances that exists and other factors considered;
- B. Description of any operational concerns supporting need to proceed on an expedited timeline;
- C. Statement and supporting documentation as to why a detailed scope of work could not be developed;
- D. Confirmation of ceiling price including support for calculation and documentation of

contractor agreement;

- E. Price analysis to support determination that the hourly rates are reasonable and justifiable under the conditions, including independent estimate and rate comparisons; and
- F. Additional documentation regarding the process used to monitor the contractor(s) and description of the type of records maintained.

Generally, federal funding of T&M contracts will be limited to a reasonable time based on the circumstances during which the Town cannot define a clear scope of work. Accordingly, the Town shall ensure in these contracts that it has the unilateral right to terminate the contract for convenience so that the Town can award a follow-on fixed price or cost reimbursement type contract after the exigency period has passed.

## **XII. CONTRACT COST AND PRICE**

The Town will perform a cost or price analysis in connection with every procurement action in excess of the simplified acquisition threshold (currently, \$150,000), including contract modifications. The method and degree of the analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the Town will establish independent estimates before receiving bids or proposals, including proposals for change orders and contract modifications. See § XIII, below. As part of evaluating reasonableness of costs, the Town will consider the amount of profit that the contractor might receive from the engagement at issue based on consideration of such issues as the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of contractor's record of past performance, and industry profit rates in the surrounding geographical area for similar work.

- *Price analysis* – the examination and evaluation of a proposed price without evaluating its separate components (cost and profit). This analysis is usually used for acquisition of commercial items and procurement by sealed bidding. Examples of price analysis include:
  - Comparing offers with one another;
  - Comparing prior proposed prices and contract prices with current proposed prices for the same or similar goods or services;
  - Comparing offers with competitive published price lists, published market prices, or similar indexes;
  - Comparing proposed prices with independently developed estimates;
  - Comparing proposed prices with prices of the same or similar items obtained through market research.
- *Cost analysis* – the review and evaluation of the separate cost elements (such as labor hours, overhead, materials, etc.) and proposed profit in order to determine a fair and reasonable price for a contract and the application of judgment to determine how well the proposed costs represent what the costs of the contract should be, assuming reasonable economy and efficiency. This analysis is usually used to establish the basis for negotiating

contract prices for procurement by competitive proposals, contract modifications, and any other case where price analysis by itself does not ensure price reasonableness. E.g.,

- Comparison of verified costs proposed for individual cost elements with previously incurred actual costs and independently developed estimates.

In all cases where cost analysis is performed (and where there is no price competition), the Town must negotiate profit as a separate element of the price. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

### **XIII. INDEPENDENT COST ESTIMATES**

The Town will develop an independent estimate for all contract work that is anticipated to exceed the Micro-Purchase threshold (currently, \$3,500). The purpose of the independent cost estimate is to provide a tool to determine if pricing is reasonable, and is valuable to help determine whether proposers or bidders have understood the scope of work as outlined. Below are guidelines for how this estimate is to be determined:

- A. Must be independent of any potential proposer or bidder. They may be prepared by the Town, other knowledgeable person, or a third-party cost estimator.
- B. Should be in hand before bids or proposals are received.
  - i. At times, contractors and consultants submit change order proposals that include pricing; the Town will seek to avoid such situations by instructing contractors and consultants not to include pricing with change order proposals.
  - ii. Where a change order proposal includes pricing, the Town shall seek an estimate from someone without knowledge of the contractor's price proposal.
- C. Must be in sufficient detail to be useful.
  - i. Estimates for items such as goods can be simply an estimated amount, e.g., a piece of heavy equipment for which there is a competitive market may have a "sticker" price. It is sufficient for the estimate to contain the purchase price without more detail. Where the equipment is custom-built, the estimate should be a build-up of labor, materials, overhead, and profit to aid in analysis of price reasonableness and contract negotiation.
  - ii. Estimates for construction contracts should be in sufficient detail to allow for careful evaluation of bids.
  - iii. Estimates for Construction Manager Services should be in the same detail as that which firms will be asked to base their proposals, e.g., fee for pre-construction services, General Conditions amount, fee for services, etc.
  - iv. FEMA has established cost curves for design and engineering services for various kinds of construction in its archived Public Assistance Guide (FEMA 322, June 2007). FEMA's

current Public Assistance Program and Policy Guide does not reference these curves; however, the Town may still use these older curves to develop an independent cost estimate for A/E services. For change order work, the Town's A/E contracts must generally provide that A/E services may not exceed a specified percentage of the construction costs. If the percentage is within the applicable FEMA cost curve, the percentage will serve as the independent cost estimate.

- v. Estimates of other professional services generally should be based on estimates of hours of effort and rates for various tasks.

#### **XIV. PREQUALIFIED LISTS OF VENDORS**

The Town may use pre-qualified lists of persons, firms, and products among which to compete contracts for goods and services. Pre-qualified lists are not contracts—they are tools to aid in the procurement of future contracts by allowing the Town to review the qualifications of prospective contractors prior to contract award of an anticipated future need.

In these instances, the Town will advertise for vendors of goods or services to submit a pre-determined list of qualifications. Vendors that qualify will be solicited to provide proposals for the various goods and services as they develop. The Town will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition

The Town will not preclude additional bidders from qualifying during the solicitation period. Use of a pre-qualified list does not eliminate the requirement that a procurement be publicly solicited.

#### **XV. CONTRACTING WITH SMALL AND MINORITY BUSINESSES, WOMEN'S BUSINESS ENTERPRISES, AND LABOR SURPLUS AREA FIRMS**

The Town is committed to ensuring that small and minority businesses, women's business enterprises, and labor surplus area firms are provided every opportunity to participate in projects. For procurements and contracts under this Part, the Town shall:

- A. Place qualified small and minority businesses, women's business enterprises, and labor surplus area firms on solicitation lists and solicit these businesses whenever they are potential sources. The Contract Manager shall research state and local lists of qualified small and minority businesses and women's business enterprises to update its solicitation list.
  - i. A "small business" is independently owned and operated, not dominant in the field of operation in which it is bidding, and qualified as a small business under the Small Business Administration criteria and size standards at 13 C.F.R. Part 21.
  - ii. A "women's business enterprise" is (a) at least 51 percent owned by one or more women or, in the case of a publicly owned business, at least 51 percent of the stock is owned by one or more women; and (b) whose management and daily operations are controlled by one or more women.

- iii. A “minority business” is (a) at least 51 percent owned by one or more minority group members or, in the case of a publicly owned business, at least 51 percent of the stock is owned by one or more minority group members; and (b) whose management and daily operations are controlled by one or more minority group members.
  - iv. A “labor surplus area firm” is one that, together with its first tier subcontractors, will perform substantially in labor surplus areas, as defined by the Department of Labor’s Employment and Training Administration. The Department of Labor’s list of labor surplus areas is available at <https://www.doleta.gov/programs/lsa.cfm>.
- B. When economically feasible, divide project requirements into smaller tasks or quantities to maximize participation opportunities for small and minority businesses and women’s business enterprises.
  - C. Establish delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women’s business enterprises.
  - D. Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce.
  - E. Require contractors, if subcontracts are utilized, to take steps (A) through (D), above.

The Town must document its compliance with these affirmative steps. For contracts with prime contractors, the requirement that the contractor take steps (A) through (D) above must also be included in solicitations and contracts.

## **XVI. BONDING**

All Federal procurements, contracts, and subcontracts for construction or facility improvements that exceed the simplified acquisition threshold (currently, \$150,000) require, at a minimum, the following bonds:

- A. A **bid guarantee** from each bidder equivalent to five percent of the bid price. The bid guarantee shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of their bid, execute such contractual documents as may be required within the time specified.
- B. A **performance bond** on the part of the contractor for 100 percent of the contract price. A performance bond is one executed in connection with a contract to secure fulfillment of all the contractor’s obligations under such contract.
- C. A **payment bond** on the part of the contractor for 100 percent of the contract price. A payment bond is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material for execution of the work provided for in the contract.

## **XVII. CONTRACT PROVISIONS FOR FEDERAL CONTRACTS**

All Federal contracts must contain the applicable provisions described in Appendix II to 2 C.F.R. Part 200—Contract Provisions for non-Federal Entity Contracts Under Federal Awards and in FEMA guidance available at <https://www.fema.gov/media-library-data/1483976790556-96bfcf3bf2c64e94d6f63dd4169a7d2c/RequiredContractClauses2C.F.R.200.326and2C.F.R.Part200AppendixII10917.pdf>.<sup>1</sup> These provisions relate to:

- A. Remedies – required for all contracts in excess of the simplified acquisition threshold, currently \$150,000.
- B. Termination for Cause and Convenience—required for all contracts in excess of \$10,000.
- C. Equal Opportunity Employment—required for all “federally assisted construction contracts” as defined by 41 C.F.R. § 60-1.3.
- D. Davis-Bacon Act and Copeland “Anti-Kickback” Act—not required for contracts funded by FEMA’s Public Assistance or Hazard Mitigation Grant Programs. See above-referenced guidance for more information about when this provision is required.
- E. Contract Work Hours and Safety Standards Act—required for contracts in excess of \$100,000 that involve the employment of mechanics or laborers.
- F. Clean Air Act and Federal Water Pollution Control Act—required for contracts in excess of \$150,000.
- G. Debarment and Suspension—required for all contracts.
- H. Byrd Anti-Lobbying Amendment—contractors that apply or bid for an award of \$100,000 or more are required to file an anti-lobbying certification.
- I. Changes—recommended for FEMA-funded contracts.
- J. Access to Records—required for FEMA-funded contracts.
- K. DHS Seal, Logo, and Flags—required for all contracts.
- L. Compliance with Federal Law, Regulations, and Executive Orders—required for all contracts.
- M. No Obligation by Federal Government—required for all contracts.
- N. Program Fraud and False or Fraudulent Statements or Related Acts—required for all contracts.

Not all of these provisions are applicable to every contract. Some of these provisions are required to be in a form provided by statute or regulation.

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<sup>1</sup> FEMA’s guidance provides sample provisions for many of these requirements. For the Equal Employment Opportunity and Contract Work Hours and Safety Standards Act provision, the language in FEMA’s guidance is outdated. The Town should refer to the most recent statutory language for these contract clauses. The statutory reference can be found in FEMA’s guidance.

### **XVIII. PERIOD OF PERFORMANCE**

Town personnel will use sound business judgment in establishing and extending a contract's period of performance, with such period generally not exceeding the time necessary to accomplish the purpose of the contract.

### **XIX. ADDITIONAL COST CONTROL PROCEDURES**

- A. **Value Engineering.** The Town may consider opportunities to use value engineering in contracts for permanent restorative work projects that are of sufficient size to offer reasonable opportunities for cost reduction. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lowest cost.
- B. **Joint Procurements.** To foster greater economy and efficiency, the Town may enter into inter-entity agreements to conduct joint procurements. A "joint procurement" is a method of contracting in which two or more non-federal entities agree to use a single solicitation document and enter into a single contract with a vendor for delivery of goods or services in a fixed quantity, even if expressed as a minimum or total maximum. This is typically done to obtain advantages unavailable for smaller procurements. A joint procurement is distinct from a purchasing schedule.

The entity responsible for undertaking the joint procurement may, upon award of the contract, assign to other participants responsibilities for administering those parts of the contract affecting their goods or services. Participation in a joint procurement, however, does not relieve the Town from the requirements and responsibilities it would have if it were procuring the goods or services itself, and does not relinquish responsibility for the actions of the participants merely because the primary administrative responsibility for a particular action resides in another entity other than the Town.

A "joint procurement" is not a piggybacked contract. The Town may not contract for work funded in whole or in part by Federal funds under another entity's agreement through assignment. Doing so is considered impermissible "piggybacking" and falls short of the Federal procurement standards. Note that "joint procurements" and "piggybacking" is distinct from work performed under a mutual aid agreement.

- C. **Cooperative Purchasing.** Cooperative purchasing programs are a type of cooperative arrangement where businesses, non-profit organizations, and/or governmental entities agree to aggregate their demand for certain goods or services to get lower prices from selected vendors. Entities typically sign up to use a cooperative purchasing program through a cooperative purchasing agreement, and program membership gives the entities access to lists of agreements or contracts for goods and services at pre-negotiated rates or prices. Typically, the member then accomplishes the actual purchase of goods or services by negotiating with participating vendors and placing purchase orders or entering into contracts based on the rates or prices listed in the cooperative purchasing program's agreements or contracts with vendors. Cooperative purchasing is distinguishable from joint procurements in that the solicitation in a joint procurement is not drafted for the



purposes of accommodating the needs of parties who did not participate in the initial solicitation, but who later choose to participate in the benefits of the contract. FEMA has advised applicants for disaster assistance grants exercise caution in utilizing contracts through cooperative purchasing programs for FEMA-eligible work. FEMA will closely scrutinize the use of such contracts in applications for funding. Accordingly, the Town should be guided by the following policies with respect to cooperative purchasing as it relates to the procurement of contracts under this Part:

- i. **Micro-Purchases:** while following the procedures outlined at § VIII.A., above, the Town may use a cooperative purchasing program to procure goods or services without further competition among vendors not participating in the program.
  - ii. **Small Purchases:** while following the procedures outlined at § VIII.B., above, the Town may obtain price or rate quotations solely from vendors participating in a cooperative purchasing program.
  - iii. **Sealed Bids and Competitive Proposals:** for procurements greater than \$150,000, the Town must seek approval from the Town Attorney prior to utilizing a contract under a cooperative purchasing program.
  - iv. **Noncompetitive Procurements:** the Town may choose any vendor, regardless of that vendor's participation in a cooperative purchasing program, as long as there is a proper justification for sole sourcing, as outlined at § IX, above.
- D. **Use of Purchasing Agents.** The Town may use a purchasing agent to assist in the procurement of goods and services. The purchasing agent may assist the Town in, among other things, conducting market research, preparing solicitations, evaluating bids or proposals, negotiating contracts, and screening information about products. Use of a purchasing agent does not excuse the Town from the requirements of this Policy.
- E. **Price Adjustment Monitoring.** The assigned Contract Manager will monitor the pricing for any pre-event contract(s) and will solicit updated pricing proposals when market conditions, cost analysis, or other factors indicate that such solicitation might be in the best interest of the Town.

## **XX. DISPUTE RESOLUTION AND PROTEST PROCEDURES**

The Town is alone responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements (e.g., source evaluation, protests, disputes, and claims).

- A. **Contract disputes.** For any awarded contract, dispute resolution will be handled consistent with the procedures as agreed-to by the parties in the applicable contract and any incorporated documents.
- B. **Bid protests.** Bid protests shall be handled in accordance with the Town's Purchasing Code.

**XXI. OTHER LEGAL RESTRICTIONS ON ACQUISITIONS**

Any applicable provisions of the Town's Purchasing Code or applicable policies set forth in Part A that are more strict than the policies set forth in Part B are hereby incorporated herein and shall apply.

APPROVED: \_\_/\_\_/2018

**Appendix A to Procurement Policy**

**Determination of Suitability of Time & Materials or Time & Equipment Contract**

All contracts that are, or may be, funded in whole or in part using federal financial assistance (e.g., grants or cooperative agreements) arising out of disasters declared after December 26, 2014 must comply with the procurement standards of the government-wide *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*, at 2 C.F.R. §§ 200.317 through 200.326. Pursuant to 2 C.F.R. § 200.318(j), time and material or time and equipment type contracts (collectively referred to herein as T&M) are to be used only under limited circumstances. As such, the Town will complete a Determination Regarding Suitability for each T&M contract covering work for which it may request federal reimbursement.

Date of Event: \_\_\_\_\_ Disaster Declaration No. and Date Declared: \_\_\_\_\_

Contractor Name, Contract No., and Anticipated General Scope of Work: \_\_\_\_\_

The Town has determined no other type of contract is suitable, because: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

The following existing facts and circumstances support this determination and set forth the procedural requirements that will apply to this Contract:

Emergency conditions will exist until the scope of work is completed.

Exigent circumstances do not permit fully assessing damages to the Town's property before repair work and/or necessary debris removal begins.

Description of any additional operational concerns supporting need to proceed on an expedited timeline:

\_\_\_\_\_

The Contract is a written agreement as to the general scope of work and rates to be charged.

The Contract includes a "ceiling price" or "not-to-exceed" clause that Contractor exceeds at its own risk. The ceiling price / not-to-exceed amount is \$\_\_\_\_\_. Attach documentation of Contractor agreement.

Contract allows the Town to terminate for convenience if circumstances later allow a fixed-price or cost reimbursement type contract.

The Town has performed and documented a price analysis to demonstrate that the rates proposed by Contractor are reasonable and justifiable under the disaster conditions. Brief description of price analysis performed: \_\_\_\_\_

\_\_\_\_\_

The Town will closely monitor Contractor and maintain good records of work performed to ensure Contractor is using efficient methods and effective cost controls. Brief description of monitoring plan: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
**Town of Sewall's Point, Florida Representative**

\_\_\_\_\_  
**Date**

**Print Name and Title:** \_\_\_\_\_

# **Town of Sewall's Point, Florida – Appendix B to Procurement Policy Standards of Conduct Covering Conflicts of Interest**

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## **I. PURPOSE AND APPLICABILITY**

The purpose of this Standard of Conduct is to provide guidance to the Town of Sewall's Point, Florida (the "Town") employees (and public officers, as applicable) engaged in the selection, award, and administration of contracts, including those that are, or may be, funded in whole or in part using federal financial assistance (e.g., grants or cooperative agreements) ("Federal contracts"), as to how to identify and handle potential and actual conflicts of interest that may arise in the course of those activities. Pursuant to 2 C.F.R. § 200.324(c)(2), the Town hereby self-certifies that this Standard is compliant with the requirements of the procurement standards of the government-wide *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*, at 2 C.F.R. §§ 200.317 through 200.326.

## **II. GENERAL RULE**

The Town's employees and public officers shall comply with this Standard and all applicable provisions of Florida Statutes, such as Chapter 112, Part III, Florida Statutes, known as the "Code of Ethics for Public Officers and Employees," including but not limited to, the following sections:

- A. Section 112.313 Standards of conduct for public officers, employees of agencies, and local government attorneys.
- B. Section 112.3143 Voting Conflicts.
- C. Section 112.3148 Reporting and prohibited receipt of gifts by individuals filing full or limited public disclosure of financial interests and by procurement employees.

No employee or public officer may participate in any part of the procurement process, including the selection, award, or administration of purchases or contracts, if he or she has a conflict of interest as defined in Chapter 112, Florida Statutes.

In addition to the requirements set forth in Chapter 112, Florida Statutes, for federal procurement purposes, no employee or public officer may participate in any part of the procurement process, including the selection, award, or administration of purchases or contracts, if he or she has a real or apparent conflict of interest. For federal procurement purposes, the following three (3) definitions apply:

A "conflict of interest" occurs when the employee, or any member of the employee's immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in, or stands to receive a tangible benefit from, a contractor considered for, or awarded, a purchase order, task release, or contract.

A "financial interest" is the potential for gain or loss to the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ and of these parties as a result of the particular procurement. The prohibited financial interest may arise from ownership of certain financial instruments or investments such as stock, bonds, or real estate, or from a salary, indebtedness, job offer, or similar interest that might be affected by the particular procurement.

## Standards of Conduct Covering Conflicts of Interest

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An “apparent” conflict of interest exists where an actual conflict does not exist, but where a person with knowledge of the relevant facts would question the impartiality of the employee, officer, or agent participating in the procurement.

### III. EMPLOYEE DISCLOSURE REQUIREMENTS

In addition to the disclosure requirements set forth in Chapter 112, Part III, Florida Statutes (and any other applicable law), all employees involved in the procurement process, including the selection, award, or administration of purchase orders, work orders, or contracts, must annually complete a Conflict of Interest Certification and Disclosure Form in a form the same, or substantially similar to, that attached hereto. Notwithstanding, employees must immediately disclose to the Town Manager (or, if the Town Manager, he or she should disclose to the Mayor) any and all situations that create, or could create, a conflict of interest involving any procurement, purchase, contract, or other business involving the Town.

Below are examples of situations that may present a conflict of interest situation that must be reported on the Conflict of Interest Certification and Disclosure Form. This list is not all inclusive and is intended only to provide guidance.

- Self-benefit. Using your position or relationship within the Town to promote your own interests or those of your immediate family, including use of confidential or privileged information acquired in the course of employment at the Town for benefit or gain of yourself or a member of your immediate family.
- Influence peddling. Soliciting benefits for yourself or an immediate family member from outside organizations in exchange for using your influence to advance the interests of that organization with the Town.
- Other business relationships and dealings. Approving contracts with organizations in which you or a member of your immediate family have a financial or other interest or relationship, particularly if you are in a position to influence major decisions, are responsible for review, negotiation and approval of the contracts, or otherwise direct the Town’s business dealings with that business or entity.
- Outside commitments. Participating in social or political activities is not restricted as long as you participate as an individual and not as a representative of the Town.
- Property transactions. Directly or indirectly leasing, renting, trading, or selling real or personal property to or from the Town.
- Use of Town property for personal advantage. Using or taking Town resources, including facilities, equipment, personnel, and supplies, for private use or other unauthorized activities.
- Recording or reporting false information. Misrepresenting, withholding, or falsifying relevant information required to be reported to external parties or used internally for

## Standards of Conduct Covering Conflicts of Interest

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decision-making purposes, in order to derive personal benefit.

- Dealings with vendors or contractors. Personally accepting anything of value from organizations or individuals that have or will have proposals pending before the Town, or otherwise do business with the Town, in exchange for your favorable influence as per the Town.

### **IV. MANAGEMENT OF REAL OR POTENTIAL CONFLICTS OF INTEREST**

Upon disclosure, the impacted employee must refrain from participating in the selection, award or administration of the affected contract until a determination has been made as to whether the employee has a prohibited conflict of interest. The employee involved in the conflict situation will work with the Town Attorney, and the Town Manager (or, if the Town Manager has the conflict, than he or she will work with the Mayor) to resolve the conflict issue in the best interests of the Town. If the Town Attorney and Town Manager (or, if the Town Manager has the conflict, then the Mayor) determine that an employee has a real or apparent conflict of interest, the Town will disqualify the employee from acting on any matter or participating in any decision(s) that could be impacted by the conflict.

### **V. CONTRACTS WITH EMPLOYEES/PUBLIC OFFICERS OR EMPLOYEE/PUBLIC OFFICER-AFFILIATED BUSINESSES**

Employees and public officers shall comply with Chapter 112, Part III, Florida Statutes, including but not limited to, section 112.313, Florida Statutes, regarding doing business with one's agency, conflicting employment or contractual relationships, and any other applicable law.

### **VI. CONSEQUENCES FOR FAILURE TO COMPLY WITH THIS POLICY**

Any employee that does not comply with the conflict of interest policy outlined herein shall be subject to disciplinary action, up to and including termination, if so warranted by the offense. If an employee fails to comply with the requirements applicable to conflicts of interest, the selection and award of the impacted contract is not automatically invalidated, although it may be. At the point the actual or apparent conflict is made known, the Town Attorney and the Town Manager (or if the Town Manager has the conflict, than the Mayor) will immediately review all pertinent facts and together make a determination as to the best course of action. If it is determined that the award will stand, such determination will be documented in writing and included in the Procurement File for the affected purchase or contract. A contractor who acts or fails to act in a manner implicating a real or apparent conflict of interest is subject to disciplinary action, up to and including termination of the contract, if so warranted by the offense.

### **VII. REVIEW OF DISCLOSURE CERTIFICATIONS.**

The Town Manager shall annually review all Conflict of Interest Certification and Disclosure Forms and generally monitor compliance with the conflict of interest provisions of this Standard. The

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Mayor shall annually review the Town Manager's Conflict of Interest Certification and Disclosure Form and monitor his or her compliance with the conflict of interest provisions of this Standard.

### **VIII. GIFTS AND ENTERTAINMENT**

Employees and public officers shall comply with Chapter 112, Part III, Florida Statutes, including but not limited to, section 112.3148, Florida Statutes, regarding the reporting and prohibited receipt of gifts and any other applicable law.

### **IX. ORGANIZATIONAL CONFLICTS OF INTEREST**

The Town will avoid organizational conflicts of interest. An organizational conflict of interest can arise within the context of contractors that are not related organizations. An organizational conflict of interest arises in these cases where a person, because of other activities or relationships with other persons, is unable or potentially unable to render impartial assistance or advice. These organizational conflicts may occur in circumstances of impaired objectivity, unequal access to information, and biased ground rules:

- "Impaired objectivity" arises where a contractor is unable, or potentially unable, to provide impartial and objective assistance or advice to the Town due to other relationships, contracts, or circumstances, e.g., circumstances where a contractor's work under one contract could entail it evaluating itself or an affiliate through an assessment of performance under another contract or an evaluation of proposals.
- "Unequal access to information" occurs when a contractor has access to nonpublic information as part of its performance under another contract with the Town and where that information may provide the contractor or an affiliate with a competitive advantage in a later competition for a the Town contract.
- "Biased ground rules" issues arise where a contractor, as part of its performance of work under a contract with the Town, has in some sense set the ground rules for another Town contract. Such a situation would arise, for example, where the Town prepares a statement of work or specifications for a contract and later competes for that contract. This is expressly prohibited, see § X, below.

### **X. OTHER CONTRACTORS**

Contractors that develop or draft specifications, requirements, statements of work, or invitations to bid or requests for proposals will be excluded from competing for purchases or work covered by same.

### **XI. GRATUITIES**

The Town will consider it a breach of general ethical standards and this Standard 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

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of employment in connection with any decision, approval, disapproval, recommendation, preparation of any part of a program requirement, procurement, solicitation, contract, or 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 controversy, or other particular matter, pertaining to any program requirement or a contract or subcontract, or to any solicitation or proposal therefore.

### **XII. KICKBACKS**

The Town will consider it a breach of general ethical standards and this Standard 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.

### **XIII. DISCLOSURE TO FEDERAL AWARDING AGENCY**

The Town will disclose, in writing, any real or potential conflict of interest impacting the procurement of a Federal contract to the associated federal awarding agency or pass-through entity within 14 days of learning of same.

### **XIV. IMPLEMENTATION OF STANDARD AND RESPONSIBILITY**

The Town Manager will be responsible for the administration of this Standard. The Mayor will be responsible for monitoring the Town Manager's compliance with this Standard. To the extent this Standard is inconsistent with the Town's other procurement policies or standards, or conflicts with any statements or requirements therein or conflicts with Chapter 112, Florida Statutes or other applicable law, the more restrictive provision will control. Notwithstanding, the Town may waive any portion of this Standard, if not in violation of any applicable law or ordinance, by determination of the Town Commission with the advice of the Town Attorney based on exigency of the circumstances at hand; however, such a waiver should be made in writing along with a description of the circumstances justifying same.

APPROVED: \_\_/\_\_/2018



