

TABLE OF CONTENTS

	<u>PAGE</u>
ARTICLE I: GENERAL PROVISIONS	6
PART A: PURPOSES, CONSTRUCTION AND APPLICATION.....	6
PART B: DEFINITION OF TERMS	9
ARTICLE II: PROCUREMENT ORGANIZATION	13
PART A: ORGANIZATION AND CONTRACT ADMINISTRATION	13
PART B: RECORD RETENTION.....	16
2-201 Record Retention Policy	16
2-202 Suggested Contract Provisions	17
1. Access to Contractor Records.....	17
2. Maintenance of Records	17
ARTICLE III: SOURCE SELECTION AND CONTRACT FORMATION	18
PART A: METHODS OF SOURCE SELECTION	18
3-101 General.....	18
3-102 Restrictive Competition Practices Prohibited.....	18
3-103 Contract Types	19
3-104 Independent Cost/Price Analysis	19
PART B: CONTRACT FORMATION.....	23
3-201 Competitive Sealed Bidding	23
3-202 Negotiated Procurement.....	23

TABLE OF CONTENTS CONTINUED

	<u>PAGE</u>
3-203 Competitive Procedures	25
1. Invitation to Bids/Requests for Proposals.....	25
2. Public Notice.....	28
3. Opening.....	28
4. Acceptance and Evaluation.....	29
5. Negotiations with Responsible Offerors.....	31
6. Correction or Withdrawal of Bids.....	32
7. Cancellation of IFB's or RFP's.....	33
8. Disqualification of Bids	33
9. Award.....	33
10. Certifications.....	34
11. Suggested Contract Provisions	35
3-204 Small Purchases	36
3-205 Sole Source Procurement	37
3-206 Emergency Procurements	38
3-207 State Contract or Cooperative Purchases	39
3-208 Professional and Consulting Services Procurements	39
3-209 Unsolicited Offers or Proposals	47
3-210 Lease/Purchase Agreements	47
3-211 Federal Excess or Surplus Property	47

TABLE OF CONTENTS CONTINUED

	<u>PAGE</u>
ARTICLE IV: MODIFICATION AND TERMINATION OF CONTRACTS48	
4-101 Modification and Change Orders.....	48
4-102 Termination of Contracts	50
1. Termination for Convenience	50
2. Termination for Default	53
ARTICLE V: LEGAL AND CONTRACTUAL REMEDIES	54
PART A: RESOLUTION OF CONTROVERSIES	56
5-101 Resolution of protested solicitations and awards.....	56
5-102 Disclosure	56
5-103 Resolution of contract disputes.....	56
PART B: SOLICITATIONS OR AWARDS IN VIOLATION OF THE LAW	56
ARTICLE VI: SMALL, DISADVANTAGED, MINORITY, WOMEN-OWNED AND HISTORICALLY UNDERUTILIZED BUSINESSES: FEDERAL ASSISTANCE OR CONTRACT PROCUREMENT REQUIREMENTS	58
PART A: POLICIES	58
ARTICLE VII: ETHICS	60
PART A: STANDARD OF CONDUCT	60
PART B: COURSE OF CONDUCT IN THE EVENT OF A CONFLICT	61
PART C: VIOLATIONS AND REMEDIES	62

TABLE OF CONTENTS CONTINUED

	<u>PAGE</u>
ARTICLE VIII: AUDITS	61
8-101 Independent Audit Requirements	61
8-102 Audit Reports	62
8-103 Suggested Contract Provision	62
8-104 Applicable Authorities	62
 APPENDICES:	
APPENDIX A: Bibliography of Applicable State and Federal Statutes and Regulations	63
APPENDIX B: Attachments	72
APPENDIX C: Forms	75

INTRODUCTION TO PROCUREMENT POLICY

This Procurement Policy is meant to provide you with a flexible procurement policy that complies with federal, state and grantor agency policies and procedures. The flexibility lies in the organization, the procurement documentation, the decision to procure and procedures for procurements that do not fall within the parameters of statutorily mandated competitive bidding requirements. The competitive bidding requirements track statutory authority and are less flexible. As a matter of policy, you should err on the side of full and open competition at any fiscal level and avoid even the appearance of impropriety in any procurement procedure.

Regional Planning Commissions (RPCs) and Councils of Governments (COGs) are political subdivisions of the State of Texas. However, there are no specific state competitive bidding requirements established for RPCs and COGs. The only statutorily mandated competitive bidding requirements pertain to public works contracts, counties, municipalities and cooperative purchases. Nevertheless, despite the lack of such regulations, the prudent and recommended course of action is to comply with the applicable statutory requirements when purchasing for a county, municipality or similar governmental entity. The provisions of the Procurement Policy mirror these state law requirements and any differences with federal requirements are so noted.

In using this Procurement Policy, you should:

- Insert the individual **COG** name, abbreviation, local procurement provision, or other referenced information in those places where a bracket and underline are used.
- Delete the legal references, notes and other commentary that are contained within shaded blocks as such are provided for information only
- Insert the provisions which are set forth in **bold** typeface as such provisions are mandatory;
- Insert the provisions, which are set forth in *bold italics* typeface as such provisions are mandatory for all JTPA programs,
- Review the provisions set forth in *italics* and determine whether they are applicable to you as such provisions are optional and may be included in the Policy; and
- Have the individual policies reviewed carefully and approved by your legal counsel and governing body before implementation.

You are encouraged to use this Procurement Policy and the attendant procedures, as they have been reviewed, commented upon and/or approved by various grantor agencies including, but not limited to, the Texas Department of Housing and Community Affairs, Texas Department of Commerce (TxDOC), Texas Board on Aging, Texas Department of Transportation (TxDOT)

and the Texas Education Agency. Please be advised that once you self-certify your policy, the procedures cannot be changed without notice to your grantor agency.

ARTICLE I

GENERAL PROVISIONS

PART A: PURPOSES, CONSTRUCTION AND APPLICATION

1-101 Purpose: The purpose of the Procurement Policy is to provide the Lower Rio Grande Valley Development Council (LRGVDC) with the requisite parameters for procuring goods and services under applicable state and federal guidelines. The policies and procedures outlined herein are intended to comply with the general requirements of OMB Circulars A-102 and A-87 and the Texas Uniform Grant and Contract Management Standards. More specifically, the underlying purposes and policies of this Procurement Policy are:

- 1. To simplify and clarify the law governing procurement by **LRGVDC**;*
- 2. To permit the continued development of procurement policies and practices;*
- 3. To provide consistency in the procurement practices of **LRGVDC** with regard to pertinent procurement laws;*
- 4. To increase public confidence in public procurement;*
- 5. To ensure the fair and equitable treatment of all persons who participate in the procurement process;*
- 6. To provide increased economy and efficiency in procurement activities by avoiding unnecessary, unwarranted and duplicative procurements;*
- 7. To foster free and open competition;*
- 8. To provide safeguards for the maintenance of a procurement system of quality and integrity; and*
- 9. To ensure that full accounting is available and given for all procurements.*

1-102 Interpretation: This Procurement Policy shall be construed and applied to promote its underlying purposes and policies. The guidelines set forth herein are intended to comply with all applicable state, local, federal and grantor agency rules, regulations, policies and procedures.

- 1-103 **Grantor Agency Policies and Procedures:** At no time are these policies intended to be more stringent than required by the grantor agency from whom **LRGVDC** receives specific funds. The written procurement procedures prepared by the source-granting agency shall be followed when funds are spent for the operation of a specific program.*
- 1-104 **Gender Neutral:** All personal pronouns used in this Procurement Policy, whether used in the masculine, feminine or neuter gender, shall mean to include all genders.*
- 1-105 **Singular-Plural:** Words in the singular include the plural and vice versa.*
- 1-106 **Headings:** The headings contained in this Procurement Policy are for reference purposes only and shall not in any way affect the meaning or interpretation of this Policy.*
- 1-107 **Conflicts:** In the event of a conflict between the terms of this Procurement Policy and any applicable state, local or federal statute, code or regulation, or the procurement procedures of the applicable grantor agency, the applicable statute, code, regulation or grantor procurement policy shall control.*
- 1-108 **Severability:** Invalidation of any one of these provisions by judgment, court order, statute, regulation or code shall in no way affect any other provision, which shall continue to remain in full force and effect.*
- 1-109 **Free and Open Competition:** All procurement transactions, regardless of dollar value, whether advertised or negotiated, shall be conducted in a manner so as to provide maximum free and open competition. **LRGVDC** should be alert to organizational conflicts of interest or noncompetitive practices among contractors, which may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors who develop or draft specifications and other requirements for solicitation instruments (RFPs, IFBs, etc.) should be excluded from competing for such procurements.*
- 1-110 **Supplementary General Principles of Law:** Unless in conflict with particular provisions of the Procurement Policy, principles of law and equity, including the Uniform Commercial Code, contracts, agency, fraud, misrepresentation, duress, coercion and mistake shall supplement this Policy.*
- 1-111 **Good Faith:** The Procurement Policy requires that all parties involved in the negotiation, performance and administration of contracts act in good faith.*
- 1-112 **Effective Date:** The Procurement Policy applies only to contracts solicited or entered into after the effective date of this Policy, December 1, 1995.*

1-113 Adoption by COG : The Procurement Policy may be adopted in whole or in part by the Lower Rio Grande Valley Development Council.

1-114 Public Access to Procurement Information: Procurement information shall be a public record to the extent provided by the Texas Open Records Act and the Freedom of Information Act and shall be available to the public as provided therein. If a proposal contains information that the bidder considers proprietary and does not want disclosed to the public or used for any purpose other than the evaluation of the offer, all such information must be indicated with the following suggested language:

The information contained on pages _____ shall not be duplicated, used in whole or in part, for any purpose other than to evaluate the proposal; provided that if a contract is awarded to this office as a result of or in connection with the submission of such information, LRGVDC has the right to duplicate, use or disclose this information to the extent provided in the contract. This restriction does not limit LRGVDC's right to use information contained therein if obtained from another source.

Each page considered proprietary should be so marked.

PART B: DEFINITION OF TERMS

- 1-201 "**Bidder**" means any person that submits a bid in response to an Invitation for Bid ("IFB").
- 1-202 "**Bidders' List**" means the pre-qualified list of persons which is used in acquiring goods and services. The Bidders' List must be kept current and include sufficient qualified sources to ensure maximum free and open competition.
- 1-203 "**COG**" means the **Lower Rio Grande Valley Development Council** created under Chapter 391 of the Texas Local Government Code as a political subdivision of the State of Texas.
- 1-204 "**Competitive Sealed Bidding**" or "**Formal Competitive Bidding**" means the procurement method whereby the Lower Rio Grande Valley Development Council drafts the specifications, schedule and other conditions for award and sends the bid package to interested bidders and/or publishes an announcement in local periodicals. To be considered, bids must conform to the IFB. Bid opening is a formal, public procedure where the award is made to the lowest responsible, responsive bidder. Award is not generally made at bid opening; rather the prices are read publicly and, after evaluation, the award is made.
- 1-205 "**Construction**" means the process of building, altering, repairing, improving or demolishing any public structure or building, or other public improvements of any kind to any public real property. It does not include the routine operation, routine repair or routine maintenance of existing structures, buildings or real property.
- 1-206 "**Contract**" means (except as used in the definitions of "grant" and "subgrant") a procurement contract under a grant or subgrant and means a procurement subcontract under a contract. A contract is a legally binding agreement between a public procurement entity and a contractor or between a contractor and a subcontractor.
- 1-207 "**Contractor**" means any person having a contract with **LRGVDC**.
- 1-208 "**Cooperative Purchasing**" means procurement conducted by, or on behalf of, more than one public procurement entity, including but not limited to any county, city, town and any other political subdivision of the state or public agency of any such subdivision, public authority, educational, health, or other institutions, such as the

General Services Commission or the Houston-Galveston Area Council, Cooperative Purchasing Programs.

- 1-209 **"Designated Authorizing Party"** means the **Lower Rio Grande Valley Development Council** representative designated by the Lower Rio Grande Valley Development Council to authorize and approve purchases based upon dollar amount and internal organizational structure, i.e., Purchasing Agent or Procurement Officer.
- 1-210 **"Disadvantaged Business Enterprise"** ("**DBE**") means a for-profit corporation in which at least 51% of all classes of the shares of stock is owned by one or more persons who are economically and socially disadvantaged because of their identification as members of certain groups, including but not limited to African Americans, Hispanic Americans and women, as determined and classified by the Small Business Administration (SBA) and/or State of Texas.
- 1-211 **"Equipment"** means tangible, non-expendable, personal property having a useful life of more than one year and an acquisition cost of \$5,000.00 or more per unit.
- 1-212 **"Federal financial assistance"** means assistance provided by a federal agency in the form of grants, contracts, cooperative agreements, loans, loan guarantees, property, interest subsidies, insurance or direct appropriations, but does not include direct federal cash assistance to individuals. It includes awards received directly from federal agencies, or indirectly through other units of state and local governments.
- 1-213 **"Grant"** or **"Grant-in-aid"** means an award of financial assistance, including cooperative agreements, in the form of money, property in lieu of money, or other financial assistance, paid or furnished by the state or federal government to any LRGVDC, person or other eligible grantee to support a program authorized by law that provides financial assistance through grant or contractual arrangements. 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. The term does not include technical assistance programs which provide services instead of money or other assistance in the form of general revenue sharing, loans, loan guarantees, insurance or contracts which are entered into and administered under procurement laws and regulations.
- 1-214 **"Historically Underutilized Business"** ("**HUB**") means:
- (A) A corporation formed for the purpose of making a profit in which at least 51 percent of all classes of the shares of stock or other equitable securities is owned by one or more persons who are socially disadvantaged because of their identification as members of certain groups, including black Americans, Hispanic Americans, women, Asian Pacific Americans, and American Indians, who have suffered the effects of discriminatory

practices or similar insidious circumstances over which they have no control;

- (B) *A sole proprietorship formed for the purpose of making a profit that is 100 percent owned, operated and controlled by a person described in Paragraph (A);*
- (C) *A partnership formed for the purpose of making a profit in which 51 percent of the assets and interest in the partnership is owned by one or more persons described by Paragraph (A). Those persons must have proportionate interest in the control, operation, and management of the partnership's affairs;*
- (D) *A joint venture in which each entity in the joint venture is a historically underutilized business under this subdivision; or*
- (E) *A supplier contract between a historically underutilized business under this subdivision and a prime contractor under which the historically underutilized business is directly involved in the manufacture or distribution of supplies or materials or otherwise warehouses and ships the supplies."*

1-215 **"Invitation for Bid"** (**"IFB"**) *means all documents, whether attached or incorporated by reference, utilized in soliciting bids.*

1-216 **"Minority Business Enterprise"** (**"MBE"**) *means a small business concern wherein at least 51% is owned or controlled in management and daily operations by women or minorities, including but not limited to, "blacks, Hispanics, Asian-Americans, American Indians and Alaska natives."*

1-217 **"Negotiated Procurement"** (a/k/a *competitive proposal procurements*) *means a process similar to the competitive sealed bidding procurements except that offerors and the LRGVDC discuss or negotiate aspects of the proposal, such as price. Negotiations are held with all offerors in the competitive range based upon the evaluation factors set out in the RFP.*

1-218 **"Offeror"** *means a person that submits a proposal in response to a Request for Proposal.*

1-219 **"Person"** *means any business, individual, group of individuals, union, committee, club, organization, vendor, contractor or entity.*

1-220 **"Procurement"** *means the buying, purchasing, renting, leasing or otherwise acquiring of any supplies, equipment or services. It also includes all activities that relate to obtaining any supplies, equipment or services, including but not*

limited to the description of requirements, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration.

- 1-221 **"Request for Proposal"** ("**RFP**") means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.
- 1-222 **"Responsibility"** means that the bidder or offeror has the capability, in all respects, including financial, to fully perform the contract requirements, as well as integrity and reliability, which will assure good faith performance.
- 1-223 **"Responsiveness"** means that the bid or proposal conforms in all material respects to the IFB or RFP.
- 1-224 **"RPC"** means the LRGVDC created under Chapter 391 of the Texas Local Government Code as a political subdivision of the State of Texas.
- 1-225 **"Services"** means the furnishing of labor, time or effort by a contractor, not involving the delivery of a specific, tangible end product other than reports which are merely incidental to the required performance. The term shall not include employment agreements or collective bargaining agreements. [See generally Professional and Consulting Services, § 3-208, *infra*.]
- 1-226 **"Small Business Enterprise"** means a business concern, including affiliates, which is independently owned and operated and which is not dominant in its field of operation, and meets the size standard requirements of 13 CFR Part 121.
- 1-227 **"Specifications"** means any description of the physical or functional characteristics, or the nature of a supply, service or construction item. It must include a description of any requirement for inspecting, testing or preparing a supply, service or construction item for delivery and constitutes the total description of the purchase.
- 1-228 **"Sub-grant"** means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible sub-grantee. The term includes financial assistance when provided by contract, but does not include procurements or any form of assistance, which is excluded from the definition of "grant" in this section.
- 1-229 **"Sub-recipient"** means any entity that receives federal assistance passed through from a prime recipient or another sub-recipient to carry out or administer a program.
- 1-230 **"Supplies"** means all tangible personal property other than "equipment" as defined in this part.

1-231 *"Vendor" means an entity that is responsible for providing generally required supplies, equipment or services to be used in a particular program, either by the recipient, sub-recipient or the participants.*

1-232 *"Women-Owned Business" means a small business concern wherein at least 51 percent of the small business concern is owned by one or more women, or in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women and the management and daily business operations of the small business concern are controlled by one or more women.*

ARTICLE II

PROCUREMENT ORGANIZATION

PART A: ORGANIZATION AND CONTRACT ADMINISTRATION

2-101 Executive Committee or Board of Directors

1. *All purchases exceeding \$25,000 must be approved by the Executive Committee or Board of Directors.*

2-102 Executive Director or Chief Financial Officer

1. *Shall be responsible for compliance with and implementation of these policies;*
2. *Shall review and approve proposed procurement actions to avoid unnecessary or duplicative purchases;*
3. *Shall analyze lease and purchase alternatives to determine the most economical and practical procurement; and*
4. *Shall have authority to approve purchases in excess of \$2,500 but less than \$24,999.*

2-103 Purchasing Agent or Procurement Officer

1. *Shall be responsible for:*
 - a. *Processing procurement requests;*

- b. *Classification of purchases;*
- c. *Identification, solicitation and selection of vendors or contractors;*
- d. *Maintaining and updating the Bidders' List;*
- e. *Negotiating and executing purchase orders and contracts;*
- f. *Monitoring the terms and conditions of the purchase orders and contracts;*
- g. *Ensuring the complete and accurate documentation of all procurements;*
- h. *Maintaining all procurement files and records; and*
- i. *Any and all other responsibilities assigned by the Executive Director or Executive Committee.*

2. *Shall have authority to approve purchases that do not exceed \$2,499.*

2-104 Authorization of Purchases

- 1. *Procurement Form: An approved form used to identify and request the supply, equipment or service.*
 - a. *Requisition forms, or a similar instrument, are used to inform the procurement officer of the needs of a particular department and to correctly identify the supplies, equipment or services requested. This procedure provides a system of authorization and safeguards so that improper, illegal, unnecessary and/or duplicative purchasing is difficult to initiate and conceal.*
 - b. *The form is also used to inform the procurement officer of the logistics of the procurement: what to buy, when it is required and the delivery destination. The requisition should contain the following information:*
 - (1) *Date of requisition;*
 - (2) *Department, including contact person;*
 - (3) *Date required;*
 - (4) *Quantity;*
 - (5) *Description of item, including technical requirements;*

- (6) *Purpose of purchase;*
- (7) *Authorized signature;*
- (8) *Estimated cost;*
- (9) *Source of funds; and*
- (10) *Delivery destination.*

c. *The request must be made as early as possible to account for delivery time and allow for competitive bidding.*

- 2. *Contract Document: All purchases must be documented by the procurement officer. The suggested forms include but are not limited to purchase orders and contracts.*
- 3. *Each purchase instrument must contain the signature of the procurement officer, which will certify that the purchase satisfies the appropriate bid procedures, applicable grant requirements or restrictions and that adequate funds have been authorized for the purchase.*
- 4. *Payment*
 - a. *Vendor invoices should be compared to the related purchase order and payment issued only upon verification of accuracy.*

PART B: RECORD RETENTION

2-201 Record Retention Policy

- 1. All procurement related records must be maintained by the LRGVDC for a period of three years after the procurement.**
 - a. Texas Department of Aging requires that all records must be maintained for a minimum period of five years following the end of the grantee's fiscal year.**
- 2. If there is litigation, a claim, or if the audit report covering the contract has not been accepted, then the records shall be retained until the resolution of such litigation, claim or audit.**
- 3. At a minimum, records retained shall include but are not limited to:**
 - a. Correspondence, notes and memoranda relating to the procurement, including RFPs, IFBs, bids and proposals received and any other procurement form and notes on verbal transactions and telephone or facsimile quotations;**
 - b. Notes comparing quotations and relating to the basis for the award, including all negotiations;**
 - c. Notes and correspondence relating to the acceptance or rejection of bids, proposals or quotations;**
 - d. Any and all documents reflecting the rationale for the method of procurement, selection of contract type, contractor selection or rejection, rating criteria, cost/price analysis forms, cost reasonableness determination and the basis for contract price;**
 - e. Any and all documentation reflecting the basis for sole source procurements, citing the authorizing authority and the basis for selection of the particular vendor;**
 - f. A copy of public media advertisements;**
 - g. Decision letters, notice of award and/or non-selection, fully executed contracts, including amendments/modifications, contract performance evaluations, progress reports, signature authorities, cost or pricing data, payment processing justifications, property and equipment records;**
 - h. Copies of required insurance policies;**

ARTICLE III

SOURCE SELECTION AND CONTRACT FORMATION

PART A: METHODS OF SOURCE SELECTION

3-101 General. Unless otherwise specified by law or program requirements , all contracts shall be awarded by competitive sealed bidding pursuant to federal and state laws, rules and regulations.

1. Exceptions to Competitive Sealed Bidding

a. Negotiated procurements [see Section 3-202];

b. Small purchases [see Section 3-204];

c. Sole source procurement [see Section 3-205];

d. Emergency procurements [see Section 3-206]; and

e. Professional and Consulting Services. [see Section 3-208]

2. Competitive Bidding: Dollar Amounts

a. Procurements in excess of \$5,000.00 (state), \$15,000.00 (cities/counties) or \$25,000.00 (federal) require competitive sealed bidding procedures.

3-102 Restrictive Competition Practices Prohibited

1. Prohibited restrictive practices include but are not limited to:

a. Requiring unnecessary experience and excessive bonding;

b. Placing unreasonable requirements on firms in order to qualify to do business;

c. Organizational conflicts of interest;

d. Non competitive pricing practices between firms;

- e. **Non competitive awards to consultants that are on retainer contracts;**
- f. **"Brand name" specifications;**
- g. **Overly restrictive specifications; and**
- h. **Arbitrary action in the procurement process.**

3-103 *Contract Types*

1. *General: The procurement instrument shall be in accordance with specific grantor purchasing procurement standards. The instrument shall be appropriate for the particular procurement and for promoting the best interest of the grant program involved.*
 - a. *Fixed price contracts or purchase orders;*
 - b. *Cost reimbursement contracts or purchase orders; and*
 - c. *Incentive contracts.*
2. *Payment:*
 - a. *Lump Sum upon completion of contract; or*
 - b. *Unit Price Basis: Partial payments based upon actual quantity constructed or supplied.*
3. *The LRGVDC will consider the option to negotiate and extend contracts before the termination for up to five years. (Amended 10/25/07)*

3-104 *Independent Cost/Price Analysis*

1. **LRGVDC must perform an independent cost or price analysis prior to every procurement action, including contract modifications.**
2. **An independent cost estimate is required:**
 - a. **When the offeror must submit the elements of his estimated cost (for professional, consulting and architectural/engineering services contracts); and**
 - b. **When adequate price competition is lacking, such as sole source procurements, change orders or contract modifications.**

3 A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

4 Procedure:

a. The procurement officer or his designee must obtain an independent cost or price analysis from

(1) Informational telephone solicitations from more than one dependable vendor or source;

(2) Catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation; or

(3) Historical data.

b. A cost reasonableness review is conducted, which includes but is not limited to reviewing

(1) Prior experience and effectiveness;

(2) Line item budget analysis;

(3) Profit/program income;

(4) The amount of the total budget;

(5) The amount of the administrative budget;

(6) All cost items and salaries;

(7) All cost items with respect to relevancy and appropriateness in accomplishing the services provided;

(8) Travel reimbursement policies;

(9) Cost per positive termination, entered employment in relation to similar training, length of time and quality; and

(10) Cost per contract hour.

c. The purpose of the cost reasonableness review is to

- (1) Assure that all costs are properly allocated and classified;**
 - (2) List any high or questionable costs;**
 - (3) Assure that an organization-wide cost allocation plan is provided where the offeror/bidder has multiple sources of funding, if applicable;**
 - (4) List any questionable issues of purchase or lease;**
 - (5) Assure that the cost of audit is covered;**
 - (6) Review staffing sources and salaries to assure budgetary limitations;**
 - (7) Assure that staff salaries are properly allocated to administration or training;**
 - (8) Determine adequacy of staffing for particular activities;**
 - (9) List high or questionable staff salaries and benefits;**
 - (10) List low cost or unreasonable staffing; and**
 - (11) Perform a comparative analysis including a comparison of activities and services to be offered, staffing patterns and costs proposed. This analysis may used to assess the reasonableness of costs through competition, and the reasonableness of proposed cost may be established by performing a comparative analysis of an item or service that is currently available in the local service delivery area, including comparisons with current market rates.**
- 5. A price analysis may be conducted by comparing price quotations submitted or by comparing price quotations with current market prices, considering any discounts. The analysis includes a comparison of prices paid for the same or similar products in the past, as well as the current market rate, including consideration of quantities, production and delivery rates. In-house estimates of cost may also be used.**
- 6. A cost analysis shall include a review, evaluation and verification of each element of cost submitted in the line item budget to determine whether costs are reasonable, necessary and allowable under**

applicable cost principles. Each cost contributes to the total price. The cost and pricing data is used to evaluate:

- a. Specific cost elements;**
 - b. The necessity of specific costs;**
 - c. The reasonableness of amounts estimated for the necessary costs;**
 - d. The reasonableness of allowances for contingencies;**
 - e. The basis for allocation of indirect costs;**
 - f. The appropriateness of allocation of indirect costs to the proposed contract; and**
 - g. The reasonableness of the total price.**
- 7. The independent cost or price analysis must be kept as part of the procurement record, even if only included as a memorandum to the file.**

PART B: CONTRACT FORMATION

3-201 Competitive Sealed Bidding

1 General

- a. For procurements utilizing written specifications for supplies, equipment and services to be procured which exceed \$5,000.00, \$15,000.00 or \$25,000.00.*
 - (1) All construction, repairs or renovations or a structure, road, highway or other improvement or addition to real property where the expenditure is in excess of \$15,000.00, competitive bidding procedures must be followed.**
- b. All IFBs must clearly set forth all requirements to be met by the bidder.*
- c. Requires formal advertising, adequate purchase descriptions, sealed bids and public openings.*
- d. Award must be to the responsible bidder whose bid is responsive to the invitation and is most advantageous to **LRGVDC**, price and other enumerated factors considered, such as transportation costs.*
- e. IFBs shall clearly set forth all factors to be used in evaluating bids.*
- f. **LRGVDC** may reject any and all bids.*

- 2 Exemptions to Competitive Bidding Requirements, see Sections 3-204 to 3-208, infra.*

3-202 Negotiated Procurement

1 General

- a. Procurements may be negotiated if one or more of the following conditions exist which make competitive sealed bidding impracticable, infeasible or inadequate:*
 - (1) The contract is for personal, professional or consulting services, or for any service to be rendered by a university, college or other educational institution;*

- (2) *Public exigency will not permit the delay incident to advertising;*
 - (3) *The supply, equipment or service to be procured is available from only one person or firm ("sole source");*
 - (4) *The supplies, equipment or services are to be procured and used outside the United States;*
 - (5) *No acceptable bids have been received after formal advertising under competitive sealed bidding procedures; or*
 - (6) *The purchases are for highly perishable materials or medical supplies; for supplies, equipment or services where the prices are established by law; for technical items or equipment requiring standardization or interchangeability of parts with existing equipment; for experimental, developmental or research work; for supplies purchased for resale; and for technical or specialized supplies requiring substantial initial investment for manufacture.*
- b. *Negotiation is otherwise authorized by federal, state or local laws, rules or regulations.*
- (1) *Negotiated procurements may only be used for the procurement of high-technology products or services, as well as insurance.*
- c. **Competition shall be obtained to the maximum extent practicable.**
- d. **The proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations.**
- e. *Negotiation:*
- (1) *Always document the results of negotiation, especially the reasons for the elimination of a proposal after negotiations.*
 - (2) *Award must be based upon the weighted evaluation factors set forth on the RFP.*

1 Invitation for Bids/Requests for Proposals

a. Shall be based upon clear and accurate descriptions of the technical requirements for the material, good, product, supply, equipment or service to be procured.

(1) *The description may contain a statement of the qualitative nature of the material, good, product, supply, equipment or service; and*

(2) *Set forth minimum essential characteristics and standards to which the material, good, product, supply, equipment or service must conform in order to satisfy its intended use.*

b. The description will not contain features which unduly restrict competition. "Brand name or equal" descriptions may be used as a means to define the performance or other salient requirements of a procurement. When so used, the specific features of the named brand which must be met by bidders/offerors should be clearly specified.

c. Offers shall be solicited by sending IFBs/RFPs to an adequate number of qualified sources as indicated by the Bidder's List to ensure competition, as well as through publication of the solicitation and responding to requests for the solicitation to the maximum extent practicable.

d. The solicitation package should include the following:

(1) *IFB/RFP Form, including:*

(a) *Purpose, goals and/or objectives, including performance standards;*

(b) *Proposal outline with format and sequence for submitting responses;*

(c) *Bidder's conference information;*

(d) *Solicitation instructions, including requirement for information regarding the bidder's/offeror's:*

i Background and experience;

- ii *Accounting system;*
 - iii *Audit/monitoring results;*
 - iv *Program proposal;*
 - v *Detailed budget; and*
- (e) *Type of contract: cost reimbursement, fixed price or fixed unit price performance;*
 - (f) *Brief description of the supply, equipment or service;*
 - (g) *Closing date and hour for receiving bids/proposals, including designated time source, i.e., purchasing office's clock;*
 - (h) *Address and office of where bids/proposals should be sent;*
 - (i) *Information on when and where specifications may be reviewed or obtained if not included in the package;*
 - (j) *Contact person;*
 - (k) *Instructions to bidders/offerors;*
 - (l) *Standard contract terms and conditions; and*
- (2) *Protest procedures must contain:*
- (a) *Contact person;*
 - (b) *Time period for submission of protests;*
 - (c) *Trigger events for submission, responses and replies to protests; and*
 - (d) *Statements regarding right to reject any and all bids/proposals, right to recall all or portions of the IFB/RFP and right to terminate contract for convenience.*

- (3) *(RFPs only) Negotiation rights and requirements with respect to clarifying, explaining and verifying any aspect of a proposal submitted in response to an RFP.*
- (4) *Standard Terms and Conditions: those conditions for doing business with **the LRGVDC** which remain constant for all contracts and purchases, unless specifically deleted.*
 - (a) *Uniform Commercial Code Standard Terms and Conditions may also be utilized.*
- (5) *Special Terms and Conditions: those terms and conditions not always required but that are required for the particular contract or purchase;*
- (6) *Cost and Pricing Data*
 - (a) *Lump-sum or unit price method; and*
 - (b) *The solicitation's and/or grant program's fiscal requirements such as, cost categories, allowable costs and specific cost limitations.*
- (7) *Specifications*
 - (a) *Statement of Work*
 - i *Service Plan/Program Design/Management Plan states the proposed program with a synopsis of key features, whether they are mandatory, optional or supplemental, program results and type of contract.*
 - ii *scope and intent of procurement; and*
 - iii *definitions and contract documents.*
 - (b) *Requirements*
 - i *Performance Requirements and Characteristics*
 - ii *Design Features*
 - (c) *Quality Assurance Standards*

i Samples

ii Test Requirements

(d) Delivery Terms

(e) Method of Payment

(8) Evaluation

(a) Identify reviewing staff;

(b) Specify how proposals will be reviewed;

(c) Any and all considerations relating to competition, reasonableness of cost/price, organizational issues and scope of work.

2 Public Notice

a. A short summary of the IFB/RFP shall be published in the local newspaper or a newspaper of general circulation under Legal Notices or in the Texas Register, if applicable.

(1) The notice must include a description of the item or where the specifications may be obtained, the time and place for receiving and opening bids, name and address of person to receive bids, basis for bid, either lump-sum or unit pricing; method of payment and any bond requirements.

b. Notice of the time and place at which the bids/proposals will be publicly opened must be published at least once a week for two consecutive weeks. The date of the first publication must be before the 14th day before the date of public opening. If there is no local newspaper the notice must be posted at city hall or county courthouse on the 14th day before public opening.

c. *The solicitation package should be sent to all qualified persons on the Bidders' List. The Bidders' List must be kept current and include enough qualified sources to ensure open and free competition. Potential bidders may not be precluded from qualifying during the solicitation period.*

3 Opening

a. Bids and proposals must be received by and opened on the date and time specified by the IFB/RFP.

(1) *Bid opening is open to the public; and*

(2) *If no member of the public attends, a member of another office shall act as a witness.*

b. Late submissions will not be considered for award.

(1) *Bids/proposals shall be date/time stamped upon receipt.*

c. Incomplete bids/proposals must be considered non-responsive, and may not be considered for award unless due to a non-material omission.

(1) *If the incomplete proposal is due to a non-material omission the procurement officer may seek the additional information or waive or correct the non-material omission.*

(a) *A non-material omission relates to a matter of form, not substance, or an insignificant mistake that may be waived or corrected without prejudicing the other bidders/offerors, i.e., the effect on price, quality, quantity, delivery or other contractual conditions is negligible.*

d. All bids and proposals must be sealed with the identification number marked outside the envelope. Only one bid/proposal may be submitted per envelope.

(1) *An unmarked envelope may be opened to establish it contains a bid, then resealed; and*

(2) *The unmarked bid will not automatically be eliminated; however, it does violate the integrity of the process.*

e. Opened bids shall be kept on file and available for inspection, except to the extent properly designated as proprietary or trade secret.

4 Acceptance and Evaluation

a. **IFBs/RFPs must clearly set forth all requirements to be met by the bidder/offeror for evaluation and the weight attached to each factor.** *Evaluation factors may include, but are not limited to:*

- (1) *Price;*
- (2) *Ability to respond in a timely manner (service capacity and response time);*
- (3) *Past recommendations and performance;*
- (4) *Safety record;*
- (5) *Financial stability and resources, including fiscal management capabilities and project budget;*
- (6) *Any other factors considered by **the LRGVDC** as necessary for the procurement.*

b. *Summary of Evaluation and Proposal Processing*

- (1) *Review proposal/offer for completeness, including but not limited to:*
 - (a) *Verifying all calculations and sums;*
 - (b) *Extending unit prices to a total price for the requested quantity;*
 - (c) *Verifying authorized signature;*
 - (d) *Verifying responsiveness to solicitation specifications; any failures to meet the requirements should be noted, as well as whether such failures disqualify the bid/proposal;*
 - (e) *Verifying that all samples or testing requirements were satisfied;*
 - (f) *Evaluating the bid/proposal against the independent cost estimate or desired, ideal system;*
 - (g) *Evaluating the proposal against the weights assigned in the RFP;*

- (h) *Reviewing the history of the bidder's/offeror's responsibility and demonstrated performance; and*
- (i) *Making recommendations and/or noting areas to be negotiated.*

(2) *The RFP process must*

- (a) *Require a line item budget (an outline of the budget summary to be completed with sufficient detail of costs to enable a cost/price reasonableness analysis);*
- (b) *Avoid and protect against giving inappropriate signals regarding an acceptable price;*
- (c) *Include a rating method containing:*
 - i) *A value for price reasonableness;*
 - ii) *Criteria for judging price reasonableness; and*
 - iii) *Past performance as a quantifiable and criteria-referenced element;*
- (d) *Contain minimum standards (such as administrative and organizational qualifications, fiscal system standards, performance and outcome expectations, adherence to time frames, etc.) for considering a response and components which would constitute disqualification, including failure to meet minimum threshold requirements; and*
- (e) *Contain signed statements certifying that the individual signing on behalf of an organization has the authority to submit the proposal and carry out the proposed services.*

5. Negotiations with Responsible Offerors (RFPs Only):

- a. Negotiations (written/oral) shall be conducted with all responsible, responsive offerors deemed to be in the competitive range, i.e., have a reasonable chance of being selected for award.**

- (1) *The review and rating of proposals must be consistently applied to assure equal treatment and arms-length transaction;*
- (2) *Data collected in the cost reasonableness review should be used to outline strengths and weaknesses of the proposed budget; and*
- (3) *All changes resulting from negotiation should be documented.*

b. Notify all unsuccessful offerors of the award in writing.

6 Correction or Withdrawal of Bids

a. Correction of Bids/Offers

- (1) Bids may not be altered or amended after the submission deadline.**
 - (a) A non-material omission or error may be waived by the procurement officer if the omission or error:**
 - i) Relates to a matter of form, not substance;**
 - ii) Has merely a negligible affect on price, quality, quantity, delivery or other contractual conditions; and**
 - iii) Does not otherwise prejudice the other bidders/offerors.**
- (2) Any alteration or change made to a bid or offer prior to opening must be initialed by the authorized signatory guaranteeing authenticity.**

b. Withdrawal of Bids/Offers

- (1) *A bid/offer may not be withdrawn or canceled by the bidder/offeror, without the permission of the LRGVDC, for a period of 90 days following the date designated for the receipt of bids. The bidder/offeror so agrees upon submittal of the bid/offer.*

(2) *A bid bond may be required on a public works project or for bids/offers exceeding \$100,000.00 to ensure that if a bidder/offeror withdraws the bid/offer after acceptance, the LRGVDC will not suffer a loss.*

(e) *The bid specifications or RFP's may require the bidder to furnish a good and sufficient bid bond in the amount of 5% of the total contract price.*

7. Cancellation of IFBs or RFPs

- a. Any or all bids may be rejected.**
- b. If no bid/offer is accepted, the entire solicitation process must be repeated.**

8. Disqualification of Bids

- a. The following occurrences require disqualification of the bid:**
 - (1) Unsigned or unauthorized signatures on bids/proposals;**
 - (2) Bids/proposals received after the date and time for opening; or**
 - (3) Bids/proposals where prices are conditional on award of another bid or are subject to unlimited escalation.**
 - (4) Communication with Vendors in the RFQ or RFP Process:**

In order to achieve fair and equitable competition and to maintain the integrity of the purchasing process, vendor discussions with LRGVDC personnel and/or Companies under contract concerning an RFQ or RFP request must be coordinated through the Purchasing Department. A vendor's failure to coordinate its discussions through the Purchasing Department may, at the LRGVDC's sole discretion, disqualify the vendor's quotation or proposal.

9. Award

- a. The award shall be made to:**
 - (1) Bids: the lowest responsible, responsive bidder.**

(e) *If two responsible bidders submit the lowest and best bid, cost and quality of the supplies, equipment or services being equal, the contract may be awarded by application of one or more preferences set forth in 1 TAC 113.8.*

(f) *In case of tie bids which, cannot be resolved by the application of one or more preferences, an award shall be made by drawing lots.*

(2) Proposals: to the responsible offeror whose proposal is the most advantageous to the LRGVDC considering the relative importance of price and other evaluation factors and who possesses the ability to perform successfully under the terms and conditions of the proposed procurement.

(3) Only one bid/offer may be accepted.

b. *In order to award the contract to one other than the lowest dollar bid meeting the specifications, before award, each lower bidder must be given notice of the proposed award and an opportunity to appear and present evidence of responsibility.*

c. *To determine responsibility, consideration may be given to bidder/offeror integrity, compliance with public policy, past performance record, financial and technical resources or accessibility to other necessary resources (and safety record if the LRGVDC has a published written definition and criteria and notice is given to the bidder).*

10. *Certifications*

a. **Executive Order 12549, Debarment and Suspension, 29 CFR Part 98.510, certification requirement;**

(1) **No award may be made, at any tier, to a party who is debarred, suspended or is otherwise excluded from or ineligible for participation in federal assistance programs.**

(2) *See Appendix C-2.*

b. **Prohibition Against Lobbying with Appropriated Funds, 31 U.S.C. § 1352 (West Supp. 1994)**

- (1) **No appropriated funds may be expended by the recipient of a federal contract, grant, loan or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, Member of Congress, an officer or employee of Congress or an employee of a Member of Congress in the awarding, making, entering into, extension, continuation, renewal, amendment or modification of any federal contract, grant, loan or cooperative agreement. Each person who requests or receives a federal contract, grant, loan or cooperative agreement must file a declaration affirming the above.**
- (2) **Certify that they have not made a prohibited payment:**
 - (a) **Upon submission of any request for consideration for award of a federal contract, grant, loan or cooperative agreement;**
 - (b) **Upon receipt of such federal monies unless such a certification was previously filed; and**
 - (c) **At the end of each calendar quarter in which there occurs any event that materially affects the accuracy of the information contained in said declaration.**
- (3) **Any person receiving a sub-grant must make such a certification.**
- (4) *See Appendix C-5.*

c. Certification Regarding Drug-Free Workplace Requirements
[see Appendix C-4.]

11. Suggested Contract Provisions

- a. Maintenance of Records [see Article II, § 2-202(2), infra.]*
- b. Access to Contractor Records [see Article II, § 2-202(1), infra.]*
 - (1) *The contract must include a clause permitting access to books and records for audit purposes by the LRGVDC, its designated representative and/or the grantor agency.*
 - (2) *Recommended Clause [see Article II, § 2-202, infra.]*

c. *Remedies*

- (1) *Termination for Convenience [see Article IV, § 4-102(1), infra; see also Appendix C-6];*
- (2) *Termination for Default [see Article IV, § 4-102(2), infra; see also Appendix C-7];*
- (3) *Termination Procedures [see Article IV, § 4-102, infra; and*
- (4) *Equitable Adjustments or Price Adjustment Clause [see Appendix C-10].*

d. *Additional Clauses*

- (1) *Changes [see Appendix C-8];*
- (2) *Differing site conditions [see Appendix C-13];*
- (3) *Suspension of work [see Appendix C-9]; and*
- (4) *Flow down clause [see Appendix C-11].*

e. *Venue:*

This agreement shall be governed and construed in accordance with the laws of the State of Texas with venue in the City of Weslaco, Hidalgo County, Texas.

3-204 *Small Purchases*

1. Definition: A small purchase is the procurement of supplies, equipment, services, or other property, that does not cost more than \$25,000.00 in the aggregate.

- a. *Department of Health and Human Services Procedures for Small Purchases.*
- b. *TxDOC, JTPA Financial Management Manual, § 5.12.*
- c. *Texas General Services Commission*
- d. *Texas Local Government Code § 252.021 (cities) and § 262.023 (counties): \$15,000.00.*

e. *Small purchases of less than \$1,000.00 in the aggregate will require three (3) verbal quotes, and competitive bidding procedures need not to be followed. (Amended 8-27-04)*

2. **Procedures (Amended 8-26-99)**

a. *General:*

(1) *A small purchase procurement requires that price or rate quotations be obtained from an adequate number of qualified sources.*

(2) **The contractor or grantee agency may not split purchases to circumvent the competitive requirements or the [\$25,000.00] limit.**

b. *Competitive Written Bids (\$1,000.00 but less than \$5,000.00)*

(1) *For purchases of less than \$1,000.00 in the aggregate, competitive bidding procedures need not be followed.*

(2) *The solicitation should commence with a written request for supplies, equipment or services.*

(3) *The purchase shall be approved, in writing, by the procurement officer.*

(4) *The procurement officer or designee must obtain a minimum of three written bids, unless there does not exist three such potential contractors on the Bidders' List.*

(5) ***The bids must be recorded, in writing, and made part of the procurement files.***

(6) *An award should be made consistent with competitive bidding policies and in conformance with maximizing free and open competition.*

(7) *Any purchase that exceeds the small purchase limit may not be split in order to circumvent the small purchase limit. Split purchases to avoid competitive bidding requirements will be considered an unauthorized purchase and may be disallowed.*

(8) ***Prior vendor performance must be evaluated before issuing subsequent awards.***

c. *Competitive Written Bids or Quotations*

- (1) *For purchases of \$5,000.00 or more, in the aggregate, the procurement officer or designee must solicit written bids through the advertisement in the local newspapers.*
- (2) *The bids shall be reviewed by the Procurement Officer to determine cost reasonableness and to avoid the purchase of unnecessary or duplicative items.*
- (3) *The selected bid, along with those that were not selected, shall be made part of the procurement files.*

3-205 *Sole Source Procurement*

1. *Sole source procurement may be used when the award is not feasible under small purchase, competitive bidding or negotiated procurement procedures.*
2. **Sole source procurement is limited to the following:**
 - a. **Public exigency or emergency;**
 - b. **Where the item is available from only a single source;**
 - c. **If, after soliciting a number of sources, competition is deemed inadequate;**
 - (1) *The LRGVDC must have demonstrated a "good faith effort" that it has solicited qualified providers through the small purchase, sealed bids or competitive proposal processes.*
 - d. **Is authorized by the grantor agency, if applicable.**
3. **Procedures**
 - a. *The process may be initiated with a Request for Quotation (RFQ), RFP or telephone solicitations.*
 - b. *The sole source should be required to submit a relatively complete proposal, including a description of the work to be accomplished and a proposed contract price.*
 - c. *Negotiations should be conducted with the sole source to obtain the best possible price.*

d. *The negotiations should be documented and retained in the procurement file along with the sole source justification.*

4. Approval of Grantor Agency

a. **The LRGVDC must receive prior written concurrence from grantor agency for any sole source procurement expected to exceed \$25,000.00.**

b. **If specifications and conditions of a solicitation have been drawn to describe a product which is proprietary to one vendor, without language which permits an equivalent product to be supplied, written justification of the requested specifications or conditions must be submitted.**

3-206 Emergency Procurements

1. *A procurement qualifies as an emergency if:*

a. *A public calamity requires the prompt purchase of items to provide for public needs or preserve property;*

b. *The item is necessary to preserve or protect the public health or safety of residents; or*

c. *The item is made necessary by unforeseen damage to public property.*

2. *Procedures*

a. *Procedures set forth in either § 3-204, infra, regarding small purchases or § 3-205, infra, for sole source procurements, should be followed to the extent possible.*

b. *All documents relating to the emergency procurement and its justification must be retained in the procurement files.*

3. *May be made without competitive bidding.*

3-207 State Contract or Cooperative Purchases

1. *The LRGVDC shall consider the possibility of entering into intergovernmental agreements for procurement or use of common supplies, equipment or services.*

2. *The LRGVDC should consider, when appropriate, to procuring supplies, equipment and services through an approved program of cooperative purchasing which has been certified as having met all applicable laws and regulations such as the Texas General Services Commission or the Houston-Galveston Area Council.*
3. *A local government that purchases supplies, equipment or services under the Inter-local Cooperation Act satisfies the competitive bidding requirement.*

3-208 *Professional and Consulting Services Procurements*

1. General:

a. Definitions:

- (1) **"Professional Services" are those performed within the scope of practice (or provided in connection with the employment of a licensed person in the areas of practice) of accounting, architecture, land survey, medicine, optometry or professional engineering.**
- (2) **"Consulting Service" means the service of studying or advising a state agency under a non-employee/employer type contract.**

b. Professional Services:

- (1) **Selection of professional services on the basis of competitive bids is prohibited.**
- (2) **If based upon a competitive bid, the contract is contrary to public policy and void.**
- (3) **Requires selection and award based upon demonstrated competence and qualifications to perform the services for a fair and reasonable price.**
- (4) *Contracts should be based or selected through the use of a Request for Proposal (RFP) or Request for Quotations (RFQ).*
 - (a) *The solicitation should track the RFP process including*
 - i) *A statement of qualifications;*

- ii) *Public notice; and*
- iii) *That the RFP or RFQ describes the services required and outlines in detail the information and data required of each offeror.*

(b) Award shall be made to the offeror determined, in writing, to be the best qualified based upon the enumerated evaluation factors and compensation determined to be fair and reasonable.

c. Consulting Services do not require or prohibit the use of competitive bidding procedures.

(1) A consulting services contract, which exceeds \$10,000.00 is considered to be a "major consulting services contract."

(2) Requires selection based on the demonstrated competence, knowledge, qualifications and reasonableness of the proposed fee.

(3) An invitation to provide offers for consulting services must be published in the Texas Register (upon filing with the Secretary of State) not later than the 30th day before the date LRGVDC enters into a major consulting services contract providing:

(a) The name of the contact person;

(b) The closing date for receipt of offers;

(c) The procedure by which award will be made; and

(d) Disclose whether such consulting services have been previously provided by a private consultant and/or the intent to award the contract to a previous private consultant unless a better offer is received.

- (4) Not later than 10 days after entering into a major consulting services contract, the LRGVDC shall file with the Secretary of State for publication in the Texas Register:
 - (a) A description of the private consultant activities;
 - (b) The private consultant's name and address;
 - (c) Contract performance period and value of contract; and
 - (d) All due dates for reports, documents, films or recordings.
- (5) Architectural and Engineering Services.

I. LEGAL REQUIREMENTS (Amended 5/19/2004)

A. *Architect Engineers Act of 1972 – Brooks Act:* Procurements of architectural and engineering services will be conducted in accordance with the Architect Engineers Act of 1972, commonly known as the Brooks Act. Public Law 40 §544 requires that an agency “shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the agency head determines is fair and reasonable.” Further, the Act provides that, “Should the agency head be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price he determines to be fair and reasonable to the Government, negotiations with that firm should be formally terminated. The agency head should then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the agency head should terminate negotiations. The agency head should then undertake negotiations with the third most qualified firm.”

Public Law 40 §541 defines the term “architectural and engineering services” as:

- 1. professional services of an architectural or engineering nature, as defined by State 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 this paragraph;*
- 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 and mapping, test, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

- B. *FTA Circular 4220.1E*:** This Circular states, “Grantees shall use qualifications-based competitive proposal procedures (i.e., Brooks Act procedures) when contracting for A&E services as defined in 40 U.S.C. §541 and 49 U.S.C. §5325(d). Services subject to this requirement are program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping and related services.

Qualifications-based competitive proposal procedures require that:

- 1. An offeror’s qualifications be evaluated;**
- 2. Price be excluded as an evaluation factor;**
- 3. Negotiations be conducted with only the most qualified offeror; and**
- 4. Failing agreement on price, negotiations with the next most qualified offeror be conducted until a contract award can be made to the most qualified offeror whose price is fair and reasonable to the grantee.**

These qualifications-based competitive proposal procedures can only be used for the procurement of the services listed above. This method of procurement cannot be used to obtain other types of services even though a firm that provides A&E services is also a potential source to perform other types of services.

These requirements apply except to the extent the grantee’s State adopts or has adopted by statute a formal procedure for the procurement of these services.”

- C. *Professional Services Procurement Act – Government Code, Title 10, Chapter 2254.001, Vernon Texas Codes Annotated*:** The “Professional Services Procurement Act sets forth the State of Texas requirements for qualifications-based procurements for architectural and engineering services.

II. REQUEST FOR QUALIFICATIONS PROCESS

- A. *Developing the Scope of Work*:** The User Department (Sponsor) shall develop a Scope of Work that completely describes and communicates the project parameters. It is very important the scope of work be well-defined so that firms can correctly tailor their statements of qualifications to the project. Following are the basic elements that need to be included in the Statement of the Scope of Work:

1. Name of Owner (LRGVDC)
2. Description of the Organization—its goals and mission
3. Project Name/Identification
4. Project Location
5. Contact Person
6. Identification and explanation of involvement by any other entities (City, County, etc.) impacting on scope of work
7. Description of any collateral activities in process or planned for the same project site, but not part of the scope of work.
8. Descriptions of completed studies, surveys, and/or preliminary feasibility work relevant to the project and available to the firm selected for contract award.
9. Technical specifications (if any)
10. Project outline to include all anticipated requirements, such as renovation; demolition; additions; new construction; energy, land use, and site selection considerations.
11. Time Frame—A complete schedule of project milestones.
12. Description of the selection process.
13. DBE Requirements (Goal)
14. Insurance requirements
15. Mandatory Terms and Conditions of the contract to be entered into.

B. *Developing List of Proposers:*

1. A proposers list is developed from the database of firms on the master proposers list. The proposers list for the project should be tailored to fit the project requirements, e.g. architectural engineering, surveying, soil testing, auditing services. A sufficient number of firms should be asked to submit statements of qualifications to assure that a well-qualified firm will be chosen to perform the work.

2. Requests for Qualifications will generally be advertised in the Local News Papers

3. The DBE office will be notified for appropriate outreach efforts.

C. *Requesting Statements of Qualifications:* The Request for Qualifications (RFQ) package shall include:

1. The detailed Scope of Work,
2. A description of the selection process,
3. A list of requirements to be included with the firms' Statements of Qualifications,

4. The criteria to be used in evaluating the proposals and their relative importance in the scoring process,
5. The deadline for submitting the statement of qualifications and a warning that qualifications received after the time and date specified shall not be considered.

III. THE EVALUATION PROCESS

A. *Evaluation Committee:* The Evaluation Committee is responsible for evaluating the original proposals (Statements of Qualifications or SOQs); making recommendations regarding clarifications and deficiencies; reviewing supplemental, revised, and/or “best and final” offers; and, if required, assisting the CO/CA during discussions and negotiations.

1. The Chairperson of the evaluation committee is appointed by the VP of the Sponsoring Department and is the CO/CA’s technical representative for the acquisition. The Chairperson will collaborate with the CO/CA to select members of the evaluation committee. The committee will normally comprise five members, no more than two of which should be from the same department. The committee should collectively be knowledgeable about the technical aspects of the acquisition and able to identify the strengths and weaknesses of the various proposals. It is not necessary that each member be an “expert”, but each should have the ability to make reasoned and unbiased decisions based on an examination of the proposals presented and LRGVDC’s scope of work.
2. The same evaluators should be available throughout the entire evaluation and selection process to ensure continuity and consistency in the treatment of proposals. Each committee member will be bound by the evaluation procedures and LRGVDC’s Code of Ethics. If a committee member drops out because of work conflicts or has an apparent or real conflict of interest related to a proposal being evaluated, that member can be replaced with another evaluator (depending upon the stage of evaluations). If a suitable replacement is not available, the committee must perform the review with one less evaluator.
3. The CO/CA will address the initial meeting of the committee and brief the evaluation process. The briefing should include:
 - explanation of conflicts of interest
 - The necessity of reading and understanding the solicitation, especially the statement of work and evaluation criteria, before reading the SOQs
 - The need for each evaluator to review all the SOQs
 - The need to watch for ambiguities, inconsistencies, errors, and deficiencies that should be noted

- An explanation of the evaluation process and what will be expected of the evaluators
 - The need for the evaluators to be aware of the requirement to have complete written documentation of the individual strengths and weaknesses that affect the scoring of the SOQs
 - An instruction directing the evaluators that, until the award is made, information concerning the acquisition must not be disclosed to any person not directly involved in the evaluation process
4. The CO/CA will distribute the SOQs and establish procedures for securing the proposals whenever they are not being evaluated. The Chairperson is responsible for keeping track of all copies of the SOQs provided by the CO/CA. After the evaluation is complete, all SOQs and other documents supporting the proposals must be returned to the CO/CA.

B. *Evaluating the Statements of Qualifications (SOQs);*

1. The Evaluation Committee will evaluate the SOQs against the pre-determined evaluation criteria. No factors other than those set forth in the RFP may be used.
2. Every evaluator should read each SOQ, describe strengths and weaknesses, and develop preliminary scores in relation to each evaluation criterion set forth in the solicitation. The evaluators will use rating sheets provided by the CO/CA.
3. After individual review, the evaluators should discuss in detail each firm's strengths and weaknesses as determined by each evaluator. Evaluators may change their numerical scores at this time if they believe they have gained a new understanding of the requirements, but they should not feel pressured to make changes to conform to the group. Once all SOQs have been discussed and evaluated, the committee will identify each as either acceptable or unacceptable. An SOQ may be rated as unacceptable if it deviates from the criteria set forth in the RFP. Predetermined cutoff scores cannot be used. Firms that are determined to be unacceptable will not be considered further. Their proposal packages will be returned to the CO/CA who will notify the firms of this determination. Unacceptable SOQ packages will be destroyed after the contract is awarded (except one for contract file).
4. The "acceptable SOQs will be ranked ordered. This ranking is determined by totaling the numerical scores assigned to the criteria by each evaluator, and developing an average rating for each offeror. The numerical scores must be accompanied by a supporting narrative that discusses what was considered in the scoring. The ranking determines which firms are within the competitive range (those offerors that have a realistic chance of being selected for contract award after orals and/or negotiations). Only the firms within the competitive range will

be evaluated further. Firms not short-listed will be notified in writing as soon as practical.

5. The evaluation committee will determine whether oral interviews or discussions with the short-listed firms are necessary and will schedule interviews as deemed necessary. If oral interview/discussions are deemed necessary, all short-listed firms will be included.
 6. LRGVDC shall negotiate a contract with only the highest qualified firm and will request a formal price proposal. LRGVDC will negotiate compensation which it determines to be both fair and reasonable for the services that are to be provided. In making such a determination, LRGVDC shall take into account the estimated value of the services to be rendered, the scope of work, complexity, and professional nature thereof.
 7. In the event that compensation cannot be agreed upon, LRGVDC will terminate negotiations and reject the price proposal. LRGVDC will then request a price proposal and will begin negotiations with the second highest qualified firm. This process will continue, as necessary, until successful negotiations are concluded.
 8. Should LRGVDC be unable to negotiate a satisfactory contract with any of the firms within the zone of consideration, a new solicitation for Statements of Qualification will be issued.
 9. The firm which presents a fair and reasonable price will be required to submit a Best and Final Offer. This offer must remain valid for ninety (90) day period after submission to LRGVDC. LRGVDC's execution of the Best and Final Offer will constitute a contractually binding document.
- C. The Committee Evaluation Report: An Evaluation Report must be prepared and signed by all voting committee members for submission to the CO/CA. The report becomes a permanent record in the contract file, and data from it is included in the Board Package submitted to the Board of Trustees. The report is also used in "debriefings" so specific references and terms must be used. The report should reflect the ranking of the Statements of Qualifications, identify those firms in the competitive range, and recommend the highest qualified firm for award. It must also include a narrative specifying the strengths and weaknesses of each firm; rating sheets; and any reservations, qualifications, or areas to be addressed that affected the selection of sources for negotiation and award. Determinations of firms not technically qualified must be supported with concrete details. Phrases such as "it could not be determined" and "sketchy presentation" are not adequate support for unacceptable ratings.

2. *Two-tiered Selection Process*

- a. *The LRGVDC shall select a person capable of performing the service, on the basis of demonstrated competence and qualifications.*
- b. *The LRGVDC shall enter into negotiation on a contract at a fair and reasonable price.*

3-209 *Unsolicited Offers or Proposals*

1. *An unsolicited offer/proposal is any offer/proposal other than one submitted in response to an IFB or RFP.*
2. **To be considered by the Executive Director or Chief Financial Officer, the unsolicited offer/proposal must:**
 - a. **Not be for an item required by law to be competitively bid or proposed;**
 - b. **Be in writing; and**
 - c. **Meet the sole source procurement standards.**
3. **An unsolicited offer must meet the standards of subsection (2) above and shall be evaluated by the Executive Director to determine its utility and benefit to the LRGVDC.**
4. **Sole source procedures must be followed.**

3-210 *Lease/Purchase Agreements*

The leasing of property and/or equipment is encouraged in lieu of purchasing where leasing is the most economical procurement approach.

3-211 *Federal Excess or Surplus Property*

The LRGVDC is encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and/or property whenever feasible and for the purpose of reducing procurement costs.

ARTICLE IV

MODIFICATION AND TERMINATION OF CONTRACTS

4-101 Modification and Change Orders

1. *Definitions*

- a. *"Change Order" means a written order signed by the Executive Director, directing the contractor to make changes authorized by the changes clause of the contract.*
- b. *"Modification" means any written alteration in specifications, delivery point, rate of delivery, period of performance, quantity or other provisions of the contract as well as any associated price adjustments, accomplished by mutual action of the parties to the contract.*

2. **All modifications or changes to the contract must be in writing.**

- a. *For an increase or decrease of \$15,000.00 or less, the Executive Director may approve the change order.*
- b. *The original contract price may not be increased by more than 25% unless the change order is necessary to comply with a federal or state statute, rule, regulation or judicial decision enacted, adopted or rendered after the contract was made.*
- c. *The original contract price may not be decreased by more than 25% [18% -- counties] without the contractor's consent.*
- d. **Total contract price may not be increased unless the cost of the change can be paid from available funds.**

3. **If a modification requires a new solicitation, the contract should be terminated for convenience and a new solicitation issued.**

4. *Requirements to Re-compete*

- a. **The LRGVDC must re-compete where the modification results in the procurement of supplies, equipment or services that:**
 - (1) **Are materially different from that for which competition was held;**

- (2) **Result in a change in the terms or conditions of a contract that interferes with or defeats the purpose of competitive procurements; or**
- (3) **Is tantamount to an unjustified sole source procurement.**

b. *To determine whether the modification is outside the scope of the RFP/IFB, the procurement officer must review:*

- (1) *The language of RFP/IFB;*
- (2) *The instructions to offerors/bidders;*
- (3) *The preliminary efforts required before the contractor can begin work;*
- (4) *Whether the Statement of Work must be amended to include the modification;*
- (5) *The cost or value of the modification in relation to the original contract price;*
- (6) *Whether a substantial extension of time is required; and*
- (7) *Whether the modification was in connection with the work contemplated or specified by the contract.*

c. *Improper Justifications for Modification:*

- (1) **On-site contractor, familiar with existing conditions, provides greater assurance of satisfying the agency's needs; or**
- (2) **Making an award with the intent to change contract specifications by a subsequent modification, i.e., the LRGVDC may not make an award when the Executive Director knows or should know it is not based on the conditions under which the performance will occur and will thus require a modification.**

5. *Suggested Contract Clause [see Appendix C-8]*

4-102 Termination of Contracts

1. Termination for Convenience

a. General

- (1) **Grant Programs.** For contracts in excess of \$10,000.00, a contract may be terminated because of circumstances beyond the contractor's control, for cause and for convenience.
- (2) **The termination for convenience clause must include the termination procedures and the basis for settlement.**

b. Process

- (1) *The LRGVDC_ may terminate a contract, in whole or in part, for the convenience of the LRGVDC by providing the contractor with thirty (30) calendar days advance notice in writing, specifying the part of the contract to be terminated and when the termination becomes effective.*
- (2) *The contractor shall cancel, withdraw or otherwise terminate any outstanding orders or subcontractors related to the performance of the contract, or the part of the contract to be terminated, and shall cease to incur costs thereunder. The LRGVDC shall not be liable to the contractor, subcontractor or any creditor for costs incurred after the date of termination. The contractor shall settle all liabilities and claims arising out of the termination of subcontracts and orders connected to the terminated work. The contractor must still complete the work not terminated by the notice of termination and may incur obligations as necessary to do so.*
- (3) *A grant contract may only be terminated for convenience as follows:*
 - (a) *By the grantor agency with the consent of **the LRGVDC** in which case the parties shall agree upon the termination conditions, including:*
 - i) *The effective date; and*
 - ii) *In case of a partial termination, the portion to be terminated.*

(b) By the **LRGVDC** upon written notification to the grantor agency, stating:

i) The reasons for such termination;

ii) The effective date; and

iii) For partial terminations, the portion to be terminated. In the event of a partial termination, if the grantor agency determines that the remaining portion will not accomplish the purposes for which the award was made, the grantor agency may terminate the award in its entirety.

(4) The Executive Director may require the contractor to transfer title and deliver to the LRGVDC in the manner and to the extent directed by the Executive Director:

(a) Any completed [construction, materials and/or supplies/equipment]; and

(b) Such partially completed [supplies/equipment and/or construction materials, including but not limited to supplies, materials, tools, parts, drawings, plans, information and contract rights] as the contractor has specifically produced or specifically acquired for the performance of the terminated part of this contract.

The contractor shall protect and preserve the property in the possession of the contractor in which the LRGVDC has an interest. If the Executive Director does not exercise this right, the contractor shall use its best efforts to sell such [construction materials, supplies and/or equipment] in accordance with the pertinent standards of the Uniform Commercial Code. The exercise of the Termination for Convenience clause in no way implies that the LRGVDC has breached the contract.

(5) Compensation

(a) The contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with any cost,

or pricing data bearing on such claim. If the contractor fails to file a termination claim within one (1) year from the effective date of termination, the Executive Director may pay the contractor, if at all, an amount set in accordance with subparagraph (c) below.

- (b) The Executive Director and the contractor may agree to a settlement provided the contractor has filed a termination claim supported by cost and pricing data and that the settlement does not exceed the total contract price plus settlement costs reduced by amounts previously paid by the LRGVDC and less any lawful offsets or credits due, including but not limited to the proceeds of any sales of construction materials, supplies and/or equipment and the contract price of the work not terminated.*
- (c) Absent complete agreement under subparagraph (b) above, the Executive Director shall pay the contractor the following amounts, not to exceed the total contract price plus the reasonable settlement costs reduced by any lawful offsets or credits:*

 - i) The cost of such work plus a fair and reasonable profit on such portion of the work (such profit shall not include anticipatory profit or consequential damages) less amounts paid or to be paid for completed portions of such work; provided, however, that if it appears that the contractor would have sustained a loss if the entire contract had been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;*
 - ii) Costs of settling and paying claims arising out of the termination of subcontracts or orders; and*
 - iii) Reasonable settlement costs of the contractor reasonably necessary for the preparation of settlement claims and supporting data.*

c. *Suggested Contract Clause [see Appendix C-6]*

2. *Termination for Default*

a. ***The LRGVDC may terminate a contract, in whole or in part, when it has determined that the contractor has substantially violated any provision of this contract.***

b. *Grounds for default include, but are not limited to:*

(1) *Failure to perform pursuant to the terms and conditions of the contract; and*

(2) *Violations of grantor agency rules or regulations.*

c. **Termination for Default Clause must be included in all grant contracts in excess of \$10,000.00.**

d. *Notwithstanding the termination of the contract and subject to the Executive Director's directions, the contractor shall take timely, reasonable and necessary action to protect and preserve property, equipment and/or supplies in possession of the contractor in which the LRGVDC has an interest.*

e. *Payment for completed supplies, equipment or services delivered and accepted by the LRGVDC shall be at the contract price. Payment for the protection and preservation of property, equipment and/or supplies shall be in an amount agreed to by the parties. The LRGVDC may withhold from amounts due to the contract amounts deemed necessary by the Executive Director to protect the LRGVDC against loss because of outstanding liens or claims of former lien holders and to reimburse the LRGVDC for the excess costs incurred in procuring similar supplies, equipment and services.*

f. *The rights and remedies provided are in addition to any other rights and remedies provided by law, under the LRGVDC procurement policy or under this grant or contract.*

g. *Suggested Contract Clause [see Appendix C-7]*

ARTICLE V

LEGAL AND CONTRACTUAL REMEDIES

PART A: RESOLUTION OF CONTROVERSIES

5-101 Resolution of protested solicitations and awards

1. *Procedure*

- a. *A protest must be submitted to the **LRGVDC** designated official within seven (7) calendar days of the time the basis of the protest became known or should have become known.*
- b. *The protest must be submitted in writing and identify the protester, the solicitation being protested and specifically identify the basis for protest, providing all pertinent information regarding the solicitation, contract and/or actions of **LRGVDC**.*
- c. *A grievance hearing may be held at the request of the protester. All interested parties must be given*
 - (1) *Written notice of the date, time and place of the hearing;*
 - (2) *An opportunity to present evidence;*
 - (3) *A written decision within 60 days after the hearing; and*
 - (4) *Notice of appeal rights.*

2. **Appeals**

- a. **Appeals from the LRGVDC decisions to the grantor agency are limited to:**
 - (1) **Violations of federal law or regulations and the standards of Section __.36 of the Uniform Administration Requirements for Grants and Cooperative Agreements to State and Local Governments; and**
 - (2) **Violations of the LRGVDC's protest procedures for failure to review a complaint or protest.**
- b. *Protests received by the grantor agency, other than as specified in subsection (a) above, are to be referred to **the LRGVDC**.*

- c. **Such appeal may be made only after exhausting all administrative remedies through the LRGVDC.**

5-102 Disclosure

1. **The LRGVDC shall disclose all information regarding a protest to the grantor agency.**

5-103 Resolution of contract disputes

1. *Upon breach or default, the Executive Director shall give the contractor written notice of default. If the default is not remedied to the satisfaction and approval of the LRGVDC within [30] working days of receipt of such notice, default will be declared.*
2. *Upon breach of contract or default, the LRGVDC may exercise any and all of its rights afforded by law, including but not limited to:*
 - a. *Taking possession of the assigned premises and any fees accrued or becoming due to date; or*
 - b. *Taking possession of all goods, fixtures and materials and may foreclose its lien against any personal property, applying the proceeds towards any deficiencies, fees due or becoming due under the agreement.*

PART B: SOLICITATIONS OR AWARDS IN VIOLATION OF THE LAW

- 5-201 Contracts awarded in violation of the competitive process or otherwise in violation of the law are void.**

ARTICLE VI

SMALL, DISADVANTAGED, MINORITY, WOMEN-OWNED AND HISTORICALLY UNDERUTILIZED BUSINESSES: FEDERAL ASSISTANCE OR CONTRACT PROCUREMENT REQUIREMENTS

PART A: POLICIES

6-101 Policy Statement:

It shall be the policy of the LRGVDC to assist small, DBE, MBE, women-owned businesses and HUBS in learning how to do business with the LRGVDC. It shall be a further policy of the LRGVDC that these sources shall have the maximum feasible opportunity to compete.

6-102 Bidder/Offeror Statement:

- 1. It shall be a mandatory provision of every solicitation that a bidder or offeror include a statement that said bidder or offeror will comply with this policy.**
2. *See Appendix C-3.*

6-103 *To ensure that LRGVDC'S policy to assure that small, MBES, DBES, women-owned businesses, and HUBS are utilized, the following affirmative steps are recommended to be taken, including the contractor and subcontractor:*

- 1. Include qualified small, MBES, DBES, women-owned businesses, and HUBS on the Bidders' List. State lists may be utilized to locate such businesses, such as the Texas Certified Disadvantaged Business Directory (a/k/a HUB Directory) or the Texas Department of Commerce "Texas Market Place" bulletin board;*
- 2. Assure that small, MBES, DBES, women-owned businesses, and HUBS are solicited whenever they may be potential sources. In this regard, the procurement officer should investigate new sources and advertise when feasible in minority publications;*
- 3. When economically feasible, and where not in contravention of competitive bidding requirements, the procurement officer should divide the total requirements into smaller tasks or quantities so as to permit maximum small, MBE, DBE, women-owned businesses and HUB participation;*

4. *Use the services and assistance of the Small Business Administration, the Office of Minority Business Enterprise of the Department of Commerce, the Minority Business Development Agency in the Department of Labor, the Texas General Services Administration and other similar agencies for locating such businesses;*
5. *Require that prime contractors take affirmative and meaningful steps towards retaining small, MBE, DBE, women-owned businesses and HUB subcontractors;*
6. *Procure goods and services from labor surplus areas;*
7. *If the requirement permits, establish delivery schedules that encourage small, MBES, DBES, women-owned businesses, and HUBS to participate; and*
8. *Advertise, at least annually, in a newspaper of general circulation for small, MBES, DBES, women-owned businesses and HUBS to be added to the Bidders' List.*
9. *Reports must be submitted to Funding Entities twice a year in order to monitor shortfalls, since each Funding Entity requires different times to submit the DBELO is responsible to develop a calendar to meet these requirements.*

6-104 *For such affirmative steps to be meaningful, the procurement officer should review all solicitations, offers and bids to confirm such affirmative actions, including the execution of the Bidder/Offeror Statement. In addition, steps should be taken to ensure that once a contract is awarded to a small, MBE, DBE, women-owned business, and/or HUB, or that the award is given to a contractor with such a subcontractor, that such business is retained during the entire performance of the contract.*

6-105 *Failure of a contractor to take meaningful affirmative steps at soliciting and retaining small, MBES, DBES, women-owned businesses and HUBS may be considered as a factor in evaluating future bids under non-compliance with public policies.*

6-106 *In making expenditures of more than \$3,000.00 and less than \$15,000.00, the procurement officer shall contact at least two HUBS on a rotating basis.*

ARTICLE VII

ETHICS

PART A: STANDARD OF CONDUCT (Amended 8/24/00)

7-101 No officer, employee or agent of the LRGVDC shall knowingly disclose confidential information for personal gain, participate in the negotiation, selection, discussion, award or administration of a contract or procurement supported by public funds if a conflict of interest, either real or apparent, would be involved. An officer, employee or agent of the LRGVDC shall at all times avoid the appearance of impropriety.

1. A conflict arises when an LRGVDC employee, officer or agent, or any member of his/her immediate family, a partner or a person or an organization which employs or may employ in the near future any of these individuals, has a financial or other substantial interest in any entity which may be considered for the award.
 - a. "Immediate family" means to refer to any person related within the second degree of affinity (marriage) or within the third degree of consanguinity (blood) to the party involved.
 - b. "Substantial interest" for purposes of this section, means the person
 - (1) Owns 10% or more of the voting stock or shares of the entity; or
 - (2) 10% or more or \$5,000.00 or more of the fair market value of the entity; or
 - (3) Received funds from the entity in excess of 10% of the person's gross income for the previous year; or
 - (4) Is related to an official in the first degree of consanguinity or affinity.

7-102 No officer, employee or agent of the LRGVDC shall demand, agree, accept or solicit gratuities, favors or anything of monetary value from contractors, potential contractors, bidders, offerors or parties to sub-agreements. No contractor, bidder, offeror or party to a sub-agreement shall offer or tender anything of monetary value to any officer, employee or agent of the LRGVDC.

PART B: COURSE OF CONDUCT IN THE EVENT OF A CONFLICT

7-201 In the event of a real or apparent conflict of interest, as set forth in subpart A, the affected officer, employee or agent must adhere to the following procedures:

- 1. Sign a declaration of a possible conflict of interest.**
 - a. A declaration must also be made on the record where*
 - (1) The officer, agent, employee or immediate family member is a board member of an bidder, offeror or proposer;*
 - (2) The officer, agent or employee is voting on an indirect affirmation of a contract relationship, such as on the job training plan; or*
 - (3) The officer, agent or employee is voting on a rival proposal, though there is no direct competition.*
 - b. Suggested Affidavit form [see Appendix C-1]*
- 2. If applicable, abstain from voting on any procurement action:**
 - a. Where the officer, employee or agent directly represents an organization or may receive a direct financial benefit; or**
 - b. Where the officer, employee or agent is in direct competition with a proposal or bid which would provide a direct financial benefit.**
- 3. Abstain from participating in the procurement process, which includes but is not limited to discussions, lobbying, rating, scoring, recommending, explaining or assisting in the design or approval of the procurement process:**
 - a. On contracts with the organization he/she represents or from which he/she receives a direct financial benefit; or**
 - b. On contracts with organizations in which a family member might realize a direct financial benefit.**

PART C: VIOLATIONS AND REMEDIES

- 7-301** Violations of the provisions of this Article constitute misconduct, subjecting the violator to any and all penalties prescribed by law.
- 7-302** Penalties, sanctions or other disciplinary actions, to the extent permitted by state or local law, rules or regulations, shall be imposed for violations of the code of conduct/conflict of interest standards, by the LRGVDC officers, employees or agents or by persons, contractors or their agents, when the procurement involves state or federal programs and/or funds.
- 7-303** Appropriate sanctions, penalties or disciplinary actions shall be applied for violations. Violations of state or federal law shall be referred to the proper authority having jurisdiction over same.

ARTICLE VIII

AUDITS

8-101 Independent Audit Requirements

1. **An audit must be conducted in accordance with the Single Audit Act of 1984 ("Act"), and federal agency implementing regulations if:**
 - a. **The LRGVDC receives a total amount of federal financial assistance equal to or in excess of \$100,000.00 in any fiscal year; or**
 - b. **The LRGVDC receives a total amount of federal financial assistance which is equal to or in excess of \$25,000.00 but less than \$100,000.00 in any fiscal year, except that:**
 - (1) **The LRGVDC may choose to comply with any applicable requirements for compliance audits contained in statutes or regulations governing the particular program.**
2. **A COG which receives less than \$25,000.00 in a fiscal year is exempt from the Act's audit requirements and those under the applicable programs. However, this exemption does not affect record retention or access requirements.**
3. **The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards.**
4. **In years where the LRGVDC receives federal financial assistance, and provides \$25,000.00 or more of it in a fiscal year to a sub-grantee, the LRGVDC shall:**
 - a. **Determine whether the sub-grantee has met the Act's audit requirements and ensure prompt corrective action is taken in the event of material non-compliance;**
 - b. **If no audit is conducted, determine if expenditures are in accordance with applicable laws and regulations and ensure prompt corrective action is taken in the event of material non-compliance; and**
 - c. **Require each sub-grantee to permit independent auditors to have access to all records and financial statements, as a condition of receiving funds.**

8-102 *Audit Reports*

1. **The audit report shall be submitted to the LRGVDC and transmitted to the appropriate federal officials within thirty (30) days of issuance. Audits are subject to review and resolution by the LRGVDC, the federal or state grantor agency or its authorized representative.**

8-103 *Suggested Contract Provision*

The LRGVDC reserves the right to conduct or cause to be conducted an independent audit of all funds received under this contract. Such audit may be performed by the grantor agency staff, local government audit staff, a certified public accounting firm, or other auditors as designated and determined by the grantor agency. It is the right of the LRGVDC or the federal or state grantor agency to determine the scope of the audit. The contractor/subcontractor agrees to maintain and make available all accounting and program records, including supporting source documentation and shall cooperate with all authorized auditors. Such audit will be conducted in accordance with all applicable professional audit standards and practices.

8-104 *Applicable Authorities*

1. *Procurement of audit services will comply with state procurement procedures, as well as the:*
 - a. *Texas Uniform Grant and Contract Management Act, Texas Government Code, § 783.001 et seq.;*
 - b. *Single Audit Requirements, 1 TAC 5.168;*
 - c. *OMB Circular A-128, A-133;*
 - d. *OMB Circular A-102, Common Rule; Uniform Administration Requirements for Grants and Cooperative Agreements to State and Local Governments, Section __.36; and*
 - e. *31 U.S.C. § 7504.*

APPENDIX A:

BIBLIOGRAPHY OF APPLICABLE STATE AND FEDERAL STATUTES AND REGULATIONS

PART A: STATE AND LOCAL STATUTES

- A-101 Texas' Regional Planning Act of 1965, Texas Local Government Code § 391.001 *et seq.*, authorizes the establishment of Regional Planning Commissions and Council of Governments; *See also* 1 TAC 5.81 *et seq.*
- A-102 Uniform Grant and Contract Management Act, Texas Government Code, § 783.001 *et seq.*, codifies and adopts OMB Circulars A-87 and A-102. (formerly Tex. Civ. Stat. Art. 4413 (32g)); *See also* 1 TAC 5.141 *et seq.*
- I. Uniform Grant and Contract Management Standards, promulgated by the Governor's Office of Budget and Planning, revised February 22, 1990;
1. HHS Guide OASC-10, Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government.
- A-103 Tex. Rev. Civ. Stat. Ann. Art. 5160 - for construction contracts relating to buildings or other public works projects in excess of \$25,000.00, a performance bond and payment bond are required.
- A-104 Texas Local Government Code, § 171.000 *et seq.* pertaining to the regulation of conflicts of interest of officers of municipalities, counties and certain other local governments.
- A-105 Texas Prompt Payment Act, Tex. Civ. Stat. Ann. Art. 601f.
- A-106 Grantor Agency Procurement Procedures including but not limited to:
- I. Texas Department of Commerce;
 1. Texas Department of Aging;
 2. Texas Department of Health;
 3. Texas Department of Community Affairs; and
 4. Texas Department of Transportation.
- A-107 State Model Purchasing Manual, Standard Financial Management System for Texas Cities and Counties by John Sharp, Comptroller of Public Accounts.

PART B: FEDERAL STATUTES AND REGULATIONS

A-201 Statutes and Regulations of General Applicability

- A. OMB Circular A-102, Uniform Administration Requirements for Grants and Cooperative Agreements to State and Local Governments (a/k/a Common Rule).
 - a. Establishes uniform administrative rules for federal grants and cooperative agreements and sub-awards to state and local governments.
 - b. Not applicable to grants of state funds. Section __.6.
 - c. *See Appendix B-1.*
1. OMB Circular A-87 (f/k/a FMC 74-4)
 - a. Presents principles for determining costs applicable to grants and contracts with state and local governments;
 - b. Lists costs which cannot be charged to state and federal contracts/awards;
 - c. Lists costs which may be charged to state and federal contracts/awards if specifically approved in advance by the grantor agency; and
 - d. Lists costs which may be charged to state and federal contracts without prior agency approval if included in the approved budget.
 - e. *See Appendix B-2.*
2. Office of Federal Procurement Policy Act Amendments of 1983, 31 U.S.C. §§ 6301-08 (West 1983): governs the use of grants, contracts and cooperative agreements.
3. Health and safety standards established under state and federal law are applicable to working conditions of program participants. With respect to any participant in a program conducted under a contract who is engaged in activities not covered by the Occupational Safety and Health Act of 1970, the Secretary shall prescribe, by regulation, such standards as may be necessary to protect the health and safety of such participant.

4. Grantor Agency Procurement Procedures including, but not limited to:
 - a. United States Department of Labor:
 - (1) Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, 29 CFR Part 97;
 - (2) Audit Requirements for Grants, Contracts and Other Agreements, 29 CFR Part 96; and
 - (3) Drug-Free Workplace (Grants), 29 CFR Part 98.
 - b. United States Department of Health and Human Services:
 - (1) Administration of Grants, 45 CFR Part 74; and
 - (2) Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, 45 CFR Part 92.
 - c. United States Department of Commerce:
 - (1) Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, 15 CFR Part 24;
 - d. United States Department of Transportation:
 - (1) Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, 49 CFR Part 18; and
 - (2) New Restrictions on Lobbying, 49 CFR Part 20.
 - e. Department of Housing and Urban Development:

- (1) Non-Federal Audit Requirements for State and Local Governments, 24 CFR Part 44;
 - (2) Administrative Requirements for Grants and Cooperative Agreements to State, Local and Federally Recognized Indian Tribal Governments, 24 CFR Part 85;
 - (3) Fair Housing Assistance Program, 24 CFR Part 111;
 - (4) Community Development Block Grants, 24 CFR Part 570;
 - (5) Housing Development Grants, 24 CFR Part 850; and
 - (6) Other programs under 24 CFR Parts 511, 571, 575, 590, 882, 905, 941, 968, 970 and 990.
5. Older Americans Act, 42 U.S.C. § 3001 *et seq.* (West Supp. 1994): delivery of services to the elderly under a sub-grant program.
 6. Comprehensive Employment and Training Act of 1973, 29 U.S.C. § 801 *et seq.*
 7. Requirements and regulations pertaining to reporting and patent rights under any contract involving research, development, experimental or demonstration work with respect to any discovery or invention which arises from or is developed in the course of or under such contract, and requirements and regulations pertaining to copyrights and proprietary data.

A-202 Mandatory Statutes and Regulations

A. All contracts irrespective of dollar amount

- a. Executive Order No. 12549, Debarment and Suspension, 29 CFR Part 98, § 98.510.
 - (1) All prospective recipients of federal assistance funds, by submission of the proposal, certify that neither it nor its principals are presently disbarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from participation in a transaction by any federal department or agency. Failure to certify any statement contained within the certification requires the prospective recipient to attach an explanation to the proposal.
 - (2) Grantees and sub-grantees, including contractors, should use the Consolidated List of Debarred, Suspended, Voluntarily Excluded and Ineligible Assistance Participants

to assure that no awards are made in violation of this regulation.

- b. Prohibition Against Lobbying with Appropriated Funds, 31 U.S.C. § 1352 (West 1994).
 - c. Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6962
 - (1) Any political subdivision of a state, which is using appropriated federal funds, must comply with section 6002 of RCRA.
 - (2) Requires preference for the purchase of specific products containing recycled materials.
 - (3) Applicable EPA guidelines are contained in 40 CFR Parts 247-253.
1. Contracts in excess of \$2,000.00 or \$2,500.00
- a. Davis-Bacon Act, 40 U.S.C. § 276a-1 *et seq.* (prevailing minimum wage), as supplemented by Department of Labor Regulations, 29 CFR Part 5, where required by the federal grant program legislation.
 - (1) Applies to all construction contracts awarded by grantees and sub-grantees in excess of \$2,000.00.
 - (2) The Act requires contractors to pay wages to laborers and mechanics at a rate no less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less often than once a week.
 - (3) The LRGVDC shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and contract award shall be conditioned upon the acceptance of the wage determination.
 - (4) The LRGVDC shall report all suspected or reported violations to the grantor agency.
 - b. Contract Work Hours and Safety Act, 40 U.S.C. §§ 327-30, sections 103 and 107, as supplemented by Department of Labor Regulations, 29 CFR Part 5.

- (1) Applicable to contracts awarded by grantees and sub-grantees in excess of \$2,000.00 for construction contracts and in excess of \$2,500.00 for other contracts involving the employment of mechanics or laborers. These requirements do not apply to the purchase of supplies or materials or articles ordinarily available on the open market or contracts for transportation or transmission of intelligence.
- (2) Section 103 requires the computation of wages of every mechanic and laborer on the basis of a standard work day of 8 hours and a standard work week of 40 hours. Work in excess of the standard workday or workweek is permissible provided that the worker is compensated at a rate of not less than 1-1/2 times the basic rate of pay for all hours worked in excess of 8 hours in any calendar day or 40 hours in the work week.
- (3) Section 107 applies to construction work and requires that no laborer or mechanic work in surroundings or under working conditions, which are unsanitary, hazardous or dangerous to his health and safety as determined under construction, safety and health standards promulgated by the Secretary of Labor.

2. Contracts in excess of \$10,000.00

- a. Executive Order No. 11246, entitled "Equal Employment Opportunity," as amended by Executive Order No. 11375 regarding equal employment opportunities, as supplemented in Department of Labor Regulations, 41 CFR Part 60.

- (1) Mandatory for all construction contracts awarded to grantees, their contractors or sub-grantees, having a value of more than \$10,000.00.

b. Walsh-Healey Public Contracts Act, 48 CFR Part 52, §§ 52.222-19, -20; 41 U.S.C. § 35 *et seq.*

- (1) Applicable to contracts for the manufacture or furnishing of materials, supplies, articles or equipment in an amount that exceeds or may exceed \$10,000.00.
- (2) Solicitations require representations set forth under 48 CFR Part 52, § 52.222-19.

3. Contracts in excess of \$100,000.00
 - a. Clean Air Act of 1970, 42 U.S.C. §§ 7401, 1857(h), *et seq.*
 - (1) Applicable to contracts and sub-grants in excess \$100,000.00
 - (2) The Member Organization shall report all violations to the grantor agency and to the ESEPA Assistant Administrator for Enforcement (EN-329)
 - b. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 and 1368, *et seq.* (a/k/a Clean Water Act)
 - (1) Applicable to contracts in excess \$100,000.00.
 - (2) The LRGVDC shall report all violations to the grantor agency and to the ESEPA Assistant Administrator for Enforcement (EN-329).
 - c. Environmental Protection Agency regulations regarding the administration of the Clean Air Act and the Clean Water Act with respect to grants and loans, 40 CFR Part 15
 - (1) Applicable to contracts in excess of \$100,000.00.
 - (2) Applies to all agencies in the Executive Branch of the Federal Government which award contracts, grants or loans to government contractors, subcontractors and recipients of funds under government grants and loans.
 - (3) The LRGVDC shall report all violations to the grantor agency and to the ESEPA Assistant Administrator for Enforcement (EN-329)
 - d. Executive Order No. 11738, providing for the administration of Clean Air Act and the Federal Water Pollution Control Act with respect to federal contracts, grants and loans.
 - (1) Applicable to contracts in excess \$100,000.00.
 - (2) The LRGVDC shall report all violations to the grantor agency and to the ESEPA Assistant Administrator for Enforcement (EN-329).

4. Construction Contracts

- a. Copeland "Anti-Kickback" Act, 41 U.S.C. § 51, *et seq.*; 18 U.S.C. § 874, as supplemented in Department of Labor Regulations, 29 CFR Part 3.
 - (1) Mandatory for all contracts and subcontracts for construction or repair.
 - (2) The Act provides that each contractor or subcontractor shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled.
 - (3) The LRGVDC shall report all suspected or reported violations to the grantor agency.

A-203 Miscellaneous Statutes and Regulations

A. Drug-Free Workplace Act of 1988, 41 U.S.C. § 701

- a. Requires Certification
- b. 48 CFR Parts 9.4, 23.5 and 52.2
- c. *See Appendix C-4.*

1. Research and Development Contracts

- a. Contracts with the principal purpose of creating, developing or improving products, processes or methods, or for exploration into fields directly concerning public health, safety or welfare, or contracts in the field of science or technology in which there has been little significant experience outside of work funded by federal assistance shall contain a notice that matters regarding the rights to inventions and materials generated under the contract are subject to regulations issued by the federal grantor agency and the grantee.
- 2. USDOL Official Policy Interpretation, JTPA: Requirements for Acceptable Fixed Unit Price, Performance-Based Contracts, 54 FR 10459 (3-13-89).
 - 3. Energy Policy and Conservation Act, 42 U.S.C. § 6201 *et seq.*

4. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* and all other regulations prohibiting and pertaining to discrimination on the basis of race, color, national origin or religion; *see also* Executive Order 11247.
5. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and all other regulations prohibiting and pertaining to discrimination on the basis of sex.
6. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and all other regulations pertaining to and prohibiting discrimination on the basis of handicap.
7. The Age Discrimination Act of 1975, 42 U.S.C. § 6101 *et seq.*, and all other regulations pertaining to and prohibiting arbitrary discrimination against persons between the ages of 40 and 70.
8. Federal Property and Administrative Services Act of 1949, ("Brooks Act"), 40 U.S.C. § 471 *et seq.*

APPENDIX B

ATTACHMENTS

1. OMB Circular A-102 (October 7, 1994)
2. OMB Circular A-87 (August 19, 1993)
3. Procurement Organizational Chart (January 2014)
4. General Clauses as per 4220.1FV.2

APPENDIX B-1

APPENDIX B-2

APPENDIX B-3

LRGVDC PROCUREMENT ORGANIZATIONAL CHART



APPENDIX B-4

APPENDIX C FORMS

Clauses located in Appendix C

1. Declaration of Conflict of Interest
2. Certification Regarding Debarment, Suspension, and Other Responsibility Matters - Primary Covered Transactions and Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion - Lower Tier Covered Transactions
3. Certification of Compliance with Small, Disadvantaged, Minority, Women-Owned and Historically Underutilized Businesses Policy
4. Certification Regarding Drug-Free Workplace Requirements
5. Certification Regarding Lobbying
6. Termination for Convenience Clause
7. Termination for Default Clause
8. Changes Clause
9. Suspension of Work Clause
10. Price Adjustment Clause
11. Flow Down Clause
12. Bidder/Offeror/Contractor Ethical Statement
13. Differing Site Conditions Clause

Clauses located within text of Policy

14. Venue, § 3-203(11)(e)
15. Proprietary Information Statement, § 1-114
16. Access to Contractor Records, § 2-202(1)
17. Maintenance of Records, § 2-202(2)
18. Independent Audit, § 8-103
19. Equal Opportunity and Nondiscrimination Clause

APPENDIX C-1

DECLARATION OF CONFLICT OF INTEREST

AFFIDAVIT OF INTEREST

STATE OF TEXAS §
COUNTY OF HIDALGO §

I, _____, as an [employee, officer or agent, or any member of his/her immediate family, a partner or a person or an organization which employs or may employ in the near future any of these individuals] of the LRGVDC, make this affidavit and state that I have a financial or other substantial interest in the LRGVDC which may be considered for the award of [specify contract or procurement].

My interest is as follows:

Upon the filing of this affidavit with the Lower Rio Grande Valley Development Council, I affirm that I will abstain from any further participation in this [contract or procurement] whatsoever.

EXECUTED this _____ day of _____, 200__.

Signature of employee, officer or agent

Title

SWORN TO AND SUBSCRIBED before me by _____
on the _____ day of _____, 200__.

Notary Public, State of Texas

1. This Affidavit must be filed with the Lower Rio Grande Valley Development Council and be maintained as part of the permanent procurement record.

2. **Upon filing the Affidavit, the officer, employee or agent must abstain from participating in the procurement process pursuant to the ethics policy set forth in Article VII.**

APPENDIX C-2

CERTIFICATION REGARDING DEBARMENT, SUSPENSION AND OTHER RESPONSIBILITY MATTERS -- PRIMARY COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.
2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.
3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.
4. The prospective primary participant shall provide immediate written notice to the department or agency to whom this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
5. The terms *covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded*, as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.
6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.
7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion - Lower Tier Covered Transaction," provided by the department

- or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.
8. A participant in a covered transaction may rely upon certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Non-procurement List (Tel. #).
 9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that, which is normally possessed by a prudent person in the ordinary course of business dealings.
 10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

Certification Clause

- (1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:
 - (a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;
 - (b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
 - (c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and
 - (d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Name of Authorized Representative

Title of Authorized Representative

Signature

Date



CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION -- LOWER TIER COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.
2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.
3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
4. The terms *covered transaction*, *debarred*, *suspended*, *ineligible*, *lower tier covered transaction*, *participant*, *person*, *primary covered transaction*, *principal*, *proposal*, and *voluntarily excluded*, as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.
5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.
6. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion - Lower Tier Covered Transactions," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Non-procurement List (Tel. #).
8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that, which is normally possessed by a prudent person in the ordinary course of business dealings.
9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification Clause

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Excluded Parties List System

The LRGVDC Purchaser shall verify debarment status of all vendors prior to utilizing Homeland Security funds, using the EPLS system (WWW.EPLS.Gov)

Procedures for Documentation

Each sub-recipient must be able to provide that debarment status of vendors has been verified before funds have been dispersed to the vendor.

Example Procedures:

Before Homeland Security funds may be spent, the LRGVDC purchaser will:

1. Go to the EPLS Website (WWW.EPLS.Gov).
2. The LRGVDC Purchaser or their agent will search the EPLS system for the vendor.
3. If the vendor is found not be debarred, a copy of the screen print indicating the vendor is not debarred at the time of the procurement should be included with the paperwork for that purchase and retained with the procurement records for audit and monitoring purposes.
4. If the vendor is debarred, the LRGVDC may not do business with this vendor.

Name of Authorized Representative

Title, Signature and date of Authorized Representative

APPENDIX C-3

**CERTIFICATION OF COMPLIANCE WITH SMALL,
DISADVANTAGED, MINORITY, WOMEN-OWNED AND
HISTORICALLY UNDERUTILIZED BUSINESSES POLICY**

The undersigned certifies that he/she is the authorized representative for the LRGVDC, has read the Small, Disadvantaged, Minority, Women-Owned and Historically Underutilized Businesses Policy for the Lower Rio Grande Valley Development Council, and to the best of my knowledge and belief, the LRGVDC will assist and/or has assisted small, DBE, MBE, women-owned businesses and HUBs by:

- a) taking affirmative and meaningful steps towards retaining small, MBEs, DBEs, women-owned businesses, and HUBs to participate in this procurement;
- b) taking affirmative and meaningful steps to ensure that such business is retained during the entire performance of the contract.

Name of Authorized Representative

Title of Authorized Representative

Signature

Date

APPENDIX C-4

CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

Instructions for Certification

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.
2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.
3. For grantees other than individuals, Alternate I applies.
4. For grantees who are individuals, Alternate II applies.
5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.
6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation. State employees in each local unemployment office, performers in concert halls or radio studios).
7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).
8. Definitions of terms in the Non-procurement Suspension and Debarment common rule and Drug-Free Workplace common rule apply to this certification. Grantees' attention is called, in particular, to the following definitions from these rules:

Controlled substance means a controlled substance in Schedules I through V of the Controlled Substances Act (21 U.S.C. 812) and as further defined by regulation (21 CFR 1308.11 through 1308.15);

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

Employee means the employee of a grantee directly engaged in the performance of work under a grant, including: (i.) All *direct charge* employees; ii) All *indirect charge* employees unless their impact or involvement is insignificant to the performance of the grant; and, (iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll. This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the grantee's payroll; or employees of sub-recipients or subcontractors in covered workplaces).

Certification Clauses

Alternate I. (Grantees Other Than Individuals)

9. The undersigned certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an ongoing drug-free awareness program to inform employees about -

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment, under the grant, the employee will-

- (1) Abide by the terms of the statement; and
 - (2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;
- (e) Notifying the agency, in writing, within ten calendar days after receiving notice, under paragraph (d)(2), from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant;
- (f) Taking one of the following actions, within 30 calendar days of receiving notice under paragraph (d)(2), with respect to any employee who is so convicted -
- (1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or
 - (2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;
- (g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

- B. The undersigned may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant;

Place of Performance (Street address, city, county, state, zip code)

Check here if there are workplaces on file that are not identified here.

Name of Authorized Representative

Title of Authorized Representative

Signature

Date

Alternate II. (Grantees Who Are Individuals)

- engage
a
- (a) The undersigned certifies that, as a condition of the grant, he or she will not in the unlawful manufacture, distribution, dispensing, possession, or use of controlled substance in conducting any activity with the grant;

 - (b) If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, the undersigned will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for the receipt of notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant.
- such

Name of Authorized Representative

Title of Authorized Representative

Signature

Date

APPENDIX C-5

CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

- (1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
- (2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
- (3) The undersigned shall require that the language of this certification be included in the award documents for all sub-awards at all tiers (including subcontracts, sub-grants, and contracts under grants, loans, and cooperative agreements) and that all sub-recipients shall certify and disclose accordingly.

Name of Authorized Representative

Title of Authorized Representative

Signature

Date

APPENDIX C-6

TERMINATION FOR CONVENIENCE CLAUSE

(1) *Termination*

The Executive Director may, when the interests of the LRGVDC so require, terminate this contract in whole or in part, for the convenience of the LRGVDC. The Executive Director shall give thirty (30) calendar days advance written notice of the termination to the contractor specifying the part of the contract terminated and when termination becomes effective.

(2) *Contractor's Obligations*

The contractor shall cancel, withdraw or otherwise terminate any outstanding orders or subcontractors related to the performance of the contract, or the part of the contract to be terminated and shall cease to incur costs in connection with the terminated work. The contractor shall stop work to the extent specified on the date set in the notice of termination. The contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The contractor must still complete the work not terminated by the notice of termination and may incur obligations as are necessary to do so.

(3) *Right to [Construction Materials and/or Supplies/Equipment]*

The Executive Director may require the contractor to transfer title and deliver to the LRGVDC in the manner and to the extent directed by the Executive Director:

- a. any completed [construction materials and/or supplies/equipment]; and
- b. such partially completed [supplies/equipment and/or construction materials, including but not limited to supplies, materials, tools, parts, drawings, plans, information and contract rights] as the contractor has specifically produced or specifically acquired for the performance of the terminated part of this contract.

The contractor shall protect and preserve the property in the possession of the contractor in which the LRGVDC has an interest. If the Executive Director does not exercise this right, the contractor shall use its best efforts to sell such [construction materials, supplies and/or equipment] in accordance with the pertinent standards of the *Uniform Commercial Code*. The exercise of the Termination for Convenience clause in no way implies that the LRGVDC has breached the contract.

(4) *Compensation*

- a. The contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with any cost or pricing data bearing on such claim. If the contractor fails to file a termination claim within one (1) year from the effective date of termination, the Executive Director may pay the contractor, if at all, an amount set in accordance with subparagraph (c) below.
- b. The Executive Director and the contractor may agree to a settlement provided the contractor has filed a termination claim supported by cost and pricing data and that the settlement does not exceed the total contract price plus settlement costs reduced by amounts previously paid by the LRGVDC and less any lawful offsets or credits due, including but not limited to the proceeds of any sales of construction materials, supplies and/or equipment and the contract price of the work not terminated.
- c. Absent complete agreement under subparagraph (b) above, the Executive Director shall pay the contractor the following amounts, not to exceed the total contract price plus the reasonable settlement costs reduced by any lawful offsets or credits:
 1. The cost of such work plus a fair and reasonable profit on such portion of the work (such profit shall not include anticipatory profit or consequential damages) less amounts paid or to be paid for completed portions of such work; provided, however, that if it appears that the contractor would have sustained a loss if the entire contract had been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;
 2. Costs of settling and paying claims arising out of the termination of subcontracts or orders;
 3. Reasonable settlement costs of the contractor reasonably necessary for the preparation of settlement claims and supporting data

APPENDIX C-7

TERMINATION FOR DEFAULT CLAUSE

(1) *Default*

If the contractor refuses or fails to perform any provisions of this contract with such diligence as will ensure its completion within the time specified by the contract, or any extension thereof, otherwise fails to timely satisfy the contract provisions, or commits any other substantial breach of this [contract, grantor agency rules or regulations], the Executive Director may notify the contractor in writing of the delay or non-performance and if not cured within ten (10) days [or within the time specified] such officer may terminate the contractor's right to proceed with the contract, or any such part of the contract affected by the delay or failure to properly perform. In the event of termination in whole or in part the Executive Director may procure similar services, equipment or supplies in a manner and upon terms deemed appropriate by the Executive Director. The contractor shall continue performance of the contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar supplies, equipment or services.

(2) *Contractor's Duties*

Notwithstanding the termination of the contract and subject to the Executive Director's directions, the contractor shall take timely, reasonable and necessary action to protect and preserve property, equipment and/or supplies in possession of the contractor in which the LRGVDC has an interest.

(3) *Compensation*

Payment for completed supplies, equipment or services delivered and accepted by the LRGVDC shall be at the contract price. Payment for the protection and preservation of property, equipment and/or supplies shall be in an amount agreed to by the parties. The LRGVDC may withhold from amounts due to the contract amounts deemed necessary by the Executive Director to protect the LRGVDC against loss because of outstanding liens or claims of former lien holders and to reimburse the LRGVDC for the excess costs incurred in procuring similar supplies, equipment and services.

(4) *Additional Rights and Remedies*

The rights and remedies provided in this clause are in addition to any other rights and remedies provided by law, under the LRGVDC procurement policy or under this grant or contract.

APPENDIX C-8

CHANGES CLAUSE

(1) *Change Order*

The Executive Director, at any time, and without notice to the sureties, in a signed writing designated or indicated to be a change order, may order:

- (a) Changes in the work within the scope of the contract; and
- (b) Changes in the time for performance of the contract that do not alter the scope of the contract.

(2) *Adjustments of Price or Time for Performance*

If any such change order increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, an adjustment shall be made and the contract modified in writing, in accordance with the Price Adjustment Clause.

Failure of the parties to agree to an adjustment shall not excuse a contractor from proceeding with the contract as changed, provided that the LRGVDC promptly and duly make such provisional adjustments in payments or time for performance as may be reasonable. By proceeding with the work, the contractor shall not be deemed to have prejudiced any claim for additional compensation or an extension of time for completion.

(3) *Written Certification*

The contractor shall not perform any change order in excess of [\$_____] unless it bears, or the contractor has separately received, a written certification, signed by the [appropriate designated authorizing authority for that dollar amount] that funds are available for the change or modification; if acting in good faith, the contractor may rely upon the validity of the certification.

APPENDIX C-9

SUSPENSION OF WORK CLAUSE

- (1) *Suspension for Convenience.* The Executive Director may order the contractor in writing to suspend, delay or interrupt all or any part of the work for such period of time as the Executive Director may determine to be appropriate for the convenience of the LRGVDC.

- (2) *Adjustment of Cost.* If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed or interrupted by an act of the Executive Director in the administration of this contract, or by the failure of the Executive Director to act within the time specified in this contract (or, if no time is specified, within a reasonable time), an adjustment shall be made for any increase in the cost of performance of this contract necessarily caused by such unreasonable suspension, delay or interruption and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay or interruption to the extent:
 - a. The performance would have been so suspended, delayed or interrupted by any other cause, including the fault or negligence of the contractor; or
 - b. For which an adjustment is provided for or excluded under any other provision of this contract.

- (3) *Time Restriction on Claim.* No claim under this clause shall be allowed:
 - a. For any costs incurred more than 20 days before the contractor shall have notified the Executive Director in writing of the act or failure to act involved.
This requirement shall not apply to claims resulting from a suspension order; and
 - b. Unless the claim is asserted in writing as soon as practicable after the termination of such suspension, delay or interruption but not later than the date of final payment under the contract.

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

APPENDIX C-10

PRICE ADJUSTMENT CLAUSE

- (1) *Price Adjustment Methods.* Any adjustment in contract price pursuant to clauses in this contract shall be made in one or more of the following ways:
 - a. By agreement on a fixed price adjustment before commencement of the 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 event or situation covered by the clause, plus appropriate profit or fee, all as specified in the contract or subsequently agreed upon;
 - d. In such other manner as the parties may mutually agree; or
 - e. In the absence of agreement between the parties, by a unilateral determination by the Executive Director of costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as computed by the procurement officer in accordance with generally accepted accounting principles.
- (2) *Submission of Cost or Pricing Data.* The contractor shall submit cost or pricing data for any price adjustments in a timely manner.

APPENDIX C-11

FLOW DOWN CLAUSE

The following contract [specify contract number or purchase order] between the LRGVDC and the contractor is hereby incorporated by reference as if fully set forth herein. The subcontractor is responsible for having reviewed the contract, the procurement policy and all applicable grantor agency rules and regulations and being in full compliance therewith. This obligation does not in any way establish privacy of contract between the subcontractor and the LRGVDC and/or the grantor agency. The subcontractor's sole rights and remedies are against the contractor with whom it has a direct contractual agreement.

APPENDIX C-12

BIDDER/OFFEROR/CONTRACTOR ETHICAL STATEMENT

The bidder, offeror or contractor represents that it has not knowingly influenced or offered or tendered anything of monetary value, and will not knowingly influence, or offer or tender anything of monetary value to any officer, employee or agent of the Lower Rio Grande Valley Development Council.

Name of Authorized Representative

Title of Authorized Representative

Signature

Date

APPENDIX C-13

DIFFERING SITE CONDITIONS CLAUSE

ALTERNATE A

- (1) *Notice.* The contractor shall promptly, and before such conditions are disturbed, notify the Executive Director, in writing, of:
 - a. Subsurface or latent physical conditions at the site differing materially from those indicated in this contract; or
 - b. Unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this contract.
- (2) *Adjustments of Price or Time for Performance.* After receipt of written notice, the procurement officer shall promptly investigate the site, and if it is found that such conditions do materially so differ and cause an increase in the contractor's cost of, or the time required for, performance of any part of the contract work, whether or not changed as a result of such conditions, an adjustment shall be made and the contract modified in writing. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause.
- (3) *Timeliness of Claim.* No claim of the contractor under this clause shall be allowed unless the contractor has given the written notice required in this clause; provided, however, that the time prescribed therefore may be extended by the Executive Director in writing.
- (4) *No Claim After Final Payment.* No contractor claim for an adjustment shall be allowed if asserted after final payment under this contract.
- (5) *Knowledge.* Nothing contained in this clause shall be grounds for an adjustment in compensation if the contractor had actual knowledge of the existence of such conditions prior to the submission of bids or offers.

ALTERNATE B

SITE CONDITIONS AS THE CONTRACTOR'S RESPONSIBILITY

The contractor accepts the conditions at the construction site as they eventually may be found to exist and warrants and represents that the contract can and will be performed under such conditions, and that all materials, equipment, labor and other facilities required because of unforeseen conditions (physical, latent or otherwise) shall be wholly at the contractor's own cost and expense, anything in this contract to the contrary notwithstanding.

APPENDIX C-14