

ARTICLE IV
Purchasing Procedure

§ 5-33. Purpose.

The purpose of this Article is to provide for the fair and equitable treatment of all persons involved in public purchasing by the city, to maximize the purchasing value of public funds in procurement and to provide safeguards for maintaining a procurement system of quality and integrity.

§ 5-34. Application.

This Article applies to contracts for the procurement of supplies, services and construction, entered into by the city after the effective date of this Article. It shall apply to every expenditure of public funds of the city for public purchasing irrespective of the source of the funds. When the procurement involves the expenditure of federal assistance or contract funds, the procurement shall be conducted in accordance with any mandatory applicable federal law and regulations. Nothing in this Article shall prevent the city from complying with the terms and conditions of any grant, gift or bequest that is otherwise consistent with law.

§ 5-35. Definitions.

As used in this Article, the following terms shall have the meanings indicated:

ARCHITECT, ENGINEER AND LAND SURVEYING SERVICES — Those professional services within the scope of the practice of architecture, professional engineering or land surveying, as defined by the Laws of New Hampshire.

BLIND TRUST — An independently managed trust in which the employee-beneficiary has no management rights and in which the employee-beneficiary is not given notice of alterations in or other dispositions of the property subject to the trust.

BRAND NAME OR EQUAL SPECIFICATION — A specification limited to one (1) or more items by manufacturers' names or catalog numbers to describe the standard of quality, performance and other salient characteristics needed to meet the city's requirements and which provides for the submission of equivalent products.

BRAND NAME SPECIFICATION — A specification limited to one (1) or more items by manufacturers' names or catalog numbers.

BUSINESS — Any corporation, partnership, individual, sole proprietorship, joint-stock company, joint venture or any other private legal entity.

CHANGE ORDER — A written order signed by both the Purchasing Agent and the department manager and issued by the Purchasing Agent, directing the contractor to make changes which the changes clause of the contract authorizes the Purchasing Agent to order without the consent of the contractor.

CONTRACT MODIFICATION (BILATERAL CHANGE) — Any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity or other provisions of any contract accomplished by mutual action of the parties to the contract.

CONFIDENTIAL INFORMATION — Any information which is available to an employee only because of the employee's status as an employee of the city and is not a matter of public knowledge or available to the public on request.

CONSTRUCTION — 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.

CONTRACT — All types of city agreements, regardless of what they may be called, for the procurement of supplies, services or construction.

CONTRACTOR — Any person having a contract with the city.

COST ANALYSIS — The evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid and costs to be reimbursed.

COST DATA — Factual information concerning the cost of labor, material, overhead and other cost elements which are expected to be incurred or which have been actually incurred by the contractor in performing the contract.

COST-REIMBURSEMENT CONTRACT — A contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this Article and a fee or profit, if any.

DIRECT OR INDIRECT PARTICIPATION — Involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing or in any other advisory capacity.

EMPLOYEE/OFFICIAL — An individual drawing a salary or wages from the city, whether elected or not; any noncompensated individual performing personal services for the city or any department, agency, commission, council, board or any other entity established by the executive or legislative branch of the city; and any noncompensated individual serving as an elected or appointed official of the city.

FINANCIAL INTEREST:

- A. Any financial, monetary, economic, commercial or property privilege, profit, gain or advantage retained or to be received by any employee or official or any member of the employee's or official's immediate family if certain actions or events occur. The interest that all city taxpayers share in the honest and prudent conduct of city business shall not, by itself, be considered a "financial interest" for the purposes of this Article.
- B. Ownership of one hundred percent (100%) of any property or business.

C. Holding a position in business, such as officer, director, trustee, partner, employee or the like, or holding any position of management.

GRATUITY — A payment, loan, subscription, advance, deposit of money, service, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received.

IMMEDIATE FAMILY — All persons residing in the same household with an official or employee and spouses or dependents of the official or employee, whether or not they reside in the same household with the official or employee.

INVITATION FOR BIDS — All documents, whether attached or incorporated by reference, utilized for soliciting sealed bids.

PERSON — Any business individual, union, committee, other organization or group of individuals.

PRICE ANALYSIS — The evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.

PRICING DATA — Factual information concerning prices for items substantially similar to those being procured. "Prices," in this definition, refer to offered or proposed selling prices, historical selling prices and current selling prices. The definition refers to data relevant to both prime and subcontract prices.

PROCUREMENT — The buying, purchasing, renting, leasing, negotiating or otherwise the acquiring of any supplies, services or construction. It also includes all functions that pertain to the obtaining of any supply, service or construction, including description requirements, selection and solicitation of sources, preparation and award of contract and all phases of contract administration.

PUBLIC AGENCY — A department, agency, board, commission or committee subject to or created by the city.

QUALIFIED PRODUCTS LIST — An approved list of supplies, services or construction times described by model or catalog numbers, which, prior to competitive solicitation, the city has determined will meet the applicable specification requirements.

REQUEST FOR PROPOSAL — All documents, whether attached or incorporated by reference, utilized for soliciting proposals.

RESPONSIBLE BIDDER OR OFFERER — A person who has the capability in all respects to perform fully the contract requirements, and the tenacity, perseverance, experience, integrity, reliability, capacity, facilities, equipment and credit which will assure good faith performance.

RESPONSIBLE BIDDER — A person who has submitted a bid which conforms in all material respects to the requirements set forth in the invitation for bids.

SERVICES — The furnishing of labor, time or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the

required performance. This term shall not include employment agreements or collective bargaining agreements.

SMALL BUSINESS — A United States business which is independently owned and which is not dominant in its field of operation or affiliate or subsidiary of a business dominant in its field of operation.

SPECIFICATION — Any description of the physical or functional characteristics or of the nature of a supply, service or construction item. It may include a description of any requirement for inspecting, testing or preparing a supply, service, or construction item for delivery.

SUPPLIES — All property, including but not limited to equipment, materials, printing, insurance and leases of real property, excluding land or a permanent interest in land.

USING AGENCY — Any department, commission, board or public agency requiring supplies, services or construction procured pursuant to this Article.

§ 5-36. Public access to procurement information.

Procurement information shall be a public record to the extent provided in New Hampshire RSA 91-A:4 and 91-A:5 and shall be available to the public as provided in such statute, with the exception that private proprietary information shall not be considered a public record.

§ 5-37. Establishment of purchasing agent.

As authorized in Section 4:09 of the Laconia City Charter, the Personnel and Purchasing Director shall act as the purchasing agent for all departments and employees of the city.

§ 5-38. Principal duties.

- A. In accordance with this Article, and subject to the supervision of the City Manager, the Purchasing Agent shall:
- (1) Procure or supervise the procurement of all supplies, services, and construction needed by the city.
 - (2) Exercise direct supervision over the city's central stores and general supervision over all other inventories of supplies belonging to the city.
 - (3) Sell, trade or otherwise dispose of surplus supplies belonging to the city.
 - (4) Establish and maintain programs for specifications development, contract administration and inspection and acceptance, in cooperation with the public agencies using the supplies, services and construction.

§ 5-39. Operational procedures.

Consistent with this Article, and with the approval of the City Manager, the Purchasing Agent may adopt operational procedures relating to the execution of his/her duties.

§ 5-40. Competitive sealed bidding.

- A. Conditions for use. All contracts of the city shall be awarded by competitive sealed bidding except as otherwise provided in this section, Competitive sealed bidding, and § 5-42, Contracting for designated professional services; § 5-43, Small purchases; § 5-44A, Sole-source procurement; § 5-44B, Emergency procurement; § 5-66A, Public announcement; and § 5-66B, Selection process, of this Article.
- B. Invitations for bids. An invitation for bids shall be issued and shall include specifications and all contractual terms and conditions applicable to procurement.
- C. Public notice. Public notice of the invitation for bids shall be given a reasonable time, not less than ten (10) calendar days prior to the date set forth therein for the opening of bids. Such notice shall include publication in a newspaper of general circulation at least ten (10) calendar days prior to bid opening. The public notice shall state the place, date and time of bid opening.
- D. Bid opening. Bids shall be opened publicly in the presence of one (1) or more witnesses at the time and place designated in the invitation for bids. The amount of each bid and such other relevant information as the Purchasing Agent deems appropriate, together with the name of each bidder shall be recorded; the record and each bid shall be open to public inspection in accordance with § 5-36.
- E. Bid acceptance and bid evaluation. Bids shall be unconditionally accepted without alteration or correction, except as authorized in the Article. Bids shall be evaluated based on the requirements set forth in the invitation for bids, which may include criteria to determine acceptability, such as inspection, testing, quality, workmanship, delivery and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs and total or life-cycle costs. The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids.
- F. Correction or withdrawal of bids; cancellation of awards. Correction or withdrawal of inadvertently erroneous bids before or after bid opening or cancellation of awards or contracts based on such bid mistakes may be permitted where appropriate. Mistakes discovered before bid opening may be modified if withdrawn by written or telegraphic notice received in the office designated in the invitation for bids prior to the time set for bid opening. After bid opening, corrections in bids shall be permitted only to the extent that the bidder can show by clear and convincing evidence that a mistake of a nonjudgmental character was made, the nature of the mistake and the bid price actually intended. After bid opening, no changes in bid prices or other provisions of bids prejudicial to the interest of the city or fair competition shall be permitted. In lieu of bid correction, a low bidder alleging a material mistake of fact may be permitted to withdraw its bid if:

- (1) The mistake is clearly evident on the face of the bid document but the intended correct bid is not similarly evident; or
 - (2) The bidder submits evidence which clearly and convincingly demonstrates that a mistake was made. All decisions to permit the correction or withdrawal of bids or to cancel awards or contracts based on bid mistakes shall be supported by a written determination made by the purchasing agent.
- G. Award. The contract shall be awarded with reasonable promptness by appropriate written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids. In the event the low responsive and responsible bid for a construction project exceeds available funds as certified by the Fiscal Officer and such bid does not exceed such funds by more than five percent (5%), the Purchasing Agent is authorized to negotiate an adjustment of the bid price with the low responsive and responsible bidder, in order to bring the bid within the amount of available funds. Any such negotiated adjustment shall be based only upon eliminating independent deductive items specified in the invitation for bids.
- H. Multistep sealed bidding. When it is considered impractical to prepare initially a purchase description to support an award based on price, an invitation for bids may be issued requesting the submission of unpriced offers to be followed by an invitation for bids limited to those bidders whose offers have been determined to be technically acceptable under the criteria set forth in the first solicitation.

§ 5-41. Competitive sealed proposals.

- A. Conditions for use. When the Purchasing Agent determines, in writing, that the use of competitive sealed bidding is either not practicable or not advantageous to the city, a contract may be entered into by use of the competitive sealed proposals method.
- B. Request for proposals. Proposals shall be solicited through a formal and written request for proposals.
- C. Public notice. Public notice of the request for proposals shall be given in the same manner as provided in § 5-40C, competitive sealed bidding public notice, provided that the minimum shall be ten (10) calendar days.
- D. Receipt of proposals. No proposals shall be handled so as to permit disclosure of the identity of any offeror or the contents of any proposal to competing offerors during the process of negotiation. A register of proposals shall be prepared containing the name of each offeror, the number of modifications received, if any, and a description sufficient to identify the item offered. The register of proposals shall be open for public inspection only after-contract award.
- E. Evaluation factors. The request for proposals shall state the relative importance of price and other evaluation factors.
- F. Discussion with responsible offerors and revisions to proposals. As provided in the request for proposals, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the

purpose of clarification to assure full understanding of and conformance to the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of the identity of competing offerors or of any information derived from proposals submitted by competing offerors.

- G. Award. Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the city, taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made.

§ 5-42. Contracting for designated professional services.

- A. Authority. For the purpose of procuring the services of professionals, such as but not limited to accountants, medical professionals as defined by the laws of New Hampshire, the requesting department shall first consult with the Purchasing Agent. This section shall not govern the appointment of the City Solicitor or staff to the City Solicitor's office or legal counsel retained by the City Council.
- B. Selection procedure.
- (1) Conditions for use. Except as provided under § 5-44A, sole-source procurement, or § 5-44B, emergency procurement, the professional services designated in Subsection A of this section shall be procured in accordance with this subsection.
 - (2) Statement of qualifications. Persons engaged in providing the designated types of professional services shall submit written statements of qualifications in accordance with Subsection B(3) below.
 - (3) Public announcement and form of request for proposals. Public notice of the need for such services shall be given by the Purchasing Agent, after receiving a written request from the city department requiring the services. The request for proposals shall describe the services required and list the types of information and data required of each offeror and state the relative importance of particular qualifications. A public notice shall be made no less than ten (10) calendar days prior to the city receiving the statement of qualifications from a source listed in Subsection A. All submissions to the request for proposal shall be in the following manner. All submissions shall be in two (2) parts. The first shall detail the qualifications of the submitter to perform the work outlined in the RFP. Once a decision has been made concerning which submissions are qualified, those determined to be qualified shall be requested to submit a full proposal detailing how they will approach the project and their estimate of cost. Only those firms determined to be qualified by the reviewers shall be permitted to submit a proposal.
 - (4) Discussions. The head of a department procuring the required professional services or a designee of such officer may, after the advertised deadline and with the assistance of the Purchasing Agent, conduct discussions with any offeror who has submitted a proposal to determine such offeror's qualifications for further consideration.

Discussions shall not disclose any information derived from proposals submitted by other offerors.

- (5) Award. Award shall be made to the offeror determined in writing by the department head procuring the required professional services and Purchasing Agent or a designee of such official to be the best qualified based on the evaluation factors set forth in the request for proposals and negotiation of compensation determined to be fair and reasonable. If compensation cannot be agreed upon with the best qualified offeror, then negotiations will be formally terminated with the selected offeror. If proposals were submitted by one (1) or more other offerors determined to be qualified, negotiations may be conducted with such other offeror or offerors in the order of their respective qualification ranking, and the contract may be awarded to the offeror then ranked best qualified in the amount of compensation as determined to be fair and reasonable.

§ 5-43. Small purchases.

- A. General. Any single purchase, not exceeding four thousand nine hundred ninety-nine dollars (\$4,999.), shall be made in accordance with the small purchase procedures authorized in this section. Contract and/or purchase requirements shall not be artificially divided so as to constitute a small purchase under this section.
- B. Purchases to nine hundred ninety-nine dollars (\$999.). The Purchasing Agent, acting through a department head, is authorized to purchase materials, goods and services in an amount not to exceed nine hundred ninety-nine dollars (\$999.) without following the provisions of other applicable sections of the Article; provided, however, that the department head seeks the best possible cost to the city for the material, good or service.
- C. Purchases from one thousand dollars (\$1,000.) to four thousand nine hundred ninety-nine dollars (\$4,999.). The Purchasing Agent is authorized to purchase materials, goods and services in an amount not to exceed four thousand nine hundred ninety-nine dollars (\$4,999.), provided that adequate written documentation is maintained to ensure competition and to properly account for the funds expended. Adequate written documentation shall include, but not be limited to, written information concerning the source of the purchase (vendor) and amount and at least two (2) other written quotations from a viable vendor for the same material, goods or services.
- D. Purchases over five thousand dollars (\$5,000.). Every contract or purchase of material, goods or services in an amount of five thousand dollars (\$5,000.) or more shall be governed by § 5-40, Competitive sealed bidding; § 5-41, Competitive sealed proposals; or § 5-42, Contracting for designated professional services, except those purchases permitted according to § 5-44, Sole-source and emergency procurement.

§ 5-44. Sole-source and emergency procurement.

- A. A contract may be awarded without competition when the Purchasing Agent determines in writing to the City Manager and after conducting a good faith review of available sources that there is only one (1) source for the required supply, service or construction item. The

Purchasing Agent shall conduct negotiations, as appropriate, as to price, delivery and terms. A record of sole-source procurement shall be maintained as a public record and shall list each contractor's name, the amount and type of each contract, a listing of the item(s) procured under each contract and the identification number of each contract file.

- B. Notwithstanding any other provisions of this Article, the Purchasing Agent may make or authorize others to make emergency procurement of supplies, services or construction items when there exists a threat to public health, welfare or safety, provided that such emergency procurement shall be made with such competition as is practicable under the circumstances.
- C. A written determination, made by the City Manager, shall determine the basis for the emergency and shall be included in the contract file. As soon as practicable, but no longer than ten (10) days following the emergency, a record of each emergency procurement shall be made and shall set forth the contractor's name, the amount and type of the contract, a listing of the item(s) procured under the contract and the identification number of the contract file.

§ 5-45. Cancellation of invitations for bids or requests for proposals.

- A. An invitation for bids, a request for proposals or other solicitation may be canceled or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation when it is for good cause and in the best interests of the city. The reasons therefor shall be made part of the contract file.
- B. Each solicitation issued by the city shall state that the solicitation may be canceled and that any bid or proposal may be rejected in whole or in part for good cause when in the best interests of the city. Notice of cancellation shall be sent to all businesses solicited. The notice shall identify the solicitation, explain the reason for cancellation and, where appropriate, explain that an opportunity will be given to compete on any resolicitation for any future procurement of similar items. Reasons for rejection shall be provided upon request by unsuccessful bidders or offerors.

§ 5-46. Responsibility of bidders and offerors.

- A. Determination of nonresponsibility. If a bidder or offeror who otherwise would have been awarded a contract is found nonresponsible, a written determination of nonresponsibility, setting forth the basis of the finding, shall be prepared by the Purchasing Agent. The unreasonable failure of a bidder or offeror to supply promptly information in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such bidder or offeror. A copy of the determination shall be sent promptly to the nonresponsible bidder or offeror. The final determination shall be made part of the contract file and be made a public record.
- B. Right of nondisclosure. Proprietary information furnished by a bidder or offeror pursuant to this section shall not be disclosed by the city outside of the office of the Purchasing Agent, without prior written consent by the bidder or offeror. Each bidder shall be

required, as a part of their bid, to clearly identify those items or information that is to be considered as proprietary for the purposes of this section.

§ 5-47. Cost or pricing data.

- A. Required submissions relating to the award of contracts. A prospective contractor shall submit cost or pricing data when the contract is expected to exceed twenty-five thousand dollars (\$25,000.) and is to be awarded by competitive sealed proposals (§ 5-41), or by sole-source procurement authority (§ 5-44).
- B. Exceptions. The submission cost or pricing data relating to the award of a contract is not required when:
 - (1) The contract price is based on adequate price competition;
 - (2) The contract price is based on established catalog prices or market prices;
 - (3) The contract price is set by law or regulation; or
 - (4) It is determined in writing by the Purchasing Agent that the requirements of this section may be waived and the determination states the reasons for such waiver.
- C. Required submissions relating to change orders or contract modifications. A contractor shall submit cost or pricing data prior to the pricing of any change order or contract modification, including adjustments to any contract awarded by competitive sealed bidding, whether or not cost or pricing data was required in connection with the initial pricing of the contract, when the change or modification involves aggregate increases or aggregate decreases in cost plus applicable profits that are expected to exceed twenty-five thousand dollars (\$25,000.).
- D. Exceptions. The submission of cost or pricing data relating to the pricing of a change order or contract modification is not required when:
 - (1) Unrelated and separately priced adjustments for which cost or pricing data would not be required are consolidated for administrative convenience; or
 - (2) It is determined in writing by the Purchasing Agent that the requirements of this section may be waived and the determination states the reasons for such waiver.
- E. Certification required. A contractor, actual or prospective, required to submit cost or pricing data in accordance with this section, shall provide a written certification that, to the best of his/her knowledge and belief, the cost or pricing data submitted was accurate, complete and current as of a mutually specified date prior to the award of the contract or the pricing of the change order or contract modification.
- F. Price adjustment provision required. Any contract award, change order or contract modification under which the submission and certification of cost or pricing data is required shall contain a provision stating that the price to the city, including profit or fee, shall be adjusted to exclude any significant sums by which the city finds that such price was increased because the contractor-furnished cost or pricing data was inaccurate, incomplete or not current as of the date agreed upon between the city and the contractor.

§ 5-48. Cost or price analysis.

Should the Purchasing Agent deem it necessary, a cost analysis or price analysis may be conducted prior to award of the contract other than one awarded under § 5-40, Competitive sealed bidding. Should one be so ordered, a written record of such cost analysis or price analysis shall be made a part of the contract file.

§ 5-49. Bid and performance bonds on supply or service contracts.

Bid and performance bonds or other security may be requested for supply contracts or service contracts as the purchasing agent or department head deems advisable to protect the city's interests. Any such bonding requirements shall be set forth in the solicitation. Bid or performance bonds shall not be used as a substitute for a determination of a bidder or offeror's responsibility.

§ 5-50. Types of contracts.

- A. General authority. Subject to the limitations of this section, any type of contract which is appropriate to the procurement and which will promote the best interests of the city may be used, provided that the use of a cost-plus-a-percentage-of-cost contract is prohibited.
- B. Multiterm contracts.
- (1) Specified period. Unless otherwise provided by law, a contract for supplies or services may be entered into for any period of time deemed to be in the best interests of the city, provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.
 - (2) Determination prior to use. Prior to the utilization of a multiterm contract, it shall be determined in writing:
 - (a) That estimated requirements cover the period of the contract and are reasonably firm and continuing; and
 - (b) That such a contract will serve the best interests of the city by encouraging effective competition or otherwise promoting economies in city procurement.
 - (3) Cancellation due to unavailability of funds in succeeding fiscal periods. When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be canceled, and the contractor shall be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies or services delivered under the contract. The cost of cancellation may be paid from any appropriations available for such purposes.

§ 5-51. Contract clauses and their administration.

- A. Contract clauses. All city contracts for supplies, services and construction shall include provisions necessary to define the responsibilities and rights of the parties to the contract. The purchasing agent, after consultation with the City Solicitor, may issue clauses appropriate for supply, service or construction contracts, addressing among others the following subjects:
- (1) The unilateral right of the city to order, in writing, changes in the work within the scope of the contract;
 - (2) The unilateral right of the city to order, in writing, temporary stopping of the work or delaying performance that does not alter the scope of the contract;
 - (3) Variations occurring between estimated quantities of work in contract and actual quantities;
 - (4) Defective pricing;
 - (5) Liquidated damages;
 - (6) Specified excuses for delay or nonperformance;
 - (7) Termination of the contract for default;
 - (8) Termination of the contract in whole or in part for the convenience of the city;
 - (9) Suspension of work on a construction project ordered by the city; and
 - (10) Site conditions differing from those indicated in the contract or ordinarily encountered, except that a differing-site-conditions clause need not be included in a contract:
 - (a) When the contract is negotiated;
 - (b) When the contractor provides the site or design; or
 - (c) When the parties have otherwise agreed with respect to the risk of differing site conditions.
- B. Price adjustments.
- (1) Adjustments in price resulting from the use of contract clauses required by Subsection A of this section shall be computed in one (1) or more of the following ways:
 - (a) By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
 - (b) By unit prices specified in the contract or subsequently agreed upon;
 - (c) By the costs attributable to the events or situations under such clauses with adjustments or profit or fee, all as specified in the contract or subsequently agreed upon;
 - (d) In such other manner as the contracting parties mutually agree; or

(e) In the absence of agreement by the parties, by a unilateral determination by the city of the costs attributable to the events or situations under such clauses with adjustment of profit or fee as computed by the city, as accounted for in accordance with §§ 5-47 and 5-48 and subject to the provisions of §§ 5-71 through 5-74, appeals and remedies.

(2) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of § 5-47, Cost pricing data.

C. Standard clauses and their modification. The Purchasing Agent, after consultation with the City Solicitor, shall establish standard contract clauses for use in city contracts.

§ 5-52. Contract administration.

A contract administration system designed to ensure that a contractor is performing in accordance with the solicitation under which the contract was awarded and the terms and conditions of the contract shall be maintained by each department managing a contract.

§ 5-53. Cost reimbursement provisions.

(Reserved)

§ 5-54. Right to inspect plant.

The city may, at reasonable times, inspect the part of the plant of business or worksite of a contractor or subcontractor at any tier which is pertinent to the performance of any contract awarded or to be awarded by the city.

§ 5-55. Right to audit records.

A. Audit of cost of pricing data. The city may, at reasonable times and places, audit the books and records of any contractor who has submitted cost or pricing data pursuant to § 5-47, Cost or pricing data, to the extent that such books, documents, papers and records are pertinent to such cost or pricing data. Any person who receives a contract, change order or contract modification for which cost or pricing data is required shall maintain such books, documents, papers and records that are pertinent to such cost or pricing data for three (3) years from the date of final payment under the contract.

B. Contract audit. The city shall be entitled to audit the books and records of a contractor or subcontractor at any tier under any negotiated contract or subcontract other than a firm-fixed-price contract to the extent that such books, documents, papers and records are pertinent to the performance of such contract or subcontract. Such books and records shall be maintained by the contractor for a period of three (3) years from the date of final payment under the prime contract and by the subcontractor for a period of three (3) years from the date of final payment under the subcontract.

§ 5-56. Reporting of anticompetitive practices.

When, for any reason, collusion or other anticompetitive practices are suspected among any bidders or offerors, a notice of the relevant facts shall be transmitted to the County Attorney for investigation and/or prosecution.

§ 5-57. City procurement records.

- A. Contract file. All determinations and other written records pertaining to the solicitation, award or performance of a contract shall be maintained for the city in a contract file by the Purchasing Agent.
- B. Retention of procurement records. All procurement records shall be retained and disposed of by the city in accordance with the New Hampshire Right to Know Law, RSA 91:A.

§ 5-58. Maximum practicable competition.

All specifications shall be drafted so as to promote overall economy for the purposes intended and encourage competition in satisfying the city's needs and shall not be unduly restrictive. The policy enunciated in this section applies to all specifications, including but not limited to those prepared for the city by architects, engineers, designers and draftsmen.

§ 5-59. Qualified products list.

(Reserved)

§ 5-60. Brand name or equal specification.

- A. Use. Brand name or equal specifications may be used when the Purchasing Agent determines in writing that:
 - (1) No other design or performance specification or qualified products list is available;
 - (2) Time does not permit the preparation of another form of purchase description, not including a brand name specifications;
 - (3) The nature of the product or the nature of the city's requirements makes use of a brand name or equal specification suitable for the procurement; or
 - (4) Use of a brand name or equal specification is in the city's best interests.
- B. The use of brand name or equal specifications shall not be intended to limit or restrict competition but shall be permitted for description when bidding for materials, goods and/or services.

§ 5-61. Responsibility for selection of methods of construction contracting management.

- A. The Purchasing Agent shall designate in the bid documents the appropriate method of contracting management for a particular project. In determining which method to use, the Purchasing Agent shall consider the city's requirements, its resources and the potential contractor's capabilities.
- B. The Purchasing Agent shall execute and include in the contract file a written statement setting forth the facts which led to the selection of a particular method of construction contracting management for each project.

§ 5-62. Bid security.

- A. Requirement for bid security. Bid security shall be required for all competitive sealed bidding for construction contracts when the price is estimated to exceed twenty-five thousand dollars (\$25,000.). Bid security shall be a bond provided by a surety company authorized to do business in the State of New Hampshire or the equivalent in cash or otherwise supplied in a form satisfactory to the city. Nothing herein shall prevent the requirement of such bonds on construction contracts under twenty-five thousand dollars (\$25,000.) when circumstances warrant.
- B. Amount of bid security. Bid security shall be in an amount equal to at least five percent (5%) of the amount of bid.
- C. Rejection of bids for noncompliance with bid security requirements. When the invitation for bids requires security, noncompliance requires that the bid be rejected unless it is determined that the bid fails to comply only in a nonsubstantial manner with the security requirements.
- D. Withdrawal of bids. If a bidder is permitted to withdraw its bid before award as provided in § 5-40F, competitive sealed bidding; correction or withdrawal of bids, cancellation of awards), no action shall be had against the bidder or the bid security.

§ 5-63. Contract performance and payment bonds.

- A. When required amounts. When a construction or service contract is awarded in excess of twenty-five thousand dollars (\$25,000.), the following bonds or security shall be delivered to the city and shall become binding on the parties upon the execution of the contract:
 - (1) A performance bond satisfactory to the city, executed by a surety company authorized to do business in the state or otherwise secured in a manner satisfactory to the city, in an amount equal to one hundred percent (100%) of the price specified in the contract for the full term of the contract; and
 - (2) A payment bond satisfactory to the city, executed by a surety company authorized to do business in the state or otherwise secured in a manner satisfactory to the city, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract. The bond shall be in an amount equal to one hundred percent (100%) of the price specified in the contract for the full term of the contract.

- B. Reduction of bond amounts. After written approval from the City Manager, the Purchasing Agent is authorized to reduce the amount of performance and payment bonds to fifty percent (50%) of the contract price for each bond when a written determination is made that it is in the best interests of the city to do so.
- C. Authority to require additional bonds. Nothing in this section shall be construed to limit the authority of the city to require a performance bond or other security in addition to those bonds or in circumstances other than specified in Subsection A of this section.
- D. Suits on payment bonds, right to institute. Unless otherwise authorized by law, any person who has furnished labor or material to the contractor or subcontractors for the work provided in the contract for which a payment bond is furnished under this section and who has not been paid in full within ninety (90) days from the date on which that person performed the last of the labor or supplied the material shall have the right to sue on the payment bond for any amount unpaid at the time the suit is instituted and to prosecute the action for the amount due that person. However, any person having a contract with a subcontractor of the contractor but no express or implied contract with the contractor furnishing the payment bond shall have a right of action upon the payment bond upon giving written notice to the contractor within ninety (90) days from the date on which that person performed the last of the labor or supplied the material. That person shall state in the notice the amount claimed and the name of the party to whom the material was supplied or for whom the labor was performed. The notice shall be served by registered mail, postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office or conducts business.
- E. Suits on payment bonds, where and when brought. Unless otherwise authorized by law, every suit instituted upon a payment bond shall be brought in the Laconia District or Superior Court, the jurisdiction in which the construction contract was to be performed.

§ 5-64. Copies of bond forms.

Any person may request and obtain from the city a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond shall be prima facie evidence of the content, execution and delivery of the original.

§ 5-65. Fiscal responsibility.

Each request for a contract modification, change order or contract price adjustment of in excess of five percent (5%) of the original contract price shall first obtain the prior written approval of the City Manager, after receiving a written report from the Director of Finance as to the effect of the contract modification, change order or contract price adjustment on the total contract budget.

§ 5-66. Architect, engineer and land surveying services.

Public announcement and selection process.

- A. Public announcement. It is the policy of the city to publicly announce all requirements for architect, engineer and land surveying services and to award such contracts on the basis of demonstrated competence and qualifications at fair and reasonable rates. In the procurement of architect, engineer and land surveying services, the Purchasing Agent shall request specific firms to submit a statement of qualifications and performance data according to the two-step process outlined below. In addition, a public notice shall be published in a local newspaper advising of the city's interest in seeking architectural, engineering and/or land surveying services.
- B. Selection process. The selecting of architects, engineers and land surveyors shall be in two (2) parts and according to the following guidelines:
- (1) Statement of qualifications. Each firm responding to the RFP shall first submit a statement of qualifications listing at a minimum, a description of the size, experience, staff of the firm, technical competence of the firm, past record of performance on similar contracts, financial stability, time constraints with respect to meeting the deadline and a statement concerning whether there is a real or perceived conflict of interest. Once submitted, the city shall establish a review committee of no less than three (3) administrative officials to review each submitted statement of qualifications. The committee shall then determine which of the submitted firms are most qualified according to the criteria established by the city. Only those firms deemed most qualified by the evaluation committee shall be permitted to submit a proposal according to Subsection B(2) below. Those firms who were not deemed most qualified shall be provided written notice of the reasons they were not qualified.
 - (2) Those firms deemed most qualified by the evaluation committee will be requested to submit a proposal listing, at a minimum, their approach to the project, description of the types of services to be provided, allocation of resources to each aspect of the project, time frames within the firm intends to complete each aspect of the project and an estimate of cost to provide these services. The city's evaluation committee, described in Subsection B(1), shall then review this submission. The evaluation committee shall then rank the submitting firms from highest score to lowest score according to the evaluation criteria. (Cost shall be considered as an evaluation criteria.) Once the final rankings have been made, the Purchasing Agent shall begin negotiations with the firm ranked first by the evaluation committee. The top ranked firm shall be deemed the lowest responsible proposal. Should the Purchasing Agent be unable to reach agreement on a contract and price with the firm deemed lowest responsible proposal, the Purchasing Agent is authorized to proceed to negotiate with the next ranked firm. Should the city not be able to negotiate a contract with any of the qualified firms, the Purchasing Agent is authorized to readvertise the project.
- C. The city reserves the right to suspend the requirements of this procedure when, in the opinion of the Purchasing Agent, that it is not in the city's best interest to follow this procedure. The Purchasing Agent shall file his reasons, in writing, with the City Manager who shall, in writing, approve or reject the Purchasing Agent's recommendation.

§ 5-67. Authority to debar or suspend.

- A. After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Purchasing Agent, after consulting with the City Solicitor, is authorized to debar a person for cause from consideration for award of contracts. The debarment shall be for a period of not more than three (3) years. After consultation with the City Attorney, the Purchasing Agent is authorized to suspend a person from consideration for award of contracts if there is probable cause to believe that the person has engaged in any activity which might lead to debarment. The suspension shall be for a period not to exceed three (3) months.
- B. The causes for debarment include:
- (1) Conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract or in the performance of such contract or subcontract.
 - (2) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty which currently, seriously and directly affects responsibility as a city contractor.
 - (3) Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals.
 - (4) Violation of contract provisions, as set forth below, of such character which is regarded by the Purchasing Agent to be so serious as to justify debarment action:
 - (a) Deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or
 - (b) A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one (1) or more contracts, provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment.
 - (5) Any other cause the Purchasing Agent determines to be so serious and compelling as to affect responsibility as a city contractor, including debarment by another governmental entity for any cause listed in this Article.
 - (6) For violations of the city's Code of Ethics.

§ 5-68. Decision to debar or suspend.

The Purchasing Agent shall issue a written decision to debar or suspend. The decision shall state the reasons for the action taken and inform the debarred or suspended person involved of their rights concerning an administrative appeal and review of this decision by the City Manager.

§ 5-69. Notice of decision.

A copy of the decision required by § 5-67, Decision to debar or suspend, shall be mailed or otherwise furnished immediately to the debarred or suspended person. This notice shall include the reasons for the decision and an explanation of their rights to appeal according to § 5-67.

§ 5-70. Finality of decision.

- A. A decision under § 5-68, Decision to debar or suspend, shall be final and conclusive, unless the debarred or suspended person, within ten (10) days after receipt of the decision, files a written appeal to the City Manager.
- B. Should an appeal be filed with the City Manager as authorized in § 5-67, the City Manager shall and within thirty (30) days following the filing of the appeal, conduct an administrative hearing to gather facts and circumstances concerning the decision of the Purchasing Agent to debar or suspend a contractor or vendor. Present for this hearing shall be the city's Purchasing Agent and the contractor or vendor and/or a representative of the contractor or vendor to represent their interests in the hearing. Within ten (10) days after the date of the hearing, the City Manager shall issue his decision, in writing, to all parties to the hearing. The City Manager's decision shall be final.

§ 5-71. Bid protests.

- A. Right to protest. Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the City Manager. Protestors must first seek resolution of their complaints with the Purchasing Agent. A protest with respect to an invitation for bids or request for proposals shall be submitted in writing prior to the opening of bids or the closing day of proposals, unless the aggrieved person did not know and should not have known of the facts giving rise to such protest prior to bid opening or the closing date for proposals. In that event, the protest shall be submitted within three (3) calendar days after such aggrieved person knows or should have known of the facts giving rise thereto.
- B. Stay of procurement during protests. In the event of a timely protest under Subsection A of this section, the Purchasing Agent shall not proceed further with the solicitation or award of the contract until the City Manager makes a determination in the record that the award of a contract without delay is necessary to protect substantial interests of the city.

§ 5-72. Contract claims.

- A. Decision of the Purchasing Agent. All claims by a contractor against the city relating to a contract, except bid protests, shall be submitted in writing to the Purchasing Agent for a decision. The contractor may request a conference with the Purchasing Agent on the claim. Claims include, without limitation, disputes arising under a contract and those based upon breach of contract, mistake, misrepresentation or other cause for contract modification or rescission.

- B. Notice to the contractor of the Purchasing Agent's decision. The decision of the Purchasing Agent shall be promptly issued in writing and shall be immediately mailed or otherwise furnished to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of its appeal rights under Subsection C of this section.
- C. Finality of Purchasing Agent's decision; contractor's right to appeal. The Purchasing Agent's decision shall be final and conclusive unless, within three (3) calendar days from the date of the receipt of the decision, the contractor mails or otherwise delivers a written notice to the City Manager or commences an action in a court of jurisdiction.
- D. Failure to render timely decision. If the Purchasing Agent does not issue a written decision, within five (5) calendar days after written request for a final decision or within such longer period as may be agreed upon between the parties, then the aggrieved party may proceed as if an adverse decision had been received.

§ 5-73. Authority of Purchasing Agent to settle bid protests and contract claims.

The Purchasing Agent is authorized to settle any protest regarding the solicitation or award of a city contract or any claim arising out of the performance of a city contract, prior to an appeal to the City Manager or the commencement of an action in a court of competent jurisdiction; provided, however, that any settlement requiring the expenditure of any city funds shall require the prior written approval of the City Manager.

§ 5-74. Remedies for solicitations or awards in violation of law.

- A. Prior to bid opening or closing date for receipt of proposals. If prior to the bid opening or the closing date for receipt of proposals, the Purchasing Agent, after consultation with the City Solicitor, determines that a solicitation is in violation of federal, state or municipal law, then the solicitation shall be canceled or revised to comply with applicable law.
- B. Prior to award. If after bid opening or the closing date for receipt of proposals, the Purchasing Agent, after consultation with the City Solicitor, determines that a solicitation or a proposed award of a contract is in violation of federal, state or municipal law, then the solicitation or proposed award shall be canceled.
- C. After award. If, after an award, the Purchasing Agent, after consultation with the City Solicitor, determines that a solicitation or award of a contract was in violation of applicable law, then:
 - (1) If the person awarded the contract has not acted fraudulently or in bad faith:
 - (a) The contract may be ratified and affirmed, provided that it is determined that doing so is in the best interests of the city; or
 - (b) If the person awarded the contract has acted fraudulently or in bad faith the contract may be declared null and void or voidable, if such action is in the best interests of the city.

§ 5-75. Cooperative purchasing.

Nothing in this Article shall prohibit the Purchasing Agent from purchasing from valid state, municipal or federal purchasing contracts or participating in cooperative purchasing with any of the same.

§ 5-76. Gratuities and kickbacks.

- A. **Gratuities.** It shall be unlawful and unethical for any person to offer, give or agree to give any city employee or former city employee or for a city employee or former city employee to solicit, demand or accept from another person a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation or preparation of any part of a program requirement or purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy or other particular matter, pertaining to any program requirement or a contract or subcontract or to any solicitation or proposal therefor.
- B. **Kickbacks.** It shall be unlawful and unethical for any payment, gratuity or offer of employment to be made by or on behalf of a subcontractor under a contract to the prime contractor or higher tier subcontractor or any person associated therewith as an inducement for the award of a subcontract or order.
- C. **Contract clause.** The prohibition against gratuities and kickbacks shall be conspicuously set forth in every contract and solicitation therefor.

§ 5-77. Prohibition against contingent fees.

It shall be a violation of this Article for a person to be retained or to retain a person to solicit or secure a city contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, except for retention of bona fide established commercial selling agency for the purpose of securing business.

§ 5-78. Contemporaneous employment prohibited.

It shall be a violation of this Article for any city employee to become or be, while a city employee, an employee of any person or firm contracting with the city by whom the employee is employed or to bid on or receive a contract from the city.

§ 5-79. Use of confidential information.

It shall be a violation of this Article for any employee or former employee knowingly to use confidential information for actual or anticipated personal gains or for the actual or anticipated personal gain of any other person.

§ 5-80. Sanctions.

- A. Employees. The City Manager may impose any one (1) or more of the following sanctions on a city employee for violations of the ethical standards in this Article:
- (1) Oral or written warnings or reprimands;
 - (2) Suspension with or without pay for specified periods of time; or
 - (3) Termination of employment.
- B. Nonemployees. The City Manager may impose any one (1) or more of the following sanctions on a nonemployee for violations of the ethical standards:
- (1) Written warnings or reprimands;
 - (2) Termination of contracts; or
 - (3) Debarment or suspension as provided in § 5-67, Authority to debar or suspend.

§ 5-81. Sale of city-owned personal property.

- A. Whenever any personal property, owned by the city and in the possession of its departments is determined to be beyond its useful life, has been replaced or is to be replaced or is in a condition that it is no longer of use to the departmental operation, then the head of the department shall certify, in writing, to the Purchasing Agent that certain itemized property is no longer of service to the city and may be sold, then, and only then, may the property be disposed of by the Purchasing Agent.
- B. Once the written certification has been received by the Purchasing Agent, the Purchasing Agent shall formulate a list of property to be disposed of and forward this list to the City Manager. The City Manager shall then approve and sign the list authorizing its disposition.
- C. The sale of personal property shall occur according to the following procedure:
- (1) All sales shall be conducted by sealed competitive bidding.
 - (2) The Purchasing Agent shall advertise the sale of this property, in a newspaper of general circulation, no less than ten (10) days prior to the date when sealed bids are due.
 - (3) The advertisement shall describe the property in a manner that adequately describes the property and the date, time and location when the bids are due and to be opened.
 - (4) The city shall be the final authority in determining the bid in the best interest of the city and shall reserve the right to reject any and all bids.
 - (5) No sale of such property shall be made where other provisions are made for the disposition of such property under law or ordinance.
 - (6) Nothing in this section shall prohibit the city from disposing of personal property by direct sale or gift to another political subdivision, nonprofit or charitable organization or to deliver personal property to the semiannual state auction for sale, provided that the property so disposed shall have been identified according Subsections A and B.