CITY OF MEMPHIS

PURCHASING POLICIES and PROCEDURES

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Last Revised May 2016

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I. INTRODUCTION AND GENERAL INFORMATION

The purchasing department supports the operations of the City of Memphis by functioning as the central purchasing unit (i) for the procurement of goods, materials, equipment and services (including construction) required by the City; and (ii) for the disposal of abandoned and surplus personal property owned by the City.

1.1 Purpose of this Manual. The purpose of this manual is to outline and prescribe the policies and procedures in which goods or services must be purchased or disposed of by the City, while ensuring the fair and equitable treatment of vendors who deal with the procurement system of the City. The policies and procedures herein are based on the rules and regulations amended or adopted, and promulgated pursuant to the laws of the City of Memphis and the applicable laws of the State of Tennessee.[1] The provisions of this Manual shall replace any previous purchasing policies and procedures. Any part of this manual which may conflict with applicable law shall be null and void. If any portion of this Manual is, for any reason, held invalid by a court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions of this Manual.

1.2 Application of this Manual.

A. Regulations and procedures set forth in this manual apply to the expenditure of all federal, state and locally appropriated funds for the procurement of any goods, materials, equipment, construction and services by the City. All purchases must be for the use or benefit of the City, and the division is responsible for determining that such items to be purchased are necessary by the City.

B. Regulations and procedures set forth in this manual apply to the City's disposition of abandoned and surplus property, excluding real property.

C. Regulations and procedures set forth in this manual do <u>not</u> apply to or govern the purchase, lease or sale of any real property by or from the City.

This manual may be accessed on the city's internet. As revisions or additions to this manual become necessary, the purchasing department will post such revisions on the internet, and it is the responsibility of the divisions to maintain the manual in an up-to-date fashion. Whenever a provision appears to require the division director or other officer to do some act or perform some duty, it shall be construed to authorize the director or officer to designate, delegate and authorize subordinates to perform the required act or perform the duty, unless the terms of the provision or section specify otherwise. If there are any questions concerning this manual, please contact the purchasing department.

[1] Ordinance #4473, codified at Code of Ord. § 2-277(c)(2), authorizes the purchasing department to adopt purchasing procedures.

An employee's failure to comply with the policies and procedures in this manual may result in disciplinary action(s), up to and including termination, in accordance with the City of Memphis Personnel Manual Policies and Procedures.

II. PURCHASING DEPARTMENT AND RELATIONS WITH DIVISIONS

2.1 Mission. The mission of the purchasing department is to provide the most cost-effective method of procuring goods, materials, construction and services for the City of Memphis while adhering to the procurement laws of the City of Memphis and the State of Tennessee, if applicable.

2.2 Objective. The overall objective of the purchasing department is to serve as the City's centralized purchasing unit through which the City and its divisions may obtain needed goods or services (including construction), via competitive concerns, at competitive costs in a timely and cost-effective manner.

2.3 Purchasing Department. The purchasing department is a department within the City's Finance Division, and is located in City Hall; 125 North Main, Room 354; Memphis, Tennessee 38103.

2.4 Responsibilities.

2.4.1 Purchasing Department. The Purchasing Agent oversees the purchasing department, which functions as a service agency for all other divisions of the City. Except as specified in this Manual or otherwise authorized by the Purchasing Agent, the purchasing department will purchase, on a competitive basis, all goods or services (including construction) on behalf of each division of the City.[2] The purchasing department must ensure procurements are conducted with integrity, fairness and openness and in accordance with local and applicable state and federal laws. The purchasing department's responsibilities include, but are not limited to, the following:

- Receiving and processing all requisitions for purchases;
- Ensuring funds are available for the purchase;
- Collaborating with divisions in meeting their needs for purchasing goods, supplies, services and construction with the least delay;
- Maintaining current lists of vendors and contractors seeking to do business with the City;
- Preparing and advertising solicitations and maintaining bid files;
- Overseeing a weekly bid and contract session for purchases over $50,000 and securing all bids in connection therewith;
- Soliciting bids and making awards for purchases;
- Handling complaints, claims, adjustments, etc. pertaining to procurement activities;
- Preparing the resulting contract for goods or services procured competitively;

[2] *See* City Charter § 222.

- Encumbering funds, amendments and change orders to all City contracts;
- Disposing of all City personal property that has been condemned by the division;
- Conducting public auctions to dispose of abandoned or stolen merchandise or motor vehicles which have been recovered by the Memphis Police Department and remains unclaimed;
- Keeping accurate records, which must include but not be limited to the time, location, price bid and price paid, of items sold at public auctions; and
- Conducting or participating in procurement education and training programs for City employees.

2.4.2 Division. The division's purchasing responsibilities are to:

- Ensure the goods and/or services are necessary by the City;
- Allow ample time for the purchasing department to process requisitions and issue purchase orders or contracts, while permitting sufficient time for the contractor to supply the necessary goods or services;
- Prepare and submit requisitions detailing the complete and accurate specifications of the goods or services to be purchased;
- Plan purchases in advance in an effort to avoid emergencies;
- Inspect goods upon receipt and note any discrepancies in types, quantities, condition or quality of goods, etc.;
- Advise the Purchasing Agent, in writing, of any nonconforming/defective goods or dissatisfaction with a contractor's performance;
- Monitor contracts and the contractor's performance thereunder;
- Review inventory list to determine whether equipment is missing or deemed surplus; and
- Condemn personal property of the City and advise the purchasing department of such surplus property.

III. DEFINITIONS

The terms defined in this Article have the meanings set forth below, whenever they appear in this manual:

1. *Addendum* – see “Amendment”.
2. *Agreement* means the bargain of the parties in fact, as found in their language or by implication from other circumstances.
3. *Amendment* means a written instrument used to modify, add to or alter an existing document (e.g., contract, Request for Quotes, Request for Proposals, etc.). "Amendment" and "modification" may be used interchangeably in this manual.
4. *Best Bid* means the evaluation of the overall bid considering the quality, price, various elements of the required goods or services, and the responsiveness and responsibility of the bidder.
5. *Bid* means a vendor’s quote/offer to provide specific goods or services, at specified prices, in response to the City's competitive solicitation; and if

accepted by the City, binds the bidder to perform in accordance with the resulting contract.

6. *Bidder* means any person or business responding to the solicitation, thereby offering to enter into a contract with the City based on the terms and conditions of the solicitation. "Bidder", "Proposer", and "Offeror" are used interchangeably in this manual.
7. *Bid Bond* means a corporate surety bond submitted with a bid, in which a third party agrees to be liable to pay a certain amount of money in the event the bidder, if his/her bid is accepted, fails to enter into a contract with the City pursuant to the submitted bid.
8. *Change Order* means a written order signed by an authorized representative of the City directing the contractor to make changes, which the contract authorizes the City to order without the contractor's consent.
9. *Check Request* means a procurement document, completed by the division, requesting that the Accounts Payable department pay for goods or services received by the City.
10. *City* means the City of Memphis, Tennessee.
11. *Competition* means the effort of two or more vendors to secure the business of a purchaser by the offer of the most favorable terms as to price, quality, promptness of delivery, and/or service.
12. *Competitive Sealed Bidding* means a method of procurement that includes the issuance of a RFQ, public advertisement of the RFQ, public bid opening and announcement of all bids received, evaluation of the bids based on criteria specified in the RFQ, and award of the contract to the lowest and best bidder.
13. *Competitive Sealed Proposal* means a method of procurement that includes the issuance of a RFP, public advertisement of the RFP, evaluation of the proposals based on criteria specified in the RFP, and award of the contract to the bidder offering the best value to the City. Discussions or negotiations may be conducted with responsible offerors in accordance with Section 4.2.6.
14. *Construction* means the process of building, altering, repairing, improving, or demolishing any public infrastructure facility, including any public structure, public building, or other public improvements of any kind to real property. It does not include the routine operation, routine repair, or routine maintenance of any existing public infrastructure facility, including structures, buildings, or real property.
15. *Contract* means all types of enforceable agreements, regardless of what they may be called, consummating the total legal obligation of the parties that results from the parties' agreement. For purposes of this manual, all agreements should be considered a contract, no matter what other name it may be given (e.g., MOU, Letter of Engagement, etc.). Throughout this manual, use of the term "contract" may be inclusive of purchase order.
16. *Contract Modification* means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract, accomplished by mutual action of the parties to the contract.
17. *Contractor* means any person having a contract or purchase order to perform services or deliver goods to the City.
18. *Data* means recorded information, regardless of form or characteristic.

19. *Debarment* means the removal of a supplier, for cause, from consideration of a contract award by the City for a period not to exceed two (2) years.
20. *Defect* means nonconformance of a good or service with specified requirements of the City.
21. *Delivery* means a voluntary transfer of possession.
22. *Designee* means a duly authorized representative of a person holding a superior position.
23. *Division* means a division of City government.
24. *Electronic* means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or any other similar technology.
25. *Established Catalogue Price* means the price included in a catalogue, price list, schedule, or other form that: (a) is regularly maintained by a manufacturer or contractor; (b) is either published or otherwise available for inspection by customers; and (c) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the suppliers or services involved.
26. *Formal Bid* means a bid that must be forwarded in a sealed envelope or other means, in conformance with the format prescribed in the solicitation, to be publicly opened and read at a specified time. See "Sealed Bid."
27. *Goods* mean all property, excluding real property or an interest in real property, including but not limited to supplies, equipment, and materials.
28. *Governmental Entity* means any department, commission, council, board, bureau, committee, authority, body, political subdivision or other office within the executive, legislative, or judicial branch of the United States, or a state of the United States.
29. *Grant* means the furnishing of assistance, whether financial or otherwise, to any vendor to support a program authorized by law. It does not include an award whose primary purpose is to procure an end product, whether in the form of goods, services, or construction.
30. *Informal Bid* means an unsealed, competitive offer conveyed by letter, telephone, fax or other means, in accordance with the format prescribed in the solicitation. Informal bids are not publicly opened or read aloud.
31. *Informality* means a minor/immaterial defect or variation of a bid or proposal from the exact requirements of the solicitation, which does not affect the price, quality, quantity or delivery schedule.
32. *Inspection* means a critical examination and/or testing of items to determine whether they (i) conform to the applicable specifications and (ii) they have been received in the proper quantity and condition.
33. *Invoice* means a written request for payment for goods delivered or services rendered under the contract.
34. *Lump sum* means a single price for a group of items without a breakdown of individual values.
35. *May* denotes permissive; used when a party is not required to undertake an obligation but is authorized to exercise a right or privilege.
36. *Mayor* means the Mayor of the City of Memphis.
37. *Net Price* means the price after all discounts, rebates, etc. have been allowed.
38. *No Bid* means a response to the solicitation stating the vendor does not wish to submit a bid.

39. *Non-responsive* means that a bid or proposal does not conform to the essential requirements of the solicitation. Such bid or proposal will not be considered for contract award. The term is used interchangeably in this manual with "nonconforming" or "unresponsive."
40. *Offeror* see "Bidder"
41. *Payment Bond* means a legal document in which a third party guarantees the contractor will pay for the labor and materials used in the work the contractor is obligated to perform on behalf of the City.
42. *Performance Bond* means a legal document in which a third party guarantees the contractor will faithfully perform the work in conformity with the plans, specifications, and conditions of the contract.
43. *Procurement* means buying, purchasing, renting, leasing, or otherwise acquiring any goods, services or construction. It also includes all functions that pertain to obtaining any goods, service, or construction, including a description of the requirements, selection and solicitation of sources, preparation and award of the contract, and all phases of contract administration.
44. *Proposal* means an offer made to a Request for Proposals (RFP) as a basis for negotiations for entering into a contract.
45. *Proposer* see "Bidder."
46. *Public Advertisement* means the distribution or dissemination of information to interested parties using methods that are reasonably available. Such methods will often include, but not be limited to, publication in newspapers of general circulation, electronic or paper mailing lists, and/or web site(s) designated by the City and maintained for that purpose.
47. *Purchase Order* means a procurement document issued by the Purchasing Department, in accordance with purchasing policies and procedures, to establish an agreement for the purchase of similar goods or services during a period of twelve (12) months or less, at a cost less than $50,000.
48. *Purchasing Agent* means the person holding the position created in the city charter to ensure procurements are in accordance with local and applicable state laws, rules and regulations.
49. *Record* means information that is inscribed on a tangible document or stored in an electronic or other medium and is retrievable for later reference.
50. *Request for Proposals (RFP)* means a solicitation document, whether attached or incorporated by reference, utilized for soliciting proposals for specified services.
51. *Request for Quotes (RFQ)* means a solicitation document, whether attached or incorporated by reference, utilized for soliciting bids/quotes for specified goods or services.
52. *Requisition* means a document, in a format prescribed by the purchasing department, used by the division to request that the purchasing department procure necessary goods or services on behalf of the division.
53. *Responsible Bidder* means a vendor who has, in all respects, the capacity, resources, competence, and qualifications to fully perform the contract requirements, and the reliability and integrity that will assure good faith performance of the contract in a timely manner.
54. *Responsive Bidder* means a vendor who has submitted a bid that conforms in all material respects to the solicitation.

55. *Sealed Bid* means a bid that must be forwarded to the purchasing department in a sealed envelope or other means, in conformance with the prescribed format, to be opened at a specified time. See "Formal Bid."
56. *Services* mean the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports that are merely incidental to the required performance. This term does not include employment agreements or collective bargaining agreements.
57. *Shall* means mandatory. This term is used interchangeably with "must" in this manual.
58. *Signature* means a manual or electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.
59. *Solicitation* means a document used to notify vendors that the City wishes to receive bids or offers to procure certain goods, services, construction, etc. Solicitation includes Request for Quotes (RFQ), Request for Proposals (RFP), Requests for Qualifications, or any other document issued by the City for the purpose of soliciting bids or proposals to perform a City contract.
60. *Specifications* mean any description of the physical, functional, or performance characteristics, or of the nature of goods, services or construction to be purchased. It may include, as appropriate, a description of any requirement for inspecting, testing or preparing the goods, services or construction for delivery.
61. *Subcontractor* means a vendor that furnishes goods or services to a contractor.
62. *Supplier* means an individual, corporation, business, trust, estate, partnership, limited liability company, association, joint venture, governmental entity, public corporation or any other legal or commercial entity that is a prospective bidder or offeror. This term is used interchangeably with “vendor” in this manual.
63. *Suspension* means the temporary removal of a supplier from consideration of a contract award by the City for a temporary period of up to one (1) year where there is a possible cause for debarment.
64. *Vendor* see "Supplier."
65. *Written* or *In Writing* means the product of any method of forming characters on paper, other materials, or viewable screens, which can be read, retrieved, and reproduced, including information that is electronically transmitted and stored.

IV. PROCUREMENT METHOD

Any vendor desiring to conduct business with the City must be registered in accordance with Section 7.2 herein. Depending upon the circumstances, goods, services or construction required by the City must be procured by one of the following methods:

4.1 Small Purchases. Purchases costing up to five thousand dollars ($5,000), during a fiscal year, are considered small-dollar purchases. The division, upon the division director's approval, may negotiate the purchase of such necessary goods or services directly with the vendor.[3] However, the purchase cannot be artificially divided to avoid competitive procurement requirements pursuant to this manual. The vendor

[3] *See* Code of Ord. § 2-277(c)(4).

must agree to furnish the goods or services on credit, without a purchase order or contract, and invoice the City after successful completion.

This purchase authority should not be used for purchases of a recurring nature, and purchases or invoices should not be split. A *split invoice* results when a total purchase of more than $5,000 is divided into more than one invoice for the same or similar goods or services from the same vendor (or from multiple vendors) to avoid the necessity of obtaining a purchase order or contract. The City will not assume responsibility for split invoices. When purchases are foreseen to be repetitive, to the extent that total purchases of a specific good or service will exceed $5,000 within a fiscal year, the division must consult the purchasing department.

Notwithstanding this small purchasing authority, the purchasing department recommends that the division solicit informal quotes to ensure the receipt of favorable prices for such goods or services.

4.2 Competitive Procurements.[4] Unless otherwise authorized herein or by law, the Purchasing Agent must procure all necessary supplies, materials, equipment and services exceeding $5,000 within a fiscal year. The purchasing department will competitively procure such goods or services pursuant to this section. All bidders must be given the opportunity to compete based upon the same specifications. At minimum, all City solicitations must comply with the requirements set forth in Section 7.5 ("Solicitation Requirements"), and the award of such purchases will be made pursuant to Section 10.3 ("Award of Purchase Order or Contract"). Divisions should anticipate their needs and allow ample time for the purchasing department to process requisitions, issue a solicitation, and issue a properly signed purchase order or fully executed contract, while allowing enough time for the successful bidder to perform pursuant to the purchase order or contract. Prior to requesting that the purchasing department procure goods or services, the division must ensure that such goods or services are necessary and verify that funds are available for such purchase.

4.2.1 <u>Competitive Bidding.</u> Competitive bidding is the preferred method of competitive procurement for goods, services or construction on behalf of the City. A Request for Quotes (RFQ) is used to initiate a competitive bidding procurement and is used when (i) the goods/services desired to be purchased can be completely and accurately described; and (ii) price and other price-related factors are the primary evaluation criteria. Please note the method to competitively procure construction services is specified in subsection B below.

4.2.1.1 *Purchases Valued Less Than $50,000 (excluding construction services).* Such purchases must be competitively procured. The division must submit a requisition, specifying the goods, services or construction to be procured, to the purchasing department. The requisition must comply with Section 7.3 herein. After receipt of the

[4] *See* City Charter § 222. Pursuant to Referendum Ord. No. 4434, Ord. No. 4473 (as codified in Code of Ord. § 2-277(c)) amended City Charter § 222 by increasing the threshold amount for purchases.

requisition and any accompanying documents, the purchasing department will competitively procure said goods and/or services in accordance with the following procedures:

A. Purchases costing between $5,000.01 and $24,999 (excluding construction services).

   i. The purchasing department will review and revise the specifications, if necessary, to ensure fair and open competition;
   ii. The purchasing department will solicit bids for the necessary goods and/or services.
   iii. The purchasing department will verify that sufficient funds are available;
   iv. The purchasing department may issue a properly signed purchase order or contract to consummate the purchase[5]; and;

B. Purchases exceeding $25,000 but costing less than $50,000. Such purchases must be procured in accordance with the bid procedure of the City's Purchasing Department.[6] The purchasing department will solicit written, informal bids for the necessary goods and/or services. The process to procure such goods or services is as follows:

   i. The purchasing department will review and revise the specifications, if necessary, to ensure fair and open competition;
   ii. The purchasing department will prepare a solicitation (i.e., RFQ), including bid documents, specifications and other necessary information;
   iii. The solicitation will be distributed to interested vendors in accordance with Section 7.5;
   iv. The purchasing department will receive the bids until the specified submission deadline and secure them until the scheduled bid opening date and time;
   v. The purchasing department will open the bids and conduct an initial review of each bid;
   vi. The purchasing department will then forward the bids to the division for evaluation and award recommendation;
   vii. The division will evaluate the bids, in accordance with Section 10.1, to determine the “lowest and best” bid;
   viii. The division must submit an award recommendation to the purchasing department in accordance with Section 10.3. Any award recommendation to one other than the lowest

[5] *See* Code of Ord. §2-277(c)(3).
[6] *See* Code Ord. §2-277(c)(2).

bidder must be justified, in writing, by the division. The phrase "does not meet specifications" is not sufficient justification;

ix. The purchasing department will publicly announce the award in accordance with Section 10.4;

x. The purchasing department will verify that sufficient funds are available for the purchase[7] and, unless a bid protest has been submitted, approve the award recommendation; and

xi. The purchasing department may issue a properly signed purchase order to the successful bidder for the purchase of the goods and/or services, in accordance with Section 12.1.

Note: The contract price, not the division's estimate, determines the procurement method to be used. If the lowest and best bid submitted in response to the solicitation pursuant to subsections (a) or (b) above equals or exceeds $50,000, all bids will be rejected, and the purchasing department will cancel the solicitation and procure the goods or services in accordance with the following section titled "Purchases costing $50,000 or more."

4.2.1.2 *Purchases costing $50,000 or more (excluding construction services):* Goods or services costing $50,000 or more must be obtained via written formal sealed bids, and such purchase must be consummated by a written contract signed by the Mayor.[8] The purchasing department will procure such goods and/or services in accordance with the following procedures:

i. After verifying that funds are available for the purchase, the division must submit the specifications to the City's Contract Compliance Officer, who will review the specifications to determine whether any minority or women-owned participation goal is required;

ii. Upon review and approval by the Contract Compliance Officer, the division must submit the requisition (in accordance with Section 7.3); specifications (in accordance with Section 7.4); written approval of the Contract Compliance Officer; and other related bid information (e.g., signature page, pricing page, etc.) to the purchasing department;

iii. The purchasing department will review the documentation and, upon approval, prepare a solicitation, (i.e., RFQ);

iv. The purchasing department will publicly advertise the solicitation in accordance with Section 7.13;

[7] *See* City Charter § 341.
[8] *See* Code of Ord. §2-277(c)(5).

v. The solicitation will be distributed to interested vendors in accordance with Section 7.5;
vi. The purchasing department will receive the sealed bids until 2:00 p.m. on the Friday specified in the RFQ and secure them until the date and time scheduled for the Bid and Contract session. At the Bid and Contract session, the purchasing department will publicly open the sealed bids in accordance with Section 9.7;
vii. After the Bid and Contract session, the purchasing department will forward the bids to the division for bid evaluation and award recommendation;
viii. The division will evaluate the bids, in accordance with Section 10.1, to determine the "lowest and best" bid;
ix. The division will submit an award recommendation to the purchasing department in accordance with Section 10.3. Any award recommendation to one other than the lowest bidder must be justified in writing by the Division. The phrase "does not meet specifications" is not sufficient justification;
x. The purchasing department will publicly announce the intent to award in accordance with Section 10.4;
xi. The purchasing department will verify that sufficient funds are available for the purchase[9] and; unless a bid protest has been submitted, approve the award recommendation; and
xii. The purchasing department will prepare and forward the contract to the successful bidder for signatory approval. At the City's discretion, the contractor will manually or electronically sign the contract;

Note: For those projects in which architectural engineering firms have been retained to administer the project on behalf of the City, the consultant will prepare and forward the contracts to the contractor for signatory approval.

xiii. The successful bidder or consultant will return the signed contract and any bond, insurance documentation, and other required information to the purchasing department for review and processing;
xiv. The purchasing department will forward the contract to the law division for review and approval as to form. Upon approval, the law division will forward the contract to the Chief Administrative Officer ("CAO") for review and execution by the CAO and the Mayor; and
xv. Upon full execution, the fully signed contract will be returned to the purchasing department. The purchasing

[9] *See* City Charter § 341.

department will then attest to the execution of the contract and forward an original, or a copy of the fully executed contract, to the contractor and the division. The original contract will be retained by the City in accordance with Section 7.22.

4.2.2 <u>Construction Services/Projects.</u> All requests for construction projects must be coordinated with the City Engineer; and all construction services will be procured by the competitive sealed bidding method. The City Engineer is responsible for the preparation and oversight of plans, specifications and estimates on all construction projects where the City and agencies of the City are a contracting party.[10] Any award recommendation for a construction project must be approved by the City Engineer.

For purposes of this subsection, a construction contract is a contract between the City (and/or agencies of the City) and a contractor for the construction, repair, demolition, improvement, etc. of City buildings, parks, streets, and other infrastructures.

4.2.2.1 Procurement Process:

A. *Construction projects costing between $5,000.01 and $9,999.* The division must submit the requisition, specifications and other necessary information to the purchasing department and adhere to the competitive sealed bidding procedure specified in Section 4.2.1.1B, titled "Purchases exceeding $25,000 but less than $50,000." Such purchase may be consummated via a purchase order.

<u>Note</u>: Requisitions will not be accepted for (i) construction projects requiring a bond; or (ii) construction projects with an estimated cost of more than ten thousand dollars ($10,000).

B. *Construction projects costing $10,000 or more.* Building Design and Construction ("BD&C") must submit a Request for Legal Notice to the purchasing department. The purchasing department will publicly advertise such construction project and proceed with the normal competitive sealed bidding process specified in Section 4.2.1.2 titled "Purchases costing $50,000 or more." The purchase will be consummated via a contract.

<u>Note</u>: The plans and specifications for construction projects will be retained and distributed to vendors by Public Works, Housing and Community Development, Building Design and Construction or the architectural and engineering firm retained by the City for consulting work. The City may charge a fee for copies of the plans and specifications.

[10] *See* Code of Ord. § 2-222.

4.2.2.2 Prohibition of Certain Purchases/Services from Architects and Engineers:

i. Any person or firm which has been engaged as an architect or engineer for a construction project, under a separate contract, is not eligible to bid or submit a proposal for construction of the same project;
ii. No building materials, supplies or equipment for any building or structure constructed by or for the City shall be sold by, or purchased from, any contractor providing architectural engineering services for such structure or from any partnership, association, or corporation in which such architect or engineer has a personal interest;
iii. No building materials, supplies or equipment for any building or structure constructed by or for the City shall be sold by, or purchased from, any vendor who has provided, or is currently providing, design services specifying a sole source for such materials, supplies, or equipment to be used in building a structure to such contractor in which such vendor has a personal interest.

4.2.2.3 License Requirements: Contractors and electrical, plumbing, and HVAC subcontractors who bid on, or engage in, any construction work where the amount of the contract costs $25,000 or more must be licensed by the state of Tennessee pursuant to the Contractors Licensing Act of 1994.[11] The vendor must provide evidence of a license in the appropriate classification before the City will consider its bid <u>or proposal</u> for an award. The terms of the Tennessee Contractors' License Act, codified at Tenn. Code Ann. § 62-6-101 et seq., are incorporated herein and into any applicable solicitation.

4.2.2.4 Envelope Requirements[12]: When the vendor's total bid is for $25,000 or more, the contractor's name, license number, license expiration date, and license classification of the contractors applying to bid for the prime contract and for the (masonry over $100,000), electrical, plumbing, heating, ventilation, and air conditioning contracts must appear on the outside of the envelope containing the bid. For each vertical closed loop geothermal heating and cooling project, the company's name, Tennessee department of environment and conservation license number, classification (G, L, or G,L) and expiration date must appear on the outside of the envelope containing the bid. Failure of a bidder to comply with this subsection will render such bid or proposal nonresponsive, and the envelope containing such bid or proposal will not be opened or considered.

[11] *See* Tenn. Code Ann. § 62-6-101 et seq.
[12] *See* Tenn. Code Ann. § 62-6-119(b).

If the vendor's total bid is for less than $25,000, at minimum, the bidder's name and the phrase "Exempt from Licensing Requirement" must appear on the outside of the envelope. Upon opening the envelope, if such bid equals or exceeds $25,000, the bid will be deemed nonresponsive and will not be considered for contract award. Prior to making an award recommendation, the division will verify the accuracy and completeness of the bidder's information.[13]

4.2.2.5 Retainage[14]: In any construction contract that provides for progress payments in installments based upon an estimated percentage of completion, the City may retain a percentage of the contract amount, not to exceed 5% or the maximum amount permitted by state law, whichever is more, to assure the contractor's faithful performance of the contract. For any contract costing $500,000 or more, such retained funds must be kept in an interest-bearing account with a third party and be paid, together with all interest, to the contractor within ninety (90) days after completion of the work or within ninety (90) days after substantial completion of the project for work completed, whichever occurs first. "Work completed" means the completion of the scope of work and all terms and conditions pursuant to the contract.

4.2.2.6 Additional Work: Whenever it becomes necessary for a contractor to perform extra work, in the completion of any construction or improvement project that was awarded competitively and costs more than $50,000, the City Engineer, after approval of the City Council, may authorize an expenditure for such additional work without the necessity of competition for such additional work; provided the cost of such additional work does not exceed 10% of the original contract amount.[15]

4.2.2.7 Payment Bond: A bond, guaranteeing the contractor will pay for all labor and materials used by such contractor, or any immediate or remote subcontractor under the contractor, in an amount not less than 25% of the contract amount, is required for any public work project in excess of $100,000 on behalf of the City.[16] For services, The City may, at its discretion, require a payment bond in an amount less than 100% of the contract amount.

A bid bond is to be required on all construction projects with an estimated cost of $100,000 or more. In addition, the bidder must post a bid bond equal to 5% of the value of the proposed services and the value of the work to be managed or may, at the time of contracting, provide payment and performance bonds in amounts equal to the combined

[13] *See* Tenn. Code Ann. § 62-6-119.
[14] *See* Tenn. Code Ann. § 66-34-103 et seq.
[15] *See* City Charter § 838.
[16] *See* Tenn. Code Ann. § 12-4-201(a).

monetary value of the construction manager's services and the value of the work to be managed.[17]

4.2.2.8 Drug-free Workplace: The City operates a drug-free workplace. Pursuant to state law, any private company or corporation with five or more employees, who provides construction services for the City, must submit as part of the bid/proposal an affidavit stating the company has a drug free workplace program that complies with state requirements.[18] Refer to the Appendix for a copy of the Drug-Free Workplace Affidavit.

4.2.2.9 Nondiscrimination: The bidder must execute and submit as part of the bid/proposal a Certificate of Nondiscrimination, in a format specified by the City, agreeing that, among other things, if awarded the contract, the bidder will not discriminate against any subcontractor, employee, or applicant for employment on the grounds of race, color, national origin or sex. Failure to comply with this provision will be cause for the bidder's bid or proposal to be rejected as nonconforming.

4.2.2.10 Liquidated Damages[19]: All contracts with the City for any public works improvement must contain a liquidated damages clause, in which damages for each day's neglect to finish the work according to the contract will be the amount as prescribed in the contract. The liquidated damages sum must be deducted from the contract price before the contractor is paid.

4.2.2.11 Wage Requirements/Prevailing Wage: Contractors (including subcontractors) awarded a City-funded contract for the construction of, improvement, enlargement, alteration or replacement of a public work or any project involving city funds in excess of $500,000 must pay laborers, workmen, mechanics or other listed classifications (performing work on said project) a minimum local prevailing wage, which will be determined in accordance with the prevailing wage ordinance.[20] The successful bidder must comply with the requirements specified in the prevailing wage ordinance, including but not limited to the reporting requirements. The Prevailing Wage Ordinance, and any amendments thereto, can be accessed on the City's website (www.memphistn.gov). Where applicable, the prevailing wage ordinance is incorporated into any City solicitation and any resulting contract. Failure to apply the requirements of the prevailing wage ordinance to the bidder's response will result in disqualification from review and the award process.

For all federally-funded or assisted contracts in excess of $2,000 for the construction, alteration and/or repair, including painting or decorating,

[17] *See* Tenn. Code Ann. § 62-6-129.
[18] *See* Tenn. Code Ann. § 50-9-101 et seq.
[19] *See* Code of Ord. § 2-278.
[20] *See* Code of Ord. § 2-333; *see* Tenn. Code Ann. §12-4-404 for State of Tennessee prevailing wage statute.

of a public building or public work, the contractor and any subcontractors must also comply with the Davis-Bacon Act, 40 U.S.C.A. § 3141 et seq., with further guidance provided at 29 C.F.R. Part 5, which requires covered contractors and subcontractors to pay their laborers and mechanics employed or working upon the worksite at least once per week and no less than the locally prevailing wages and fringe benefits for corresponding classes or laborers and mechanics employed on similar projects in the area, as determined by the Secretary of Labor. Vendor must further comply with the terms and conditions of the Act, where applicable.

4.2.2.12 Contract Work Hours and Safety Standards Act: Pursuant to the Contract Work Hours and Safety Standards Act, 40 U.S.C.A. § 3701, with further guidance provided at 29 C.F.R. Part 5, contractors and subcontractors on federally-funded or assisted construction contracts in excess of $100,000 must pay all laborers and mechanics employed in the performance of the contract one and one-half (1½) times their basic rates of pay for all hours worked over forty (40) in a workweek. Vendor must further comply with the terms and conditions of the Act, where applicable.

4.2.2.13 Copeland Anti-Kickback Act: For all contracts with respect to the construction, prosecution, completion or repair of any public building, public work or building or work financed, in whole or in part, by loans or grants from the United States, the contractor must comply with the provisions of the Copeland Anti-kickback Act, 18 U.S.C.A. § 874, as supplemented by Department of Labor regulations (29 C.F.R. Part 3), and is prohibited from inducing, by any means, any employee to give up any part of the compensation to which he or she is entitled under his or her employment contract.

4.2.2.14 Contract Specifications: Construction contracts must refer to and adopt the plans and specifications relating to the construction and include the exact cost of the work to be performed.[21]

4.2.3 <u>Printing Services.</u> All requests to procure printing services must be submitted to the City's Printing and Mail Services Service Center on a printing invoice form consistent with the City's existing policy for printing services, as may be amended from time to time.

4.2.4 <u>Fleet Purchases.</u> All requests to procure motor vehicles must be submitted to and coordinated through the Division of General Services, Department of Fleet Management.

[21] *See* Code of Ord. § 2-223.

4.2.5 Information Technology. All requests to procure information technology-related equipment and services must be reviewed and approved by the City's Chief Information Officer.

4.2.6 Competitive Sealed Proposals (RFP).[22] Upon a determination by the division and approval by the Purchasing Agent that competitive bidding is neither practicable nor advantageous to the City, competitive sealed proposals may be used to procure the necessary goods or services. The term "practicable" denotes what may be accomplished. "Advantageous" connotes an assessment of what is in the City's best interest. RFPs are used when factors, such as qualifications, experience, or competence, are more important than price; and when (i) there is more than one solution to a purchasing issue and the competitive sealed proposals will assist in choosing the best solution; or (ii) there is no readily identifiable solution to a purchasing issue and the competitive sealed proposals will assist in identifying one (1) or more solutions. Typically, RFPs are used when there are no concrete specifications and the City is looking for the vendor to propose its own solution to satisfy the City's need as described in the solicitation.

The RFP must comply with Section 7.5 herein. The division will prepare the RFP and forward it to the purchasing department for advertisement, release, etc. The Purchasing Agent may authorize the division to advertise and release the RFP; receive proposals in response to the RFP; etc.; however, the division must comply with all requirements specified herein.

At the City's sole discretion, the vendor may be required to submit its price under separate cover.

4.2.6.1 Evaluation Criteria. Proposals submitted in response to the solicitation will be evaluated in accordance with Section 10.1.2. The proposal evaluation must be based on a total possible score of 100 points. The RFP must state the evaluation process and criteria to be used to evaluate proposals, stating the relative importance of price and other evaluation criteria, which must be clear and objective. The RFP must further describe the relative weight of each criterion, which may include technical expertise/qualifications, experience, references, financial stability, compliance with City's standard contract terms and conditions; proposed project solution/plan of services, price, etc. In addition, the solicitation must specify the breakdown of any points/weight that may be assigned within each criterion. The City's most valued criteria must be weighed more in the solicitation.

4.2.6.2 Discussions with Proposers. If provided for in the RFP, the City may conduct discussions with, or require an oral presentation from, responsible vendors who submit responsive proposals determined to be reasonably susceptible of being selected for award (e.g., the highest rated

[22] *See* Tenn. Code Ann. § 12-3-1011.

bidders). Such discussions will be conducted for the purpose of clarification to assure the City's full understanding of information contained in the vendor's proposal. In conducting such discussions with a proposer, the division's personnel must not disclose any information contained in other proposals. All proposers must be given fair and equal treatment with respect to any opportunity for discussions.[23] The discussions or oral presentation, if utilized, is intended to provide an opportunity for the vendor to clarify or elaborate on its qualifications without restating the proposal. Such discussions cannot be used to negotiate any terms of the contract. All travel expenses for the discussions or oral presentation shall be the responsibility of the vendor. Notwithstanding this subsection, the City is not obligated to conduct discussions with any proposers.

4.2.6.3 Negotiations. After evaluating the submitted proposals, the City may conduct negotiations with the apparent successful proposer, whose proposal is determined to be most advantageous to the City, taking into consideration price and evaluation factors. During the negotiations, the division and vendor may agree to alter the proposal in a way more favorable to the City; however, division personnel must not disclose information contained in other proposals. The negotiations cannot increase the cost or amend the proposal such that the apparent successful proposer no longer offers the best proposal. Upon successful negotiations, the City, by and through the responsible division, and successful proposer will enter into a negotiated contract. In the event negotiations with the apparent successful proposer fails, the City may conduct negotiations with the next best bidder.

4.2.7 Multi-Step Sealed Bidding. The multi-step sealed bidding method may be used when it is not practical to initially develop definitive specifications sufficient enough to elicit bid information. It is a two-phase process consisting of the first phase, in which the City issues a solicitation requesting submission of an unpriced technical bid based on established criteria set by the City. Once the submissions have been reviewed, the City compiles a list of responsive bidders based upon the responsiveness of the submissions. In the second phase, those bidders deemed responsive during the first phase submit price bids to be considered. This method is designed to obtain the benefit of competitive sealed bidding by awarding the contract to the lowest and best bidder, and at the same time obtaining the benefits of the competitive sealed proposals procedure through the solicitation of technical offers and by allowing the division to conduct discussions with the bidders to evaluate and determine the acceptability of such technical offers.

4.3 Purchases Exempt from Competitive Procurement. The following classifications of goods and/or services are exempt from the competitive procurement requirements herein:

[23] *See* Tenn. Code Ann. § 12-3-1011(h).

4.3.1 ***Professional Services.*** Contracts for professional services (i.e., legal services, fiscal agent, financial advisor or advisory services, educational consultant services, and similar services by professional persons or groups of high ethical standards) will not be based upon competitive bids. Professional service contracts must be awarded based on recognized competence and integrity, and in its sole discretion, the Division may interview eligible vendors to determine the capabilities of such vendors.[24] The City will enter into a negotiated contract with the professional service provider.

When attempting to enter into a professional service contract, the division must provide the Purchasing Agent with the written, proposed scope of work. The Purchasing Agent will determine whether such work qualifies as professional services and is therefore exempt from the competitive procurement requirements.

4.3.2 ***Artifacts & other Museum Pieces.***[25] **(See City Charter Section 51)**

4.3.3 ***Sole-source items.***[26] Sole-source purchases are allowed when items are unique and possess specific characteristics that can be filled by only one source.

4.3.3.1 Factors to be considered in sole-source purchases include:

a) Whether the vendor possesses exclusive and/or predominant capabilities or the items contain a patented feature providing superior utility not obtainable from similar products;
b) Whether the product or service is unique and easily established as one of a kind;
c) Whether the program requirements can be modified so that competitive products or services may be used;
d) Whether the product is available from only one source and not merchandised through wholesalers, retailers, etc.;
e) Whether items must be interchangeable or compatible with items currently used by the City; or
f) Other justifications as approved by the Purchasing Agent.

4.3.3.2 The process for procuring a sole-source purchase is:

a) The Division Director must submit a written request to the Purchasing Agent, justifying (i) the division's need(s); and (ii) why the vendor is the only source who can provide the necessary goods and/or services. In addition, the division's

[24] *See* Tenn. Code Ann. § 12-4-106.
[25] *See* City Charter § 51.
[26] Id.

justification shall be accompanied by a letter from the vendor certifying the vendor is the sole-source provider of such goods or service;
b) If the purchase is approved by the Purchasing Agent as a sole-source procurement, the division may directly negotiate terms and conditions, in the City's best interest, with the vendor;
c) The purchase may be consummated via a properly signed purchase order or fully executed contract;
d) The division must maintain appropriate documentation, including at minimum, contractor's name; amount of contract; description of the goods or services procured; and justification for the sole-source purchase. At minimum, the records must comply with the requirements specified in Section 7.22 herein.

4.3.4 ***Animal Purchases for the Zoo.***[27] **(See City Charter Section 51)**

4.3.5 ***Items Purchased for Resale (e.g., candy, T-shirts, souvenirs, or other items purchased for resale in recreational areas).***[28] **(See City Charter Section 51)**

4.3.6 ***Emergency Purchases.***[29] An emergency exists when there is an imminent threat to life, health or property and there is insufficient time for advertising in the newspapers as required by local laws and adhering to the competitive procurement requirements herein. Purchases of goods and/or services pursuant to the emergency purchase procedure are subject to the Purchasing Agent's and/or the Chief Administrative Officer's approval; however, the emergency purchase procedure will not apply to procurements resulting from poor planning or scheduling. The Purchasing Agent will review requests for emergency purchases totaling less than $50,000, and the Chief Administrative Officer will review requests for emergency purchases totaling $50,000 and more.

Whenever practical, after attaining approval to procure the necessary goods and/or services as an emergency, the division director must submit a written request to either the Purchasing Agent or the Chief Administrative Officer detailing (i) the division's need(s); (ii) why the purchase must be procured as an emergency purchase; and (iii) how the selected vendor was chosen. If applicable, the request must include the names of three (3) vendors the division has used in the past for the procurement of same or similar goods and/or services. If approved as an emergency, the Purchasing Agent will procure, or authorize the division to procure, the goods or services as an emergency

[27] Id.
[28] Id.
[29] Id.

purchase. If the Purchasing Agent or Chief Administrative Officer determines no emergency exists, the division will be advised of the denial, and the goods and/or services will be procured in accordance with the competitive procurement requirements herein.

After normal business hours, such approval must be obtained from the division's director prior to proceeding with the purchase. As soon as possible, but prior to the end of the next business day, the division director must submit to the Purchasing Agent and Chief Administrative Officer a written report detailing/justifying the emergency procurement.

When practical, at least three (3) competitive informal bids must be obtained, and the required goods and/or services must be procured from the lowest and best bidder.

The division must maintain records of any emergency purchase, including without limitation, the authorization received, amount paid, goods or services purchased, from whom the purchase was made, and the nature and circumstances prompting the emergency. At minimum, the records must comply with the requirements specified in Section 7.22 herein.

4.3.7 ***Used or Secondhand Items.*** The City may purchase used or secondhand goods, materials, supplies, commodities, and equipment from any federal, state, or local governmental entity.[30] Also, the City may purchase such used or secondhand items from any private individual or entity, so long as the purchasing department documents the general range of value of the item through a listing in a nationally recognized publication or through an appraisal by a licensed appraiser, and the price paid by the City falls within ten percent (10%) of the documented range.[31] In addition, the City may purchase or trade, upon approval of the governing bodies involved in the transaction, any used or surplus property from another governmental entity.[32]

4.3.8 ***Cooperative Purchasing with Local Government Entities.***[33] The City may participate in, sponsor, conduct, or administer a cooperative purchasing agreement with another governmental entity of the State of Tennessee for the procurement of goods, services, or construction in accordance with the terms and conditions of an agreement entered into between the City and such governmental entity. Where competitive procurement is required, the entity purchasing the goods or services need only comply with its own purchasing requirements.

In addition, a local governmental entity (e.g., City) may, upon request, purchase goods, equipment and services for another local governmental entity, provided

[30] *See* Tenn. Code Ann. § 12-3-1003(a).
[31] *See* Tenn. Code Ann. § 12-3-1003(b).
[32] *See* Tenn. Code Ann. § 12-3-1005.
[33] *See* Tenn. Code Ann. § 12-3-1009.

the entity purchasing the goods or services complies with its own procurement policies and procedures.[34] For example, the City may purchase goods or services for another local governmental entity, provided the City complies with the purchasing policies and procedures herein. When purchasing services pursuant to this provision, it is a good idea for the entity procuring goods or services on behalf of another governmental entity to identify the requesting governmental entity in its solicitation.

Note: For purposes of subsections 4.3.7 and 4.3.8 above, "local governmental entity" means any city, town, municipality, county including any county having a metropolitan form of government, local education agency, development district, utility district, human resource agency or other political subdivision of the State of Tennessee. To ensure such purchase is in compliance with law, the Division should submit documentation evidencing the entity is a local governmental entity, where applicable.

4.3.9 ***Interlocal Agreements.***[35]

For purposes of this subsection, "Public agency" means (i) any political subdivision of this state; (ii) any private incorporated fire department and industrial fire department not supported by public funds or which are only partially supported by public funds; (iii) any incorporated rescue squad that is not supported by public funds or that is only partially supported by public funds; (iv) any agency of the state of Tennessee or of the United States; and (v) any political subdivision of another state.

4.3.9.1 *Joint or Cooperative Agreement.*[36] The City may enter into an agreement for joint or cooperative action with (i) another public agency of the state of Tennessee having the power, privilege or authority to exercise such undertaking; or (ii) with a public agency of another state or of the United States; provided the laws of the other state or of the United States permit such joint exercise. The governing bodies of the public agencies must authorize such joint action. More specifically, the City is authorized to contract with Shelby County Government, municipal corporations or other local governmental agencies for the consolidation and/or joint operation of governmental activities or functions.[37]

Divisions of City government, which have governing boards separate from the City's governing body, may enter into an interlocal joint or cooperative agreement with one another for joint or cooperative action; provided the governing bodies of each division approves such agreement.

[34] *See* Tenn. Code Ann. § 12-3-1004.
[35] *See* Tenn. Code Ann. § 12-9-101 et seq.
[36] *See* Tenn. Code Ann. § 12-9-104. Joint or cooperative agreements must specify the information prescribed by statutory law.
[37] *See* City Charter § 847 et seq.

4.3.9.2 *Service Agreement.*[38] The City may enter into an agreement with another public agency to perform any governmental service, activity or undertaking which each public agency is authorized by law to perform; provided, such contract is authorized by each contracting party's governing body. The contract must set forth fully the purposes, powers, rights, objectives and responsibilities of the contracting parties.

4.3.10 ***Purchases through State Contracts.*** The City may purchase goods or services under a statewide contract entered into by the state of Tennessee Department of General Services.[39] The City must establish an account with the vendor by either issuing a properly executed purchase order or by entering into a contract with the vendor.

4.3.11 ***Purchases from Tennessee Rehabilitative Initiative in Correction (TRICOR) Board.*** The City **must** purchase from the TRICOR all articles required by the City that are produced, repackaged, assembled, warehoused, or manufactured with the labor of inmates confined within the state of Tennessee; provided the items are certified by the board of standards as being (i) of satisfactory quality, (ii) reasonable in price, and (iii) available.[40]

4.3.12 ***Purchases from Blind/Handicapped.*** The City **must** purchase all services or goods required by the City from qualified nonprofit work centers for the blind or agencies serving individuals with severe disabilities; provided the items are certified by the board of standards and are available.[41]

4.3.13 ***Insurance Purchases.*** The City may purchase tort liability insurance, authorized by the Tennessee Governmental Tort Liability Act,[42] through a plan authorized and approved by an organization of governmental entities representing cities and counties.[43]

V. PURCHASES WITH GRANT AND/OR CONTRACT FUNDS

City personnel must exercise care to comply with applicable requirements or special terms of any grant agreements or donations. Requisitions for the purchase of goods or services with grant or contract funds must be approved by the individual responsible for the division's budget and the individual responsible for grant accounting for the division.

VI. UNAUTHORIZED PROCUREMENT

[38] *See* Tenn. Code Ann. § 12-9-108.
[39] *See* Tenn. Code Ann. § 12-3-1001.
[40] *See* Tenn. Code Ann. § 41-22-119 et seq.
[41] *See* Tenn. Code Ann. § 71-4-701.
[42] *See* Tenn. Code Ann. § 29-20-101 et seq.
[43] *See* Tenn. Code Ann. § 29-20-407.

The Mayor is the only individual authorized to sign contracts on behalf of the City[44]; however, the Purchasing Agent is authorized to execute purchase orders with a value of less than $50,000.[45] **Division directors, officials, employees, etc. are not authorized to execute contracts and/or purchase orders on behalf of the City.**

A purchase made by any person in the name of the City, in violation of the provisions specified herein, shall be void and of no effect. Any employee who enters into a contract in the City's name, in violation of the provisions of this manual, may be subject to disciplinary actions, including and up to termination from employment. In addition, the employee may be personally liable for any City funds paid for goods or services procured contrary to the policies and procedures herein, and the City may charge the unauthorized amount to the employee's account and deduct such from his or her salary or wages.[46]

VII. GENERAL COMPETITIVE PURCHASING GUIDELINES

Terms of this manual are specifically incorporated into all solicitations unless otherwise specified in the solicitation. Any exceptions to the provisions of this manual must be made in the vendor's bid or proposal. The guidelines detailed in this Article apply to the competitive procurement processes specified in Section 4.2. For any division authorized by the Purchasing Agent to competitively procure goods or services on behalf of the City, any reference in these sections to the purchasing department is deemed applicable to such division. All solicitations issued by or on behalf of the City will be subject to the following solicitations.

7.1 Electronic Procurement.[47] The City may satisfy any requirement for mailing by distributing solicitations electronically. In addition, the City may release and advertise solicitations and receive bids or proposals electronically.

7.2 Vendor Registration/Bidders List.

7.2.1 Vendor Registration. No vendor will be deemed or considered a qualified bidder unless and until the vendor has registered with the purchasing department. A vendor may register and be added to the bidders list by completing the Online Supplier Registration Form available at www.memphistn.gov and submitting a completed IRS W-9 form to the purchasing department. Upon submission of the registration form and the completed W-9 form, the purchasing department will send an electronic correspondence to the vendor, specifying details for accessing the City's electronic procurement system. Once granted access to the electronic procurement system, the vendor should access the system and update its account with any additional address and contact information, product and services information, and business classification (minority-owned, woman-

[44] *See* "Pop" Charter (Ord. No. 1852, § 14), which authorizes the Mayor to assign executive duties to the Chief Administrative Officer; see also City Legal Opn. 015.10 (July 9, 2010).
[45] *See* Code of Ord. §§ 2-277(c)(2) and 2-277(c)(3).
[46] *See* Code of Ord. § 2-38.
[47] *See* Tenn. Code Ann. § 12-3-704.

owned, etc.). Upon the vendor's submission of the registration information, the Contract Compliance Officer will review and verify whether the vendor is a certified minority or woman-owned business enterprise, as defined in Article XVII herein.

Notwithstanding the above, those vendors doing business with the City, solely pursuant to a grant agreement, may register by submitting a completed W-9 form to the purchasing department.

The purchasing department will establish and maintain a list of vendors interested in doing business with the City, based upon the commodities for which a vendor has registered with the City. The bidders list should include the vendor's contact information (i.e., name, mailing address, and e-mail address); type(s) or class(es) of goods or services the vendor is willing and able to furnish to the City; and other pertinent information. Once added to the bidders list, the purchasing department will issue the vendor electronic notification of procurement opportunities applicable to the commodity for which the vendor has registered.

7.2.2 Removal From Bidders List. Once placed on the bidders list, the vendor must remain active by responding to City solicitations and notifying the purchasing department of any subsequent changes in either the vendor's name, organization, contact information, or goods or services offered. At the Purchasing Agent's discretion, vendors who fail to respond to three (3) consecutive solicitations for the same commodity may be removed from the bidders list or placed in inactive status for that applicable commodity code. In either event, the Purchasing Agent will notify the vendor of such removal/inactive status. A response includes a statement of "No Bid", as defined in Article III.

In addition, contractors who fail to adequately perform in accordance with the terms and conditions of any purchase order or contract may be suspended or debarred (in accordance with Section 13.2), and subsequently removed from the applicable bidders list(s). At its request, a vendor may be reinstated on the bidders' list(s) upon satisfying the requirements specified in this section and, if applicable, upon completion of the debarment/suspension time period.

7.3 Requisition for Purchase; Requirements.[48] Whenever it is necessary for the purchasing department to procure goods or services on behalf of a division, a requisition, signed by the division's director, must be submitted to the purchasing department. The requisition informs the purchasing department of the goods and/or services needed by the division. All requisitions for purchase must include detailed specifications. When requested by the purchasing department, the division must provide information to verify the anticipated use of such goods or services within that division. Requisitions should be submitted far enough in advance to allow sufficient time for the purchasing department to (a) secure bids or proposals, if necessary; and

[48] *See* City Charter § 223.

(b) process the order; and for the successful bidder to deliver the goods or services. The requisition must be accompanied by specifications, in accordance with Section 7.4 ("Specifications; Requirements") and other related bid information.

The division director's approval and submission of a requisition to the purchasing department is certification that (1) the goods or services are needed by the division; and (2) funds are available within the division's budget for the approximate expenditure.

7.4 Specifications; Requirements. The requisition must be accompanied by specifications that clearly and accurately describe the necessary goods or services and list the minimum performance requirements. To ensure the purchase is procured competitively, specifications must be written in such a manner to clearly, accurately and thoroughly describe the division or department's needs, without having the effect of requiring a proprietary good or service. In other words, specifications cannot be unnecessarily restrictive so as to unduly restrict or limit competition by eliminating items that would be capable of satisfactorily meeting the division's actual needs and/or guarantees the awarding of the contract to a pre-selected vendor. Any responsible vendor who considers the specifications to be unfair or of a non-competitive nature, must immediately contact the Purchasing Agent in accordance with Section 11.1.

When preparing specifications, the division should anticipate and assess all possible risks with contracting for the necessary goods or services (i.e., list foreseeable risks and the impact should the risk(s) occur). To the extent possible, specifications must include essential physical and functional characteristics necessary to express the City's minimum requirements and be written to avoid/address any identified risks (e.g., preventative actions). Specifications should also include, but not be limited to, information regarding the following:

i. Operational requirements (e.g., requirements and/or limitations on environment, water or air cooling, electrical requirements, magnetic-free operations, etc.);
ii. Financial requirements;
iii. Site preparation requirements (any requirements for which the contractor will be responsible, such as electricity, plumbing, etc.);
iv. Compatibility requirements (e.g., existing equipment with which the item is to be used);
v. Conversion requirements (e.g., maintaining the operation of a system while installing a unit and then converting to the operation of new equipment;
vi. Installation and maintenance requirements;
vii. Expendable goods and parts requirements;
viii. Quantity required (specify whether actual or estimate amount);
ix. Schedule of performance (e.g., when good or service required);
x. Delivery terms;
xi. Warranty on parts and labor;
xii. Service location and response time; and

xiii. Other pertinent information that further describes the good or service required.

The purchasing department may approve the specifications, as provided by the division, or modify them to ensure the procurement is conducted openly and competitively. Specifications will be considered open and competitive by satisfying one of the following:

A. Based on brand names: reference to brand names, trade names, model numbers, or other descriptions peculiar to specific brand products is made to establish a minimum level of quality and functional capabilities and to acquaint vendors with the type of goods desired by the division. Such reference will be used as a standard by which alternative goods will be evaluated and is not intended to limit or exclude other products of that level. Any reference to brands must be followed by the phrase "or equal to." "Or equal to" means an item or equipment that, in the opinion of the division, is similar to the named product, suited to the same function as that named, has a record of service equal to that named, and is equal in quality, capacity, and/or efficiency to that named product. Any referenced brands must be (i) in current production; (ii) available on the market; and (iii) familiar to most bidders. The specific features of the named brand that must be met by bidders must be clearly stated in the specifications.

B. Based on standard specifications that, insofar as possible, meet the requirements of majority of all City divisions that use the same goods and/or services;

C. Based on qualified product lists, resulting from analytical testing, and the referenced product meeting such specifications; or

D. Based on catalogs, price lists, or price schedulers.

7.5 Solicitation Requirements; Distribution.

7.5.1 <u>Solicitation Requirements.</u> At minimum, all solicitations must specify the following:

A. Complete, accurate and detailed specifications of the goods or services, to be purchased, including technical requirements, amount or quantity required;
B. Instructions and information concerning bid or proposal submission requirements, including the bid/proposal format, deadline for submitting bids, address to which bids or proposals must be delivered, and any other special information;
C. Time and terms of delivery, specifying the number of calendar days in which delivery must be made after receipt of a properly executed purchase order or fully executed contract;
D. Bid bond requirements, if any;

E. Performance bond requirements, if any;
F. Insurance requirements, if any;
G. Instruction, forms and any documents necessary to enable vendors to prepare and submit bids (e.g., price list);
H. Requisite bidder qualifications;
I. Evaluation criteria and process to be used in evaluating the bids or proposals;
J. Delivery or performance schedule;
K. Inspection requirements;
L. Bid protest procedure (i.e., deadline to submit bid protest, etc.);
M. If applicable, whether other public agencies may purchase under the contract;
N. Contract terms and conditions required by the City;
O. Applicable provisions specified in this manual (e.g., Conflict of Interest, Covenant Against Contingent Fees, Local Preference, Living Wage, MWBE, etc.); and
P. Other requirements or information regarding the purchase, as deemed appropriate and necessary.

The solicitation may incorporate documents by reference, if the solicitation specifies where such documents can be obtained.

In addition to the above, a Request for Proposal (RFP) must also include:

A. A statement specifying whether discussions may be conducted with proposers determined to be reasonably susceptible of being selected for award. Proposals may be accepted without such discussions;
B. A statement of when and how the cost proposal should be submitted; and
C. The relative weight of each evaluation criterion.

7.5.2 Distribution of Solicitation. Unless otherwise excepted, the solicitation will be distributed to interested vendors by the purchasing department and/or posted on the City's website (www.memphistn.gov). To the extent possible, a record of all vendors retrieving a copy of the solicitation must be maintained.

7.6 Confidential/Proprietary Information. The solicitation should not request any confidential or proprietary information. *Confidential information* means non-public knowledge that was conveyed to the City as a result of the procurement process. *Proprietary information* means commercial or financial information owned by a company and which gives the company certain competitive advantages. The vendor must clearly label any confidential/proprietary information within a bid/proposal as such. With the City of Memphis being a governmental entity subject to the public records laws of the state of Tennessee, any information submitted to the City, whether or not identified as proprietary or confidential, may be subject to disclosure as a public record.[49] The City assumes no liability for any information disclosed pursuant to a request under the public records laws of the state of Tennessee.

[49] *See* Tenn. Code Ann. § 10-7-501 et seq.

7.7 Taxes. The City is a tax-exempt organization; therefore, taxes shall not be included in bids or proposals submitted in response to a City-issued solicitation.[50] The bidder's offer must be inclusive of all applicable federal, state and local taxes and duties it will incur for supplying the goods or services to the City. Upon request, the City will issue a tax exemption certificate.

7.8 Local Preference; Local Presence.[51]

7.8.1 Local Preference. The procurement may be subject to the City's Local Preference Ordinance, which establishes a preference (on any contract costing $10,000 or more) for businesses located within the limits of the City of Memphis. A copy of the vendor's Shelby County and Tennessee Business Tax Receipt must accompany the bid or proposal for consideration of such preference. In addition, the bidder must provide proof that Shelby County personal property taxes and all other necessary local business operational taxes, inherent to the business have been paid.

A local business is defined as a vendor or contractor whose physical principal business address is located within the boundaries of the city of Memphis and (1) the vendor has a valid domestic type Memphis/Shelby County, Tennessee business license; (2) the business license has been issued at least one (1) year prior to the bid or proposal opening date; (3) the business license authorizes the business to provide the goods, services or construction to be purchased; (4) the business is located in an area zoned for conduct of such business; (5) the vendor operates or performs majority of its business on a day-to-day basis from such location; and (6) the vendor conducts 100% of the necessary functions to maintain or fulfill its contract with the City from such location. Post office boxes cannot be used to establish the principal address of the business.

If the lowest and best bidder is a regional or non-local business, then all bids received from responsive local businesses must be decreased by five percent (5%). The original bid will not be changed, and the 5% decrease is calculated only for the purposes of determining the local preference. The local preference cost differential is not to exceed $100,000. When procuring goods, services or construction pursuant to the competitive sealed proposals method, local businesses are assigned five percent (5%) of the total evaluation points, up to a maximum of five (5) points.

7.8.2 Local Presence. [52] In the event there is no business qualifying for the local preference, local presence will be considered for procurements which exceed two million ($2,000,000.00.) dollars.

[50] *See* Tenn. Code Ann. § 67-6-329.
[51] *See* Code of Ord. § 2-332.
[52] Ordinance amendment to include Local Presence was adopted on third reading on January 18, 2011.

Local Presence will be established in favor of the business that employs the largest number of employees within Shelby County, however, the qualifying business must demonstrate at the time of bid response a minimum of twenty five (25) employees located within Shelby County.

For procurements, a five (5%) percent differential (not to exceed $200,000.00) shall be granted in favor of the qualifying business. For RFP's or for responses for which factors are evaluated, local presence at the time of response will be a weighted criteria. The Local Preference Ordinance, and any amendments thereto, can be accessed on the City's website at (www.memphistn.gov).

7.9 Living Wage. The procurement may be subject to the City's Living Wage Ordinance, which requires businesses (including subcontractors), awarded a contract by the City to provide services to or for the City, pay employees employed (full-time, part-time, or temporary) as part of the city service contract a living wage.[53] The City may annually adjust the living wage, in accordance with the federal poverty level index.[54] The successful bidder must comply with the living wage requirements, including but not limited to the reporting requirements.[55] The following are exempt from the living wage ordinance: (1) corporations organized pursuant to Section 501(c)(3) of the Internal Revenue Code, except as it relates to childcare workers; (2) contract involving services by student interns; (3) contract with a school district or another governmental entity. Further, the following class of employees are not covered by the living wage ordinance: (1) individuals providing volunteer services; (2) individuals employed in construction work and are subject to the provisions of the prevailing wage ordinance, discussed in Section 4.2.2.11 above; and (3) individuals employed in the hospitality industry within the geographical limits of the city of Memphis (e.g., restaurants, hotels, etc.).[56] The Living Wage Ordinance, and any amendments thereto, can be accessed on the City's website (www.memphistn.gov). Where applicable, the Living Wage Ordinance is incorporated into any City solicitation and any resulting contract. Failure to apply the requirements of the living wage ordinance to the bidder's response may result in disqualification from review and the award process.

7.10 Nondiscrimination. The successful bidder must comply with all federal, state, and local laws and regulations, including but not limited to Title II of the federal American Disabilities Act of 1990 and Titles VI and VII of the federal Civil Rights Act of 1964, prohibiting discrimination in employment practices or in the performance of the resulting contract, on the grounds of race, age, color, religion, sex, national origin, handicap and/or disability, or any other classification protected by federal, state, or local law.

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[53] *See* Code of Ord. § 2-407 et seq.
[54] *See* Code of Ord. § 2-416.
[55] City Ord. No. 5293 modifies the reporting requirements for locally-owned small businesses with 10 or less full-time employees.
[56] *See* Code of Ord. § 2-407 et seq.

In addition, the City shall not discriminate against religious organizations with regard to contracts provided through or administered by the departments of children's services and health and human services. The City will contract with religious organizations on the same basis as any other non-governmental vendor without impairing the religious character of the organization and without diminishing the religious freedom of beneficiaries of assistance funded under the programs.[57]

7.11 Illegal Immigrants. The successful bidder must comply with all federal, state and local laws, rules and regulations prohibiting the employment of individuals not legally authorized to work in the United States. No bidder may contract to provide goods or services to the City if he/she/it knowingly utilizes the services of illegal immigrants in performance of the contract.[58]

7.12 Bidding Time. Bidding time is the period of time between the release of the solicitation and the deadline date and time set for bid or proposal submission. The bidding time will be set to provide bidders a reasonable period of time to prepare and submit their bids or proposals in response to the solicitation. Unless the Purchasing Agent determines a shorter period of bidding time is reasonable, a minimum of ten (10) days will be provided for the competitive sealed bidding method, and a minimum of thirty (30) days will be provided for the competitive sealed proposals method.

7.13 Public Notice/Advertisement. Procurements must be advertised by adequate public notice that allows an adequate time for vendors to prepare and submit a response. Every procurement of goods or services costing more than $50,000 ($10,000 for construction projects) must be advertised in a newspaper that is circulated daily in the City of Memphis (e.g., The Daily News, The Commercial Appeal, etc.) for two (2) consecutive days in the week preceding the bid/proposal due date.[59] In an effort to reach prospective bidders, information regarding the solicitation may also be published in newspapers, engineering, public works or financial journals, or other similar periodicals in Memphis and other cities.

In addition, the City may post notice on the City's website or issue written notification, by letter or electronic mail, to vendors on the bidders' list for the particular commodity code for which goods and/or services are being procured. All publications and notices will indicate where, when, and for how long the solicitation may be obtained; generally describe the goods, service, or construction desired; and contain other appropriate information.

7.14 Bid Questions/Inquiries. Any questions or concerns concerning the solicitation must be submitted in writing via e-mail at purchasingbidinquiries@memphistn.gov or the Oracle online discussion tool. The preferred method of correspondence should be through the Oracle online discussion tool. Please be aware that a vendor's contact with any City personnel (other than the

[57] *See* Tenn. Code Ann. § 12-4-122.
[58] *See* Tenn. Code Ann. § 12-4-124.
[59] *See* Code of Ord. § 2-277 (c)(1) (Pursuant to Referendum Ord. No. 4434, Ord. No. 4473 (as codified in Code of Ord. § 2-277) amended City Charter § 51 by modifying the advertising requirement and increasing the threshold amount for purchases.

person clearly identified in the solicitation) regarding the solicitation may disqualify such vendor from consideration of award for the solicitation. The written correspondence should reference the section of the solicitation to which the question pertains, and must clearly specify the question(s) and identify the solicitation number to which such questions pertain. Unless otherwise specified in the solicitation, questions or concerns must be submitted at least three (3) days before the bid or proposal deadline date. Any questions or concerns not submitted within a timely manner will be deemed waived. Any response to the submitted questions or concerns will be made via an addendum or Question and Answer document, which will be issued to each vendor known to have received a copy of the solicitation, pursuant to Section 7.5, and/or posted on the City's website (www.memphistn.gov). The Addendum/Question and Answer document will become a part of the solicitation.

Any oral interpretations or instructions given by a City employee or other person does not affect the terms and conditions of the solicitation, as amended.

7.15 Amendment to Solicitation. At any time prior to the submission deadline, the City may, in its sole discretion, amend the solicitation. Any amendment to the solicitation will be in writing and specifically identified as an "Addendum." The amendment must clearly specify the terms of the solicitation being amended and how such term is being amended. The amendments will be issued to all prospective bidders known to have received a copy of the solicitation, pursuant to Section 7.5, and/or posted on the City's website (www.memphistn.gov). Amendments will be distributed within a reasonable amount of time to allow prospective bidders to consider such amendments in preparing and submitting their bid or proposal. If the deadline set for receipt of bids or proposals will not permit such timely distribution, the submission deadline will be reasonably increased, to the extent possible, in the amendment or via a separate amendment.

7.16 Cancellation of Solicitation. At any time prior to award of the purchase order or contract, and if deemed in the best interest of the City, the City may, in its sole discretion cancel the solicitation and reject all bids or proposals by issuing a notice to all bidders who submitted a response to the solicitation. The notice must identify the applicable solicitation; however, the solicitation cannot be cancelled solely to avoid awarding the purchase order or contract to a particular bidder.

The City may cancel a solicitation for the following reasons: (i) prices exceed available funds; (ii) errors in the solicitation; (iii) changes to the specification; (iv) cessation of need; (v) unavailability of funds; or (vi) any other reason approved by the Purchasing Agent.

7.17 Rejection of Bid/Proposals; Informality in Bid or Proposal. Upon cancellation of a solicitation, the City will reject all bids/proposals submitted in response thereto. The City may, in its sole discretion, reject any or all bids or proposals and waive any informality in a bid or proposal.

7.18 Pre-bid/Pre-proposal Conference. In the City's sole discretion, a pre-bid/pre-proposal conference may be scheduled to discuss the solicitation and clarify any

concerns vendors may have with the solicitation. The conference should be held long enough after the solicitation has been issued to allow vendors to become familiar with the solicitation, but sufficiently before the bid/proposal submission deadline. Information regarding the conference, including whether attendance is mandatory, must be stated in the solicitation. Nothing stated at the pre-bid/pre-proposal conference will change the solicitation, unless a change is made by a written amendment as provided in Section 7.16.

The City reserves the right to make attendance at the conference mandatory. If attendance at such conference is mandatory, any vendor desiring to submit a response to the solicitation must have at least one representative present at the conference. The division must submit the sign-in sheet to the purchasing department prior to the scheduled bid/proposal opening date and time. All expenses incidental to attending the pre-bid/pre-proposal conference will be borne by the vendor.

7.19 Business License/Debt Owed to the City. Any vendor located within the geographical boundaries of the City of Memphis, excepting non-profit organizations that qualify as tax exempt under Section 501(c)(3) of the Internal Revenue Code or businesses which are otherwise exempt, must maintain a current City of Memphis/Shelby County Business Tax License. The vendor will be required to submit a copy of its current business license or exemption documentation. If applicable, the City will not contract with any vendor who is not registered with the State of Tennessee Department of Revenue and/or fails to maintain a City of Memphis/Shelby County Business Tax License.[60]

In addition, the City will not knowingly conduct business with any vendor who owes a debt to the City or who is a defaulter on surety to the City.

7.20 Prohibited Vendors. Unless otherwise exempted, it is unlawful for any vendor who has pleaded guilty or nolo contendere to or has been convicted of (i) violating the Sherman Antitrust Act (15 U.S.C. §1), (ii) mail fraud (18 U.S.C. § 1341), or (iii) any other federal or state criminal laws in connection with any contract let or funded, wholly or in part, by the state of Tennessee or state entities or arising out of official investigation of such offenses, to solicit contracts from the City for a period of twenty-five (25) years from the date of such conviction, provided the conviction was on or after May 22, 1981.[61]

7.21 Buy America. The City shall not purchase any materials for highway or roadway construction, resurfacing, or maintenance, including but not limited to asphalt cement, asphalt emulsion, rock, aggregate, liquid and solid additives, sealers and oils, from any foreign government, from any company that is wholly owned and controlled by a foreign government (regardless of the location of such company), or from any entity of the federal government or company, unless satisfactory American-made materials are not reasonably available in sufficient quantities or if using American-

[60] *See* TCA 12-4-120; City Charter § 777 et seq.
[61] *See* Tenn. Code Ann. § 12-4-602.

made materials would increase the overall project cost by at least 5% more than the overall project cost if using foreign-made materials.[62]

7.22 Records Maintenance/Public Records. In order to provide a clear audit trail for each purchase, the division should maintain a complete and thorough written record on all procedures and justifications for each purchasing transaction. The records must include the entire procurement history, including but not limited to, a copy of the requisition; the method of procurement; any required justification; a copy of the notice/advertisement, if applicable; a copy of the solicitation, if applicable; a copy of all submitted bids or proposals; rejected bids or proposals; a copy of the bid or proposal evaluation, including proposal evaluation forms; a copy of the notice of intent to award; a copy of the executed contract and any contract amendments; billing and payment records; documentation regarding cancellation of the solicitation, if applicable; copies of correspondence to/from the contractor; and other records pertaining to the purchase. In addition, the records must indicate the estimated percentage of MWBE participation, name of MWBE, and other pertinent information pursuant to the MWBE requirement.

The purchasing department will forward records regarding the solicitation to the Records Management department, where they will be maintained. At minimum, the Records Management department will retain the procurement records for the retention period specified below. Notwithstanding, the division should maintain records regarding the procurement for a minimum period of three (3) years. The records may be maintained electronically.[63]

Records to be Retained	Retention Period
Bids/Proposals; Contracts	7 years after expiration or termination of the contract
Requisitions	5 years after creation of the record
Minutes of Bid Openings	1 year after the award
Bonds	7 years after release, replacement or expiration of the bond

The City is a governmental entity subject to the public records laws of the State of Tennessee. Bids and proposals submitted to the City are subject to being disclosed as a public record in accordance with the laws of the State of Tennessee.

After completion of the evaluation process, all procurement records, including the submitted bids and proposals, become public record and will be made available for public inspection. For purposes of this section, the evaluation process is not complete until after the intent to award the contract to a particular vendor is announced.[64]

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[62] *See* Tenn. Code Ann. § 54-5-135; s*ee* 41 U.S.C. §10(a) for the federal government's Buy American Act.
[63] *See* Code of Ord. § 2-277.1.
[64] *See* Tenn. Code Ann. § 10-7-504(7); see also Tenn. Code Ann. § 12-3-1011(f).

7.23 Preference to In-state Natural Gas Producers. The City shall purchase natural gas produced from wells located in the state of Tennessee if such gas is available at a price which is equal to or less than the price for natural gas produced from wells located outside the state of Tennessee, taking into account transportation costs.[65]

7.24 Preference to In-state Coal Mining Companies. The City shall purchase coal mined in the state of Tennessee if such coal is available at a delivered price that is equal to or less than the price for coal mined outside the state of Tennessee.[66]

VIII. BID AND CONTRACT SECURITY

8.1 Security; Requirements. The Purchasing Agent or division representative, in his/her sole discretion, may require a bond or other security for any solicitation and/or contract. Any required security must be stated in the solicitation and will not be reduced or waived for any bidder or contractor. The vendor's offered security must equal the amount required in the solicitation or contract and be in a form approved by the City.[67]

8.2 Surety Bonds. Surety bonds are financial guarantees of the bidder's/contractor's obligation to provide the goods and/or services. Surety bonds, although often written by insurance companies, are not insurance policies because there is no risk transfer from the surety (i.e. the company providing the guarantee) to the principal (i.e. the contractor). To the extent the surety pays an obligee (i.e. the City) on behalf of a principal, the surety will seek to recoup that payment from the contractor. The bond shall be non-expiring and submitted on forms provided by the City. In addition, the bond must be signed by a licensed agent (i.e., Attorney-in-Fact) of such surety company. The Attorney-in Fact must affix an original, certified and current copy of the Power of Attorney form to the bond. The corporate seal of the surety company must be affixed to the Power of Attorney form, and the certification date of the Power of Attorney form must coincide with the date on which the bond is executed by the Power of Attorney. All bonds shall be in substantially the form of the samples in the Appendix and are subject to approval by the City officials.

If the surety company for the vendor's/contractor's bond (i) files or is declared bankrupt; (ii) becomes insolvent; (iii) is not authorized to do business in Tennessee; or (iv) ceases to meet the requirements of the bond, the contractor must submit, within five (5) business days, another surety bond, which must be acceptable to the City.

In its sole discretion, the City may require the following types of surety bond(s):

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[65] *See* Tenn. Code Ann. § 12-3-812.
[66] *See* Tenn. Code Ann. § 12-3-811.
[67] *See* the City of Memphis Contract Insurance and Indemnification Manual for further guidance regarding surety bonds.

8.2.1 Bid Bond

A *bid bond* is a guarantee by the surety that the bidder will, if its bid is accepted, enter into an agreement with the City at the quoted price. Bid bonds are generally required for certain solicitations involving large expenditures, in an attempt to protect the City's interest in the event the successful bidder attempts to withdraw its bid or proposal or fails/refuses to enter into a contract with the City.

When required, each bid or proposal must be accompanied by a bid bond, in the required form and amount, pledging the bidder will satisfy all bid requirements and enter into a contract with the City on the terms stated in its bid. Bids received without the required bid bond will be deemed non-responsive. Bid bonds of each unsuccessful bidder will be returned after the award has been made.

If the successful bidder refuses to enter into a contract with the City or fails to provide the required bond and insurance information within ten (10) calendar days after receipt of the written notice of intent to award, the bid security will be forfeited to the City.

8.2.2 Performance and Payment Bond

The most common type of required surety bond is a *performance bond*, which acts as a financial guarantee that the contractor will complete the work/provide the goods or services in accordance with the contract terms. A performance bond is important when the City not only wants the work completed, but also wants it done on time and according to the specifications. In the event the contractor fails to complete the work/provide the services, the surety will assume the contractor's responsibility to have the work completed.

The *payment bond* guarantees the contractor will pay for all materials used to fulfill the contract and pay for all laborers used by the contractor, or any subcontractor under the contractor. As stated in Section 4.2.2.7, a payment bond is required for public work projects on behalf of the City.

8.3 Alternatives to Surety Bond[68]. In lieu of a surety bond, the contractor may provide one of the following, in an amount equal to the required bond amount:

8.3.1 *Certified/Cashiers Check.* Made payable to the City of Memphis;

8.3.2 *Irrevocable Letter of Credit.* A Letter of credit ("LOC") issued by a financial institution that (i) has its principal office in Tennessee or (ii) has its principal office outside Tennessee and maintains one (1) or more branches in

[68] *See* Tenn. Code Ann. § 12-4-201(c).

Shelby County which are authorized to accept federally insured deposits. The terms and conditions of the LOC are subject to approval of the City officials. The LOC must be, and conspicuously specify it is, irrevocable and automatically renewable without any effort on the part of the City; or

8.3.3 ***Certificate of Deposit.*** Certificate of Deposit, ("CD") issued by a financial institution (i) having its principal office in Tennessee or (ii) having its principal office outside Tennessee and maintaining one (1) or more branches in Shelby County which are authorized to accept federally insured deposits. The original CD must be in the name of, or assigned to, the City. In addition, the CD must remain, and conspicuously specify it is, automatically renewable without any effort on the part of the City of Memphis. The terms and conditions of the CD are subject to approval of the City officials.

8.4 Insurance. The City may require the successful bidder to maintain and provide proof of insurance prior to entering into a contract with the vendor. The amount and types of insurance coverage(s) will be determined by the goods to be purchased/scope of services relative to the risk(s) involved in the goods or services to be provided. For contracts that involve a potential for theft, forgery or fraud by the successful bidder, a Fidelity Bond/employee dishonesty insurance coverage may be required. The solicitation will specify the insurance requirements, and the insurance requirements will not be reduced or waived for any bidder, including the successful bidder. Refer to the City's Contract Insurance and Indemnification Manual for guidance in determining the proper insurance requirements.

The insurance may be evidenced by an original certificate of insurance or .pdf format document. If the certificate of insurance is in .pdf format, the insurance company must forward it directly to the City. Upon award, failure of the contractor to maintain the required insurance coverage for the duration of the contract term may result in cancellation/termination of the contract. In the event the insurance policy on file with the City expires during the contract term, the contractor must provide proof of the required insurance coverage within five (5) business days from the date of request.

8.5 Indemnification. In submitting a bid or proposal, the successful bidder will be required to indemnify the City against any and all claims or legal actions arising as a result of the bidder's performance of the resulting contract. Refer to the City's Contract Insurance and Indemnification Manual for guidance in determining the proper indemnification requirements. The indemnification requirements must be stated in the solicitation.

IX. BIDDING GUIDELINES

All solicitations issued by or on behalf of the City will be subject to the following guidelines:

9.1 Bid/Proposal Requirements. Bids or proposals must be completed and submitted on any forms provided by the City and show the vendor's commitment to comply with the solicitation requirements. Bids or proposals not submitted on the

prescribed forms will not be considered. In addition to satisfying the requirements of the solicitation, the bid/proposal must comply with the following:

i. Must be signed by an individual authorized to bind the bidder to a contract. Bids may not be signed after or during bid opening, even if the vendor's representative is present at the bid opening session; and
ii. Must show the title of the individual signing the bid/proposal. If requested by the City, the individual must furnish satisfactory proof that he/she has authority to bind the bidder; and
iii. Must specify the full legal name and business address of the bidder; and
iv. In the event the City permits vendors to submit manual bids or proposals, such bids or proposals must be typed or completed in ink.

All bids/proposals must be prepared in accordance with the solicitation. For failure to comply with the above or any requirements specified in the solicitation, the bids/proposals will be deemed nonresponsive.

9.2 Bid Pricing. Unless otherwise specified in the solicitation, the bidder must list a specific net unit price for each item in the solicitation. The net unit price is the list price for each item minus all trade or other discounts offered, not including cash discount for prompt payment. If provided in the solicitation, the bidder must specify the net unit price on the price sheet provided. In the case of error in the extension of prices in the bid, the net unit price will govern. Unless otherwise indicated, bids or proposals will be deemed nonresponsive if they fail to contain a definite net unit price for each item.

9.3 Descriptive Literature and Sample Product. In its sole discretion, the City may require the bidder to submit descriptive literature and/or a sample product as part of its response, when it is necessary to assist the City in evaluating the required characteristics of the proposed items and determining whether such item meets the City's needs. *Descriptive literature* means information available in the ordinary course of business, which shows the characteristics, construction, or operation of an item. *Sample product* means a sample to be furnished by the bidder to show the characteristics of the item offered in the bid or proposal. Any required sample product or descriptive literature must be provided to the City free of charge and may be retained for future comparison. Any sample product, which is not destroyed by testing or which is not retained for future comparison, will remain the property of the City if not retrieved within two (2) weeks of the award. The City will retain samples provided by the successful bidder until the goods are delivered and accepted by the City as being equal to the sample. The bidder's bid or proposal will be deemed nonresponsive if the bidder fails to comply with the requirements of this section.

9.4 Delivery Terms. Time of delivery may be a consideration in the evaluation of the bid/proposal. Unless otherwise specified in the solicitation, all items must be delivered F.O.B. destination. More specifically, the items must be delivered and unloaded at the location specified by the City in an undamaged condition, with all charges for freight, transportation, unloading, etc. prepaid by the successful bidder.

The successful bidder must assume all liability and responsibility for delivery of the items in good condition.

In the space provided in the solicitation, the bidder must specify the number of calendar days after receipt of order (ARO) for delivery of the goods or services to the City. If the delivery time is already specified by the City and the bidder intends to comply therewith, the bidder need not specify delivery ARO terms.

9.5 Cash Discount for Prompt Payment. Bidders are urged to include cash discounts into their quoted price, with terms of payment to be a minimum of Net 20. If cash discount for prompt payment is offered by the bidder, it must be shown in the bidder's response; however, discounts for prompt payment will not be considered in the evaluation of bids or proposals. If earned, the City will take all discounts offered for prompt payment, provided correct and proper invoices, prepared in accordance with the terms of the purchase order or contract, are processed and payment is issued or post-marked to the successful bidder within the stipulated time frame.

Note: The time for computing prompt pay begins upon the City's receipt of an accurate invoice.

9.6 Bid/Proposal Submission. Bids/proposals must be submitted in the manner set forth in the solicitation. If required in the solicitation, bids must be submitted electronically; otherwise, the bid or proposal must be delivered to the assigned Buyer or Contract Analyst in the purchasing department, located at 125 North Main, Room 354 (or to the individual otherwise specified in the solicitation at the designated location). Telephone or facsimile bids will not be accepted or considered unless procured by the purchasing department via the informal bid process specified in Section 4.2.1.1(A).

Bids or proposals must be in the actual possession of the City (at the specified location) on or before the deadline date and time stated in the solicitation. All bids or proposals submitted in response to the solicitation will be date and time stamped upon receipt. The official date and time of receipt will be the actual date and time the purchasing department or division receives the bids or proposals. **Late bids or proposals will be rejected and will not be considered for award.** Bids/Proposals, including all accompanying materials or documents, will become the property of the City and will not be returned to the Bidder.

If required in the solicitation, the bidder must submit the bid or proposal in a sealed envelope conspicuously specifying the bidder's legal name and the applicable RFQ/RFP number and title. For construction projects, the bidder must submit the bid or proposal in a sealed envelope conspicuously specifying the information required in Section 4.2.2.4. By failing to properly identify the bid or proposal, the bidder risks having the bid or proposal opened prior to or after the scheduled bid opening. The purchasing department or division will store the bids or proposals in a secure place until the scheduled bid opening. All submitted bids and proposals are subject to public inspection in accordance with Section 7.23 herein.

All costs incurred by the vendor in preparing and submitting a response to the solicitation are the vendor's sole responsibility. Vendors who choose not to submit a response to the solicitation should submit a "Statement of No Bid." Submission of a bid/proposal does not create rights, interests, or claims of entitlement in any bidder, including the lowest apparent bidder; however, the contents of the bid/proposal of the successful bidder will become a contractual obligation if a contract is entered into.

9.7 Public Opening and Announcement. All formal bids must be sealed and will be publicly opened on the scheduled date and time. The name of each bidder, bid price, and such other information, as deemed appropriate by the Purchasing Agent, will be read aloud and recorded at the bid opening. Unless otherwise stated in the solicitation, informal bids for less than $50,000 are opened (not publicly) in the purchasing department at 11:00 a.m. on the date specified in the solicitation, and bids for $50,000 or more are publicly opened and announced in the City Council Chambers at 2:00 p.m. on the date specified in the solicitation. At the bid opening session, bidders are allowed to view and record submitted formal bids.

Proposals will not be opened publicly but will be opened in the presence of two (2) or more employees of the purchasing department or the division responsible for receipt of the proposals. The proposals will be opened in a manner that avoids disclosure of contents to competing proposers during the negotiation.[69]

9.8 Bid Validity. Unless otherwise stated in the solicitation or the bidder's response, the bid/proposal and all prices, terms and conditions quoted therein, must remain valid for acceptance by the City for a minimum period of one hundred twenty (120) days after the bid opening date. The City may request offerors to extend the bid validity period; provided that no other change is permitted.

9.9 Bid Rejection/Informalities. In the City's sole discretion, the City reserves the right to reject any bid or proposal, in whole or in part. In addition, the City may waive any minor informalities in a bid or proposal. (e.g., clerical or computation errors in the computation of unit and total prices). Material defects in a bid or proposal (e.g., failure to sign the response, failure to submit the required bid bond, etc.) cannot be waived. A minor informality is one which is merely a matter of form and net of substance or pertains to some immaterial or inconsequential defect or variation from the exact requirement of the solicitation.

9.10 Withdrawal or Modification of Bid or Proposal. Before the submission deadline, a vendor may withdraw or modify its bid or proposal upon submitting a written request, signed by an authorized representative of the bidder, to the City. The representative may be required to present satisfactory proof of such authority. Any modification must be submitted in the same manner required for submission of the original bid/proposal. Failure to comply may be cause for provisional rejection of part, or all, of the bid or proposal. If a bid or proposal is withdrawn in accordance with this section, any required bid security will be returned to the bidder.

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[69] *See* Tenn. Code Ann. § 12-3-1011(f).

A bid or proposal may not be withdrawn or modified after the submission deadline. Negligence on the part of the bidder in preparing the bid or proposal confers no right for the withdrawal of the bid or proposal after the submission deadline.

9.11 Bid Exceptions. The bidder must list and provide complete details of all exceptions, deviations or variations to the City's specifications on a sheet designated by the bidder as such. Brochures, standard catalog sheets or technical data should accompany each bid or proposal, but will not be considered as notice of exceptions, deviations, or variations to the City's specifications.

9.12 Single Responsive and Responsible Bid or Proposal. If only one responsive and responsible bid or proposal is received in response to the solicitation, other prospective bidders had a reasonable opportunity to respond to the solicitation, and there is inadequate time for reissuing the solicitation, the City may award the contract to the single bidder, pursuant to Section 4.3(c), if the Purchasing Agent determines the submitted price is reasonable and within budgetary limits. The criteria for evaluating the reasonableness of the proposed price are: (i) price comparison, (ii) value analysis, (iii) prior price history, (iv) engineering estimate, or (v) other method as determined by the Purchasing Agent. Otherwise, the City may reject the bid and reissue the solicitation for the purpose of obtaining competitive sealed bids or proposals.

9.13 Multiple or Alternate Bids. For purposes of this section, an alternate bid is defined as a bidder's offer, which materially differs from the City's specifications, to provide the required goods and/or services.

Unless multiple or alternate bids are specifically allowed per the solicitation, such bids or proposals will be rejected by the City. If multiple or alternate bids or proposals are allowed, the solicitation must specify the treatment of such multiple or alternate bid/proposal. Such multiple or alternate bid may be submitted in addition to, or in lieu of, a responsible bid and must be clearly labeled as such. Notwithstanding the above, the multiple or alternate bid must substantially comply with the City's specifications to be considered for award. The multiple or alternate bid should not be used as a substitute for addressing the City's stated requirements. Bidders who wish to bid an alternate to the City's requested specifications must give complete specifications and a description of the alternate offered. The alternate bid must be equal to or better than the requested specifications. The City reserves the right to determine if the quoted good or service is equal to that specified.

9.14 Compliance with Brand & Trade Names. In the event a particular brand is referenced in the solicitation, the City will consider comparable products of other manufacturers if the bidder provides proof of comparability in the bid or proposal. The bidder must state the brand or trade names of the goods on which he or she is bidding and furnish, with the bid or proposal, such specifications, catalog pages, brochures, or other data which clearly describe the proposed item and how the proposed item varies from the brand referenced in the solicitation. In the City's sole discretion, the vendor's proposed goods must be equal to, or superior in quality and

workmanship, to those specified in the solicitation. Failure to provide the comparability data may be considered valid justification for the City's rejection of the bid or proposal.

When no substitution is specified by the vendor, the bid/proposal is presumed to conform to the City's referenced brand.

X. EVALUATION AND AWARD OF CONTRACT

10.1 Evaluation of Bids/Proposals. To be considered for award, the vendor's response must comply in all material respects with the requirements of the solicitation. Bidders must be both responsible and responsive. During the evaluation period, all bid and proposal analysis must remain confidential. All bids/proposals must be considered honestly and fairly and evaluated based upon what is actually presented in the bid or proposal. Only criteria set forth in the solicitation may be used to evaluate bids/proposals.

10.1.1 Bid Evaluation. Bids will be evaluated to determine the **lowest and best** bidder, whose bid meets the requirements and criteria clearly set forth in the solicitation.[70] The purchase price and whether the goods or services meet specifications are the most important considerations. However, in determining the best bidder, the City will consider other relevant factors, including but not limited to, the vendors' qualifications, the quality and reliability of the goods or services, delivery terms and record of the vendor's past performance on contracts with the City. If a sample product or descriptive literature was required, the City may inspect or test such product, as part of the evaluation, for quality or workmanship and to determine whether the product complies with the specifications.

Where more than one item is specified in the solicitation, the City reserves the right, in its sole discretion, to determine the lowest bidder(s) either on the basis of each individual item, a group of items, or a total of all items, unless otherwise provided in the solicitation.

10.1.2 Proposal Evaluation. A rating guide will be created such that proposals are evaluated in accordance with the criteria and process specified in the solicitation. The factors to be considered in evaluating proposals may include, but are not limited, to vendor qualifications, experience, technical approach and cost. An evaluation committee, comprised of three (3) or more individuals, will evaluate proposals, in accordance with the rating guide, to determine the vendor most qualified and best suited to provide the goods and/or services. To the extent possible, the evaluation committee will be comprised of representatives of the City who have knowledge and experience of the goods and/or services being procured. Members of the evaluation committee shall be carefully considered to safeguard against any conflicts of interest. Individuals serving on the evaluation committee must sign a Conflict

[70] *See* City Charter §§ 51; 222; and 223.

of Interest/Non-Disclosure statement (see Appendix for sample form). No proposal will be evaluated for any criteria or requirement that is not disclosed in the solicitation.[71] Each proposal evaluation must be in writing and state the reasons for each rating. The lowest cost proposal will not necessarily be awarded the contract. The award will be made to the highest ranking vendor based on the evaluation criteria set forth in the solicitation.

10.2 Low Tie Bids. A low tie bid exists when two (2) or more bidders offer goods and/or services at identical prices, and each bidder meets all specifications and requirements set forth in the solicitation. In such event, preference will be given in the following order:

a. Bidder who is a SBE or MWBE, pursuant to Article XVII herein, with its principal place of business in the city of Memphis;
b. Bidder who is not a SBE or MWBE with its principal place of business in the city of Memphis;
c. Bidder with principal place of business in Shelby County;
d. Bidder with principal place of business in the state of Tennessee.

If no preference applies, the purchasing department will break the tie by conducting a draw.

10.3 Award of Purchase Order or Contract. The solicitation does not commit the City to award a contract. The City may award all or part of a responsible and responsive bid or proposal. In addition, the City reserves the right to split the award among two (2) or more bidders, when the City determines a multiple award is in the City's best interest. If the City anticipates multiple awards prior to issuing the solicitation, the solicitation should state such information and the criteria for award.

After evaluation, the division must forward a Bid and Contract Agenda Sheet/Purchase Order Bid Award Recommendation Form ("B&C") to the purchasing department, specifying the division's award recommendation. The award recommendation must be approved by the Division Director prior to submission of the recommendation to the purchasing department. **Note:** Any award recommendation for a construction project must be approved by the City Engineer.

10.3.1 Bid Award. If the purchase was procured via competitive sealed bidding or multi-step sealed bidding, the City will award the purchase order or contract to the lowest and best bidder. The B&C must be accompanied by a copy of the bid tabulation sheet. The bid tabulation sheet must list all bids submitted in response to the solicitation and be signed by the personnel who completed the bid tabulation sheet. If the division recommends that the purchase order or contract be awarded to one other than the lowest bidder, a full and complete statement of the reasons must accompany the recommendation, for review and approval by the Purchasing Agent.

[71] *See* Tenn. Code Ann. § 12-3-1011(i).

10.3.2 Proposal Award. If the purchase was procured via competitive sealed proposals, the City will award the procurement to the best bidder. The B&C must be accompanied by the proposal ratings and the resulting negotiated contract, signed by the recommended vendor. Please note the contract does not have to be awarded to the lowest bidder, but must be awarded to the vendor with the proposal most advantageous to the City, taking into consideration the evaluation criteria and process specified in the RFP.

10.4 Public Notice of Award. Notice of the award will be posted on the City's website (www.memphistn.gov). In addition, the City may issue a written Notice of Intent to Award to each bidder that submitted a timely bid or proposal. The Notice of Intent to Award will list all bidders that responded by the deadline and announce the bidder(s) that were recommended for a contract award. Such notice can be mailed, faxed, or e-mailed to the bidders. For a sample notice of intent to award, please refer to the Appendix. Prior to the issuance of the intent to award notification for proposals, the division's personnel shall not communicate with vendors regarding the division's award recommendation. **Note:** The date on all notices of intent to award, including the web posting, **must** be the same.

For solicitations, the scoring matrix or bid tabulation, as applicable, may be made available at the time of issuance of the Notice of Intent to Award. If requested, this information may be provided to the bidder participating in the solicitation without the need for the filing of a Public Records request.

Notification of the City's intent to award does not create rights, interest or claims of entitlement in any bidder, and the "award" is defined as the City's presentation of a properly executed purchase order or fully executed contract to the successful bidder. The resulting purchase order or contract will be issued in the name of the successful bidder and mailed to the address as specified in the bid or proposal. If the successful bidder refuses or fails to enter into the contract within the specified time limit, the City may award the contract to the next lowest and best bidder.

The intent to award notification will be deemed publicly announced on the date specified on the notice.

XI. BID PROTEST

A vendor may protest (1) the City's specifications or solicitation requirements; or (2) the contract award recommendation.

11.1 Protest of Specifications. Any vendor may protest the terms of the specifications and/or solicitation. Any protest regarding the specifications or solicitation requirements must be submitted to the Purchasing Agent at least three (3) business days prior to the bid/proposal due date. Failure of a vendor to timely protest the specifications or solicitation requirements constitutes a waiver of the protest and any resulting claims regarding the specifications or solicitation requirements.

11.2 Protest of Award. Only a vendor who has submitted a timely bid or proposal in response to the solicitation may protest the award recommendation pertaining to such solicitation. If a vendor wishes to protest the award recommendation, he or she must submit a written bid protest to the Purchasing Agent (125 North Main, Room 354; Memphis, Tennessee 38103) within five (5) calendar days after the intent to award notification is publicly announced in accordance with Section 10.4 above. For construction projects, the bid protest must be submitted to the Purchasing Agent (125 North Main, Room 354; Memphis, Tennessee 38103) within ten (10) calendar days after the intent to award notification is publicly announced in accordance with Section 10.4 above. FAILURE OF A VENDOR TO FOLLOW THE BID PROTEST REQUIREMENTS WITHIN THE TIME FRAMES PRESCRIBED IN THIS SECTION CONSTITUTES A WAIVER OF THE PROTEST AND ANY RESULTING CLAIMS.

11.3 Contents of Protest. The bid protest must be clearly designated "BID PROTEST" and contain the following:

1. The solicitation number and title;
2. The name and address of the protesting vendor and the title and position of such person submitting the bid protest on behalf of the protesting vendor;
3. A statement specifying the objection(s) to the award recommendation;
4. A statement indicating the relief sought by the protesting vendor; and
5. All other relevant information/documentation in support of the bid protest.

11.4 Certification. By submitting a bid protest, the protester certifies, to the best of his/her knowledge, information and belief, that the protest is well grounded in fact and is warranted by existing law, policy or a good faith argument for the extension, modification or reversal of existing law or policy, and that it is not interposed for any improper purpose, such as to harass, limit competition, or to cause unnecessary delay or needless increase in the cost of the procurement or of the litigation.

11.5 Stay of Award. Upon receipt of a timely filed bid protest, the City will <u>not</u> proceed further with the procurement or award of the contract until the protest is heard and resolved, except and unless the Purchasing Agent finds and makes a written determination that award of the contract without delay is necessary to avoid a danger to the public health, safety or welfare of citizens of the City of Memphis.

11.6. Resolution of Protest. The Purchasing Agent has the authority to settle and resolve a bid protest. Upon receipt of the bid protest, the Purchasing Agent will investigate the matter. If deemed necessary, the Purchasing Agent may hold an informal hearing with the protester within seven (7) business days (excluding City-recognized holidays) after receipt of the bid protest. The Purchasing Agent will provide written notification to the protester of the date, time and location of such informal hearing. The purpose of the informal hearing is to provide an opportunity for the protester and the division personnel to present evidence to support its position(s) and for the Purchasing Agent to (i) review the basis of the protest; (ii) evaluate the facts and merits of the protest; and (iii) make a determination whether to uphold or reject the division's award recommendation, based upon all supporting information and documentation. If requested, a debriefing of the protester's response may be

conducted at the informal hearing. Within a maximum of five (5) business days (excluding City-recognized holidays) after receipt of the bid protest or conclusion of the informal hearing, whichever is later, the Purchasing Agent will issue a written decision, which will state reasons for the action taken. Such decision must be mailed, or otherwise furnished, to the protester and any other interested party. The decision must summarize the protest by identifying the parties; giving background information (e.g., history of the solicitation process, etc.); identifying the issues (e.g., protester's concerns and disputes); and telling how the purchasing agent's decision was reached.

If the protester does not agree with the Purchasing Agent's decision, he/she/it may request an administrative review from the Finance Director. Within five (5) calendar days from receipt of the Purchasing Agent's written decision, the protester must submit a Request for an Administrative Review to the Finance Director. The Finance Director will issue a written decision, which will state reasons for the action taken. Such decision must be mailed, or otherwise furnished, to the protester and any other interested party. The decision must summarize the protest by identifying the parties; giving background information (e.g., history of the solicitation process, etc.); identifying the issues (e.g., protester's concerns and disputes); and telling how the decision was reached.

If the protester does not agree with the Finance Director's decision, he/she/it may seek a ruling from the Mayor. In his or her sole discretion, the Mayor may schedule a formal hearing with the protester and City representatives, or the Mayor may make a decision based upon the written material and prior correspondence(s) regarding the protest. Upon conclusion of the formal hearing, a written decision will be provided to the protester stating the reason(s) for the Mayor's determination. As the contracting officer for the City, the Mayor's decision will be final.

The protest procedure set forth in this section is a mandatory administrative procedure that must be utilized and exhausted prior to seeking judicial review or remedy of the protest.

XII. PURCHASE ORDERS/CONTRACTS

The City assumes no contractual obligation as a result of the issuance of a solicitation, the preparation or submission of a response by a vendor, the evaluation of a response, or the recommendation of a vendor. Each requisition that is approved and processed by the purchasing department will result in either a purchase order or contract. The solicitation and the contractor's bid or proposal in response to the solicitation will be incorporated into and become a part of the resulting purchase order or contract. However, if the lowest and best bid for the purchase equals $5,000 or less, the purchase may be procured in accordance with Section 4.1 ("Small Purchases"). Prior to the City issuing a properly executed purchase order or contract, the vendor must supply all necessary documentation, including but not limited to the required insurance, bond, a copy of its current Memphis and Shelby County Business Tax License, and other documentation required by the City. ***The successful bidder shall not commence any services or provide any goods until he/she/it receives a***

***properly executed purchase order or fully executed contract from the City, and any such p*erformance shall be at the vendor's sole risk.**

12.1 Purchase Orders. A purchase order is an authorization from the Purchasing Agent for the delivery of goods and/or services in accordance with all terms and conditions of the purchase order. A purchase order cannot be issued for purchases costing $50,000 or more.[72] Only the Purchasing Agent, or his or her authorized designee, has the authority to prepare and execute a purchase order on behalf of the City.

A. Purchase order distribution

   i. The purchasing department will forward an original and properly executed purchase order to the successful bidder.
   ii. The purchasing department will retain a copy of the purchase order.

B. A binding contract is formed once the vendor accepts the properly executed purchase order or upon the vendor's commencement of performance as indicated in the purchase order.

C. Purchase order change/cancellation.

   Only the Purchasing Agent, or his or her authorized designee, may change or cancel a purchase order. The only type of change permitted to a purchase order is an accounting change. If an accounting change or cancellation is deemed necessary to the purchase order, the division must request such change by submitting a PO Maintenance Document Form (signed by the division director) to the purchasing department. Any purchase order change will be distributed in the same manner as the purchase order, pursuant to subsection A above.

12.2 Contracts. As stated in Section 4.2.1.2, a contract is required for any award costing $50,000 or more. The original contract, signed by the successful bidder, must be accompanied by all required documentation and submitted to the purchasing department for signatory approval by the necessary City officials. Any contract being routed for signatures after the contract term commencement date must be accompanied by a written justification detailing why the contract is being routed after the contract term commencement date. The Mayor of the City of Memphis is the sole contracting authority for the City of Memphis,[73] and the contract will not be effective and binding on the City until it has been fully executed by the Mayor and delivered to the contractor. Once fully executed, a copy of the fully executed contract will be forwarded to the contractor and division. The original contract will be retained by the purchasing department.

[72] *See* Code of Ord. § 2-277(c)(2) and §2-277(c)(3).
[73] *See* Home Rule Ord. No. 1852, § 14.

All contracts must be in a legal form approved by the City Attorney's Office. The Contract Terms Library Administrator maintains an electronic library of standard contract clauses and templates prepared by the City Attorney's Office. The standard contract templates contain all required and standard provisions specified in subsections 12.2.3 and 12.2.4 below and may be used for routine contractual transactions. No changes shall be made to the standard templates or clauses without prior approval of the City Attorney's office. A vendor's contract template may be used if the City does not have a standard template for the particular goods or services and the terms and conditions are not inconsistent with any of the City's required and standard terms; however, such contract must be reviewed and approved by the City Attorney's office in advance.

12.2.1 **Term Contract** - A term contract is a contract established for a specified period of time. A term contract is established for no longer than twelve (12) months, but may contain renewable options for additional one-year periods. If the contract was procured competitively, the initial contract, plus the renewal options, cannot exceed a total period of three (3) years.

12.2.2 **Multi-Year Contract** - A multi-year contract is a contract established for a term of greater than twelve (12) months, but no more than thirty-six (36) months, unless otherwise expressly approved by the Purchasing Agent. If the contract was procured competitively, the term of the initial contract, plus all renewal options, cannot exceed sixty (60) months. The term of all multi-year contracts and conditions of renewals or extensions, if any, must be stated in the solicitation. The division director must submit written justification to the Purchasing Agent as to why such a long-term contract is advantageous and/or necessary by the City. Multi-year contracts must contain a provision that the contract is subject to the availability and annual appropriation of funds for such goods or services. In the event funds are not appropriated or otherwise made available to support continuation of performance, the City may immediately terminate the contract without any penalties, damages, etc.[74]

12.2.3 Required Contract Provisions. At minimum, all term and multi-year contracts must include the following provisions:

1. Parties to the contract. Clearly and accurately identify the parties to the contract. Be sure to specify the full legal name of the contractor;
2. Detailed scope of service. This provision should answer the "what, where, when, and how" questions about the purchase. Be as lengthy as necessary and as specific as possible when detailing each party's duties and responsibilities. Specify the goods and/or services to be provided, price, quantity, payment terms, quality, etc. The scope of services section is really important when, and if,

[74] Tenn. Code Ann. § 6-56-203 requires the City to operate under an annual budget. In addition, Home Rule Ord. 1852, § 12 prohibits the Comptroller from making disbursements not specifically provided for in the budget as approved by Council.

it becomes necessary for the City to determine whether the contractor has breached the contract;

3. Term of contract (beginning and ending), including any renewal, extension or other options. For contracts procured competitively, any renewal, extension or options must have been advertised in the City's original solicitation. The effective date should be left blank and will be inserted once the contract has been fully executed by the necessary City officials.;
4. Contract Amount (i.e., amount of funds to be spent pursuant to the contract). Specify the price and quantities of goods or services to be provided. If applicable, include a payment schedule specifying the amount and due date of each payment. If the contract amount is an estimated figure because the exact quantity is unknown, include a table of cost per unit and the statement "quantities and contract amount are estimated and invoicing/compensation shall be only for actual goods and/or services provided, based upon the unit cost herein." Such provision would be helpful in determining a pro rata payment in the event of early termination;
5. Prevailing Wage (for construction projects in excess of $500,000);
6. Liquidated damages (for public works improvements);
7. Bond Requirements, if applicable
8. Conflict of Interest;
9. Covenant Against Contingent Fees;
10. Indemnification/Hold Harmless;
11. Nondiscrimination;
12. Employment of Illegal Immigrants;
13. Independent Contractors;
14. Governing Law/Venue. Governing law must be Tennessee and venue must be in Shelby County, Tennessee without regard to conflict of laws provisions;
15. Compliance with Laws;
16. Insurance Requirements; and
17. Termination of Contract

    (i) For Cause if the contractor fails to fulfill its obligations under the contract in a timely or proper manner or fails to comply with any term or provision of the contract. The contractor will not be relieved of liability for any loss or damages sustained by the City by virtue of the contractor's breach;

    (ii) Without Cause, at any time, following written notification of the City's intent to terminate pursuant to the terms of the contact; and

    (iii) Immediately in the event sufficient funds for the Agreement are not available or appropriated by Memphis City Council to support continuation of performance.

12.2.4 Standard Terms and Conditions. In addition to the required contract provisions, the following terms and conditions should be included in all contracts:

1. Invoices;
2. Compensation/Payment;
3. No Tax Payments;
4. Title & Risk (for goods);
5. Transportation Charges (for goods);
6. Shipments (for goods);
7. Records Retention/City's Right to Audit;
8. Travel Expenses (The contract should either state whether (i) the contractor is entitled to no additional payments for travel-related expenses; or (ii) travel expenses will be reimbursed by the City. Travel expenses should not exceed those set by City policy);
9. Reports;
10. Confidentiality;
11. Rights in Data;
12. Remedies Cumulative;
13. Waiver of Contract Rights;
14. Minority/Women Business Enterprise (MWBE);
15. Public Records;
16. Notices;
17. Assigning/Subcontracting Contract;
18. Force Majeure;
19. Dispute Resolution;
20. Amending Contract;
21. Severability;
22. Standard of Performance;
23. Warranty;
24. Entire Agreement; and
25. Patent Indemnification

12.2.5 Impermissible Contract Provisions. Unless otherwise approved, contracts shall not include the following clauses:

1. Hold harmless/Indemnification by the City. The City cannot contractually agree to indemnify or hold harmless another entity. The Tennessee Attorney General's Office has opined that the City does not have the power to enter into an indemnity clause which extends its liability beyond that imposed by law because it constitutes an unauthorized unconstitutional act[75];

[75] *See* Tenn. Op. Atty. Gen. No. 93-01, which references Tenn. Const. Art. I, § 17, which states suits may be brought against the State in such manner and in such courts as the Legislature may by law direct; and Tenn. Const. Art. 2, § 29, which prohibits the City from giving or loaning credit to or in aid of any person, company, association or corporation.

2. Contractor's Disclaimer of liability for incidental, exemplary or consequential damages, etc. The City is entitled to actual damages it suffers, which consist of both general and special damages. Disclaimers of liability for damages are (potentially) an unconstitutional lending of the City's credit; thus, if the City is prohibited from recouping all of its losses following a breach, it has in essence made a loan to the breaching party equal to the amount of the damages waived;
3. Contractor's Disclaimer of express or implied warranties. A warranty is the contractor's promise or representation that the goods will be of a stated quality or character. Such disclaimers limit the circumstances under which the contractor will be in breach of the contract by waiving its responsibility for the performance of goods or services purchased by the City. The risk of performance will fall to the City, and the City is essentially purchasing the product "as is." Such disclaimers are (potentially) an unconstitutional lending of the City's credit;
4. Limitation on damages/dollar amount recoverable by the City. (Example: In no event will the City be able to recover more than the purchase price of the product.) The City is entitled to actual damages, and this provision is (potentially) an unconstitutional lending of the City's credit. Thus, if the City is prohibited from recouping all of its losses following a breach, it has in essence made a loan to the breaching party equal to the amount of the damages waived;
5. Limitation on time within which the City may bring suit. Statute of limitation provisions govern the timeframe within which the City must bring a suit, and limiting the time within which the City may bring suit may be an impermissible waiver of sovereignty;
6. Contract Term with no specific termination date. (Example: The term of this Agreement shall be one year commencing upon execution and shall automatically renew for additional one-year periods.)
7. Provisions requiring advanced deposits or payments from City. State law requires payment to be made when goods or services have been delivered or provided[76];
8. Provisions requiring the City to pay any taxes associated with the contract. In accordance with Section 7.7, the City is a tax- exempt organization;
9. Clauses assessing attorney's fees, court fees, penalties and/or liquidated damages in case of breach by the City. Such provisions are impermissible because the City is liable for actual damages only and cannot voluntarily agree to pay another party's court costs, attorney fees, etc.;
10. Clause granting the contractor unilateral authority to assign contract. Any purported assignment of the contract must be subject to the City's prior written consent (e.g., City should retain right to ensure the contract is not assigned to an entity who is not responsible or otherwise approved by the City);

[76] *See* Tenn. Code Ann. § 12-4-703.

11. Governing law other than Tennessee/Consent to jurisdiction/venue outside Shelby County, Tennessee;
12. Provisions requiring payment of interest, late charges or finance charges in excess of the Tennessee Prompt Pay Act[77];
13. Provisions requiring confidentiality and nondisclosure that violate the Tennessee Public Records Act.[78] Example: The City agrees to hold the trade secrets and other proprietary information of contractor in confidence;
14. Provisions requiring the City to purchase or obtain insurance, including liability insurance, performance bonds or property insurance. The City is self-insured in accordance with the provisions of the Tennessee Governmental Tort Liability Act.[79]
15. Binding Arbitration. The Mayor must approve the compromise and settlement of any claim or civil litigation to which the City might be a party.[80]

12.2.6 Contract Review/Approval Process. See Appendix M for the Contract Review/Approval Process Flow.

XIII. CONTRACT MANAGEMENT

13.1 Monitoring Contract or Purchase Order. The procuring division is responsible for the effective administration and management of all purchase orders and contracts procured under its purview. The contractor must deliver all goods and/or services in accordance with the terms and conditions of the purchase order/contract. To ensure the receipt of quality service and goods, the division's personnel must monitor the services or goods provided by the contractor to ensure compliance with the contract/purchase order. Monitoring and documenting the contractor's performance in a consistent and thorough manner is essential to identifying and resolving problems with a contractor's performance; evaluating contractors for future awards; and when necessary, providing a basis for removing a vendor from the City's bidders list, debarring or suspending a vendor. If, at any time, goods or services are not provided in accordance with the terms and conditions of the purchase order/contract, the division's personnel should make a reasonable effort to resolve the problem with the contractor within the context of the purchase order or contract. For further guidance, see Section 13.4.4 of this manual. If the problem persists , the division's personnel must submit a written notification to the Purchasing Agent. The notice must be detailed and include any supporting documentation.

The Purchasing Agent will attempt to resolve any issues/concerns with the contractor and the division's representative(s). If deemed necessary, the City Attorney's Office will assist to resolve any contract disputes. Continued nonperformance of the purchase order or contract terms, conditions and specifications may result in

[77] *See* Tenn. Code Ann. § 12-4-701 et seq.
[78] *See* Tenn. Code Ann. § 10-7-501 et seq.
[79] *See* Tenn. Code Ann. § 29-20-101 et seq.
[80] *See* City Charter §194.

cancellation or termination of the purchase order/contract, pursuant to the terms and conditions therein.

13.2 Contract Changes.

13.2.1 Change Order. Within the scope of the contract, a change order is used to (1) authorize the contractor to perform extra work to complete any construction or improvement project that had been awarded under a contract; or (2) increase or decrease the quantities resulting from variations between estimated quantities in a fixed-unit cost contract and the actual quantities.

13.2.2 Contract Modifications. A contract modification is a formal change to an existing contract. The following are formal changes to an existing contract:

A. A *contract renewal/extension* awards the contractor an additional contract period upon successful completion of the initial or subsequent contract period. The terms and conditions of a contract renewal may be the same as, or may be appropriately changed from, the terms and conditions of the contract being renewed. A renewed contract is typically, but not always, for the same duration of the contract being renewed. A *contract extension* is used when additional time is required for the contractor to complete the contract obligations. Typically a contract is extended for a short duration (e.g., 6 months), and the remaining terms and conditions of the contract remain the same and in full force and effect. The beginning of the term of a contract renewal or extension must be prior to or the same as the termination date of the contract being renewed/extended.

A competitively-procured contract cannot be renewed without rebidding unless the original contract contains a renewal provision. Suggested language for such a clause is: *"This contract may be renewed for additional one-year terms by mutual written consent of the parties. Renewals shall be at the same or lower price(s) or rate(s) and on the same terms as stated in the original contract."*

B. A *contract amendment* is used to increase the maximum funding allocation; change the scope of services; change any of the terms and conditions; change the contract term; or change a contractor's name. A formal contract amendment is not required to add new sites to a contract; transfer funds between individual line items; or add new personnel classifications to be paid under the contract. A contract amendment can be anticipated or unanticipated. An anticipated amendment is an expected change, which was allowed in the terms and conditions of the original contract (e.g., price adjustments, extension, or renewal of the contract). An unanticipated amendment must be within the scope of the original contract, authorized by the terms of the contract, and due to legitimate, unforeseen circumstances. Competitively-procured contracts cannot be modified unless such change was provided for in the solicitation and resulting contract.

The different formal changes can be combined into one (1) modification document. All contract modifications require the signatory approval of the contractor and the required City officials. Unless otherwise approved, a contract may not be amended, extended or renewed after the contract expiration date; because, once the contract has expired, there is no legal document remaining to modify. Hence, the division personnel must carefully monitor contracts. If the contractor's name changes (e.g., Merger), an Assignment and Novation ("A&N"), including official documentation evidencing the name change, should be prepared. The A&N must be signed by all parties.

A CONTRACT CANNOT BE MODIFIED TO AVOID COMPETITION REQUIREMENTS.

For a sample contract amendment, please refer to the Appendix or the electronic contracts library.

13.2.3 Process to Modify Contracts.

1. If required per the terms of the contract, the applicable party must submit written notification to the other party of its desire to renew, extend or amend the contract. If such notification is required from the City, the division must submit to the contractor written notification (within the time period required in the contract) of the City's intent to modify the contract. From a practical standpoint, such notice should be submitted at least 45 days prior to the number of days required for receipt of such written notice.; and
2. The division must prepare and forward the signed contract modification document(s) to the purchasing department for processing. The document must include a justification for the modification. Additional documentation regarding the modification may be required. The modification document must reference the contract number, section(s) of the contract being modified and describe how the contract is being changed. When submitting a contract amendment for review and signature, a copy of the original contract and all previously executed renewals and amendments may be required.

13.3 No Unauthorized Changes to Scope of Service. The division is responsible for ensuring that the contractor complies with the terms and conditions of the purchase order or contract, including any amendments. The division must ensure the contractor provides all required goods/services (e.g., reports, etc.) in accordance with the properly executed purchase order or fully executed contract. The scope of service cannot be changed, except via a formal contract modification pursuant to Section 13.2.3 above.

If, at any time, the division is unsure whether it is allowed to make any changes to the scope of service without a formal contract modification, the division should contact the law division for clarification.

13.4 Inspection and Acceptance of Goods and/or Services. Unless otherwise provided for in the purchase order or contract, the contractor must deliver all goods in a single lot. Upon delivery and prior to acceptance, the City reserves the right to inspect goods or services to ensure compliance with the purchase order or contract. The City's failure to conduct an inspection and reject goods and/or services upon receipt does not relieve the contractor of liability for delivery of non-compliant or defective goods and/or services.

13.4.1 Receiving Delivery. At the time of delivery, the division's receiving personnel must verify that each incoming shipment was authorized by the City pursuant to a legitimate purchase order or contract. If an unordered parcel is received, the receiving personnel must refuse the entire shipment. When no purchase order or contract number is specified on the delivery documents, the receiving personnel must open the package to see if a packing list and/or invoice is available which evidences a City purchase order or contract number. If no identifying information is found, the receiving personnel must refuse the shipment and not sign any receiving documents. When signing the receiving documents (e.g., freight bill, packing slip, etc.), include the notation "SUBJECT TO INSPECTION." Be sure to retain a copy of all signed documents.

13.4.2 Inspection. Delivered goods and/or services are subject to inspection within a reasonable amount of time after receipt of such goods and/or services. *Inspection* ensures the terms of the purchase order or contract are fully performed and the goods or services are received in compliance with the purchase order or contract. At the time of delivery, but prior to acceptance, the division's personnel must ensure that the items being delivered comply with the specifications and requirements of the purchase order or contract in regard to delivery time, quantity, quality, size, color, model number, brand name, etc. The division's personnel must:

A. Ensure the carrier's freight bill or packing slip evidences the actual number of cartons, crates, boxes, etc. received;
B. Examine all containers for signs of readily, visible damage or tampering. If signs of damage or tampering are obvious or suspected, note such on the freight bill and receiving documents. Visibly damaged items must be rejected in accordance with Section 13.4.4;
C. Ensure the items being delivered complies with the items ordered by the City. Count and examine the internal contents of all boxes, crates or cartons to determine that the items received fully complies with the quantity and description shown on the receiving documents. Note any discrepancies (e.g., over shipment, under shipment, noncompliant items, etc.) on the receiving documents prior to signing such document(s). Non-compliant items and any discrepancies will be addressed in accordance with Section 13.4.4; and
D. Inspect the items for apparent damages. Damaged items must be rejected in accordance with Section 13.4.4.

13.4.3 Substitutions. Unless otherwise authorized in the purchase order or contract, the City will not accept any substitutions. The division's

representative must immediately notify the division's procurement representative of the problem, who will proceed in accordance with Section 13.4.4 below.

13.4.4 Rejection/Resolving Discrepancies. Any discrepancies must be immediately reported to the division's procurement representative so that appropriate corrective action may be taken. The division's personnel will reject visibly damaged or noncompliant goods or services and notify the contractor of any discrepancies or defects. The procurement representative must note any discrepancies in the contract file. He or she must request replacements for the items or request an adjustment to the amount to be invoiced. If an invoice has already been issued, the contractor must issue a new invoice. The procurement representative must document such contact with the contractor in writing. In addition, the procurement representative must report any discrepancies and resulting action(s) to the Purchasing Agent.

If City rejects items, the City reserves the right to purchase like goods or services elsewhere and hold the contractor responsible for any loss or damage sustained by the City, including but not limited to, the difference between the price stated in the purchase order or contract and the price paid by the City for such like goods or services, plus all costs of collecting the same, including but not limited to attorney's fees and court costs.

The contractor must retrieve all items rejected by the City pursuant to this Section. At the contractor's request and in the City's sole discretion, the City may return the goods at the contractor's expense, provided the contractor will be responsible for any damage in transit.

13.4.5 Acceptance. After the City has been afforded a reasonable amount of time to fully inspect the items, the items will be accepted. *Acceptance* constitutes acknowledgement that the goods or services comply with the requirements of the purchase order or contract.

XIV. LEGAL AND CONTRACTUAL REMEDIES

14.1 Default of Contractor. In case of default by the contractor (e.g., failure to complete within the specified time, failure to provide goods in conformance with the purchase order or contract, etc.), the City may by written notice in accordance with the terms of the purchase order or contract, cancel the purchase order or contract and purchase substitute goods or services from another source. In that event, the City may recover any excess costs from the Contractor. *Excess costs* are defined as the difference between the price stated in the purchase order or contract and the actual cost incurred by the City, including but not limited to re-procurement costs. In addition, the City may, exercise any additional remedies specified in the purchase order or contract and/or which are available at law or in equity.

14.2 Contractor Debarment or Suspension. In addition to other remedies available to the City, the City may debar or suspend a vendor. The effect of a

debarment or suspension is an automatic prohibition of the City from awarding any contracts, including any renewal or extension to an existing contract, to the vendor. After providing reasonable notice to the contractor of the charges and a reasonable opportunity for the contractor to rebut the charges, the Purchasing Agent may (i) debar a vendor for a period not exceeding one (1) year; or (ii) suspend a vendor for a period not exceeding two (2) years.

The causes for debarment or suspension include, but are not limited to, the following:

a. Conviction for commission of fraud or a criminal offense in connection with obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;
b. Conviction under state or federal statutes for embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or honesty that seriously and directly affects the vendor's responsibility as a City contractor;
c. Conviction under state or federal antitrust statutes relating to the submission of bids or proposals;
d. Violation of purchase order or contract provisions, as set forth below, of a character which is regarded by the Purchasing Agent to be so serious as to justify suspension or debarment including:
    i. failure, without good cause, to perform in accordance with the terms of one or more purchase orders or contracts; or
    ii. a history of failure to perform or of unsatisfactory performance of one or more purchase orders or contracts within the past two (2) years; provided that failure to perform or unsatisfactory performance caused by acts beyond the contractor's reasonable control will not be considered as a basis for debarment or suspension;
e. Violation of the ethical standards set forth in this manual; or
f. Any other cause the Purchasing Agent determines to be so serious and compelling as to affect the vendor's responsibility as a City contractor, including debarment by another governmental entity.

The Purchasing Agent will issue a Notice of Debarment or Suspension to the vendor. The notice will set forth the reason(s) for the debarment/suspension. Solicitations will cease to be issued to the vendor as of the date of the notification, unless the vendor requests a hearing.

The vendor may request a hearing by submitting written documentation to the Purchasing Agent within five (5) business days after receipt of the Notice of Debarment of Suspension. The Purchasing Agent will schedule a hearing with the vendor, at which evidence may be presented. Upon conclusion of the hearing, the Purchasing Agent will issue a written decision to the vendor, stating the reasons for the action taken.

If the vendor fails to request a hearing within the five-day period, the Purchasing Agent's decision to suspend or debar will stand.

XV. CONTRACTOR PAYMENT

15.1 Payment for Purchases.

A. Cash on Delivery (C.O.D.). The City will not accept C.O.D. purchases.[81]

B. Prepayment. In certain instances, it is necessary for the City to remit payment to the vendor in advance (at the time an order is placed), without the necessity of a purchase order or contract. Examples of such purchases include but are not limited to seminar registration, membership dues, periodical subscriptions, utility and telephone payments, and similar purchases. The Division will submit a Check Request form to the Accounts Payable Department for payment of such goods or services.

C. Invoices. Except for those prepayment purchases specified in subsection B above, the contractor must submit an original invoice, in accordance with Section 15.2, for the payment of goods and/or services received by the City.

15.2 Processing and Paying Invoices. Upon the contractor's satisfactory completion of its obligations, the contractor must submit an original invoice, either typed or written in ink, to the division, with all necessary supporting documentation. Invoices must be itemized to identify the quantity and price for all items purchased or the specific services provided. The invoice must be billed to the City of Memphis and mailed to the individual at the address specified in the purchase order or contract. At a minimum, the invoice must contain the following:

a. Invoice date;
b. Contractor's name;
c. Contract or purchase order number (assigned by the City);
d. Description of the delivered item(s) or service;
e. Total amount due for the delivered item(s) or service;
f. Address to which payment should be remitted;
g. Name, title, and contact information of the individual to be contacted regarding billing questions; and

[81] Pursuant to the Tennessee Prompt Pay Act, codified at T.C.A. § 12-4-701 et seq., the City pays for any acquired services or goods after delivery of such goods or services.

h. Any other information or documentation required by the purchase order or contract.

Upon receipt of the invoice, the division's representative must either write or stamp the date (month, day, and year) of receipt of such invoice. The timeframe for payment (and any discount) begins when the City receives the invoice, in accordance with the minimum requirements specified above. The division's personnel must (1) review the invoice to verify that all goods have been received by the City in acceptable condition or the services have been performed satisfactorily; (2) review the invoice for accurate mathematical computations; (3) review the contract to ensure the prices reflected on the invoice are in compliance with the terms of the purchase order or contract; (4) ensure the contractor has complied with all terms and conditions of the purchase order or contract (e.g., submitting reports, etc.); and (5) have the division director approve (by signing and date) the invoice. Approval of an invoice by the division's director assures the Accounts Payable department (1) the invoice is correct and in accordance with the terms of the purchase order or contract; and (2) payment is due to the contractor. After approval of the invoice, the division will submit a check request form, accompanied by the contractor's invoice, to the Accounts Payable department for processing and payment remittance to the contractor.

In the event the quantity delivered by the vendor is less than the quantity ordered and the division wishes to make a partial payment, the division will complete the "Partial Shipment" form and forward it, along with the check request form, to the Accounts Payable department.

Unless otherwise agreed in the purchase order or contract, the Tennessee Prompt Pay Act requires the City to pay the contractor within forty-five (45) days after receipt of the invoice for such delivered goods or services, unless the City disputes the amount due or the contractor's compliance with the terms of the purchase order or contract. However, the City of Memphis' payment term is net 30.

XVI. GIFTS TO THE CITY

The City may accept any money or property for the purpose of fulfilling any public or corporate use.[82] All monetary gifts to the City must be accepted by City Council via resolution. Any gift to the City must be evidenced as a voluntary transfer of the goods or services made gratuitously and without consideration. Essential elements of a gift are: (a) capacity of the donor of the gift; (b) intention of the donor to make a gift; (c) completed delivery of the gift to or for the City; and (d) proper acceptance of the gift by the City. *Please note the City is not obligated to accept any gift(s).*

XVII. PURCHASES FROM MINORITY OR WOMEN-OWNED BUSINESSES (M/WBE) AND SMALL BUSINESS ENTERPRISES (SBE)

[82] *See* City Charter § 451.1; see also Tenn. Code Ann. §12-3-1005.

City procurements may be subject to the City's Equal Business Opportunity Procurement Program[83], which establishes requirements for the participation of minority and women-owned businesses on certain City contracts, and/or the Small Business Enterprise Opportunity Program, which establishes requirements for the participation of SBEs on certain City contracts. The City will take affirmative steps to assure that small, minority and women-owned business enterprises are solicited whenever there are potential qualified sources. Information regarding minority and women-owned businesses, including a current listing of active and certified MWBEs and SBEs can be obtained from the City's Contract Compliance Office. The Contract Compliance Office is responsible for capturing data regarding the involvement of minority or women-owned businesses on City contracts, including any involvement as a subcontractor.

17.1 Definitions

Minority-owned business means a business (including, without being limited to, sole proprietorship, partnership, corporation, joint venture or any other business or professional entity): (1) which is at least fifty-one percent (51%) owned by one or more minority persons, or, in the case of a publicly owned business, at least fifty-one percent (51%) of all classes of the stock is owned by one or more minority persons; (2) whose management, policies, major decisions and daily business operations are independently controlled by one or more of such minority persons; and (3) which performs a commercially useful function.

Minority person means those persons, citizens of the United States and lawfully admitted resident aliens, who are African American, Hispanic, Asian, or Native American.

Small Business Enterprise (SBE) means a firm with its headquarters and/or principal office located in the city of Memphis which is an independent and continuing enterprise for profit, performing a Commercially Useful Function, which is Owned and Controlled by one or more Economically Disadvantaged persons, and for which the gross revenues or number of employees averaged over the past three years, inclusive of any affiliates as defined by 13 C.F.R. Sec. 121.103, does not exceed the size standards as defined pursuant to 13 C.F.R. §121. In addition, the net worth of each owner of an SBE cannot exceed $750,000, excluding each owner's primary residence which may be located in the Memphis MSA and the business enterprise for which the owner(s) is seeking SBE certification from the City.

Woman-owned Business Enterprise means a business (including, without being limited to, sole proprietorship, partnership, corporation, joint venture or any other business or professional entity): (1) which is at least fifty-one percent (51%) owned by one or more women, or, in the case of a publicly owned business, at least fifty-one percent (51%) of all classes of the stock is owned by one or more such women; (2) whose management, policies, major decisions and daily business operations are independently controlled by one or more of such women; (3) which performs a

[83] *See* Code of Ord. § 2-325 et seq.

commercially useful function; and (4) which is owned by those persons, citizens of the United States and lawfully admitted resident aliens, who are of the female gender, and not otherwise included in one of the specific ethnic minority groups.

17.2 Goals. In establishing any minimum EBO participation goals, the City representatives will consider the following factors as part of the goal-setting methodology in establishing annual EBO goals:

a. The number of minority and women-owned businesses in the relevant market area;
b. The availability of minority and women-owned businesses in the relevant market area willing to do business with the City;
c. The general availability of minorities and women having the requisite skills to manage and/or form businesses in the relevant market area;
d. The percentage of minority and women-owned businesses compared to the total number of businesses in the relevant market;
e. The availability of minority and women-owned businesses in the relevant market area which an agency can reasonably add to its certification list; and
f. The degree of outreach and training the City is reasonably able to undertake as a means of making opportunity available to minority and women-owned businesses.

Only vendors certified pursuant to Section 17.4 can be utilized to satisfy any EBO goals established by the City. Bids or proposals that fail to satisfy the EBO goal requirement will be deemed nonresponsive and ineligible for contract award.

17.3 Bond Requirements. As an initiative to enhance minority and women-business participation on all City contracts, bid bonds required on all construction projects with an estimated cost of one hundred thousand dollars ($100,000) or more will be five percent (5%) for MWBEs. For projects under one hundred thousand dollars ($100,000), bond requirements will be set at the discretion of the Purchasing Agent.

17.4 Certification. To qualify as an MWBE, the business must be located within the Memphis MSA (Crittenden County in Arkansas, DeSoto, Marshall, Tate, and Tunica County in Mississippi, and Fayette, Shelby and Tipton Counties in Tennessee) and be certified as a minority or woman-owned business by a City approved central certification agency and approved by the Office of Contract Compliance.

17.5 Compliance. Where required, the contractor must comply with all provisions of the EBO ordinance. For failure to comply with such provisions, the contractor will be subject to penalties as specified therein. Upon a determination that the bidder or contractor has failed to comply with the requirements of the MWBE ordinance, the City may (a) declare the vendor's bid nonresponsive; (b) deny the vendor's recognition as an approved MWBE, for purposes of contracting with the City, for a period not to exceed one (1) year; (c) exclude the contractor from submitting a bid or proposal for a period not to exceed one (1) year; (d) terminate the contract; and/or (e) withhold from the contractor ten percent (10%) of all future payments under the involved project until it is determined that the contractor is in compliance.

17.6 Contract Complaints. In an effort to resolve complaints that may lead to the cancellation or termination of contracts or purchase orders awarded to certified MWBEs, the Purchasing Agent will include the Contract Compliance Officer in the resolution of such complaints.

XVIII. PERSONAL PROPERTY MANAGEMENT

The City maintains records on all personal property and equipment that it owns or purchases. After payment has been made for any equipment, the Fixed Assets Coordinator assigns a tag number and forwards an asset number to the division. The division must affix the assigned asset number on such equipment. On an annual basis, the Comptroller generates and sends an inventory list of equipment to the Division Director for verification purposes. The division's representative must review the list and identify any surplus equipment for disposal in accordance with Section 18.1 below. In the event equipment is missing or stolen, the Division Director must notify the Purchasing Agent, who will then file a police report. The purchasing department will remove the asset number for such stolen equipment from the inventory list and fixed asset books.

The purchasing department is responsible for disposing of all (i) surplus property; and (ii) abandoned, stolen and recovered property. The City may convey or transfer personal property, surplus or otherwise, to another governmental entity or public agency if the receiving entity uses the property for a public purpose and the governing body of each entity authorizes such conveyance/transfer.[84]

18.1 Surplus Property. Surplus property is tangible personal property that has been determined unfit for service or use by the City in any division.

18.1.1 <u>Division Director to Condemn.</u> The division's representative must report any property that becomes unfit for service or use by the City to the division director. The division director must examine the condition of the property, and in his/her judgment, and condemn such property if it is unfit for service or use to the City. Once condemned, the director will immediately submit a written report, identifying such condemned property, to the Purchasing Agent. Such report will completely describe the property, its condition, quantity, and location. Notwithstanding the above, no tangible personal property of the City, having an estimated value of $10,000 or more, can be condemned except by resolution of the City Council.[85]

18.1.2 <u>Purchasing Agent to Sell</u>. The Purchasing Agent will dispose of all personal property, valued less than $10,000, which has been condemned pursuant to the preceding subsection. He or she must sell, publicly or privately in his or her discretion, such condemned property on the best terms he or she can obtain on behalf of the City. Notwithstanding the above, tangible personal

[84] *See* T.C.A. § 12-9-110.
[85] *See* Code of Ord. § 2-301, modified by Resolution No. 20 (issued April 24, 2007).

property of the City, with an estimated value of $10,000 or more, can be sold by resolution of the City Council.[86]

Surplus property will be disposed of by a method determined by the Purchasing Agent to be of the most value and in the City's best financial interest; however, property acquired through federal or state funds must be disposed of in accordance with the requirements of the funding agency, if applicable. The following disposal methods may be used for surplus property:

1. Sale
   a. Auctions. Auctions will be conducted at the time and place specified in the notice in accordance with subsection C below.[87] Auctions are held at 12 o'clock noon each Tuesday at 465 Klinke Avenue; Memphis, Tennessee 38127 and, if deemed necessary (in the City's sole discretion), at 12 o'clock noon on specified Thursdays at 79 Flicker Street; Memphis, Tennessee 38104. A list of the items to be sold each week is available in the Purchasing Department, 125 North Main Street, Room 354; Memphis, Tennessee 38103 and at the Vehicle Storage Lot, 465 Klinke Avenue; Memphis, Tennessee 38127. In addition, the auction may be conducted online via the internet. The property will be sold to the highest bidder; or
   b. Sealed bids. Bids will be publicly opened, and the property will be sold to the highest bidder. The City reserves the right to reject any and all bids considered not in its best interest.

2. Transfer from one City division to another. Upon receipt of notice of the condemned property, the purchasing department will first attempt to transfer the property to another City division.

3. Transfer to another government entity. By resolution or ordinance, the City may dispose of surplus property to another governmental entity by gift, sale, trade or barter.[88] In addition, the City may convey or transfer personal property. If the receiving entity uses the property for a public purpose, and the governing body of each entity authorizes such conveyance/transfer.

4. Trading in for new purchase. The Purchasing Agent may bargain with vendors for the trading in of condemned property as an offset or allowance on the purchase of other property, provided all vendors are given an equal opportunity to view and appraise the condemned property for such purpose.[89] The Purchasing Agent must report such disposal in accordance with Section 17.5 below.

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[86] *See* Code of Ord. § 2-302, modified by Resolution No. 20 (issued April 24, 2007).
[87] *See* City Charter § 498.
[88] *See* Tenn. Code Ann. § 12-3-1005; Pursuant to T.C.A. § 12-9-110(b), property conveyed or transferred to another governmental entity is not required to be declared surplus.
[89] *See* Code of Ord. § 2-306.

18.1.3 Advertising Sale – Prospectus of Property to Be Sold. The Purchasing Agent will prepare a prospectus of all surplus property to be sold pursuant to this section. The prospectus must specify the date, time and location of the sale, and terms and conditions of the sale.[90] The prospectus should also include a description of the items being sold and other pertinent information regarding the sale (e.g., minimum purchase amount, form of payment, etc.). Such information will be provided to prospective buyers via the most effective method[91] (e.g., website posting, newspaper publication, written notification to vendors on the bidders list for the applicable commodity code, etc.). Information regarding the sale will also be posted on the City's website. In addition, a prospectus of items to be sold will be available in the Purchasing Agent's office and at the Vehicle Storage Lot, located at 4665 Klinke Avenue, Memphis, Tennessee 38127. Whenever the Purchasing Agent determines the property is of such value to justify the expense, he or she will advertise in one or more of the daily newspapers circulated in the City of Memphis; however, he or she may not advertise more than three (3) insertions in any one paper.[92] Any such advertisement must state whether sealed bids will be received or an auction will be held.[93]

18.2 Abandoned, Stolen and Recovered Property.[94] The City may sell and dispose of all abandoned, stolen, and/or recovered property of every kind and character, including motor vehicles, which remains unclaimed with the Memphis Police Department for a minimum period of thirty (30) consecutive days after the owner has been notified of the property's location and the process to claim and receive same.[95]

18.2.1 Notification of Owners and Lienholders of Abandoned, Immobile or Unattended Motor Vehicles. The police division must be immediately notified of any abandoned, immobile or unattended mobile vehicle(s) transported to the City's vehicle storage lot.[96] Unless the vehicle identification number (VIN) is missing, the division of police services must conduct, or have conducted, a title search on any abandoned motor vehicle(s) to determine the owner.[97]

Within three (3) business days of receiving verification of ownership of the vehicle, the police division must notify, by registered mail, return receipt requested, the last known registered owner of the vehicle and all lienholder(s) of record that such vehicle is in the City's custody.[98] The notice must (i) describe

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[90] *See* Code of Ord. § 2-303.
[91] Id.
[92] Id.
[93] Id.
[94] *See* City Charter § 495 et seq.; Code of Ord. §§ 48-214.1 et seq.
[95] *See* City Charter § 495.
[96] *See* Code of Ord. § 48-214.1.
[97] Id.; Code of Ord. § 48-214.2(c); see also Tenn. Code Ann. § 55-16-105(e).
[98] *See* Tenn. Code Ann. § 55-16-105(a) and Tenn. Code Ann. § 55-16-105(d); Code of Ord. § 48-214.2(a). Such notice is not required if the owner of the motor vehicle cannot be ascertained by the title search. *See* Code of Ord. § 48-214.2(b). In addition, such notice is not

the year, make, model and serial number of the motor vehicle; (ii) specify the location where the motor vehicle is being held; (iii) inform the owner/lienholder(s) of their right to reclaim the motor vehicle within a specified number of days after the date of the notice, upon payment of all towing and storage fees resulting from placing the motor vehicle in the City's custody; and (iv) state that the owner/lienholder's failure to reclaim such motor vehicle within the specified time will be deemed a waiver by the owner/lien holder(s) of all right, title and interest in the motor vehicle and consent to the sale of the motor vehicle at a public auction).[99]

18.2.2 Reclaiming Motor Vehicle. While the motor vehicle is being held at the vehicle storage lot, the owner may reclaim such vehicle, upon payment of any storage and tow fees owed to the City. The storing agent must notify the police services director of such redemption by the owner.[100]

18.2.3 Purchasing Agent to Sell. The police director will determine the date of the sale of such motor vehicles.[101] The division's director must give the Purchasing Agent a list of all abandoned property subject to sell and deliver the scheduled property, except motor vehicles, to the Purchasing Agent before the date of sale.[102] For any motor vehicles to be sold herein, the division must submit documentation evidencing the title search and copies of the written notices sent to the last known owner and/or lienholder(s), pursuant to subsection 18.2.1 above. Motor vehicles will be retained by the division until a sale has been made.[103] Notwithstanding the provisions above, motor vehicles cannot be sold within thirty (30) days after the title search.[104] The City cannot (i) sell more than six (6) motor vehicles from the City's impound lot, during any calendar year, to an individual who is not a duly licensed automobile dealer; or (ii) sell an unsalvageable motor vehicle from the City's impound lot to an individual who is not a duly licensed salvage dealer.[105]

18.2.4 Notice of Sale. The Purchasing Agent will provide thirty (30) days advance notice of the date, time and location of the sale, and a descriptive list of the abandoned property to be offered for sale, by (i) posting notice at the courthouse door of Shelby County, Tennessee and at the regular entrance to City Hall; (ii) listing such information on the City's website; (iii) mailing notice, via registered mail, return receipt requested, to the last known owner and all

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required in the event a pre-seizure notice was provided in accordance with Code of Ord. § 48-212 and Tenn. Code Ann. § 55-16-105(b).

[99] *See* Tenn. Code Ann. § 55-16-105(a); Code of Ord. §48-214.2(a). Tenn. Code Ann. § 55-16-105(a) requires that he owner/lien holder shall have a minimum of 10 days (after the date of the notice) to retrieve the motor vehicle.

[100] *See* Code of Ord. § 48-214.3; Tenn. Code Ann. § 55-16-105(a).

[101] *See* Code of Ord. § 48-214.2(a).

[102] *See* City Charter § 496.

[103] Id.

[104] *See* Code of Ord. § 48-214.2(a).

[105] *See* Code of Ord. §§ 21-31and 21-32; see also Legal Opn. 031.10 for definition of "unsalvageable vehicle".

lien holders of record.[106] If there was no response to the notice provided in accordance with subsection A above, sale of the motor vehicle must be advertised in a newspaper of general circulation in the City of Memphis (e.g., The Commercial Appeal).[107] The division must provide the purchasing department a descriptive list of motor vehicles to be published in the newspaper advertisement.

18.2.5 Auction Required. Abandoned property will be sold at a public auction to the highest bidder for each piece of property, or assembled in groups, whichever, in the discretion of the Purchasing Agent, tends to bring the best price for said property.[108] However, motor vehicles will be sold separately.[109] Property found in an abandoned motor vehicle may be sold separately or with such motor vehicle.[110] The auction will be conducted at the time and place specified in the notice pursuant to subsection D above.[111] The amount received for the motor vehicle will be reported to the division of police services.[112]

18.2.6 Motor vehicles over Ten (10) Years Old and Totally Inoperable. Notwithstanding any other provision of this section, the City may dispose of an abandoned motor vehicle to a demolisher without the title and without complying with the notification procedures herein if the vehicle is over ten (10) years old and has no engine or is otherwise totally inoperable.[113]

18.2.7 Tow and storage fees, etc. The sale of an abandoned motor vehicle will be subject to any towing and storage charges and expenses of the sale (including advertising costs, etc.), as approved by the division of police services.[114] Any additional amount in excess of the aforesaid charges/expenses will be paid to the former owner/lien holder of the motor vehicle if a claim is presented to the City within ninety (90) days after the date of sale of the motor vehicle.[115]

18.3 Disposition of Worthless Property/Motor Vehicle. In the event any property/motor vehicle, which after having been listed, advertised and offered for sale in accordance with this manual, is not successfully sold, the Purchasing Agent will deem such property/motor vehicle worthless and may dispose of it in such manner as he or she and the Police Services director may deem right and proper. The Purchasing Agent will report the date and manner of disposal of such worthless property to the City Comptroller.[116]

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[106] *See* City Charter § 497; Code of Ord. § 48-214.2(a).
[107] *See* Tenn. Code Ann. § 55-16-106(c).
[108] *See* City Charter § 497; Code of Ord. § 48-214.2(a); Tenn. Code Ann. § 55-16-106(a).
[109] *See* City Charter § 497; Code of Ord. § 48-214.2(a).
[110] *See* Code of Ord. § 48-214.4.
[111] *See* City Charter § 498.
[112] *See* Cod of Ord. § 48-214.2(a).
[113] *See* Code of Ord. § 48-214.2(e); see also Tenn. Code Ann. § 55-16-108.
[114] *See* Code of Ord. § 48-214.2(a); Tenn. Code Ann. § 55-16-106(d).
[115] *See* Code of Ord. § 48-214.2(a).
[116] *See* City Charter §501; Code of Ord. § 48-214.2(d).

18.4 Disposition to Charitable or Other Worthy Organizations.[117] The division's directors may, in his or her discretion, authorize and direct that abandoned property, which remains unclaimed with the City, be donated to any charitable or worthy organization, cause, project or program for use in the activities of such organization, cause, project or program, without the necessity of a public auction. The division's director must submit a written report to the comptroller stating the date of disposition, description of the property, and the identity of the organization, cause, project or program that received the property. This subsection does not apply to abandoned motor vehicles.[118]

18.5 Records/Report of Disposition. The Purchasing Agent will keep an accurate statement of each item disposed of/sold pursuant to this Article, including the price bid and paid therefore. In addition, he or she will provide a detailed, written report of the sale (including, without limitation, identification of each item sold, purchaser's name, purchase price, and the time and location where such sale was conducted) and deliver the proceeds therefrom, to the City Comptroller.[119] Records will be maintained by the purchasing department for a period of five (5) years.

18.6 Public Inspection. Items will be made available for public inspection prior to the public bidding/auction.

18.7 Forms of Payment/Title. Payment for all sales under this Article must be paid immediately to the City. Payment must be in the form of cash, money order, or certified check.[120] No other forms of payment will be accepted by the City. In its sole discretion, the City may accept personal checks, provided the vendor has a current letter of credit on file with the City, in accordance with the requirements specified in Section 8.3.2.[121] Proceeds from the sale will be delivered to the City Comptroller, who will then provide a receipt to the buyer.[122] ALL SALES ARE FINAL, and all property is sold "As Is, Where Is" with no warranty or guarantee as to its fitness for any use or purpose.

The Purchasing Agent will provide an Odometer Disclosure statement for the purchase of motor vehicles pursuant to this Article. Title to any property and/or motor vehicles purchased pursuant to this Article will pass to the purchaser free and clear of all liens and claims of ownership.[123]

18.8 Receipt of Purchased Property. The vendor must retrieve the purchased items at the time of purchase. If the items are not retrieved in said time frame, the City reserves the right to cancel the transaction and resell the item, returning any funds received from the purchaser.

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[117] *See* City Charter § 502.1.
[118] *See* Code of Ord. §§ 48-214.2.
[119] *See* City Charter § 499; Code of Ord. § 2-305.
[120] *See* City Charter § 498; Code of Ord. § 2-304.
[121] *See* Code of Ord. § 2-304.
[122] *See* City Charter § 499.
[123] *See* City Charter § 495; Code of Ord. § 48-214.2(a); Tenn. Code Ann. § 55-16-106(b).

18.9 Unlawful Disposition of Property. Any disposition of City property in violation of the provisions in this Article will be void and of no effect. Any official or employee of the City who sells, attempts to sell, or otherwise disposes of any condemned personal property of the City in violation of this Article, or who fails or refuses to perform any duty imposed upon him by this Article, will be guilty of a misdemeanor.[124]

XIX. ETHICS IN PROCUREMENT AND CONTRACTING

City personnel and officials must conduct all business with honesty, fairness, integrity and loyalty to the City. They must discharge their duties impartially so as to assure fair competitive access to procurements issued by the City. Moreover, they should conduct themselves in such a manner as to foster public confidence in the integrity of the City's purchasing activities.

Any City employee or official who attempts to realize a personal gain through public employment, by conduct inconsistent with the proper discharge of such employee's duties, is a breach of public trust. Further, any effort of an individual to influence a City employee to breach the standards of ethical conduct set forth in this Article is also a breach of ethical standards. The City's standard "conflict of interest" and "covenant against contingent fees" provisions must be conspicuously stated in all City contracts and solicitations. These provisions are included in the electronic library of the City's standard clauses.

No elected or appointed official of the City, nor any person appointed to any board or commission, nor employee of the City, shall make, participate in making, or use his official position, to influence a city government decision in which he knows or has reason to know he has any financial interest.[125] All City officers and employees must comply with the City's Code of Ethics in fulfilling their purchasing responsibilities.[126]

19.1 <u>Conflict of Interest</u>. Neither the Mayor nor any Council member, officer or employee of the City shall be connected with or interested in, directly or indirectly, any contract with the City.[127]

It is unlawful for any officer, committee member, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract to be directly interested in any contract in which the City shall or may be interested. "Directly interested" means any contract with the official personally or with any business in which the official is the sole proprietor, a partner, or the person having the controlling interest. "Controlling interest" includes the individual with the ownership or control of the largest number of outstanding shares owned by any single individual or corporation. "Indirectly interested" means any contract in which the

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[124] *See* Code of Ord. § 2-307.
[125] *See* Code of Ord. § 2-42, which codifies the City's conflict of interest legislation relating to officers and employees of the City, including members of boards and commissions.
[126] *See also* Executive Order No. 2-2009.
[127] *See* City Charter §§20, 22, and 176; *see also* Executive Order No. 2-2009, § 5.

officer is interested but not directly so, but includes contracts where the officer is directly interested but is the sole supplier of goods or services in the City.[128]

No official or employee of the City shall make, participate in making, or use his or her official position to influence a city government decision in which he or she knows or has reason to know he or she has any financial interest.[129] Employees should avoid any action, which might result in or cause the appearance of (i) using public office for private gain; (ii) giving preferential treatment to any person; (iii) impeding government efficiency or economy; (iv) losing complete independence or impartiality; (v) making a government decision outside of official channels; or (vi) affecting adversely the confidence of the public in the integrity of the government.[130]

19.2 Gifts, Gratuities, etc.[131] It is a breach of the City's ethical standards for any official or employee of the City to solicit, accept, directly or indirectly, any money, gift, gratuity or other consideration or favor of any kind from anyone other than the City (i) for the performance of an act, or refraining from performance of an act, that he or she would be expected to perform or refrain from performing, in the regular course of his or her duties; or (ii) that might reasonably be interpreted as an attempt to influence the employee's or official's action, or reward him/her for past action, in executing business of the City. Any person violating this section may be subject to forfeiture, up to the fair market value, of any such gratuity.[132]

It is a felony for any City official or employee to accept any monies or gifts, of any character, other than that stipulated for performing their official duties.[133]

19.3 Contingent Fees. It is a breach of the City's ethical standards for a vendor to employ a company or person, other than bona fide employees or bona fide established commercial selling agencies working solely for the purpose of securing business for the vendor, to solicit or secure a City contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, or any other consideration contingent upon or resulting from the contract award.

19.4 Disclosure of Personal Interest.[134] Any City employee or official, who must exercise discretion relative to any matter, other than casting a vote, and has a personal interest in the matter that affects or would lead a reasonable person to infer that it affects his/her exercise of discretion must disclose, before the exercise of discretion, when possible, the interest on a form provided by and filed with the recorder. An officer with the responsibility to vote on a matter must disclose during the meeting at which the vote takes place, before the vote and so it appears in the minutes, any personal interest that affects or would lead a reasonable person to infer that it affects the officer's vote on the measure. In addition, the officer or employee

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128 *See* Tenn. Code Ann. § 12-4-101; see also Tenn. Code Ann. § 6-54-107.
129 *See* Code of Ord. § 2-42(a).
130 *See* Executive Order No. 2-2009.
131 *See* Ord. No. 5206, §5; see also Executive Order No. 2-2009, §§ 3-4.
132 *See* Ord. No. 5206, § 13(b)(3).
133 *See* City Charter § 346.
134 *See* Ord. No. 5206, §§ 3-4.

may, to the extent permitted by local law or policy, recuse him/herself from the vote or exercise of discretion in the matter.

For this subsection, "personal interest" is defined as any financial, ownership, or employment interest (i) in the subject of a vote by a board or commission of the city not otherwise regulated by state statutes on conflicts of interests; or (ii) in a matter to be regulated or supervised; or (iii) of the official's or employee's spouse, parent(s), stepparent(s), grandparent(s), sibling(s), child(ren), or stepchild(ren). "Employment interest" includes a situation in which an official or employee or a designated family member (of such official or employee) is negotiating possible employment with a person or organization that is the subject of the vote or that is to be regulated or supervised. The determination of whether a financial interest exists is based upon whether the employee or a member of the employee's immediate family has any direct or indirect dealing with such organization from which he or she knowingly materially benefits (e.g., through receipt, directly or indirectly, of money or anything of value).

In other words, it is a breach of ethical standards for any City official or employee, in the performance of his or her official duties, to participate, directly or indirectly, in any matter pertaining to any contract, subcontract or solicitation thereof, in which:

a) He or she or any member of his/her immediate family has a financial interest[135]; or
b) A business or organization in which he or she, or any member of his/her immediate family has a financial or fiduciary interest.

Direct or indirect participation of an employee includes, but is not limited to, involvement through approval, disapproval, recommendation, preparation of any part of a solicitation, influencing the content of any specification, rendering advice, investigation, auditing or involvement in any other advisory capacity.

19.5 Outside Employment.[136] It is a breach of the City's ethical standards for any City official or employee to accept or continue any outside employment if the work unreasonably inhibits the performance of any affirmative duty of the city position or conflicts with any provision of the City's charter, ordinance, policy, rules or regulations.

19.6 Use of Confidential Information.[137] It is a breach of the City's ethical standards for any City official or employee to disclose any confidential information obtained in his or her official capacity or position of employment. It is also a breach of ethical standards for any official or employee to use or disclose information obtained in his or her official capacity or position of employment, for actual or anticipated financial gain for him/herself or of any other person or entity.

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[135] *See* City Charter § 177 further prohibits any official, employee or agent of the City from passing upon, supervising or controlling any work for the City, or purchasing or contracting on the City's behalf with a person or persons who are related to the City official, employee or agent by blood or marriage within the sixth (6th) degree, as computed by common law.
[136] *See* Ord. No. 5206, § 9.
[137] *See* Ord. No. 5206, § 6; see also Executive Order No. 2-2009, § 6.

19.7 Use of Position or Authority.[138] It is a breach of the City's ethical standards for any City employee or official to make or attempt to make private purchases in the name of the City, or to use his or her position to secure any privilege or exemption for him/herself or others that is not authorized by local or state law or policy.

19.8 Use of City Time, Facilities, etc.[139] It is a breach of the City's ethical standards for any City employee or official to use or authorize the use of the City's time, facilities, equipment or supplies for private gain or advantage for him/herself or for any private person or entity.

19.9 Penalties for an Employee/Official's Breach of Ethical Standards.[140]

a. Penalties. In accordance with the City's ordinance, the Board of Ethics may take any one or more of the following actions for an employee's or official's breach of the City's ethical standards:
   - (i) Discipline in accordance with the City's personnel policy and procedures;
   - (ii) Recommendation to City Court that it assess any penalty as provided in the conflict of interest ordinance;
   - (iii) Recommendation to City Council for appropriate action, including censure, suspension or removal;
   - (iv) Referral to the appropriate authorities (i.e., District Attorney or U.S. Attorney) for appropriate criminal action; or
   - (v) Referral to the appropriate authorities (i.e., City Attorney, City Court or District Attorney) for appropriate civil action.

b. Due Process. All remedies will be subject to due process requirements. Notice and an opportunity for a hearing will be provided prior to the imposition of any penalties.

c. Remedies Cumulative. All remedies herein are cumulative to other remedies provided under local or state laws.

19.10 Penalties for a Non-employee/Official's Breach of Ethical Standards.[141]

a. Penalties. In accordance with the City's ordinance, the Board of Ethics may take any one or more of the following actions for a non-employee's breach of the City's ethical standards:
   - (i) Written warnings or reprimands;
   - (ii) Termination of purchase order or contract;
   - (iii) Recommendation to City Court that it assess any penalty as provided in the conflict of interest ordinance;
   - (iv) Referral to the appropriate authorities (i.e., District Attorney or U.S. Attorney) for appropriate criminal action; or

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[138] *See* Ord. No. 5206, § 8.
[139] *See* Ord. No. 5206, § 7.
[140] *See* Ord. No. 5206, § 13; see also Code of Ord. §2-42(d).
[141] *See* Ord. No. 5206, § 13.

(v) Referral to the appropriate authorities (i.e., City Attorney, City Court or District Attorney) for appropriate civil action.

b. Right to Debar or Suspend. The Board of Ethics may impose debarment or suspension in accordance with the procedures set forth in Section 13.2 (Contractor Debarment or Suspension) for a vendor's breach of the ethical standards.

c. Due Process. All remedies will be subject to due process requirements. Notice and an opportunity for a hearing will be provided prior to the imposition of any penalties.

d. Remedies Cumulative. All remedies herein are cumulative to other remedies provided under any local or state laws.

Should you have any questions concerning whether a matter presents a conflict of interest, contact the City Attorney/Chief Ethics Officer for assistance.

Appendix A
Sample Affidavit of Non-Collusion

State of _____

County of _____

Submitted in response to City of Memphis Solicitation No. _____

Affiant, _____, deposes and makes oath that:
(printed name of person signing Affidavit)

1. He or she is authorized by _____
(legal name of entity submitting the bid or proposal)
to submit the attached bid/proposal on behalf of the Bidder or Proposer;

2. The Bidder or Proposer is fully informed respecting the preparation and content of the attached bid or proposal and of all pertinent circumstances respecting such bid or proposal;

3. Such bid or proposal is genuine and is not a collusive or sham bid or proposal;

4. Neither the Bidder or Proposer nor any of its officers, agents, representatives, owners, employees or parties in interest, including this Affiant, has in any way colluded, conspired, connived or agreed, directly or indirectly, with any official, employee or agent of the City of Memphis or with any other firm, person, or potential or actual bidder or proposer to submit a collusive or sham bid or proposal in connection with the contract for which the attached bid or proposal has been submitted, or to refrain from bidding or proposing, or sought by agreement, collusion, or communication with any other firm, person, or potential or actual bidder or proposer to fix the price or prices or cost element of the bid, quoted or proposed price of the bid, quoted or proposed price of any other potential or actual bidder or proposer, or to secure through any collusion, conspiracy, connivance, or unlawful agreement any advantage against the City of Memphis or any person interested in the proposed contract;

5. The price or prices quoted in the attached bid or proposal are fair and proper and are not tainted by a collusion, conspiracy, connivance or unlawful agreement on the part of the Bidder or Proposer or any of its officers, agents, representatives, owners, employees or parties in interest, including this Affiant; and

6. The contents of the bid or proposal, any information or data relative thereto, the proposed price or any of its breakdown has been divulged, directly or indirectly, to other parties.

_____ _____
Signature of Affiant, Title Date

Sworn and subscribed to before me this ____ day of _____, _____

_____
Notary Public

My Commission expires: _____

Appendix B
Sample Notice of Intent to Award

TO: **All Bidders**

VIA ELECTRONIC MAIL and/or FACSIMILE

DATE:

SUBJECT: **Notice of Intent to Award**
{INSERT CITY'S SOLICITATION NUMBER AND TITLE}
OPENING DATE AND TIME: {INSERT}

The following vendors submitted responses to the above solicitation:

{INSERT VENDORS' NAME, CITY, STATE}

Responses were evaluated in accordance with the criteria stated in the solicitation, and we hereby announce our intent to award the contract for the above-mentioned goods/services for Fiscal Year _____ to:

{INSERT NAME OF SUCCESSFUL BIDDER(S)}

Please be advised the contract is subject to the availability and annual appropriation of funds by the Memphis City Council. Further, vendors are reminded that any protests of this decision must be submitted to the Purchasing Agent within five (5) calendar days after issuance of this notice, pursuant to the date above. For construction projects, any protests of this decision must be submitted to the Purchasing Agent within ten (10) calendar days after issuance of this notice, pursuant to the date above. The successful vendor is instructed not to begin work, purchase materials, or enter into subcontracts relating to the project until receipt of a properly executed purchase order or fully executed contract from the City.

We would like to thank each vendor for your time and efforts in preparing a response to this solicitation. If you would like additional information, please contact me.

Sincerely,

Purchasing Agent

xc: Division Director

Appendix C
Sample Amendment / Extension Cover Sheet

Contract No. _____

Division:		**Name of Contractor**
Current Contract Term		**Project Description**
Begin Date	**End Date**	

Amendments to contracts must include or expand the provision of services or products within the scope of the original contract or include tasks that are so substantially similar that it would be impracticable for a different contractor to perform the work. The Division Director or designee must determine that an amendment would best serve the interest of the City rather than a new contract and yield cost savings. An amendment should be fully executed before the contract expires.

Does the Agreement Allow the Contract to be extended or renewed?		**Yes**		**No**	
Total Number of Extensions or Renewals specified		**Unlimited**		**Number:**	
What form of notice must a party give to the other indicating intent/desire to extend or renew the agreement?		**Written**		**Oral**	
		Certified		**N/A**	
Based upon the above requirement of notice, please provide the date **CITY** must give notice to vendor of the **CITY'S** Intent/Desire to extend or renew the Agreement.					
Based upon the requirement of notice, please provide the date **VENDOR** must give notice to City of the **VENDOR'S** Intent/Desire to extend or renew the Agreement.					
Based upon the specific date(s) indicated above, Insert Specific Date that **Notification Will Be Mailed to Vendor** Indicating the City's Intent to Extend the Agreement.					
Based upon the specific Date indicated above and utilizing six weeks as the average time to process and execute a modification, insert the specific date the **Extension must be sent to Vendor** for execution prior to the contract end date.					
Based upon the specific Date indicated above and utilizing six weeks as the average time to process and execute a modification, insert the specific date the **Extension should be FULLY EXECUTED.**					

Approved: _____ **Date:** _____
Division Director or Designee

Appendix D
Contract Amendment Guidelines

Renewal and Extensions

1. Section **INSERT NUMBER, INSERT TITLE.** The Contract commenced on **ORIGINAL CONTRACT START DATE** for a period of **INSERT NUMBER MONTHS/YEARS** with an option to **RENEW OR EXTEND** the contract for up to **INSERT NUMBER MONTHS/YEARS**.

   (OPTION IF THE CONTRACT WAS PREVIOUSLY RENEWED/EXTENDED) The Contract was previously **RENEWED OR EXTENDED** for **INSERT NUMBER MONTHS/YEARS.**

   The parties have agreed to **RENEW OR EXTEND** the Contract for an additional **INSERT NUMBER MONTHS/YEARS**; therefore, the contract is amended to change the expiration date to **INSERT NEW EXPIRATION DATE.**

Scope of Work

1. **Section INSERT NUMBER, INSERT TITLE.** The scope of work is hereby amended as follows: **DESCRIBE THE CHANGE BEING MADE.**

   (e.g. The third subsection is deleted in its entirety and replaced with…).
   (e.g. Section INSERT NUMBER of the Contract stated that the CONTRACTOR may be required to perform additional work within the scope of the original contract. Therefore, the CONTRACTOR must INSERT A DESCRIPTION, SCHEDULE, AND PRICE FOR THE ADDITIONAL WORK.)

Price Adjustment

1. Section **INSERT NUMBER**, **INSERT TITLE.** Pursuant to Section **INSERT NUMBER** of the **CONTRACT/SOLICITATION NUMBER** which contained provisions for adjustment of the contract price, Section **INSERT NUMBER**, **INSERT TITLE**, is hereby changed as follows:

   INSERT CHANGES (e.g. Item 1, Widget, is increased from $10.00 each to $12.00 each)

Note: All capitalized/italicized text must be modified accordingly.

Appendix E
Sample Contract Amendment

AMENDMENT to CONTRACT #_____
Between
CITY OF MEMPHIS
and
_____

THIS AMENDMENT is made and entered into this _____ day of _____, _____, by and between the City of Memphis ("City"), a municipal corporation of the State of Tennessee, acting through its <INSERT DIVISION NAME>, and _____ ("Contractor").

WHEREAS, City and Contractor entered into the aforementioned Agreement dated _____ for Contractor to provide [INSERT GOODS/SERVICES TO BE PROVIDED] ("Agreement"); and

WHEREAS, [INSERT JUSTIFICATION FOR AMENDMENT]; and

WHEREAS, City and Contractor desire to formally amend said Agreement to [INSERT DESCRIPTION OF AMENDMENT].

NOW, THEREFORE, in consideration of the premises and mutual promises contained herein, and for other good and valuable consideration, the Agreement is hereby amended as follows:

1. [Insert detailed description of the amendment(s) (e.g., "Section __ is deleted and substituted with ____." or "Section __ is amended to read _____.")]

2. All other terms and conditions set forth in the original Agreement, not in conflict with this Amendment, shall remain in full force and effect. Nothing in this Amendment relieves either party of their respective obligations under the Agreement.

3. This Amendment, together with the Agreement, as amended, constitutes the entire agreement between the parties and supersedes all other prior or contemporaneous communication between the parties relating to the subject matter of the Agreement.

IN WITNESS WHEREOF, the parties have caused this Amendment to be executed as of the day and year first written above.

CITY OF MEMPHIS, TENNESSEE

By: _____
Mayor

[insert Contractor's Name]

By: _____
Signature Person's Name, Title

Approved as to Form:

_____
City Attorney

Attest:

_____
Deputy Comptroller

Appendix F
Sample Bid Bond

Know all men by these present, that we, the undersigned, _____ as Principal, and_____as Surety, licensed under the laws of the state of Tennessee to act on surety on bonds for principals, are hereby held and firmly bound unto the City of Memphis, Tennessee, as Owner in the penal sum of _____ for the payment of which, well and truly to be made, we hereby jointly and severally bind ourselves, our heirs, executors, administrators, successors and assigns.

This condition of the above obligation is such that whereas the Principal has submitted to the City of Memphis a certain bid, attached hereto, and made a part hereof, to enter into a contract in writing for: _____

Now therefore,

A) If said bid shall be rejected; or in the alternative,

B) If said bid shall be accepted and the Principal shall execute and deliver a signed contract in the form prescribed by the Owner (properly completed in accordance with said bid), and shall furnish all required insurance documentation and a Bond for the faithful performance of said contract and for the payment of all persons performing labor or furnishing materials in connection therewith, and shall in all other respects perform the agreement created by the acceptance of said Bond,

Then this obligation shall be void, otherwise the same shall remain in force and effect; it being expressly understood and agreed that the liability of the Surety for any and all claims hereunder shall, in no event, exceed the amount of this obligation as herein stated.

The Surety, for value received, hereby stipulates and agrees that the obligations of said Surety and its bond shall be in no way impaired or affected by any extension of the time within which the Owner may accept such bid; and said Surety does hereby waive notice of any such extension.

In witness whereof, the Principal and the Surety hereunto set their hands and seals, and such of them as are corporations have caused their corporate seals to be hereto affixed and these presents to be signed by their proper officers, the day and year set forth above.

WITNESS, our hands this _____ day of _____, 20_____

PRINCIPAL

_____
Bidder's Name

By: _____
Signature (Principle)

_____
Printed or Typed Name and Title

SURETY

Surety:_____

By: _____
Attorney in Fact - Signature (**Please attach Power of Attorney to Bond)**

_____
Printed or Typed Name

COUNTERSIGNED:

_____
Tennessee Resident Agent

ADDRESS: _____
_____

PHONE NUMBER: _____

Appendix G
Sample Performance Bond

STATE OF _____
COUNTY OF _____

We,_____, as Principal, and _____, as Surety, licensed under the laws of the State of Tennessee to act as surety on bonds for Principals, bind and acknowledge ourselves indebted to the City of Memphis ("City"), in the State and County aforesaid, in the penal sum of _____ for the payment of which well and truly to be paid by ourselves, our successors and assigns, our heirs and personal representatives, jointly and severally.

WHEREAS, the said Principal entered into an Agreement with the City of Memphis for _____ ("Agreement"), a copy of which Agreement is hereby referred to and incorporated herein, and the said Surety hereby acknowledges the contents of said Agreement, and accepts all the terms and conditions thereof, including but not limited to those provisions requiring the Principal to pay for all the labor and materials used for said project;

WHEREAS, the City required the Principal to furnish a Performance Bond containing the terms and conditions set forth herein as a condition to executing the Agreement with the Principal.

NOW, THEREFORE, the condition of this obligation is such that should the Principal faithfully and fully perform all the terms and obligations of the said Agreement, including any amendments or extensions thereof, then this obligation or bond shall be null and void, otherwise it shall remain in full force and effect.

WITNESS, our hands this _____

CITY OF MEMPHIS, TENNESSEE

By: _____
Mayor

APPROVED AS TO FORM

_____
City Attorney

CONTRACTOR - PRINCIPAL

By: _____

Printed Name: _____

ATTEST:

By: _____
Corporate Secretary

SURETY:

By:_____
Attorney in Fact (**Note: Please attach Power of Attorney to Bond**)

Printed Name: _____

COUNTERSIGNED:

By: _____
TENNESSEE RESIDENT AGENT

Address: _____

Phone Number:_____

Appendix H

CITY OF MEMPHIS CERTIFICATE OF NONDISCRIMINATION

(Note: For use on City of Memphis construction contracts not funded from U.S. Federal Government funding sources which otherwise require compliance with Federal Regulations).

As Bidder, Contractor, or Subcontractor on City of Memphis Construction Contract, _____ (NAME OF PROJECT), the undersigned states that it does not discriminate against any subcontractor, employee, or applicant for employment on the grounds of race, color, national origin or sex and, if awarded a contract for this project, agrees in performance of work:

1. Not to discriminate against any subcontractor, employee, or applicant for employment on the grounds of race, color, national original or sex;

2. To maintain payrolls of laborers and mechanics employed on this contract until five (5) years after final release and final payment by the City;

3. To require a similar certificate to be executed by each subcontractor at the time a subcontract is executed under the contract with the requirement that such subcontractor agrees to require a similar certificate of requirement on any lower tiers of subcontracts; and

4. To conform with federal law, state statutes, executive orders, and local ordinances prohibiting discrimination.

_____
Bidder's/Contractor's Name

_____
Date

_____
Signature

_____
Printed or Typed Name and Title

Appendix I
Drug Free Workplace Affidavit

STATE OF TENNESSEE
COUNTY OF _____

NOW COMES AFFIANT, who being duly sworn, deposes and says:

1. He/She is the principal officer for _____ ("Bidding entity") and is duly authorized to execute this Drug Free Workplace Affidavit on behalf of the Bidding Entity;

2. That the Bidding entity has submitted a bid/proposal to the City of Memphis in response to a solicitation for _____
_____;

3. That the Bidding entity employs no less than five (5) employees;

4. That Affiant certifies that the Bidding entity has in effect, at the time of submission of its bid or proposal to perform the construction referred to above, a drug-free workplace program that complies with Tennessee Code Annotated §50-9-101 et seq., and the Bidding Entity is further in compliance with Tennessee Code Annotated §50-9-101 et seq.;

5. That this affidavit is made on personal knowledge.

Further Affiant saith not.

Printed name of Affiant _____

Signature of Affiant _____

Title of Affiant _____

SUBSCRIBED AND SWORN TO before me this _____ day of _____, _____.

_____
Notary Public

My Commission Expires: _____

Appendix J
Sample Conflict of Interest/Non-Disclosure
Statement for RFP Evaluation Committee Members

I, the undersigned Evaluation Committee member, whether an employee of the City or acting as a consultant, do hereby certify, to the best of my knowledge, that the following statements are true and correct and that I agree to be bound by the commitments contained herein.

1. I am acting at the request of the City as a member of the evaluation committee for Request for Proposal No. _____ for the procurement of _____;

2. I am familiar with the requirements and specifications contained in the RFP and fully understand the objective of the procurement;

3. I have been informed of the names of all vendors who have submitted a proposal in response to the RFP;

4. Neither I nor any of my relatives have, nor shall we acquire during the evaluation, a financial interest, ownership interest, employee interest, personal interest nor am I seeking employment or any such interests with any of the respondents or related parties, including identified subcontractors or vendors, submitting proposals for this Request for Proposal (RFP). Relative shall include spouse; children, including stepchildren; grandchildren; parents; grandparents; siblings, including half siblings and in-laws;

5. In the performance of carrying out the responsibilities of evaluating the proposals, I will receive proposals which may contain vendor information which is not publicly known. I will treat **all** information received during the course of my service on the evaluation committee as confidential and shall not use, disclose or otherwise divulge any information, including without limitation the contents, status or ranking or any proposal, to anyone, except for the proper discharge of my obligations as an evaluator. I understand the terms "disclose or otherwise divulge" include, but are not limited to, reproduction of any part or portion of any proposal, or removal of same from designated areas without prior authorization from the evaluation team leader;

6. I shall only consider information provided in the vendor's proposal during the evaluation of the proposal(s); and

7. I agree to perform all evaluations of said proposals in an unbiased manner, to the best of my ability, and with the best interest of the City paramount in all decisions.

Name/Title (print): _____

Signature: _____ Date: _____

Organization (if not City employee): _____

APPENDIX K
STANDARD SERVICE AGREEMENT

This Agreement is made and entered into this [INSERT EFFECTIVE DATE], by and between [INSERT CONTRACTOR'S FULL LEGAL NAME], hereinafter called the "Contractor" and the City of Memphis, a municipal corporation of the State of Tennessee, hereinafter called the "City".

SCOPE OF SERVICES. The Goods/Services to be provided in connection with this Agreement shall include, but not be limited to, those items listed in the Scope of Work, which is attached hereto and incorporated herein as Exhibit A (the "Services").

TERM. This Agreement shall not be binding upon the parties until it has been signed first by the Contractor and then by the authorized representatives of the City in accordance with applicable ordinances, laws and regulations.

The Initial Term of this Agreement shall commence beginning _____ and shall end on the earlier of _____ or until all goods/services herein have been provided to the City ("Initial Term"), subject to the availability and appropriation of funds to finance the same and the successful operation of the program. The City shall have the option to extend the Initial Term for _____ additional one-year periods (the "Option Periods"), subject to the appropriation of funds by the Memphis City Council and mutual agreement of the parties. The Initial Term and the exercised Option periods are collectively referred to hereinafter as the "Term."

PAYMENT TERMS AND CONDITIONS
INVOICES. The Contractor shall submit original invoices, or copies of original invoices certified as such by the Contractor, on the Contractor's letterhead and in form and substance acceptable by the City and with all necessary supporting documentation, to the City. The invoice shall describe the services provided, list the price per unit, reflect any applicable terms of payment, and show the contract number to which it relates. Unless the contract number is shown on the invoice, it may be returned to the Contractor. Invoices shall be submitted to: City of Memphis [DIVISION NAME], [ADDRESS]; Memphis, Tennessee [ZIP CODE]; Attn: _____.

COMPENSATION. Unless the City has good faith and reasonable objections to the Contractor's invoice(s), the City shall compensate the Contractor, based on invoices submitted by the Contractor, the sum total not to exceed $_____ (USD) (the "Fee") during the term of the Agreement, which shall include all reimbursable expenses. The City shall use its best efforts to remit payment based on the Contractor's invoice within thirty (30) days after receipt of accurate invoice and approval by the City. The City is not obligated to pay, and may withhold from payment, any amounts the City has in dispute with the Contractor based on the Contractor's non-performance, unsatisfactory performance or negligent performance of any services hereunder.

TRAVEL EXPENSES. Where travel expenses are otherwise allowed and payable herein, such travel expenses shall be in accordance with the City's Travel Policy and Procedures, as may be amended from time to time. This includes advance written travel authorization, submission of travel claims, documentation requirements, and reimbursement rates. No travel advances will be made by the City.

TAX PAYMENTS. The City of Memphis is exempt from Federal Excise, State and Local Taxes on all purchases and upon request, will issue tax exemption certificates to the Contractor. Contractor shall be solely responsible and liable for any taxes and business license fees assessed or imposed by any government having jurisdiction over the work and/or goods to be provided herein.

PAYMENT DOES NOT IMPLY ACCEPTANCE OF WORK. The payment of an invoice shall not prejudice the City's right to object to or question any invoice or matter in relation thereto. Such payment by the City shall neither be construed as acceptance of the work nor as final approval of any of the costs invoiced therein, and the City's payment shall not relieve the Contractor from its obligation to replace or correct any work that does not conform to this Agreement, even if the unsatisfactory character of such work may have been apparent or detected at the time such payment was made. Work, data or components that do not conform to the requirements of this Agreement shall be rejected by the City and replaced by the Contractor, without delay or additional cost to the City. If the Contractor receives payment from the City for a service or reimbursement that is later disallowed or rejected by the City or another governmental entity on the basis of audit or monitoring, the Contractor shall promptly refund the disallowed amount to the City upon the City's request. At its option, the

City may offset the amount disallowed from any payment due to the Contractor under this Agreement or any other agreement.

FINAL CONTRACT INVOICE. The Contractor shall submit to the City a final contract invoice within 45 calendar days from the termination date of the contract, for any services provided pursuant to this Agreement. The Contractor further acknowledges and agrees the City will not be responsible for any Contractor invoices, pertaining to this Agreement, submitted to the City after the final contract invoice. The Contractor shall close out it accounting records at the end of the Agreement period in such a manner that reimbursable expenditures and revenue collections are NOT carried forward.

GENERAL TERMS AND CONDITIONS
INCORPORATION OF WHEREAS CLAUSES. The foregoing whereas clauses are hereby incorporated into this Agreement and made a part hereof.

TITLE & RISK. The title and risk of loss of any goods hereunder shall not pass to the City until the City actually receives and takes possession of the goods at the point or points of delivery. The Contractor/successful bidder shall assume all liability and responsibility for delivery of such goods in good condition to the City.

PATENT INDEMNIFICATION. The Contractor warrants that any goods/services furnished hereunder do not infringe or violate any patent, trademark, copyright, trade secret, or any other proprietary right of any third party; that it shall defend all suits that may arise with respect thereto; and that it shall indemnify, defend, save and hold harmless the City, its officials, employees, agents, successors and assigns, from and against all liabilities, suits, claims, damages, costs or expenses, including without limitation attorney and expert witness fees, for or by reason of any actual or alleged claim the goods/services purchased by City hereunder infringe any patent, copyright, or is a violation of trade secret disclosure laws, whether by reason of the Contractor's purchase or otherwise. This indemnification obligation shall survive the expiration or termination of this Agreement.

TRANSPORTATION CHARGES/F.O.B. DELIVERY. All pricing is F.O.B. destination, in which Contractor shall be responsible for freight, transportation costs, and all incidental charges, unless delivery terms are specified otherwise in the bid and agreed to by the City. In the event shipping other than FOB destination is allowed by the City, The City agrees to reimburse the Contractor for transportation costs in the amount specified in the Contractor's bid, or actual costs, whichever is lower, provided the City shall have the right to designate what method of transportation shall be used to ship the goods.

SHIPMENTS. Substitutions will not be accepted, unless otherwise specified herein. Partial shipments may be allowed unless otherwise stated in writing by City, however, full shipment of all items ordered hereunder must be completed by the date specified in this Agreement or this Agreement will be subject to cancellation by the City. The Contractor shall not ship excess quantities without the City's prior written approval.

REPORTS. Upon request, the Contractor shall prepare and submit reports of its activities, funded under this agreement, to the originating department of the City. The reports shall include an itemization of the use of the City's funds, inclusive of specific services delivered by the Contractor. Any such reports provided to the City shall be prepared with the understanding that the City may make such reports available to the public.

In addition, Contractor shall submit and, as necessary, update subcontractor information (including but not limited to payments thereto), for any and all subcontractors used on City project(s), in the City's compliance tracking software, B2GNow. The City shall have the right to withhold future disbursement of funds under this Agreement and any future Agreements until the requirements of this provision have been met.

ENTIRE AGREEMENT. This Agreement constitutes the full and final understanding of the parties with respect to the subject matter hereof and supersedes and replaces any and all prior or contemporaneous agreements or understandings, whether written or oral, express or implied, between the parties with respect to the subject matter of the Agreement.

STANDARD OF PERFORMANCE. All services by the Contractor shall be performed in compliance with the specified requirements, in a manner satisfactory to the City, and in accordance with the generally accepted business practices and procedures of the City and pursuant to the governing rules, practices and regulations of the industry, based on the type of services performed hereunder.

HEADINGS. Titles and headings used herein are for the convenience of reference only and shall be disregarded completely in the interpretation and validity of this Agreement or any of its terms.

MODIFICATION AND AMENDMENT. This Agreement shall be amended or modified only by a written document signed by the parties hereto.

CONFIDENTIALITY. While performing work under this Agreement, the Contractor may gain access to proprietary and/or confidential information that, if disclosed to third parties, may be damaging to the City or its officials or employees. Such information shall include materials considered to be confidential information as a matter of law (e.g., personnel records), and shall also include (i) all materials in any form developed or created by the City related to funding and financial and business information; (ii) all information owned, possessed or used by the City, which is communicated to, learned, developed or otherwise acquired by the Contractor in the performance of the Services for the City; (iii) the terms, conditions and pricing contained herein; and (iv) any other information that the Contractor has been advised by the City is confidential, privileged or proprietary. Confidential information, as used in this Agreement, shall not include (i) information in the Contractor's possession prior to disclosure by the City; (ii) information generally available to the public or that becomes available to the public through a source other than the City, or (iii) information that was rightfully obtained by the Contractor from a third party who is under no obligation of confidentiality to the City with respect to such information. The Contractor agrees that it will accept and hold confidential information obtained from the City in confidence at all times during and after termination of this Agreement. The Contractor shall neither use nor disclose such information, except as provided in this Agreement or as required by law, without the prior written permission of the City. The Contractor acknowledges and agrees that a breach of this section by the Contractor will cause the City irreparable injury and damage; therefore, the Contractor expressly agrees that the City shall be entitled to injunctive or other equitable relief in any court of competent jurisdiction to prevent or otherwise restrain a breach of this Agreement. The Contractor agrees that it will disclose confidential information only to those employees who have a right to know, and shall require its employees, agents, and subcontractors to comply with the requirements of this provision and the requirements of the provisions herein titled "Public Statements" and "Rights in Data."

PUBLIC STATEMENTS. The Contractor shall not make any announcement, release any information, or authorize or participate in any interview concerning this Agreement and the goods and/or services required herein, without obtaining prior written consent from the City. The Contractor shall require its employees, agents, and subcontractors to comply with the requirements of this provision. This provision shall survive the expiration or termination of this Agreement.

RIGHTS IN DATA. The Contractor agrees that all reports, studies, plans, models, drawings, specifications, and any other information or data of any type produced under this Agreement, whether or not the same is accepted or rejected by the City, shall remain the property of the City and shall not be published by the Contractor or any other party without the express prior written consent of the City. In implementing the foregoing, the Contractor hereby grants and assigns to the City all rights and claims of whatever nature, whether now or hereafter, arising in and to any and all of such reports, studies, plans, models, drawings, specifications, and other information or data and shall cooperate fully with the City in any steps the City may take to obtain copyrights, trademark or like protections with respect thereto. The signing of this Agreement shall constitute a complete transfer of ownership, intellectual property and copyright of all documents from the Contractor to the City upon the Contractor's delivery of such documents and/or information to the City or upon completion of the Project, whichever occurs first. The Contractor shall not construe such transfer as a grant for usage nor can the Contractor revoke it.

EMPLOYMENT OF CITY WORKERS. The Contractor shall not engage, on a full, part-time or any other basis during the term of this Agreement, any professional or technical personnel who are or have been at any time during the term of this Agreement in the employ of the City.

CONTRACTOR'S PERSONNEL. The Contractor certifies that it presently has adequate qualified personnel to perform all services required under this Agreement and that all work performed under this Agreement shall be supervised by the Contractor. Contractor will make its personnel aware of and cause them to comply with the City's policies that have been made known to Contractor while performing pursuant to this Agreement. The Contractor further certifies that all of its employees assigned to perform any work hereunder shall have such knowledge and experience as required to perform the duties assigned to them. Any employee of the Contractor who, in the opinion of the City, is incompetent, whose conduct becomes detrimental to the work, or whom the City deems to be unsatisfactory for any reason, shall immediately be removed from association with the services hereunder per the City's request. Upon such request, the Contractor shall use all reasonable efforts to promptly replace such employee(s) with substitute employee(s) having appropriate skills and training. Contractor is

responsible for the acts or omissions of its personnel under or relating to this Agreement. The Contractor shall be solely liable and responsible for providing to, or on behalf of, all persons performing work pursuant to this Agreement, all employee compensation and benefits. The City shall have no liability or responsibility for the payment of any salaries, wages, unemployment benefits, health, welfare and disability benefits, Federal and local taxes, or other compensation, benefits or taxes for any personnel provided on behalf of the Contractor. In addition, the Contractor shall be solely liable and responsible for any and all workers' compensation benefits to any person as a result of injuries arising from or connected with any work performed by or on behalf of the Contractor pursuant to this Agreement.

INDEPENDENT CONTRACTORS. Nothing in this Agreement shall be deemed or construed to represent that the Contractor, or any of the Contractor's employees or agents, are the agents, representatives, or employees of the City. The Contractor acknowledges that it is an independent contractor over the details and means for performing the services hereunder. Anything in this Agreement which may appear to give the City the right to direct the Contractor as to the details of the performance of its obligations hereunder or to exercise a measure of control over the Contractor is solely for purposes of compliance with local, state and federal regulations and means the Contractor will follow the desires of the City only as to the intended results of the scope of this Agreement. It is further expressly agreed and understood by the Contractor that neither it nor its employees or agents shall hold itself out contrary to the terms of this paragraph, and the City shall not be liable for any representation, act or omission of the Contractor contrary to the provisions hereof.

TERMINATION

1. It shall be cause for the immediate termination of this Agreement if, after its execution, the City determines that either:

   a. the Contractor or any of its principals, partners or corporate officers, if a corporation, including the corporation itself, has plead nolo contendere, or has plead or been found guilty of a criminal violation, whether state or federal, involving, but not limited to, governmental sales or purchases, including but not limited to the rigging of bids, price fixing, misappropriation of government funds, or any other collusive and illegal activity pertaining to bidding and governmental contracting; or

   b. the Contractor subcontracted, assigned, delegated, or transferred its rights, obligations or interests, voluntarily or involuntarily, under this Agreement without the City's consent or approval; or

   c. the Contractor has filed bankruptcy, has been adjudicated bankrupt, become insolvent or made an assignment for the benefit of creditors, or a receiver, or similar officer is appointed to take charge of all or part of the Contractor's assets.

2. The City may cancel/terminate this Agreement, in whole or in part, upon providing written notice to the Contractor of the City's intention to terminate the Agreement as a result of Contractor's failure to provide the goods and/or services specified under this Agreement or in violation(s) of any of the terms herein, and the Contractor has failed to cure such breach within [NUMBER OF DAYS TO CURE BREACH] business days of such notice. The City may reject the goods and/or services and cancel this Agreement for any goods/services rendered or to be rendered hereunder. At its option, City may return the rejected portion of such goods to Contractor at its expense or hold the same for such disposal as Contractor shall indicate. In the event of any such rejection/termination, the City shall, at the City's option, have the right to obtain like goods and/or services elsewhere or to take over the work and prosecute the same to completion, both at the Contractor's expense; and in such event, the City may take possession of and utilize in completing the work, such materials, appliances, etc. as may be on the site of the work and necessary therefore. The Contractor shall be liable to the City for any loss, damage, or additional cost incurred thereby, including but not limited to any difference between the cost for procuring such like services and the price specified herein, attorneys' fees and court costs.

3. Notwithstanding the foregoing or any section herein to the contrary, the Contractor shall not be relieved of liability to the City for damages sustained by the City by virtue of any breach of the Agreement by the Contractor, and the City may withhold any payments to the Contractor, for the purpose of setoff, until such time as the exact amount of damages due the City from the Contractor is determined.

4. The City may, in its sole discretion, suspend and/or terminate this Agreement for convenience upon giving [NUMBER OF DAYS TO TERMINATE CONTRACT FOR CONVENIENCE] business days prior written notice to the Contractor. In the event a purported termination for cause by the City is in error, then such termination may, at the City's sole discretion, be deemed to be a termination for convenience under this section. In the event of such termination, the Contractor shall be entitled to receive just and equitable compensation, as determined by the City, for any satisfactory authorized work performed in accordance with the Agreement up to the termination date; but in no event shall the City be liable to the Contractor for expenses incurred after the termination date. All goods accepted by City or services completed by the Contractor prior to the Termination Date shall be documented and all tangible work documents shall be transferred to the City prior to payment for services rendered, and shall become the sole property of the City. Such termination by the City

shall not be deemed a Breach of Contract by the City, and the Contractor shall not be compensated for any anticipatory profits, or other damages of any description, that have not been earned as of the date of termination.
5. The Contractor shall deliver to the City all hard copy and electronic files maintained on behalf of the City within _____ calendar days of termination of this Agreement. Upon reasonable request, the City reserves the right to obtain such information prior to the termination of this Agreement.

COMPENSATION FOR CORRECTIONS. No compensation shall be due or payable to the Contractor pursuant to this Agreement for any of the services performed by the Contractor to correct services, when such corrections are required as a direct result of negligence by the Contractor to properly fulfill any of its obligations herein.

CITY'S RIGHT TO WITHHOLD CERTAIN AMOUNTS AND MAKE APPLICATION THEREOF. If evidence is produced before the final settlement of all or any balances that the Contractor has failed to pay laborers employed on his work or failed to pay for materials used therein, or if the City has reason to suspect the same, the City may withhold such balances and upon evidence satisfactory to the City as to the amount due for such labor and materials, the City, acting as the agent of the Contractor, may settle and pay for the same and charge the amounts to the Contractor and deduct the same from the said balance or balances.

REMEDIES CUMULATIVE. All remedies available to the City herein are cumulative and shall be in addition to all other rights and remedies provided by law. The termination, expiration, or suspension of this Agreement shall not limit the City from pursuing other remedies available at law or in equity.

SUBCONTRACTING, ASSIGNMENT or TRANSFER. The Contractor shall not subcontract, assign, delegate or transfer all or part of its rights, responsibilities, or interest under this Agreement without the prior written consent of the City. Any purported assignment, transfer, or delegation in violation of this Section shall be voidable by the City. No subcontracting, assignment, delegation or transfer shall relieve the Contractor from performance of its duties hereunder; neither shall the City be responsible for the fulfillment of the Contractor's obligations to its transferors or subcontractors. Upon request of the City, the subcontracting, assigning, delegating or transferring party shall provide all documents evidencing the transfer. At any time, City may, in its sole discretion, revoke its prior approval of a subcontractor and direct Contractor to replace such subcontractor or perform the services that were being performed by such contractor itself if the City finds in its reasonable judgment that (i) such subcontractor's performance is materially deficient or otherwise unacceptable to City; (ii) good faith doubts exist concerning the subcontractor's ability to render future performance because of changes in the subcontractor's ownership, management, financial condition, or otherwise; or (iii) there have been one (1) or more material misrepresentations by or concerning the subcontractor. The City reserves the right to terminate the Agreement if Contractor, in whole or in part, is acquired by another entity during the term of this Agreement. In the event the Contractor is allowed to sublet any part of the Agreement, the Contractor shall be as fully responsible to the City for the acts and omissions of the subcontractor and of the persons employed or directly or indirectly employed by the subcontractor as he is for the acts and omissions of persons employed by Contractor. The Contractor shall not subcontract more than [SUBCONTRACTOR PERCENT]% of the work required hereunder. The computation for percentages will be based on monetary values.

CONFLICT OF INTEREST. Neither party shall engage in any conduct or activity in the performance of this Agreement that constitutes a conflict of interest under applicable federal, state or local laws, rules and regulations. The Contractor covenants that it has no public or private interest, and shall not acquire, any interest, directly or indirectly, which would conflict in any manner with the performance required under this Agreement, and the Contractor covenants that no gratuities, in the form of entertainment, gifts, or otherwise, were offered or given by the Contractor or any agent or representative of the Contractor, to any officer, official, agent or employee of the City, in an effort to secure the Agreement or favorable treatment with respect to any determinations concerning the performance of the Agreement. The Contractor warrants that no part of the total contract amount provided herein shall be paid directly or indirectly to any officer or employee of the City as wages, compensation, or gifts in exchange for acting as officer, agent, employee, subcontractor or consultant to the Contractor in connection with any work contemplated or performed relative to this Agreement. For breach or violation of this provision, the City shall have the right to recover or withhold the full amount of such gratuities.

COVENANT AGAINST CONTINGENT FEES. The Contractor warrants that it has not employed or retained any company or person other than a bona fide employee working solely for the Contractor, to solicit or secure this Agreement, and that it has not paid or agreed to pay any company or person, other than a bona fide employee working solely for the Contractor any fee, commission, percentage, brokerage fee, gift, or any other consideration contingent upon or resulting from

the award or making of this Agreement. For breach or violation of this provision, the City shall have the right to recover the full amount of such fee, commission, percentage, brokerage fee, gift, or other consideration.

GENERAL COMPLIANCE WITH LAWS. The Contractor certifies that it is qualified or will take steps necessary to qualify to do business in the State of Tennessee and that it shall take such action as, from time to time, may be necessary to remain so qualified and shall obtain and maintain, at its own expense, all licenses, permits, insurance, and governmental approvals, if any, necessary to the performance of its obligations under this Agreement. Such permits and licenses shall be made available to the City, upon request. The Contractor is assumed to be familiar with and shall comply with all applicable federal, state, and local laws, ordinances, and regulations in performing any of its obligations under this Agreement, including but not limited to the City of Memphis Living Wage Ordinance, the Fair Labor Standards Act, Occupational Safety and Health Administration (OSHA), and the Americans with Disabilities Act (ADA). The Contractor shall promptly notify the City of any conflict discovered between this Agreement and any applicable laws, rules, regulations, and/or permits and licenses, and await resolution of the conflict.

NON-DISCRIMINATION. The Contractor hereby agrees to comply with Title VI and Title VII of the Civil Rights Act of 1964 and all other federal, state or local laws prohibiting discrimination, which provide in whole or in part, that no person shall be excluded from participation in, or be denied benefits of, or be otherwise subjected to discrimination in the performance of this Agreement or in the Contractor's employment practices on the grounds of handicap and/or disability, age, race, color, religion, sex, national origin, or any other classification protected by Federal, State or statutory law. The Contractor shall, upon request, show proof of such nondiscrimination, and shall post in conspicuous places available to all employees and applicants notices of nondiscrimination. In the event the Contractor fails to comply with the City's non-discrimination policy and any and all other laws prohibiting discrimination, this Agreement may be canceled, terminated or suspended in whole or in part by the City.
The City reserves the right to investigate any claims of illegal discrimination by the Contractor and in the event a finding of discrimination is made and upon written notification thereof, the Contractor shall take all necessary steps to cure and rectify such action to the reasonable satisfaction of the City. The Contractor's failure or refusal to do so shall be cause for termination of this Agreement in accordance with the terms of this Agreement.

EMPLOYMENT OF ILLEGAL IMMIGRANTS. The Contractor hereby certifies to comply with all applicable federal and state laws prohibiting the employment of individuals not legally authorized to work in the United States. Contractor shall not knowingly (i) utilize the services of illegal immigrants; or (ii) utilize the services of any subcontractor who will utilize the services of illegal immigrants in the performance of the contract. In the event the Contractor fails to comply with any and all local, state and federal laws prohibiting the employment of individuals not legally authorized to work in the United States, this agreement may be canceled, terminated or suspended in whole or in part by the City, and the Contractor may be prohibited from contracting to supply goods and/or services to the City for a period of one (1) year from the date of discovery of the usage of illegal immigrant services in the performance of a contract with the City.

SEVERABILITY. If any terms or provisions of this Agreement are held to be illegal, invalid or unenforceable as a matter of law, such provision shall be fully severable, and the remaining provisions of this Agreement shall remain in full force and effect and continue to be binding and shall not be affected by such provision or by its severance herefrom. Furthermore, in lieu of such unlawful, invalid, or unenforceable provision, the parties may negotiate in good faith to replace such provision with a valid, legal and enforceable provision that most closely approximates the parties' original intent.

NO WAIVER OF CONTRACTUAL RIGHT. No term or provision of this Agreement, or of any document executed pursuant hereto, shall be held to be waived, modified or deleted unless in writing and executed by the parties hereto . No delay or failure of the City to enforce any right or provision of this Agreement or in any document executed pursuant hereto shall operate as a waiver or relinquishment of the City's right to subsequently enforce and compel strict compliance with such provision or any other provision herein or in any document related hereto and specifically identified as a waiver of any succeeding breach thereto or of any other provision herein contained.

SUJBJECT TO FUNDING. This Agreement is subject to availability and annual appropriation of funds by the Memphis City Council. In the event sufficient funds for this Agreement are not available or appropriated by the Memphis City Council for any of its fiscal period during the term hereof, then the City shall immediately terminate this Agreement upon written notice to the Contractor. In the event of such termination, the Contractor shall be entitled to receive just and equitable compensation for any satisfactory work performed up to the termination date. Such termination by the City shall not be deemed a Breach of Contract by the City, and the Contractor shall have no right to any actual, general, specific, incidental,

consequential, or any other damages whatsoever of any description or amount that have not been earned as of the date of termination.

CONTRACTING WITH SMALL AND MINORITY FIRMS AND WOMEN'S BUSINESS ENTERPRISE. The Contractor shall take affirmative action to ensure that small, minority-owned and women-owned businesses, which have been certified by the City, are utilized when possible as sources of supplies, equipment, construction and services.

PUBLIC RECORDS. Notwithstanding anything to the contrary contained herein or within any other document supplied to the City by the Contractor, the Contractor understands and acknowledges that the City is a governmental entity subject to the State of Tennessee Public Records Act, and any reports, data or other information supplied to the City regarding services performed hereunder may be subject to disclosure as a public record in accordance with the laws of the State of Tennessee.

ORGANIZATION STATUS AND AUTHORITY. The Contractor represents and warrants that it is a corporation, limited liability company, partnership, or other entity duly organized, validly existing and in good standing under the laws of the state of Tennessee; it has the power and authority to own its properties and assets and is duly qualified to carry on its business in every jurisdiction wherein such qualification is necessary. The execution, delivery and performance of this Agreement by the Contractor has been duly authorized by all requisite action and will not violate any provision of law, any order of any court or other agency of government, the organizational documents of the Contractor, any provision of any indenture, agreement or other instrument to which the Contractor is a party, or by which the Contractor's respective properties or assets are bound, in conflict with, result in a breach of, or constitute (with due notice or lapse of time or both) a default under any such indenture, agreement or other instrument, or result in the creation or imposition of any lien, charge or encumbrance of any nature whatsoever upon any of the properties or assets.

Each person executing this Agreement represents that: he/she is lawfully authorized to sign the Agreement on behalf of the party he/she represents and execution of the Agreement was duly and regularly authorized by the party's governing body.

WARRANTY. The Contractor warrants to the City that all goods/work shall be free from defects in design and faulty or improper workmanship and shall be in strict compliance with the terms of this Agreement. This warranty shall be effective for a period of not less than one year from the date of acceptance by the City of such goods and/or services as satisfactorily complete, and shall be in addition to all other warranties, express, implied or statutory. The warranty shall survive the termination or expiration of this Agreement.

RECORDS AND AUDITS. The Contractor shall make and keep as the same accrue, full and complete books, documents, accounting records and other evidence, that specifically relate to this Agreement, in accordance with generally accepted accounting principles. The Contractor shall retain such records, and shall make same available to the City, upon reasonable request, during the term of this Agreement, and for a minimum period of three (3) full years after completion of the contract obligations or from the date of final payment under this Agreement, whichever is later. In the event any litigation, claim or audit is instituted prior to the expiration of the required three-year retention period, such records shall be retained until such litigation, claim or audit finding has been resolved. Copies of said records shall be furnished to the City upon request. Upon reasonable notice, the Contractor shall permit the City, any other governmental entity, any agency participating in the funding of this Agreement, or any of their duly authorized representatives, to enter the Contractor's offices, during regular business hours, to interview employees and to inspect and/or copy said records and books of accounts together with any and all documents pertaining hereto that may be kept, maintained or possessed by the Contractor. Reviews may also be accomplished at meetings that are arranged at mutually agreeable times and places.

DISPUTE RESOLUTION. In the event of any dispute(s), controversy, or claim arising out of or relating to this Agreement or the breach thereof, the parties agree that they shall first use their best efforts in an attempt to settle the dispute through negotiations involving themselves or their representatives as they each deem appropriate. Any dispute concerning a question of fact in connection with this Agreement between the Contractor and the City shall be referred in successive order for resolution, first to the City Purchasing Agent, second to the City Attorney, and thirdly to the Mayor of the City of Memphis, whose decision regarding same shall be final.

FORCE MAJEURE. The City shall not be deemed in default hereunder, nor shall the City be responsible for any delay, interruption, or cessation in the performance of its obligations under this Agreement where such failure of performance is the

result of any force majeure event, including, but not limited to, acts of God, riots, wars, strikes, epidemics, acts, governmental authorities or acts of nature or other similar cause beyond its control.

SUCCESSORS AND ASSIGNS. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors and assigns.

NOTICES. All notices and other communications required or permitted to be given hereunder shall be written and hand delivered with signed receipt; delivered by facsimile; delivered by a nationally recognized overnight courier; or mailed via certified U.S. mail, postage prepaid and return receipt requested. All notices shall be deemed received and effectively given as follows: (i) if by hand delivery, on the date of delivery; (ii) if by fax, on the day the fax transmission is received at the receiving location and receipt is telephonically confirmed by the sender; (iii) if by delivery via U.S. mail, on the date of receipt appearing on a return receipt card; or (iv) if by overnight courier, on the date receipt is confirmed by such courier service. All notices must be addressed to the respective party at the following addresses or to such other person or address as either party may designate in writing and deliver as provided herein:

To the CITY:
City of Memphis [DIVISION NAME]
[ADDRESS]
Memphis, TN [ZIP CODE]
Attn: [CITY CONTACT/REPRESENTATIVE]
Fax: [FAX NUMBER]

With copy, if requested, to:
City Attorney
125 N. Main, Room 336
Memphis, TN 38103

To the CONTRACTOR:
[CONTRACTOR NAME]
[CONTRACTOR ADDRESS]
[CITY], [STATE] [ZIP CODE]
Attn: [CONTRACTOR REPRESENTATIVE]
Fax: [FAX NUMBER - CONTRACTOR REPRESENTATIVE]

NO THIRD PARTY BENEFICIARY: This Agreement is entered into solely between, and may be enforced only by, City and Contractor. Unless otherwise specified herein, this Agreement shall not be deemed to create any rights in third parties, including suppliers or customers of either party.

SERVICE MARKS. The Contractor agrees that it shall not, without City's prior written consent, use the name, service mark or trademarks of the City.

NUMBER AND GENDER. Unless the context requires otherwise, (i) use of a specific gender imports the other gender(s); and (ii) use of the singular imports the plural and vice versa.

SURVIVAL. The parties hereto acknowledge that provisions that require or contemplate performance or observance after expiration or termination of this Agreement shall survive the expiration or termination of this Agreement and continue in full force and effect.

DRAFTER. This Agreement is the result of arm's length negotiations between the parties and shall be construed to have been drafted by both parties such that any ambiguities in this Agreement shall not be construed against either party.

COUNTERPARTS. This Agreement may be signed in multiple counterparts and/or counterpart signature pages, each of which shall be deemed an original, and all of which when taken together shall constitute one and the same instrument. Signed signature pages may be transmitted by facsimile, and any such signature shall have the same legal effect as an original.

CITY LIABILITY. The City shall have no liability except as specifically provided in this Agreement. The City, by execution of this Agreement, assumes no liability for damages caused to persons or property by reason of Contractor providing services herein or for injury to any employee, agent or subcontractor of the Contractor performing under this Agreement.

INDEMNIFICATION. CONTRACTOR shall indemnify, defend, save and hold harmless the CITY and its officers, agents and employees from and against any and all claims, demands, suits, actions, penalties, damages, settlements, costs, expenses, or other liabilities of any kind and character, including without limitation attorney fees and litigation expenses, arising out of or in connection with the performance of this Agreement by Contractor, its employees, subcontractors, or agents or the breach of this Agreement by Contractor, its employees, subcontractors or agents. This obligation shall survive the expiration or termination of this Agreement. The Contractor expressly understands and agrees that any insurance protection required by this Agreement or otherwise provided by the Contractor shall in no way limit the Contractor's responsibility to indemnify, defend, save and hold harmless the City or its elected or appointed officials, officers, employees, agents, assigns, and instrumentalities as herein required. The City reserves the right to appoint its own counsel regarding any matter defended hereunder. The
Contractor acknowledges that the City has no obligation to provide legal counsel or defense to the Contractor, its employees or subcontractors in the event that a suit, claim or action of any character is brought by any person not a party to this agreement against the Contractor as a result of or relating to obligations under this agreement. The City shall have no obligation for the payment of any judgments or the settlement of any claims asserted against the Contractor or its subcontractors or employees as a result of or relating to the Contractor's obligations hereunder. The Contractor shall immediately notify the City c/o City Attorney; 125 North Main, Suite 336; Memphis, TN 38103, of any claim or suit made or filed against the Contractor or its subcontractors regarding any matter resulting from or relating to the Contractor's obligations under this Agreement and agrees to cooperate, assist and consult with the City in the defense or investigation thereof.

LIVING WAGE. In accordance with the City of Memphis Ordinance No. 5185, commonly referred to as the Living Wage Ordinance, as amended, certain businesses holding a service or service-related contract with the City of Memphis shall pay its employees performing work on said contract a minimum hourly wage in the amount of $10.27 per hour with health benefits for employees and their dependents or $12.32 per hour without health benefits. Unless otherwise exempted, the Contractor agrees to follow and comply with the requirements of said ordinance, as amended. The Contractor further agrees to provide certified payrolls, or affidavits in accordance with Ordinance No. 5293, associated with this agreement to the City of Memphis c/o Manager, Prevailing Wage Office; 125 N. Main St., Room 1B-18; Memphis, TN 38103. The Living Wage Ordinance, and any amendments thereto, can be accessed on the City's website (www.memphistn.gov). Once on the City's homepage, click on the "Business" link, and then click on the "Doing Business with the City" link. A link to the Ordinance will be accessible on the top right side under the section "Links." Annual adjustments, if any, to the rates will be posted on the website for the upcoming fiscal year on or around February.

GOVERNING LAW, JURISDICTION AND VENUE. The terms and conditions of this Agreement shall be construed in accordance with and governed by the laws of the State of Tennessee. All actions, whether sounding in contract or in tort, relating to the validity, construction, interpretation and enforcement of this Agreement shall be instituted and litigated in the courts of the State of Tennessee, located in Shelby County, Tennessee, without regard to conflicts of laws principles. In accordance herewith, the parties to this Agreement submit to the jurisdiction of the courts of the State of Tennessee located in Shelby County, Tennessee.

INSURANCE
A. The Contractor shall not commence any work under this agreement until it has obtained and caused its subcontractors to procure and keep in force all insurance required hereunder. The Contractor shall require all subcontractors to carry insurance as outlined below, in case the subcontractor(s) are not protected by the policies carried by the Contractor. Prior to commencing any work under this contract, the Contractor shall furnish the City a Certificate of Insurance and/or policies, upon request, executed by an authorized representative of the insurance carrier evidencing that the insurance required hereunder is in effect. Failure to maintain or renew coverage or to provide evidence of renewal may result in termination of the contract by City. Failure of the City to identify any deficiency in the evidence that is provided shall not be construed as a waiver of the Contractor's obligation to maintain such insurance. The City reserves the right to review these requirements and to modify insurance coverage and their limits when deemed necessary and prudent. Insurance coverage shall be provided by companies rated A:VI or better by Best's Insurance Rating. The City reserves the right to reject any or all insurance carrier(s)

with an unacceptable financial rating. All insurance companies must be acceptable to the City of Memphis and licensed in the State of Tennessee.

B. If any of the insurance requirements are non-renewed at the expiration dates of any policy, payment to the Contractor may be withheld until those requirements have been met, or at the option of the City, the City may pay the renewal premiums and withhold such payments from any monies due the Contractor. Contractor's insurance shall be primary as respects the City, its officers, employees, and agents. Any insurance or self-insurance maintained by the City, its officers, employees and agents shall be excess of the Contractor's insurance and shall not contribute with it.

C. The Contractor shall maintain, at its expense, at minimum, the following insurance coverage during the life of the Agreement: [CONSULT RISK MANAGEMENT FOR REQUIRED INSURANCE COVERAGE AND AMOUNTS]

1. WORKERS COMPENSATION in accordance with the statutory requirements and limits of the State of Tennessee with minimum limits of

Employer's Liability	$100,000 Each Accident
	$500,000 Disease - Policy Limit
	$100,000 Disease - Each Employee

The workers compensation policy shall include a waiver of subrogation in favor of the City, its officials, employees and agents.

2. AUTOMOBILE LIABILITY covering owned, non-owned and hired vehicles with a minimum limit of: $_____ Each Occurrence - Combined Single Limits. The policy shall include a waiver of subrogation in favor of the City, its officials, employees and agents.

3. The Contractor shall be responsible for maintaining any and all PROPERTY INSURANCE on its own equipment and shall require all subcontractors to do likewise.

4. COMMERCIAL GENERAL LIABILITY: Comprehensive General Liability Insurance, covering Bodily Injury and Property Damage on an "occurrence" basis. The policy shall include a waiver of subrogation in favor of the City, its officials, employees and agents. The coverage shall be provided on ISO occurrence Form CG 00 01 07 98 (or substitute form for providing equivalent or greater coverage) and include Premises and Operations, Contractual Liability, Independent Contractor's Liability, Broad Form Property Damage, including Premises/Completed Operations, and Personal Injury liability, with employee and contractual exclusions deleted, with minimum limits of

General Aggregate	$_____
Products - Completed Operations	$_____
Personal & Advertising	$_____
Each Occurrence	$_____ (Bodily Injury & Property Damage)
Fire Damage (any one fire)	$_____
Medical Expense (any one Person)	$_____

5. A Separation of Insureds condition shall be included in all general liability and automobile liability polices required by this Agreement.

D. Each certificate or policy shall require and state in writing the following clauses:

1. Thirty (30) days prior to cancellation or material change to the insurance coverage, notice thereof shall be given to the City of Memphis Risk Manager by registered mail, return receipt requested to the following address: City of Memphis; Attn: Risk Management; 2714 Union Avenue Extended, Suite 200; Memphis, TN 38112.

Notwithstanding the preprinted cancellation provisions on the Certificate of Insurance, the vendor shall provide notice to the City of Memphis Risk Management within three (3) business days following receipt of any notice of cancellation or material change in the vendor’s insurance policy. 2. "The City of Memphis, its officials, agents, employees and representatives shall be named as Additional Insured on all liability policies." The additional insured endorsements shall be attached to the Certificate of Insurance."

Appendix L
Checklist for Contracts

1. **The Contract must contain the following REQUIRED CONTRACT PROVISIONS, if applicable:**
   - Parties to the contract
   - Contractor's Duties/Scope of Services
   - Term of contract (commencement and termination)
   - Contract Amount
   - Prevailing Wage (required for construction projects over $500,000)
   - Liquidated damages (required for public works improvements)
   - Living Wage (required for certain service-related contracts)
   - Bond Requirements (required for construction projects)
   - Conflict of Interest
   - Covenant Against Contingent Fees
   - Indemnification/Hold Harmless
   - Insurance Requirements
   - Nondiscrimination
   - Employment of Illegal Immigrants
   - Independent Contractors
   - Governing Law/Venue (Tennessee without regard to conflict of laws provisions)
   - Compliance with Laws
   - Termination of Contract
     (a) For Cause
     (b) Without Cause
     (c) Non-appropriation of Funds

2. **STANDARD TERMS AND CONDITIONS, IF APPLICABLE, are included in the Contract:**
   - Invoices
   - Compensation/Payment (include payment schedule, if applicable)
   - No Tax Payments
   - Records/Audit, if applicable
   - Travel Expenses
   - Reports
   - Confidentiality, if applicable
   - Public Records
   - Rights in Data, if applicable
   - Remedies Cumulative
   - Waiver of Contract Rights
   - Minority/Women Business Enterprise (MWBE)
   - Notices
   - Assigning/Subcontracting Contract
   - Force Majeure
   - Dispute Resolution
   - Amending Contract
   - Severability
   - Standard of Performance
   - Warranty
   - Entire Agreement/Integration
   - Patent Indemnification
   - Title and Risk (for goods)
   - Shipments (for goods)
   - Transportation Charges (for goods)

3. **Following IMPERMISSIBLE CLAUSES are excluded from the Contract or are otherwise approved:**
   - Hold harmless/Indemnification by the City
   - Contractor's Disclaimer of liability for incidental, exemplary or consequential damages, etc.

- Contractor's Disclaimer of express or implied warranties
- Limitation on damages/dollar amount recoverable by the City
- Limitation on time within which the City may bring suit
- Contract Term with no specific termination date
- Provisions requiring advanced deposits or payments from City
- Provisions requiring City pay any taxes associated with the contract
- Clauses requiring the City pay Contractor's attorney's fees, court fees, penalties and/or liquidated damages
- Clause granting Contractor unilateral authority to assign contract
- Governing law other than Tennessee
- Consent to jurisdiction or and/or venue outside Shelby County, Tennessee
- Provisions requiring payment of interest, late charges or finance charges in excess of the Tennessee Prompt Pay Act
- Provisions requiring confidentiality and nondisclosure that violate the Tennessee Public Records Act
- Provisions requiring the City to purchase or obtain insurance, including liability insurance, performance bonds or property insurance
- Binding Arbitration

4. BLANK SPACES IN CONTRACT ARE COMPLETE OR MARKED N/A, excluding the Effective Date

5. ALL RIDERS, EXHIBITS AND ATTACHMENTS ARE ATTACHED TO CONTRACT

6. INSURANCE/BOND

- Contractor's insurance and bond documentation is submitted with Contract
- Documentation evidences all insurance coverage(s) and bond as required in Contract

7. SIGNATURES

- Contract/document is being routed for signatory by City officials before the contract term commencement date. If no, justification is attached detailing why the contract is being routed after the contract term commencement
- Titles of signatories are noted in Contract/document
- <u>All</u> parties have signed the contract and initialed any changes, insertions and deletions (handwritten or otherwise)

8. FOR CONTRACT AMENDMENT/RENEWAL/EXTENSION:

- Original contract and if applicable, prior amendments are attached to document
- Original contract number is referenced in document
- Justification for amendment/extension is included in document
- Such modification is permissible (without competition) per terms of original contract
- Document is being processed before expiration of contract
- Contractor's insurance/bond documentation is submitted with document

9. DOCUMENTS REJECTED AND BEING RESUBMITTED

- Contractor has seen and approved (in writing) any changes/additions to the document

APPENDIX M
CONTRACT REVIEW/APPROVAL PROCESS FLOW

CONTRACT REVIEW/APPROVAL PROCESS FOR COMPETITIVE PROCUREMENTS

1. Purchasing Dept.
- Ensures the procurement of such items/services are in compliance with the City's purchasing policies and procedures and applicable state and federal laws (i.e., local preference, etc.);
- Ensures funds are available and encumbers funds;
- If applicable, consults Risk Management for insurance requirements;
- Ensures the Division Director has approved the contract award;
- Prepares contract, based upon City's solicitation, using City's standard contract templates in Oracle;
- Assigns contract number.

2. Contractor
- Reviews and signs contract (manually or electronically);
- Returns signed contract to City and include any necessary insurance and bond documentation;
- Unless otherwise exempted, submits documentation evidencing licensure in Memphis/Shelby County.

3. Purchasing Dept.
- Ensures Contractor has signed contract (manually or electronically);
- Ensures documentation evidencing the required insurance and bond is attached to contract;
- Unless otherwise exempted, ensures Contractor is licensed in Memphis/Shelby County;
- Where required, ensures City Council's approval has been obtained.

4. City Attorney's Office reviews contract "as to form"
- Ensures contract complies with local and applicable state and federal laws (i.e., living wage, prevailing wage, liquidated damages, bond for construction projects, etc.);
- Ensures contract contains City's required contract terms (i.e., definite term of contract, termination of contract, contractor's duties, contract amount, conflict of interest, governing law is Tennessee, venue/jurisdiction in Tennessee, insurance, indemnification, audit, etc.);
- Reviews contract for impermissible contract provisions (i.e., tax payments, penalties/interest payments not in compliance with state law, confidentiality provisions that violate state's public records laws, requiring City to indemnify or hold vendor harmless, requiring proof of insurance or bonds from City, disclaimers of warranties, disclaimers of liability, limitation on damages recoverable by City, etc.);
- Ensures Contractor has signed contract;
- Ensures any handwritten changes (i.e., whited out or additions) and deletions to contract are initialed/accepted by all parties;
- Ensures contract amendments/renewals are allowed (without competition) per terms of original contract;
- Ensures contracts are amended/renewed before the contract expires;
- Ensures referenced documents are attached and incorporated into contract;
- Reviews contractor's insurance and bond information to ensure compliance with contract;
- Rejects and sends contract back to purchasing dept./division for failure of contract to comply with form or for <u>readily apparent</u> business concerns;
- Upon approval, initials contract.

5. Chief Administrative Officer reviews contract

6. Mayor reviews and signs contract, upon approval

7. Purchasing Agent/Comptroller
- Attests to contract and finalizes it in City's financial system;
- Maintains original contract;
- Forwards a fully executed contract (or copy) to Contractor and Division.

8. Contractor
- Receives fully executed contract;
- Begins delivering goods/services in accordance with contract.

CONTRACT REVIEW/APPROVAL PROCESS FOR NONCOMPETITIVE PROCUREMENTS

1. Division
- Determines division's needs
- Ensures items/services are necessary;

- Ensures funds are available for such purchase;
- Ensure prices are fair and reasonable;
- Ensure statement of work is accurate and complete;
- Prepares contract/amendment using City's standard contract templates in Oracle and negotiates business terms (e.g., items/services to be purchased, purchase price of such goods/services, etc.). Upon request, assisted by City Attorneys' office with negotiations;
- If applicable, consults Risk Management for insurance requirements.

2. Contractor

- Reviews and signs contract (manually or electronically);
- Returns signed contract to City and include any necessary insurance and bond documentation;
- Unless otherwise exempted, submits documentation evidencing licensure in Memphis/Shelby County.

3. Division

- Prepares, and Director signs, Bid & Contract Agenda Form (B&C);
- Ensures documentation evidencing the required insurance and bond is attached to contract;
- Where applicable, Director signs contract/amendment

4. Purchasing Dept.

- Ensures the procurement of such items/services are in compliance with the City's purchasing policies and procedures and applicable state and federal laws (i.e., local preference, etc.);
- Ensures funds are available and encumbers funds;
- Consults Risk Management dept. for insurance requirements;
- Ensures Division Director has approved contract and Contractor has signed contract (manually or electronically);
- Ensures documentation evidencing the required insurance and bond is attached to contract; Ensures contract amendments/renewals are allowed (without competition) per terms of original contract;
- Unless otherwise exempted, ensures Contractor is licensed in Memphis/Shelby County
- Where required, ensures City Council's approval has been obtained
- Assigns contract number.

5. City Attorney's Office reviews contract "as to form"

- Ensures contract complies with local and applicable state and federal laws (i.e., living wage, prevailing wage, liquidated damages, bond for construction projects, etc.);
- Ensures contract contains City's required contract terms (i.e., definite term of contract, termination of contract, contractor's duties, contract amount, conflict of interest, governing law is Tennessee, venue/jurisdiction in Tennessee, insurance, indemnification, audit, etc.);
- Reviews contract for impermissible contract provisions (i.e., tax payments, penalties/interest payments not in compliance with state law, confidentiality provisions that violate state's public records laws, requiring City to indemnify or hold vendor harmless, requiring proof of insurance or bonds from City, disclaimers of warranties, disclaimers of liability, limitation on damages recoverable by City, etc.);
- Ensures Contractor has signed contract;
- Ensures any handwritten changes (i.e., whited out or additions) and deletions to contract are initialed/accepted by all parties;
- Ensures contract amendments/renewals are allowed (without competition) per terms of original contract;
- Ensures contracts are amended/renewed before the contract expires;
- Ensures referenced documents are attached and incorporated into contract;
- Reviews contractor's insurance and bond information to ensure compliance with contract;
- Rejects and sends contract back to purchasing dept./division for failure of contract to comply with form or for <u>readily apparent</u> business concerns;
- Upon approval, initials contract.

6. Chief Administrative Officer reviews contact

7. Mayor reviews and signs contract, upon approval

8. Purchasing Agent/Comptroller

- Attests to contract and finalizes it in City's financial system;
- Maintains original contract;
- Forwards a fully executed contract (or copy) to Contractor and Division.

9. Contractor

- Receives fully executed contract;
- Begins delivering goods/services in accordance with contract.