

ORDINANCE NO. 6236

**AN ORDINANCE REVISING FAIRBANKS GENERAL CODE
CHAPTER 54, PROCUREMENT**

WHEREAS, Chapter 54 of the Fairbanks General Code addresses all aspects of city procurement; and

WHEREAS, this chapter of the code has not been revised in many years; and

WHEREAS, after review by the city staff, a number of revisions and updates are being proposed.

NOW THEREFORE, BE IT ENACTED BY THE CITY COUNCIL OF THE CITY OF FAIRBANKS, ALASKA, as follows:

SECTION 1. FGC Chapter 54 is hereby amended as follows [new text in **bold/underlined** font; deleted text in ~~strikethrough~~ font]:

**CHAPTER 54 - PROCUREMENT
ARTICLE I. IN GENERAL**

Sec. 54-1. Definitions.

~~The following words, terms, and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:~~

Administering authority means a person authorized to administer contracts for a department and make written determinations with respect to them.

Appropriate authority means those persons set forth in this chapter as having award authority or those persons designated as having administering authority.

Awarding authority means a person authorized to enter into and award a contract such as the purchasing agent, **mayor**, or the city council.

Change order means a written order, signed by the administering authority, directing the contractor to make changes that **are authorized by the contract**~~the changed clause of the contract authorizes the city to order~~ without the consent of the contractor.

Construction means the process of building, altering, repairing, maintaining, improving, or demolishing a public highway, structure, building, or other public improvement of any kind to real property, to include services and professional services relating to planning and design required for the construction.

Contract means all types of city agreements, regardless of what they may be called, for the procurement or disposal of supplies, equipment, services, professional services, or construction.

Contract modification means a written alteration ~~in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions~~ of a contract accomplished by mutual action of the parties to the contract.

Contractor means the prime contractor, ~~including~~ **and any** subcontractors, performing work **under a city contract** ~~necessary to facilitate public construction.~~

Invitation ~~to~~ for bids (ITFB) means all documents, whether attached or incorporated by reference, used for soliciting bids.

Late bids means any bid received after the time and date set for the receipt of bids ~~is late~~. Any withdrawal or modification of a bid received after the time and date set for opening of bids ~~at the place designated for opening~~ **will be considered** ~~is late~~.

Offerors or proposers means only those businesses submitting proposals that are acceptable or potentially acceptable. The term **doeshall** not apply to those businesses who submitted unacceptable proposals.

Professional services means professional, technical, or consultant's services that are predominantly intellectual in character, result in the production of a report or the completion of a task, and include analysis, evaluation, prediction, planning, or recommendation.

Purchasing means buying, procuring, renting, leasing, or otherwise acquiring supplies, services, or construction. It also includes functions that pertain to the obtaining of ~~any supplies~~, services, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contracts, and phases of contract administration.

Purchasing description means the words used in the solicitation to describe the supplies, services, or construction to be purchased, and includes specifications attached to or made a part of the solicitation.

Reasonable notice for purposes of notifying the city council of change orders is not later than the second regular meeting of the city council following the change.

Request for proposals (RFP) means all documents, whether attached or incorporated by reference, used for soliciting proposals.

Responsible bidder means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will ensure good faith performance.

Responsive bidders means a person who has submitted a bid which conforms in all material respects to the invitation to bid.

Retainage means moneys withheld from a contractor until completion of a contract or satisfaction of some other contingency as evidenced by approval of the applicable pay estimate.

Services means 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; it does not include employment agreements or collective bargaining agreements.

Specification means any description of the physical, functional, or performance characteristics, or of the nature of a supply, service, or construction item.

Supplies means all property of a department, including equipment, materials, and insurance; it includes privately owned real property leased for the use of a department, such as office space.

Sec. 54-2. Ethics.

(a) *Financial interest.* Any purchase order or contract within the purview of this chapter in which ~~the agent or~~ any officer or employee of the city is financially interested, directly or indirectly, is ~~shall be~~ void; except that before the execution of a purchase order or contract, the city council has ~~shall have~~ the authority to waive compliance with this section when it finds such action to be in the best interests of the city; ~~however, w~~Where an ~~agent, officer,~~ or employee of the city has previously sold material, machines, or other goods to the city and the city council has waived compliance with this section, the ~~agent, officer,~~ or employee may sell to the city items of service, repair, or replacement parts without further waiver by the city council ~~when~~ upon a finding by the mayor that the service, repair, or replacement parts are considered proprietary items. The ~~agent, officer,~~ or employee shall, within one week, file written notice with the mayor of each such sale ~~of service, repair, or replacement parts,~~ which will then be reported to the city council in a public meeting.

(b) *Rebates prohibited.* Every officer and employee of the city is expressly prohibited from accepting, directly or indirectly, from any person to whom ~~which~~ any such contract is or might be awarded, any rebate, gift, money, or anything of value ~~whatsoever,~~ except when ~~where~~ given for the use and benefit of the city or where accepted with the express consent of the city council.

(c) *Gratuity for influencing purchasing standards prohibited.* No person shall offer, give, or agree to give any employee or former employee, and noner ~~shall~~ any employee or former employee shall solicit, demand, accept, or agree to accept from another person a gratuity, kickback, or offer of employment in connection with any aspect of the procurement process ~~decision, approval, disapproval, recommendation, preparation or any part of a program requirement or a purchase request, influencing the content of any specification or purchasing standard, rendering of advice, investigation, auditing, or in any other advisory determination, claim or controversy, or other particular matter, pertaining to any program requirement or a contract or subcontract, or any solicitation or proposal.~~

(d) *Employment of another to secure city contract.* No person may ~~shall be retained nor~~ retain another person to solicit or secure a city contract upon an agreement of understanding for a commission, percentage, brokerage, or other contingent fee, except for retention ~~by bona fide~~

employees of bona fide, established commercial selling agencies for the purpose of securing business.

(e) *Payment of subcontractor to contractor prohibited.* No payment, gratuity, or offer of employment ~~may~~**shall** be made by or on behalf of a subcontractor under a contract to a prime contractor or higher tier subcontractor or any person associated with a contract as an inducement for award of a subcontract or order.

Sec. 54-3. Penalties.

(a) *Sanctions.*

(1) The mayor may impose ~~the following~~ sanctions on an employee for violations of this chapter **up to and including termination.**

- a. ~~Oral or written reprimand;~~
- b. ~~Suspension;~~
- e. ~~Termination.~~

(2) The mayor may impose ~~the following~~ sanctions on a nonemployee for violations of this chapter, **including written warnings or reprimands, termination of contracts, or debarment, suspension, or disqualification from receiving any city business for a stated period.**

- a. ~~Written warnings or reprimands;~~
- b. ~~Termination of contracts;~~
- e. ~~Debarment, suspension, or disqualification from receiving any city business for a stated period of time.~~

(b) *Assessment.*

(1) The value of anything transferred or received **by any person** ~~per section 54-2~~ in **violation** ~~breach of~~ **the provisions of Sec. 54-2** ~~this chapter~~ by an employee or nonemployee may be recovered from **that person** ~~either~~.

(2) Upon showing that a subcontractor made a kickback to a prime contractor or a higher tier subcontractor in connection with the award of a subcontract or order, it will be conclusively presumed that the amount **of the kickback** was included in the price of the subcontract or order and ultimately borne by the city and will be recoverable from the recipient. The amount may also be recovered from the subcontractor making such kickbacks. Recovery from one offending party ~~does~~**shall** not preclude recovery from other offending parties.

(3) A person who contracts for or purchases supplies, equipment, services, professional services, or construction in a manner the person knows to be contrary to the requirements of this chapter is liable for all costs and damages to the city arising out of the violation.

- (4) Any person violating ~~any of the provisions of~~ section 54-2(b), (c), (d), or (e) ~~this chapter~~ is ~~shall be deemed~~ guilty of a misdemeanor, and upon conviction shall be fined in an amount not exceeding \$1,000.00 or be imprisoned for a period not exceeding one year or be both so fined and imprisoned. Each day such violation is committed or permitted to continue ~~shall~~ constitutes a separate offense and shall be punishable as such under this section.

Secs. 54-4—54-35. Reserved.

ARTICLE II. ADMINISTRATION

Sec. 54-36. Purchasing authority.

(a) Purchasing authority is derived from the City Charter and this Code.

(b) Centralized purchasing is provided by the purchasing division ~~department~~ under the direction of the purchasing agent.

Sec. 54-37. Duties of purchasing agent.

Except as otherwise specifically provided, the purchasing agent shall:

- (1) Purchase or supervise the purchasing of all supplies, services, equipment, and materials needed by a department.
- (2) Sell, trade, transfer between departments, or otherwise dispose of surplus, obsolete or scrap supplies, equipment, or material, and make proper adjustments in the accounts of such departments ~~agencies concerned~~.
- (3) Prescribe the time, manner, authentication, and form for ~~of~~ making requisitions for purchasing.
- (4) Prescribe standard forms for ~~pertaining to~~ solicitations and contracts.
- (5) Provide for other matters that may be necessary to carry out the provisions of this chapter.

Sec. 54-38. Encumbrance of funds.

Except in cases of emergency declared by the mayor, the city shall not enter into any contract or change order until the ~~director of finance~~ chief financial officer ~~has~~ ~~shall have~~ verified that there is a sufficient unencumbered account balance to cover the contract or order.

Sec. 54-39. Contract award authority.

(a) The purchasing agent may award contracts funded with identifiable appropriations made by the city council when the amount is \$50,000.00 or less, provided that the purchasing agent notifies the city council ~~in a timely manner of awards which exceed \$25,000 and provide that~~ when competitive bidding is not deemed to be possible ~~the purchasing agent shall notify the city council~~

and recite the reasons and findings. The purchasing agent may award the sale, trade, or disposal of all personal property which has become surplus, obsolete, or unusable.

(b) The mayor may award contracts funded with identifiable appropriations made by the city council when the contract amount is \$250,000.00 or less.

(c) The city council may award all other contracts, ~~provided that~~ **W**hen competitive bidding is not deemed to be possible, the city council shall, in the resolution for award, recite the reasons why and findings.

Sec. 54-40. Formal written contracts.

All contracts awarded under the provisions of this chapter which exceed ~~\$50~~**25,000.00, or which are required by law to be in writing, must** shall be memorialized in a formal, written contract, unless otherwise provided in this chapter.

Sec. 54-41. General policy.

(a) Except as otherwise provided in this chapter, or unless specifically exempted by law, contracts ~~must~~ shall be awarded by competitive sealed bidding.

(b) Competitive sealed bidding is not required:

- (1) When the purchasing agent determines in writing that it would be advantageous to the city to purchase medical supplies, or other special materials ~~for use by any department may be purchased otherwise to the best advantage of the city~~ in another manner;
- (2) When rates are fixed by law or ordinance;
- (3) For the purchase of services provided by an established employment program;
- (4) For professional or unique services;
- (5) For concessions operated on city property;
- (6) For the purchase of supplies, equipment, or services available under other governmental or municipal contracts as provided in section 54-242;
- (7) For sole source procurement as described in section 54-241; ~~or~~
- (8) ~~When it can be demonstrated in writing and reasons cited that competition does not exist;~~
or
- (9) For informal purchasing under section 54-247.

(c) The following items are unique, ~~internal and over which~~ **and** the purchasing ~~division~~ department has no meaningful influence or control over them. They **do not require a formal procurement process and** can be processed by internal mechanisms coordinated by the

~~director of finance~~**chief financial officer**without the necessity of purchase orders issued by the purchasing department:

- (1) Newspaper ads, both legals and advertisements;
- (2) Medical expenses, such as physical exams **and drug testing**;
- (3) Travel expenses, to include transportation, room and board, advances, and personal expenses;
- (4) Subscriptions;
- (5) Utility bills, to include phone traces;
- (6) ~~Hotel/motel~~**Room rental** appropriations or similar appropriations;
- (7) Contributions to charities;
- (8) Dues to approved organizations;
- (9) Overdue invoices for payment;
- (10) ~~Department of public safety~~**Police Department** investigative funds; and
- (11) ~~City right of way~~**Imprest** funds.

Sec. 54-42. List of contractors.

(a) The purchasing agent shall establish and maintain lists of persons who desire to provide supplies, services, professional services, or construction services to the city.

(b) A person who desires to be on a bidder's list shall submit to the purchasing agent evidence of a valid state **and city** business license. ~~A fee may be established by regulation in an amount reasonably calculated to pay the cost of administering this section.~~ A construction contractor shall also submit a valid certificate of registration issued under AS 08.18. The purchasing agent may require submission of additional information.

(c) The list may be used by the purchasing agent when issuing invitations to bid or requests for proposals.

Sec. 54-43. Specifications.

(a) The purchasing agent shall adopt policies governing the preparation, revision, and content of specifications for supplies, services, professional services, and construction required by a department. The purchasing agent shall monitor the use of these specifications.

(b) The purchasing agent may obtain expert advice and assistance from department personnel in the development of specifications. Specifications must promote overall economy for the purposes intended and encourage competition in satisfying the city's needs, and may not be unduly restrictive. The requirements of this subsection regarding the purposes and nonrestrictiveness of specifications apply to all specifications, including those prepared by architects, engineers, designers, and other professionals.

~~(c) In this section, "specification" means a description of the physical or functional characteristics, or of the nature of a supply, service, professional service, or construction project; it may include requirements for licensing, inspecting, testing, and delivery.~~

Sec. 54-44. Retention of purchasing records.

Purchasing records ~~must~~ shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the city council mayor. ~~Retained documents shall be made available to the city attorney or his designee upon request and proper receipt.~~

Sec. 54-45. Records of purchasing transactions.

A contract file, open for public inspection and containing all essential documents, ~~must~~ shall be kept by the purchasing ~~department~~ division and, where applicable, the administering authority. The file kept by the administering authority must contain:

- (1) A copy of the contract;
- (2) The register of proposals prepared and a copy of each proposal submitted; and
- (3) The written determination to award the contract prepared under section 54-168.

Sec. 54-46. Federal assistance.

If a purchase involves the expenditure of federal funds or federal assistance and there is a conflict between a provision of this chapter and a federal statute, regulation, policy, or requirement, the federal statute, regulation, policy, or requirement ~~shall~~ prevails.

Sec. 54-47. Supplementary general principles of law applicable.

Unless displaced by the particular provisions of this chapter, the principles of law and equity, including the Uniform Commercial Code, and law relative to capacity to contract, agency, fraud, misrepresentation, duress, coercion, mistake, or bankruptcy ~~shall~~ supplement the provisions of this chapter.

Sec. 54-48. Requirement of good faith.

All parties involved in the negotiation, performance, or administration of city contracts shall act in good faith.

Sec. 54-49. Reporting of anticompetitive practices.

When for any reason collusion or other anticompetitive practices are suspected among bidders or offerors, a notice of the relevant facts ~~must~~shall be transmitted to the city attorney by the person who suspects the collusion or other anticompetitive practices.

Sec. 54-50. Purchasing rules and policies.

(a) The mayor shall establish all rules and policies necessary to the implementation of this chapter.

(b) Rules and policies ~~shall~~ pertain but are not limited to:

- (1) Suspension, debarment, and reinstatement of prospective bidders and contractors.
- (2) Bid protests.
- (3) Conditions and procedures for the purchase of items for resale.
- (4) Conditions and procedures for the use of source selection methods, including sole-source purchasing, emergency purchasing, and ~~informal~~small purchasing.
- (5) The opening or rejecting of bids and offers and waiver of informalities in bids and bid offers.
- (6) Confidentiality of technical data and trade secrets submitted by actual or prospective bidders or offerors.
- (7) Partial, progressive, and multiple awards.
- (8) Transfer, sale, or other disposal of supplies, equipment, and material.
- (9) Purchase of supplies, equipment, and materials by an employee ~~of the using or disposing agency.~~
- (10) Definitions and classes of contractual services and procedures for acquiring them.
- (11) ~~Providing for e~~Conducting price analysis.
- (12) Use of payment and performance bonds in connection with contracts for supplies, equipment, and services.
- (13) Guidelines for use of cost principles, negotiations, adjustments, and settlements.
- (14) A bidder's or offeror's duties under sections 54-1615 and ~~section 54-202~~.

- (15) The elimination and prevention of discrimination on the basis of a protected class under federal or state law in city contracting ~~because of race, religion, color, national origin, sex, age, marital status, pregnancy, parenthood, handicap or political affiliation.~~

Secs. 54-51—54-80. Reserved.

ARTICLE III. CONTRACTS ADMINISTRATION

DIVISION 1. GENERALLY

Secs. 54-81—54-100. Reserved.

DIVISION 2. CONSTRUCTION CONTRACTS

Sec. 54-101. Administering authority.

(a) The city engineer or the public works director, as determined by the mayor, shall be the administering authority for construction contracts ~~not determined by the mayor to be administered by the director of public works.~~

(b) All construction contracts will~~shall~~ be administered in accordance with the provisions of this division.

Sec. 54-102. Change orders.

(a) *Proposal required.* Any change required in the work will~~shall~~ be made only after receiving a written proposal from the contractor for changes~~additions to or deductions from~~ the original contract sum for the proposed ~~changes~~proposed.

(b) *Change orders by administration.* Upon receipt of a proposal for a change in the contract sum and after a determination that the contractor's proposal is reasonable, the administering authority may issue a written change order. The aggregate sum of the change orders authorized under this subsection for each such construction contract will be as follows:

- (1) If the total project cost is \$1 million or less, then \$25,000.00 or 25% of the total project cost, whichever is greater;
- (2) If the total project cost is greater than \$1 million, then \$250,000.00 or 10% of the total project cost, whichever is greater.

Any change order issued under this subsection which exceeds \$250,000.00 must~~shall~~ be reasonably noticed to the city council by the administering authority.

(c) *Change orders by city council.* When a proposed change order exceeds the limits set forth in subsection (b) ~~of this section~~, the proposal, together with recommendations of the mayor,

~~must~~ shall be forwarded to the city council. The city council ~~shall then~~ may either accept or reject the proposal determine whether the proposal shall be accepted or rejected.

Sec. 54-103. Changed condition provision.

(a) ~~There is established a~~ A contingency fund is established for each construction contract project in the sum of \$50,000.00 or ten percent of the original contract amount, whichever is smaller, to be administered by the mayor. Whenever a change in the work is required immediately due to and upon the discovery of unforeseen conditions, the administering authority, with the approval of the mayor, shall direct such change in the work be made when the cost of the change does not exceed the amount of the established fund.

(b) In those instances where the mayor approves the immediate change in the work within the monetary limitation established in this division, the administering authority shall make a full report of the circumstances and the related cost to the city council no later than the second regular city council meeting following the change. If the city council concurs with the action, the fund will be restored by the amount of the expenditure. If the city council fails to concur with the action, the amount remaining in the fund, if any, will shall be reduced by the amount of the expenditure not so concurred by the city council. This procedure will shall be continued during the particular construction project, as may be required, until the amount of the contingency fund for each project is fully expended or the construction project is completed, whichever ~~should first~~ occurs first. The immediate nature of such changes will shall be determined by the mayor, subject to the review and final determination by the city council.

Sec. 54-104. Partial payments.

No partial payment for work completed ~~may~~ shall be made to a contractor without approval by the administering authority of the quantities and values submitted by the contractor.

Sec. 54-105. Public construction contract payments.

(a) The city shall initiate procedures to pay the contractor under a public construction or public work contract within ~~30~~ 15 days after the contractor submits to the city a bill for materials provided or services performed and a sworn statement that all employees employed on the project by the contractor and all subcontractors have been paid under the terms of the contract and in compliance with applicable law ~~not less than the established prevailing rate of pay as determined and published by the state department of labor.~~

(b) If the city fails to make a payment due the contractor under this section within 30 days after receiving a contractor's billing, the city shall pay interest to the contractor under AS 45.45.010(a) on the amount due.

(c) The city shall pay interest at the rate provided for in AS 45.45.010(a) on retainage on a contract for public works or public construction. Interest on retainage accrues from the date of approval of a pay estimate until the date of payment to the contractor.

~~–(d) If the city has received a state grant for a public construction or public works project, the city may use money from the state grant to pay the interest on retainage under contracts for the project as required by subsection (c) of this section.–~~

Secs. 54-106—54-125. Reserved.

DIVISION 3. OTHER CONTRACTS

Sec. 54-126. Administration.

All contracts other than those described in division 2 of this article are administered by the purchasing agent in accordance with the provisions in this division.

Sec. 54-127. Initiation of increases.

(a) Change orders to increase the amount of an order or contract are initiated by the administering authority and sent to the purchasing ~~division~~department for change order preparation following compliance with section 54-38.

(b) Change orders to decrease the amount of an order or contract or to change any other term or condition may be initiated by the administering authority and sent to the purchasing ~~division~~department for change order preparation after approval from the department head.

Secs. 54-128—54-160. Reserved.

ARTICLE IV. COMPETITIVE BIDDING

Sec. 54-161. Invitation ~~to~~for bid (ITFB).

(a) When competitive sealed bidding is used, the purchasing agent shall issue an invitation ~~to~~for bid. It must include a time, place, and date by which the bid must be received, purchase description, and a description of all essential contractual terms and conditions applicable to the purchase.

(b) When responding to the invitation ~~to~~for bid, the bidder shall supply evidence of the bidder's valid state business license. A bidder for a construction contract shall also submit evidence of the bidder's registration under AS 08.18.

Sec. 54-162. Subcontractors.

(a) Within seven working days after the identification of the apparent low bidder, the apparent low bidder shall submit a list of the subcontractors the bidder proposes to use in the performance of the contract. The list must include the name and location of the place of business for each subcontractor and evidence of the subcontractor's valid state and city business licenses. A bidder for a construction contract shall also submit evidence of each subcontractor's registration under AS 08.18.

(b) A bidder may replace a listed subcontractor if the subcontractor:

- (1) Fails to comply with AS 08.18;
- (2) Files for bankruptcy or becomes insolvent;
- (3) Fails to execute a contract with the bidder involving performance of the work for which the subcontractor was listed, and the bidder acted in good faith;
- (4) Fails to obtain bonding;
- (5) Fails to obtain insurance acceptable to the city;
- (6) Fails to perform the contract with the bidder involving work for which the subcontractor was listed;
- (7) Must be substituted in order for the prime contractor to satisfy required state and federal affirmative action requirements;
- (8) Refuses to agree or abide with the bidder's labor agreement; or
- (9) Is determined by the purchasing agent not to be a responsible subcontractor bidder.

(c) If a bidder fails to list a subcontractor or lists more than one subcontractor for the same portion of work and the value of that work is in excess of one-half of one percent of the total bid, the bidder ~~will~~ shall be considered to have agreed to perform that portion of the work without the use of a subcontractor and to have represented the bidder to be qualified to perform that work.

(d) A bidder ~~violates who attempts to circumvent the requirements of this section by listing as a subcontractor another contractor who, in turn, sublets the majority of the work required under the contract, violates this section.~~

(e) If a contract is awarded to a bidder who violated this section, the awarding authority may:

- (1) Cancel the contract; or
- (2) After notice and a hearing by the purchasing agent, assess a penalty on the bidder in an amount that does not exceed ten percent of the value of the subcontract at issue.

Sec. 54-163. Bid security.

(a) Bid security ~~is~~ shall be required for all competitive sealed bidding for construction contracts when the price is estimated by the purchasing agent to exceed an amount set forth in this section. When the price is estimated to be less than the amount set forth in this section, bid security may be required when the circumstances warrant, in an amount not to exceed ten percent of the amount of the bid. Bid security may be required for competitive sealed bidding for contracts for supplies, services, or professional services in accordance with the rules and policies of the purchasing agent when needed for the protection of the city.

(b) Bid security must be a bond provided by a surety company authorized to do business in the state or otherwise supplied in a form satisfactory to the purchasing agent. Bid security must be in an amount equal to at least:

- (1) Ten percent of the amount of the bid if the bid does not exceed \$100,000.00; or
- (2) Ten percent of the first \$100,000.00 and five percent of the amount of the bid over \$100,000.00 if the bid exceeds \$100,000.00 up to a maximum of \$200,000.00 in security.

(c) When the invitation ~~to~~ bid requires security, the purchasing agent shall reject a bid that does not substantially comply with the bid security requirement.

Sec. 54-164. Public notice of invitation ~~to~~ bid.

The purchasing agent shall give adequate public notice of the invitation ~~to~~ bid at least 21 days before the date for the opening of bids. If a determination is made in writing that a shorter notice period is necessary for a particular bid, the 21-day period may be shortened. The determination ~~will~~ shall be made by the purchasing agent for an ITFB for supplies, services, professional services, or equipment. The determination ~~will~~ shall be made by the city engineer or the public works director ~~of public works~~, as appropriate, for ITFB's for construction. The time and manner of notice must be in accordance with policies adopted by the purchasing agent. Notice shall include:

- (1) Publication in a manner ~~newspapers~~ calculated to reach prospective bidders;
- ~~(2) Notices posted in public places; and~~
- ~~(23)~~ Notices distributed ~~mailed~~ to selected active prospective vendors or contractors on the appropriate list maintained under section 54-42; and may include notices posted with Alaska General Contractors or plan bureaus.

Sec. 54-165. Bid opening.

(a) The purchasing agent shall open bids at the time and place designated in the invitation ~~to~~ bid. All bid openings are open to the public. The amount of each bid and other essential information required by this article, together with the name of each bidder, ~~must~~ shall be recorded.

(b) The information recorded under subsection (a) ~~of this section~~ is open to public inspection as soon as practicable following the bid opening. To the extent the bidder designates and the purchasing agent concurs, trade secrets and other proprietary data contained in a bid document are confidential.

Sec. 54-166. Bid consideration and evaluation.

(a) Bids ~~will~~ shall be ~~unconditionally~~ considered without alteration or correction, except as authorized in section 54-167. The purchasing agent shall evaluate bids based on the minimum

requirements set out in the invitation ~~to for~~ bid. **The city engineer or public works director shall evaluate bids based on the bid criteria** ~~which may include criteria~~ to determine acceptability, such as inspection, testing, quality, delivery, and suitability for a particular purpose. The criteria that will affect the bid price and which are to be considered in evaluation for award must be objectively measurable, such as discounts, transportation cost, and total or life cycle costs. The invitation ~~to for~~ bid must set out the evaluation criteria to be used. Criteria may not be used in bid evaluation if they are not set out in the invitation ~~to for~~ bid.

(b) A contract based on total or life cycle costs may be awarded only when the purchasing agent or, for construction contracts, the city engineer or the **public works** ~~director of public works~~, as appropriate, determines in writing at the time of bid solicitation that the contract will promote overall economy for the purposes intended, encourages competition, is not unduly restrictive, and is in the best interests of the city.

Sec. 54-167. Late bids; withdrawal; cancellation.

(a) Bids received after the bid date and time indicated on the invitation to bid may not be considered unless the delay was due to an error ~~by~~ **of** the city.

(b) Correction or withdrawal of inadvertently erroneous bids before or after bid opening, or cancellation of awards or contracts based on bid mistakes may be permitted in accordance with policies adopted by the purchasing agent. After **the** bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the city or fair competition may not be permitted. A decision to permit the correction or withdrawal of a bid, or to cancel an award or contract based on bid mistake, **must** ~~shall~~ be supported by a written determination made by the purchasing agent. If a bidder is permitted to withdraw a bid before award, an action may not be maintained against the bidder or the bid security.

Sec. 54-168. Contract award; local preference.

(a) Except as provided otherwise in this section, a contract may be awarded based on the solicited bids with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and criteria set out in the invitation ~~to for~~ bid.

(b) In determining responsibility, the awarding authority may consider:

- (1) The ability, capacity, and skill of the bidder to perform the contract;
- (2) The bidder's ability to perform the contract within the time specified, without delay or interference;
- (3) The character, integrity, reputation, experience, and efficiency of the bidder;
- (4) The quality of performance of previous contracts;

- (5) The past and existing ability by the bidder to comply with laws and ordinances relevant to the contract;
- (6) The sufficiency of the financial resources and ability of the bidder to perform the contract; and
- (7) The number and scope of conditions attached to the bid.

(c) If applicable, the awarding authority may award a contract based on solicited bids to the lowest responsive and responsible bidder only after a local bidder's preference has been applied. In this subsection, "local bidder" means a person who:

- (1) Is a regular dealer who owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and sold to the public in the usual course of business;
- (2) Holds a current state **and city** business license;
- (3) Submits a bid for goods, services, or construction under the name as appearing on the person's current state business license;
- (4) Has maintained a place of business within the borough, staffed by the bidder or an employee of the bidder, for a period of six months immediately preceding the date of the bid;
- (5) Is incorporated or qualified to do business under the laws of the state, is a sole proprietorship, and the proprietor is a resident of the borough, or is a partnership, and the majority of the partners are residents of the borough; and
- (6) If a joint venture, is composed entirely of ventures that qualify under subsection (c)(1)—(4) ~~of this subsection.~~

(d) A local bidder who qualifies as a responsible and responsive bidder ~~will~~**shall** be granted a local preference in excess of the lowest bid received in the amount of:

- (1) The lesser of five percent or \$50,000.00 for a construction contract.
- (2) The lesser of five percent or \$5,000.00 for any other contract.

(e) If a tie results under subsection (d) ~~of this section~~, the local bidder will be awarded the bid. If a tie results between local bidders, the award will be determined by a public coin toss conducted by the appropriate authority.

(f) The provisions of subsection (d) ~~of this section~~ are not applicable to any contract funded by a federal or state grant which expressly prohibits a local preference in awarding contracts.

(g) An award to **a bidder** other than the low bidder may be made as follows:

- (1) If the low bidder is more than 30 days past due on a contract delivery or completion, without a written extension of time having been granted by the purchasing agent, the bidder is ineligible for the award of any other city contract or order until the bidder completes the existing order or contract. The awarding authority may waive compliance with this requirement when it is determined to be in the best interests of the city.
- (2) When the award is not given to the lowest bidder for any reason, a full and complete statement citing the reasons ~~must~~shall be prepared by the awarding authority and filed with the other papers relating to the transactions.

Sec. 54-169. Performance and payment bonds.

(a) Before a contract exceeding \$100,000.00 for the construction, alteration, or repair of a public building or public work is awarded to a general or specialty contractor, the contractor shall furnish the following bonds, which become binding upon the award of the contract to that contractor:

- (1) A performance bond with a corporate surety qualified to do business in the state; the amount of the performance bond ~~must~~shall be equivalent to the amount of the payment bond;
- (2) A payment bond with a corporate surety qualified to do business in the state; when the total amount payable by the terms of the contract is not more than \$1,000,000.00, the payment bond ~~must~~shall be in a sum of half the total amount payable by the terms of the contract; when the total amount payable by the terms of the contract is more than \$1,000,000.00 and not more than \$5,000,000.00, the payment ~~bond~~bid ~~must~~shall be in the sum of 40 percent of the total amount payable by the terms of the contract; when the total amount payable by the terms of the contract is more than \$5,000,000.00, the payment bond ~~must~~shall be in the sum of \$2,500,000.00.

(b) This section does not limit the city's authority to require a performance bond or other security in addition to those ~~specified in subsection (a)~~cases or in cases other than the cases specified in subsection (a) ~~of this section~~.

(c) When no payment bond has been furnished, the administering authority may not approve final payments to the contractor until the contractor files a written certification that all persons who supplied labor or material in the ~~execution~~prosecution of the work provided for in the contract have been paid.

(d) The city may exempt contractors from compliance with subsection (a) of this section if the estimated cost of the project does not exceed \$100,000.00, and:

- (1) The contractor is, and for two years immediately preceding the award of the contract has been, a licensed contractor having its principal office in the borough; and

- (2) The contractor certifies that it has not defaulted on a contract awarded to the contractor during the period of three years preceding the award of a contract for which a bid is submitted;
- ~~(3) The contractor submits a financial statement, prepared within a period of nine months preceding the submission of a bid for the contract and certified by a public accountant or a certified public accountant licensed under AS 08.04, demonstrating that the contractor has a net worth of not less than 20 percent of the amount of the contract for which a bid is submitted; and~~
- ~~(4) The total amount of all contracts that the contractor anticipates performing during the term of performance of the contract for which a bid is submitted does not exceed the net worth of the contractor reported in the certified financial statement prepared and submitted under subsection (d)(3) of this section by more than seven times.~~

Sec. 54-170. Multistep sealed bidding.

When it is considered impractical to initially prepare a definitive purchase description to support an award based on price, the purchasing agent may issue an invitation ~~to for~~ bid requesting the submission of unpriced technical offers to be followed by an invitation to bid limited to the bidders whose offers are determined to be technically qualified under the criteria set out in the first solicitation.

Secs. 54-171—54-200. Reserved.

ARTICLE V. COMPETITIVE SEALED PROPOSALS

Sec. 54-201. Conditions for use.

(a) A contract not awarded by competitive sealed bidding ~~will~~**shall** be awarded by competitive sealed proposals, unless otherwise provided for in this chapter.

(b) The purchasing agent may determine in writing that it is either impracticable or disadvantageous for the city to procure specified types of supplies, services, or construction by competitive sealed bidding that would otherwise be procured by that method. When the purchasing agent, or for construction the city engineer or the **public works** director ~~of public works~~, as ~~appropriate~~, determines in writing that the use of competitive sealed bidding is either impracticable or disadvantageous to the city, a contract may be entered into by competitive sealed proposals in accordance with this chapter. When it is determined that it is practicable but not advantageous to use competitive sealed bidding, the purchasing agent or city engineer or the **public works** director ~~of public works~~, as ~~appropriate~~, shall specify with particularity the basis for the determination.

(c) When the city engineer or the **public works** director ~~of public works~~, as ~~appropriate~~, determines that it is advantageous to the city, the purchasing agent may issue a request for proposals requesting the submission of offers to provide construction in accordance with a design

provided by the offeror. The request for proposals ~~must~~ require that each proposal contain a single price that includes the design build.

Sec. 54-202. Request for proposals (RFP).

(a) A request for competitive sealed proposals must contain the date, time, and place for delivering proposals; a specific description of the supplies, construction, services, or professional services to be provided under the contract; and the terms under which the supplies, construction, service, or professional services are to be provided. The request ~~must~~ require the offeror to submit evidence of the offeror's valid state business license and, no later than seven working days after identifying which proposal is most advantageous to the city, to list subcontractors the offeror proposes to use in the performance of the contract. The list ~~must~~ include the name and location of the place of business for each subcontractor and evidence of the subcontractor's valid state business license. An offeror for a construction contract ~~must~~ also submit evidence of the offeror's registration under AS 08.18 and evidence of registration for each listed subcontractor.

(b) A request for proposals must contain the essential information necessary for an offeror to submit a proposal or contain references to any information that cannot reasonably be included with the request. The request must provide a description of the factors that will be considered when evaluating the proposals received, including the relative importance of price and other evaluation factors.

(c) Notice of request for proposals ~~must~~ be given in accordance with procedures under section 54-164. The purchasing agent may use additional means considered appropriate to notify prospective offerors of the intent to enter into a contract through competitive sealed proposals.

(d) The provisions of section 54-162 apply to competitive sealed proposals for construction.

Sec. 54-203. Treatment of proposals.

The purchasing agent shall open proposals so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals containing the name and address of each offeror ~~must~~ be prepared in accordance with policies adopted by the purchasing agent. The register and the proposals, except as otherwise noted in this section, are open for public inspection after the award is issued. To the extent that the offeror designates and the purchasing agent concurs, trade secrets and other proprietary data contained in the proposal documents ~~will~~ be confidential.

Sec. 54-204. Discussion with responsible offerors and revisions to proposals.

As provided in the request for proposals, and under policies adopted by the purchasing agent, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of and responsiveness to the solicitation requirements. Offerors reasonably susceptible of being selected for award ~~must~~ be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after

submissions and before the award of the contract for the purpose of obtaining best and final offers. In conducting discussions, the city's authorized participants shall not disclose information derived from proposals submitted by competing offerors.

Sec. 54-205. Award of contract.

(a) A contract may be awarded under competitive sealed proposals to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the city, taking into consideration price and the evaluation factors set out in the request for proposals. Other factors and criteria may not be used in the evaluation. The contract file must contain the basis on which the award is made.

(b) In determining whether a proposal is advantageous to the city, consideration ~~will~~shall include the offeror's qualifications under section 54-168.

Sec. 54-206. Contract execution.

A contract awarded under competitive sealed proposals must contain:

- (1) The amount of the contract stated on its first page;
- (2) The date for the supplies to be delivered or the date for construction, services, or professional services to begin and be completed;
- (3) A description of the supplies, construction, services, or professional services to be provided;
- (4) Applicable terms and conditions or incorporating references to such terms and conditions; and
- (5) Signatures of the successful contractor and necessary authority and dates of signatures.

Sec. 54-207. Architectural, engineering and land surveying contracts.

(a) Notwithstanding other provisions of this chapter, the city engineer or the public works director ~~of public works~~, when the public works director ~~of public works~~ is designated to do so by the mayor, shall negotiate a contract with the most qualified and suitable person of demonstrated competence for architectural, engineering, or land surveying services. The appropriate authority shall award a contract for those services at fair and reasonable compensation as determined in writing by the city engineer or the public works director ~~of public works~~, as appropriate, after consideration of the estimated value of the services to be rendered, and the scope, complexity, and professional nature of the services. ~~When determining the most qualified and suitable person, the city engineer or the director of public works, as appropriate, shall consider among other things:-~~

- ~~(1) Proximity of the project site to the office of the person; and~~
- ~~(2) Employment practices of the person with regard to women and minorities.~~

(b) If negotiations with the most qualified and suitable firm or person under subsection (a) of this section are not successful, the city engineer or the public works director of public works, as appropriate, shall negotiate a contract with other qualified firms or persons of demonstrated competence, in order of public ranking. The city engineer or the public works director of public works, as appropriate, may reject all or part of a proposal.

(c) This section does not apply to contracts awarded in a situation of public necessity if the appropriate authority certified in writing that a situation of public necessity exists.

(d) Notwithstanding the other provisions of this section, the city engineer or the public works director of public works, as appropriate, may include price as an added factor in selecting architectural, engineering and land surveying services when, in the judgment of the city engineer or the public works director of public works, as appropriate, the services required are repetitious in nature, and the scope, nature and amount of services required are thoroughly defined by measurable and objective standards to reasonably enable persons making proposals to compete with a clear understanding and interpretation of the services required.

(e) This section does not apply to a contract that incorporates both design services and construction.

Sec. 54-208. Professional registration requirements.

No contract for architectural, engineering, or land surveying services may be awarded to:

- (1) An individual who is not registered under AS 08.48 to perform the architectural, engineering, or land surveying services required by the contract;
- (2) A partnership that is not qualified under AS 08.48.251 to provide the architectural, engineering, or land surveying services required by the contract; or
- (3) A corporation that is not authorized under AS 08.48.241 to offer the architectural, engineering, or land surveying services required by the contract.

Secs. 54-209—54-240. Reserved.

ARTICLE VI. OTHER PURCHASING METHODS

Sec. 54-241. Sole-source purchasing.

(a) A contract may be awarded for supplies, services, professional services, or construction without competitive sealed bidding, competitive sealed proposals, or other competition in accordance with this article. A contract may be awarded under this section only when the purchasing agent determines in writing that there is only one source for the required purchasing or construction. A sole-source purchase may not be made if a reasonable alternative source exists. The written determination must include findings which support the determination that only one

source exists. The authority to make the determination and findings required by this subsection may not be delegated.

(b) The using department shall submit written evidence to support a sole-source determination. The purchasing agent may also require the submission of cost or pricing data in connection with an award under this section.

(c) The purchasing agent shall negotiate with the single supplier, to the extent practicable, to obtain the most advantageous contract to the city.

Sec. 54-242. Cooperative purchasing authorized.

The purchasing agent may either participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of supplies, services, professional services, or construction with one or more public purchasing units or external purchasing activities in accordance with an agreement entered into between the participants. Cooperative purchasing may include joint or multiparty contracts between public purchasing units and open-ended state public purchasing units contracts that are made available to local public purchasing units.

Sec. 54-243. Joint use of facilities.

The purchasing agent may enter into agreements for the common use or lease of warehousing facilities, capital equipment, and other facilities with another public purchasing unit or an external purchasing activity under the terms agreed upon between the parties.

Sec. 54-244. Supply of information, technical services.

(a) The informational, technical, and other services of the purchasing agent may be made available to another public purchasing unit or external purchasing activity. The requesting public purchasing unit or external purchasing activity shall pay for the expenses of the services so provided, in accordance with an agreement between the parties.

(b) Upon request, the purchasing agent may make available to public purchasing units or external purchasing activities the following services, among others:

- (1) Standard forms;
- (2) Printed manuals;
- (3) Product specifications and standards;
- (4) Quality assurance testing services and methods;
- (5) Qualified products lists;
- (6) Source information;

- (7) Common use commodities listings;
 - (8) Supplier performance ratings;
 - (9) Lists of persons debarred or suspended from consideration for award of city contracts;
 - (10) Forms for invitations ~~to~~for bids, requests for proposals, instructions to bidders, general contract provisions, and other contract forms; and
 - (11) Contracts or published summaries of them, including price and time of delivery information.
- (c) The purchasing agent may provide the following technical services among others:
- (1) Development of product specifications;
 - (2) Development of quality assurance test methods, including receiving, inspection, and acceptance procedures;
 - (3) Use of product testing and inspection facilities; and
 - (4) Use of personnel training programs.

Sec. 54-245. Contract controversies.

Under a cooperative purchasing agreement, controversies arising between the city and its bidders, offerors, or contractors ~~will~~shall be resolved in accordance with article VII of this chapter.

Sec. 54-246. Emergency purchasing.

(a) Purchasing may be made under emergency conditions when there exists a threat to public health, welfare, or safety; when a situation exists that makes a purchase through competitive sealed bidding or competitive sealed proposals impracticable or contrary to the public interest; or to protect public or private property. An emergency purchase need not be made through competitive sealed bidding or competitive sealed proposals but ~~may~~shall be made with competition that is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular vendor or contractor ~~must~~shall be included in the contract file. The written determination must include findings that support the determination.

(b) In case of an apparent emergency which requires immediate purchase of supplies or contractual services, the mayor ~~may~~shall be empowered to authorize the purchasing agent to secure by informal purchasing procedures, at the lowest obtainable price, any supplies or contractual services regardless of the amount of the expenditure. A full report of the circumstances of an emergency purchase ~~must~~shall be filed by the agent with the mayor and ~~is~~shall be open to public inspection.

(c) In cases of actual emergency and with the consent of the purchasing agent and the approval of the mayor, the head of any department may purchase directly any supplies whose immediate purchase is essential to prevent delays in the work of the department. The department head shall send to the agent a requisition and a copy of the delivery record, together with a full written report of the circumstances of the emergency.

Sec. 54-247. Informal purchasing.

(a) When the value of purchases for supplies, services, or construction is estimated to be less than ~~\$5025~~,000.00, the use of competitive sealed bidding or competitive sealed proposals ~~is~~ are not required. Oral or written quotes may be obtained by the purchasing agent and the award made to the lowest responsive and responsible bidder. When competitive purchasing is deemed to be impractical, a written statement citing the reasons must be included in the purchase file by the purchasing agent.

(b) To assist departments in making incidental purchases estimated to be less than ~~\$5025~~,000.00, the purchasing agent or the mayor may adopt other procedures which do not require competitive sealed bids or proposals but ~~must~~ shall require competition that is practicable under the circumstances. Such procedures may include:

- (1) Limited or local purchase orders;
- (2) Petty cash;
- (3) Charge accounts; and
- (4) Imprests funds.

Sec. 54-248. Fragmentation prohibited.

Purchasing requirements ~~may~~ shall not be artificially divided, fragmented, or structured so as to constitute a purchase under this section or to circumvent the requirements of article IV or V of this chapter.

Secs. 54-249—54-280. Reserved.

ARTICLE VII. PROTESTS

Sec. 54-281. Filing of a protest.

An interested party may protest the award of a contract, the proposed award of a contract, or a solicitation for supplies, services, professional services, or construction by filing with the purchasing agent in writing the following information:

- (1) The name, address, and telephone number of the protester;

- (2) The signature of the protester or the protester's representative;
- (3) Identification of the solicitation or contract at issue;
- (4) A detailed statement of the legal and factual grounds of the protest, including copies of relevant documents; and
- (5) The remedy~~form of relief~~ requested.

Sec. 54-282. Time for filing a protest.

A protest based upon a proposed award of a contract must be filed within ten days after the purchasing agent has issued notice of~~identified~~ the lowest responsive and responsible bidder.

Sec. 54-283. Notice of protest.

The purchasing agent shall promptly~~immediately~~ give notice of a filed protest~~filed~~ to all interested parties.

Sec. 54-284. Stay of an award.

If a protest is filed, the award may be made unless the purchasing agent determines in writing that a:

- (1) There is a R~~reasonable probability exists~~ that the protest will be sustained; or
- (2) Stay of the award is not contrary to the best interests of the city.

Sec. 54-285. Decision by the purchasing agent.

(a) The purchasing agent shall issue a written decision containing the basis of the decision within ten days after a protest has been filed. A copy of the decision must~~shall~~ be furnished to the protestor by certified mail or other method which provides evidence of receipt.

(b) If a decision is not made by the date it is due, the protester may proceed as if the purchasing agent had issued a decision adverse to the protester.

Sec. 54-286 Protest remedies.

(a) If the purchasing agent sustains a protest in whole or in part, the purchasing agent shall implement an appropriate remedy.

(b) In determining an appropriate remedy, the purchasing agent shall consider the circumstances surrounding the solicitation or purchase, including the seriousness of the purchase deficiencies, the degree of prejudice to other interested parties or to the integrity of the purchasing system, the good faith of the parties, the extent the purchase has been accomplished, costs to the city and other

impacts on the city of a proposed remedy, and the urgency of the purchase to the welfare of the city.

Sec. 54-287. Appeal on a protest.

(a) ~~A protester may~~ An appeal from ~~at the purchasing agent's~~ the purchasing agent's decision of the purchasing agent on a protest ~~by~~ may be filed ~~an appeal~~ by the protester with the mayor. An appeal to the mayor ~~must~~ shall be filed within five days after the purchasing agent's decision is received by the protester or within five days of when such decision was due under section 54-285. The protester also shall file a copy of the appeal with the purchasing agent.

(b) An appeal must contain the information required under section 54-281. In addition, the appeal must include:

- (1) A copy of the decision being appealed, if any; and
- (2) Identification of the factual or legal errors in the decision that form the basis for the appeal.

Sec. 54-288 Notice of a protest appeal.

(a) The purchasing agent shall promptly ~~immediately~~ give notice of an appeal filed under section 54-287 to the contractor if a contract has been awarded or, if no award has been made, to all interested parties.

(b) The purchasing agent shall, on request, furnish a copy of the appeal to a person notified under subsection (a) of this section, except that confidential material must ~~shall be~~ redacted ~~deleted~~ from the copy.

Sec. 54-289. Stay of award during protest appeal.

If a protest appeal is filed before a contract is awarded and the award was stayed under section 54-284, the filing of the appeal automatically continues the stay until the mayor makes a written determination that the award of the contract without further delay is necessary to protect substantial interests of the city.

Sec. 54-290. Protest report.

(a) The purchasing agent shall file a complete report with the mayor as soon as is practicable on the protest and decision. The purchasing agent shall furnish a copy of the report to the protester and to interested parties that have requested a copy of the appeal under section 54-288.

(b) The protester may file comments on the protest report with the mayor within seven days after the report is received. The protester shall provide copies of the comments to the purchasing agent. The purchasing agent shall provide copies of the comments ~~and~~ to interested parties that have requested a copy of the appeal ~~under section 54-288~~.

[Note: current section 291 has been placed after current section 292; these sections have been renumbered and amended]

~~Sec. 54-291. Decision without hearing.~~

~~-(a) The mayor shall dismiss a protest appeal before a hearing is held if it is determined that the appeal is untimely under section 54-287.~~

~~-(b) The mayor may issue a decision on an appeal without a hearing if the appeal involves questions of law without genuine issues of fact.~~

~~-(c) The mayor shall, within 15 days after receipt of an appeal, notify the appellant of the acceptance or rejection of the appeal and, if rejected, the reasons for the rejection.~~

Sec. 54-291. Hearing on protest appeal.

(a) Unless the mayor issues a decision without a hearing under section 54-292, a hearing on a protest appeal will be conducted so as to provide a fair opportunity for the protester to present evidence in support of the appeal.

(b) The mayor will schedule the hearing within 15 days of receipt of the appeal and shall issue a decision on the appeal within 15 days of completion of the hearing.

~~Sec. 54-292. Hearing on protest appeal.~~

~~A hearing on a protest appeal shall be conducted so as to provide a fair opportunity for the protester to present evidence in support of the appeal.~~

Sec. 54-292. Decision without hearing.

(a) The mayor shall dismiss a protest appeal before a hearing is held if it is determined that the appeal is untimely under section 54-287.

(b) The mayor may issue a decision on an appeal without a hearing if the appeal involves questions of law without genuine issues of fact.

(c) The mayor shall issue a decision under subsection (a) or (b) within 15 days after receipt of the appeal.

Sec. 54-293. Contract controversies.

(a) A contractor ~~may~~ shall file a claim with the purchasing agent concerning a contract awarded under this chapter. The contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of the contractor's knowledge and belief, and

that the amount requested accurately reflects the contract adjustment for which the contractor believes the city is liable.

(b) If a controversy asserted by a contractor concerning a contract awarded under this chapter cannot be resolved by agreement, the purchasing agent shall, after receiving a written request by the contractor for a decision, issue a written decision. The decision ~~must~~ shall be made no more than 20 days after receipt of the request from the contractor and receipt by the purchasing agent of all ~~relevant~~ necessary information from the contractor. Failure of the contractor to timely furnish ~~relevant~~ necessary information requested by the purchasing agent constitutes a waiver of the claim. ~~Before issuing the decision, the purchasing agent shall review the facts relating to the controversy and obtain necessary assistance from legal, fiscal, and other advisors.~~

(c) The time for issuing a decision under subsection (b) of this section may be extended for good cause by the mayor if the controversy concerns an amount in excess of \$50,000.00. The purchasing agent shall notify the contractor in writing that the time for the issuance of a decision has been extended and of the date by which a decision ~~will~~ shall be issued.

(d) The purchasing agent shall furnish a copy of the decision to the contractor by certified mail or other method that provides evidence of receipt. The decision ~~must~~ shall include a:

- (1) Description of the controversy;
- (2) Reference to the pertinent contract provisions;
- (3) Statement of the agreed upon and disputed facts;
- (4) Statement of reasons supporting the decision; and
- (5) Statement substantially as follows:

"This is the final decision of the purchasing agent. This decision may be appealed to the mayor. If you appeal, you must file a written notice of appeal with the mayor within ten days after you receive this decision."

(e) If a decision is not made by the date it is due, the contractor may proceed as if the purchasing agent had issued a decision adverse to the contractor.

(f) If a controversy asserted by the city concerning a contract awarded under this chapter cannot be resolved by agreement, the matter shall be ~~promptly~~ immediately referred to the mayor.

Sec. 54-294. Appeal on a contract controversy.

(a) An appeal from a decision of the purchasing agent on a contract controversy may be filed by the contractor with the mayor. This appeal ~~must~~ shall be filed within ten days after the decision is received by the contractor. The contractor shall also file a copy of the appeal with the purchasing agent.

(b) An appeal ~~must~~ **shall** contain a copy of the decision being appealed and identification of the factual or legal errors in the decision that form the basis for the appeal.

Sec. 54-295. Hearing on a contract controversy.

Within 15 days after receipt of an appeal on a contract controversy, the mayor may, without a hearing, adopt the decision of the purchasing agent as the final decision or grant a hearing to further examine evidence, if any, to be presented by the appellant. If a hearing is granted, the mayor may adopt, reject, or modify the decision of the purchasing agent.

Sec. 54-296. Delegation.

The mayor may delegate responsibilities under sections 54-287, ~~and section 54-295~~, and 54-299.

Sec. 54-297. Authority to debar or suspend.

(a) ~~After consultation with the using department and the city attorney and after a hearing conducted to provide a fair opportunity to be heard and to present evidence, T~~ the mayor may debar a person for cause from consideration for award of contracts. ~~Notice of a debarment hearing shall be provided in writing at least seven days before the hearing.~~ The debarment may not be for a period of more than three years.

(b) The mayor, ~~after consultation with the using department and the city attorney,~~ may suspend a person from consideration for award of contracts if there is probable cause for debarment and compelling reasons require suspension to protect city interests. The suspension may not be for a period exceeding three months.

Sec. 54-298. Causes for debarment or suspension.

The causes for debarment or suspension include the following:

- (1) ~~Conviction for commission~~ of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of the contract or subcontract;
- (2) Conviction under local, state, or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or other offense indicating a lack of business integrity or business honesty that currently and seriously affects responsibility as a city contractor;
- (3) Conviction or civil judgment finding a violation under state or federal antitrust statutes;
- (4) Violation of contract provisions of a character that is regarded by the mayor to be so serious as to justify debarment action, such as:

- a. Knowingly failing, without good cause, to perform in accordance with the specifications or within the time limit provided in the contract; or
 - b. Failure to perform or unsatisfactory performance in accordance with the terms of one or more contracts, except that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor may not be considered to be a basis for debarment;
- (5) For violation of the ethical standards set out in state law or regulation;
- (6) For a violation under section ~~54-308~~54-346; and
- (7) Any other cause determined to be so serious and compelling as to affect responsibility as a city contractor, including debarment by another governmental entity.

Sec. 54-299. Written determinations.

- (a) The mayor shall issue a written decision to debar or suspend. The decision must:
- (1) State the reasons for the action taken; and
 - (2) Inform the debarred or suspended person of their rights to ~~judicial appeal or inform the suspended person of right to~~ administrative and judicial appeals.
- (b) A copy of the decision under subsection (a) ~~must of this section shall~~ be mailed or otherwise furnished promptly ~~immediately~~ to the debarred or suspended person and any other intervening party.

Sec. 54-300. Hearing on a suspension or debarment.

- (a) A person suspended or debarred ~~under section 54-297~~ is entitled to a hearing if the person files a written request for a hearing with the mayor within seven days after receipt of the notice of suspension or debarment under section 54-299~~8~~.
- (b) If a suspended or debarred person requests a hearing, the mayor shall promptly schedule a ~~prompt~~ hearing unless the city attorney determines that a hearing at the proposed time is likely to jeopardize an investigation. A hearing may not be delayed longer than six months after notice of the suspension or debarment is provided under section 54-299~~8~~.

(c) The mayor will have 20 days after completion of the hearing to issue a written determination.

Sec. 54-301. List of persons debarred or suspended.

The purchasing agent shall maintain a list of all persons debarred or suspended from consideration for award of contracts.

Sec. 54-302. Reinstatement.

(a) The mayor may, at any time after a final decision to debar a person from consideration for award of contracts, reinstate the person after determining that the cause for which the person was debarred no longer exists or has been substantially mitigated.

(b) A debarred person may request reinstatement by submitting a petition to the mayor supported by evidence showing that the cause for debarment no longer exists or has been substantially mitigated.

(c) The mayor may require a hearing on a reinstatement petition. A decision on reinstatement ~~must~~ shall be made in writing within seven days after a reinstatement petition is submitted. The decision ~~must~~ shall specify the factors on which it is based. A decision under this section is not subject to judicial appeal.

Sec. 54-303. Limited participation.

The mayor may permit a debarred person to participate in a contract on a limited basis during the debarment period if the mayor determines in writing that the participation is advantageous to the city. The determination ~~must~~ shall specify the factors on which it is based and the limits imposed on the debarred person.

Sec. 54-304. Hearing procedures.

(a) The mayor shall act as a hearing officer or appoint a hearing officer for a hearing conducted under this article. The hearing officer shall arrange for a prompt hearing and notify the parties in writing of the time and place of the hearing. The hearing ~~will~~ shall be conducted in an informal manner.

(b) The hearing officer may:

- (1) Hold prehearing conferences to settle, simplify, or identify the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding;
- (2) Require parties to state their positions concerning the various issues in the proceeding;
- (3) Require parties to produce for examination those relevant witnesses and documents under their control;
- (4) Rule on motions and other procedural matters;
- (5) Regulate the course of the hearing and conduct of the participants;
- (6) Establish time limits for submission of motion or memoranda;

- (7) Impose appropriate sanctions against a person who fails to obey an order of the hearing officer, including:
 - a. Prohibiting the person from asserting or opposing designated claims or defenses or introducing designated matters into evidence;
 - b. Excluding all testimony of an unresponsive or evasive witness; and
 - c. Excluding a person from further participation in the hearing;
- (8) Take official notice of a material fact not appearing in evidence if the fact is among the traditional matters subject to judicial notice; and
- (9) Administer oaths or affirmations.

(c) **Hearings will not be recorded unless a party so requests. The party requesting the recording will be responsible for all costs associated with the recording** ~~A transcribed record of the hearing shall be made available at cost to a party that requests it.~~

Sec. 54-305. Recommendation by the hearing officer.

(a) If the mayor is not acting as the hearing officer, the hearing officer shall recommend a decision to the mayor based on the evidence presented. The recommendation ~~must~~shall include findings of fact and conclusions of law.

(b) The mayor may affirm, modify, or reject the hearing officer's recommendation in whole or in part, ~~may~~ remand the matter to the hearing officer with instructions, or take other appropriate action.

Sec. 54-306. Final decision by the mayor.

A decision by the mayor after a hearing under this article is final. A decision ~~must~~shall be sent within 20 days after the hearing to all parties by personal service or certified mail, except that a decision by the mayor involving procurement of construction ~~must~~shall be sent within 90 days after the hearing to all parties by personal service or certified mail.

Sec. 54-307. Judicial appeal.

(a) A final decision of the mayor under sections 54-291, 54-292, 54-295, 54-297(a) or and 54-299 may be appealed to the superior court in accordance with the state rules of appellate procedure governing administrative appeals.

(b) A final decision of the mayor under sections 54-291, 54-292, 54-295, and 54-299 must contain a notice that the mayor's decision is a final administrative determination that may be appealed to the superior court ~~for a trial de novo unless the parties have otherwise agreed to arbitrate the underlying controversy,~~ **that any appeal to the superior court must be filed within 30 days from the date of the decision, and that failure to appeal within the 30 days will bar any such appeal.**

Sec. 54-308. Misrepresentations and fraudulent claims.

(a) A person who makes, or uses in support of a contract claim under this article, a misrepresentation, or who practices or attempts to practice a fraud at any stage of proceedings relating to a purchase or contract controversy under this chapter:

- (1) Forfeits all claims relating to that procurement or contract; and
- (2) Is liable to the city for reimbursement of all sums paid on the claim, for all costs attributable to review of the claim, and for a civil penalty equal to the amount by which the claim is misrepresented.

(b) The purchasing agent, mayor, or court shall make specific findings of misrepresentation, attempted fraud, or fraud before declaring a forfeiture under subsection (a)(1) of this section.

~~(c) A person who in a matter relating to a purchase or a contract controversy or claim under this chapter makes a misrepresentation to the city through a trick, scheme, or device is guilty of a class C felony, prosecutable under state law.~~

~~(d) In this section, "misrepresentation" means a false or misleading statement of fr material fact, or conduct intended to deceive or mislead concerning a material fact, whether or not it succeeds in deceiving or misleading.~~

Sec. 54-309. Exclusive remedy.

This article provides the exclusive procedure for asserting a claim against the city arising in relation to a purchase under this chapter.

Secs. 54-310—54-340. Reserved.

ARTICLE VIII. CONTRACT FORMATION AND MODIFICATION

Sec. 54-341. Review and approval by the city attorney.

If a contract contains a term that is in conflict with a standard form contract term or if a standard term is deleted or modified by a term that is not standard, the contract must be reviewed by the city attorney and approved as to form.

Sec. 54-342. Bid cancellation, rejection.

An invitation ~~to~~for bid, a request for proposals, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part, or the date for opening bids or proposals may be delayed when it is in the best interests of the city. The reasons for cancelling, rejecting, or delaying in opening bids or proposals ~~will~~shall be made part of the contract file.

Sec. 54-343. Determination of responsibility.

(a) A written determination of responsibility of a bidder or offeror ~~must~~ shall be made by the purchasing agent. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility is grounds for a determination of non-responsibility with respect to the bidder or offeror.

(b) Information furnished by a bidder or offeror under subsection (a) of this section is confidential and may not be disclosed without prior written consent by the bidder or offeror, unless otherwise required by law.

Sec. 54-344. Multiterm contracts.

(a) Unless otherwise provided by law, a contract for supplies, services, or professional services may be entered into for any period of time considered to be in the best interests of the city, provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods ~~are~~ shall be subject to the availability and appropriation of funds by the city council for them.

(b) Before using a multiterm contract, the purchasing agent shall determine in writing that:

- (1) Estimated requirements cover the period of the contract and are reasonably firm and continuing; and
- (2) The contract will serve the best interests of the city by encouraging effective competition or otherwise promoting economies in city purchasing.

(c) When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract ~~shall be terminated.~~ The contractor may only be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies, services, or professional services delivered under the contract that are not otherwise recoverable. The cost of termination may be paid from any appropriations available for these purposes.

Sec. 54-345. Cost or pricing data.

(a) Before an award of a contract or a change order or contract modification, the contractor or prospective contractor may be required to submit cost and pricing data. The contractor or prospective contractor shall certify that, to the best of the contractor's or prospective contractor's knowledge and belief, the data submitted is accurate, complete, and current at a mutually determined specified date and will continue to be accurate and complete during the term performance of the contract.

(b) When a contractor becomes aware of a situation that may form the basis of a claim for compensation that exceeds the amount designated as the base amount of the contract and before

performing additional work or supplying additional materials, the contractor shall submit cost and pricing data on the additional work or materials. The contractor shall certify that, to the best of the contractor's knowledge and belief, the data submitted is accurate, complete and current and is the actual cost to the contractor of performing the additional work or supplying the additional materials.

(c) A contract, change order, or contract modification ~~for~~under which a certificate is required under subsection (a) or (b) ~~of this section~~ must contain a provision that the price to the city, including the contractor's profit or fee, will be adjusted to exclude any significant sums by which the city finds that the price is increased because the cost or pricing data furnished by the contractor or prospective contractor is inaccurate, incomplete, or not current as of the date agreed upon by the parties.

(d) The requirements of subsection (a) ~~of this section~~ do not apply when:

- (1) The contract price is based on adequate price competition; or
- (2) The contract price is set by law or regulation.

Sec. 54-346. Right to inspect plant.

The city may, at reasonable times, inspect the ~~part of the plant or~~ place of business of a contractor or subcontractor that is related to the performance of a contract.

Sec. 54-347. Right to audit records.

The city may, at reasonable times and places, audit the books and records of a person who has submitted cost or pricing data to the extent that the books and records relate to the cost or pricing data. A person who receives a contract, change order, or contract modification for which cost or pricing data is required shall maintain books and records that relate to the cost or pricing data for three years after the date of final payment under the prime contract and by the subcontractor for a period of three years after the date of final payment under the subcontract, unless a shorter period is authorized in writing by the purchasing agent.

Sec. 54-348. Standard modification clauses for contracts.

(a) The purchasing agent may adopt standards permitting the inclusion of clauses providing for adjustments in prices, time of performance, or other contract provisions as appropriate.

(b) The purchasing agent may adopt standards permitting or requiring the inclusion in city contracts of clauses providing for appropriate remedies ~~and covering the following subjects:~~

- ~~(1) Liquidated damages;~~
- ~~(2) Specified excuses for delay or nonperformance;~~

~~(3) Termination of the contract for default; and~~

~~(4) Termination of the contract in whole or in part for the convenience of the city.~~

Sec. 54-349. Fiscal responsibility.

(a) A contract modification, change order, or contract price adjustment under a construction contract in excess of an amount established by this chapter is subject to prior written certification by the **chief financial officer**~~director of finance~~ or other official responsible for monitoring and reporting upon the status of the costs of the total project budget or contract budget, as to the effect of the contract modification, change order, or adjustment. If the certification of the **chief financial officer**~~director of finance~~ or other responsible official discloses a resulting increase in either budget, the administering authority may not approve the contract modification, change order, or adjustment in contract price unless sufficient funds are available, or the scope of the project or contract is adjusted to permit the degree of completion that is feasible within the total project budget or the contract budget as it existed before the contract modification, change order, or price adjustment.

(b) Sections ~~54-389~~ and section ~~54-398~~ apply to this section.

SECTION 2. The effective date of this ordinance is the 4th day of March 2023.



David Pruhs, Mayor

AYES: Ringstad, Tidwell, Rogers, Sprinkle, Marney, Cleworth
NAYS: None
ABSENT: None
ADOPTED: February 27, 2023

ATTEST:

APPROVED AS TO FORM:



D. Danyielle Snider, MMC, City Clerk



Paul Ewers, City Attorney